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Ernesto A. Hernandez-Lopez

BAG WARS AND BANK WARS, THE GUCCI AND BANQUE NATIONAL DE PARIS HOSTILE BIDS: EUROPEAN CORPORATE CULTURE RESPONDS TO ACTIVE SHAREHOLDERS

Ernesto Hernández-López[*]

The internationalization of capital markets and the decreasing importance of national political boundaries have brought individual domestic economies closer together. With this development, investors from foreign countries increasingly exert their influence on national firms. On the bright side, companies find funds from new and unexpected sources. On the dark side, national companies often lose control to actors in other countries. In this context corporations must begin to learn how foreign corporate shareholders invest and exert their influence. European corporate governance has steadily taken on Anglo-American characteristics. Hostile takeovers exemplify these trends. Traditionally, European corporate boards did not have to fend off unwarranted bids by a shareholder seeking to purchase or control a corporation. In recent years, however, large established European corporations like Vodafone ArTouch, Mannesmann, Banque National de Paris ("BNP"), Paribas, Société Générale ("SG"), Telecom Italia, Olivetti, Gucci, Louis Vuitton Moët Hennessey ("LVMH"), Iberpistas, Acesa, FAG, Electricité de France, Fiat, and Montedison have become entangled in hostile takeovers resembling the corporate battles of the United States. Responding to these trends, the European Union ("EU") has attempted to harmonize the corporate laws of its member states. For over twelve years, the EU has attempted to ratify and implement the Thirteenth Directive, whose

[*] Ernesto Hernández-López, M.A., J.D., has served as International Relations Research Professor at the Universidad del Rosario and Political Science Professor at the Universidad Javeriana, both in Santafé de Bogota, Colombia. The Author thanks Lawrence Mitchell for his comments regarding earlier drafts of this Article and Virginia Tent for inspiring conversations on the topics included in the Article.

main purpose is to standardize the rules for corporate takeovers in the EU.

This Article examines trends in European corporate governance, which shape the context wherein recent hostile takeover attempts have occurred.[1] Specifically, the Article examines shareholder activism, corporate structure in Europe, and the EU's attempts to regulate takeovers.[2] This Article analyzes the recent takeover experiences involving: (1) LVMH's 1999–2001 bid for Gucci, with Pinault-Printemps-Redoute (PPR) serving as Gucci's white knight; and (2) BNP's 1999 dual-bid for Paribas and SG. Aside from Gucci, which is incorporated in the Netherlands, all these firms are incorporated in France. LVMH and Gucci are both luxury goods firms, and PPR is a commercial retail group. BNP,

1. For this Article, "hostile takeover" means "[a] takeover that is resisted by the target corporation's board of directors." *See* BLACK'S LAW DICTIONARY 1466–67 (7th ed. 1999). Synonyms for this term include "hostile bid" and "unsolicited bid." *Id*.

2. For this Article, "shareholder activism" refers to any action a shareholder may take, based on his rights as a shareholder, with the objective of influencing the management of the corporation. Because a hostile bidder seeks control through the purchase of shares, a hostile bidder is an activist shareholder.

"Management of a corporation" means influencing or participating in the decision-making necessary to keep the corporation active. Shareholders do not need to participate in "management of a corporation." A shareholder, to be a shareholder, need only invest in the corporation, as part owner with one or more shares.

A shareholder is an activist if, in addition to owning shares, he seeks to influence the management of the corporation. Shareholder activism may take many forms, including voting at shareholder meetings, soliciting proxies, purchasing shares in order to increase control over a corporate board of directors, publicly announcing how one will vote as shareholder, and seeking judicially enforced remedies to enforce shareholder rights.

The most active shareholders participate on boards, solicit proxies, keep themselves heavily informed, purchase more shares to gain greater influence over management, seek hostile bids, and seek to enforce shareholder rights through court-determined remedies. The most passive shareholders never vote, do not care to be informed, and will sell their shares rather than influence management. "Shareholder rights" may be created in national corporate law and in a corporation's articles of incorporation or bylaws.

A "shareholder/board dispute" refers to any conflict, whether brought to court or not, in which a shareholder contests his rights with the corporate board. "Corporate structure" refers to the division of labor in a corporation, as between management and ownership, the organization and distribution of shareholders, and the institutional structures required to keep the corporation active, such as the board of directors, shareholder meetings, and supervisory boards.

Paribas, and SG are all financial institutions. The Article considers two central questions: (1) why have recent European hostile takeovers been so prolonged and antagonistic?; and (2) how have the EU and national governments responded to these takeover attempts?

This Article makes three contentions about recent European hostile takeovers. First, the recent takeovers have been prolonged and antagonistic because corporate boards have little experience with hostile bidders. Second, traditional corporate methods of resolving disputes through conciliation fail with respect to hostile bids. Third, attempts by the EU to regulate takeovers will fail to be implemented in the foreseeable future because of political issues.[3]

Marked by concentrated stockownership and exclusive ranks of executives, traditional European corporate culture resolves its disputes with conciliatory methods such as interlocking boards, meetings, and cross-shareholding arrangements. These methods cannot resolve shareholder-board disputes, however, when there is an unsolicited bid for a corporation.

Regarding government response to these hostile bids, this Article argues that state intervention may serve as the only way to resolve shareholder-board disputes and that due to inexperience in resolving these types of disputes, judicial systems in the European courts may fall victim to endless litigation.[4] When a dispute arises between a share-

3. This Article applies scholarly understandings of European corporate governance to events involving the BNP and LVMH bids. This Article does not attempt to provide an in-depth analysis of EU laws, directive proposals, and treaties covering corporate issues. Instead, this Article considers how recent EU developments are responses to new corporate governance issues raised by increasing shareholder activism.

4. This Article suggests that new trends in European shareholder activism will push governments to develop new corporate law rules. In this respect, the U.S. experience will serve as an indication of what might happen. For an examination of how shareholder, corporate board, and public interest groups play into the definition of corporate law, see Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 Tex. L. Rev. 469 (1987).

For a leading example of the corporate federalist theory, which argues that states must develop efficient corporate law rules to obtain income from corporate charters and revenue, see RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 306–307 (5th ed. 1998). *See also* RALPH K. WINTER, GOVERNMENT AND THE CORPORATION 28–42 (1978); Barry D. Bassinger & Henry N. Butler, *The Role of Corporate Law in the Theory of the Firm*, 28 J.L. & ECON. 179, 181–82 (Apr. 1985); Daniel Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corpora-*

holder-acquirer and the board of a target corporation, there has been a tradition of government intervention to resolve such corporate disputes. There is little European jurisprudence on minority shareholder rights or corporate duties in hostile bids. The LVMH-Gucci and BNP-Paribas-SG experiences illustrate that governments must decide between a bidder's rights as a shareholder and a corporate board's efforts to resist the corporate raider's bid.[5] In both of these cases, the raider and the target corporation made extensive efforts to litigate their rights in courts.[6] The LVMH-Gucci bid illustrates that without much experience in resolving hostile bids, a country's judicial system may easily become the victim of prolonged litigation.[7] The BNP-Paribas-SG bid demonstrates that state intervention may become the only solution.[8]

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tion Law, 76 NW. U. L. REV. 913, 919–20 (1982). For the "race to the bottom" theory, which holds that competition among states for franchise taxes produced Delaware's corporate law rules, under which corporate boards are relatively free to exploit shareholders, see William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 666 (1974).

5. "Corporate raider" refers to "[a] person or business that attempts to take control of a corporation against its wishes, by buying its stock and replacing its management." BLACK'S LAW DICTIONARY 341 (7th ed. 1999). This Article uses this term synonymously with the terms "raider," "bidder," and "hostile bidder." "White Knight" refers to "[a] person or corporation that rescues the target of an unfriendly corporate takeover, especially by acquiring a controlling interest in the target corporation or by making a competing tender offer." *Id.* at 1591.

6. "Target corporation" refers to "[a] corporation over which control is being sought by another party." *Id.* at 345.

7. Gucci's 1999 Annual Report states:

> On March 22, 1999, LVMH filed an act in the Enterprise Chamber of the Amsterdam Court of Appeals challenging the Company's strategic alliance with PPR. On May 27, 1999 the Enterprise Chamber denied any relief with respect to the PPR transaction and dismissed the complaint. On June 21, 1999, LVMH renewed its complaint regarding the PPR transaction in the District Court of Amsterdam and on July 27, 1999, appealed to the Supreme Court of The Netherlands from the decision of the Enterprise Chamber. On March 10, 2000, LVMH filed a further complaint in the District Court of Amsterdam seeking damages in connection with the PPR transaction.

GUCCI GROUP N.V. ANNUAL REPORT 1999, *at* http://www.guccigroup.com/invCenter/default.asp?ReqView=annualReports.asp (last visited Sept. 18, 2003). On March 8, 2001, the court ordered an independent investigation of Gucci's management practices from January to May 1999, the period during which the PPR Alliance was negotiated. *See* discussion *infra* Part IV.A.

8. *See* discussion *infra* Part IV.B.

Political controversy will likely impede any approval—and thus implementation—of the EU Takeover Directive, at least in the near future. Interests to protect corporate boards, whether they may be for nationalistic, labor, entrenched economic or statist (*i.e.*, pro-state intervention) concerns, will continue to lobby aggressively against the Directive. Such lobbying has already rallied resistance to the Proposal at the drafting and negotiation levels and during voting in the European Parliament. Various groups fear EU legitimatization of hostile corporate takeovers or EU restriction of options for the board of a corporation facing a hostile takeover.

In its latest version, the Directive continues to neglect vital issues. For instance, statist concerns such as "golden shares" and various labor issues remain unaddressed by the proposal.[9] Likewise, the Directive stresses a "neutrality" approach, whereby states are required to prohibit boards from frustrating any takeover attempt. This policy is contrary to the U.S. approach, in which the board may oppose a takeover if it feels that the takeover may be against the shareholders' interests. Because a board's right to take on defensive measures is so important to many European corporations, as illustrated by the 2001 defeat of the Directive, the most recent version of the Directive will most likely fail to gain approval by the European Parliament. Without such approval, the Directive will fail to harmonize European law on hostile takeovers.

Despite these legislative issues, the Directive provides a great deal of benefits to investors, governments, and corporate boards. The Directive establishes substantive legal rights for bidders, shareholders, and the board, such as mandatory bids, information disclosures, and equitable price determinations. The Directive precisely determines information disclosures, which bidder and board must both fulfill. The Directive also proposes that Members designate a single supervisory authority to regulate the procedure of bidder/board disputes. The Directive provides much needed legal clarity in the procedural methods characteristic of hostile binds and in the rights and duties of the shareholder, the board, and multilateral institutions in hostile bids.

9. "Golden shares" are shares owned by a government in a corporation. Patrick Del Duca & Duccio Mortillaro, *The Maturation of Italy's Response to European Community Law: Electric and Telecommunication Sector Institutional Innovations*, 23 Fordham Int'l L.J. 536, 586 (defining golden shares as the interest in an enterprise that a country retains control of after the previously state-owned enterprise becomes privately held).

Part I of this Article describes the differences between U.S. market-oriented and European bank-oriented corporate structures. The European system results in higher concentration of stockownership in Europe than in the United States. Concentrated stockownership creates a vested economic interest, an important feature of the European corporate culture. Given this vested economic interest, a great deal is at stake when a target and a raider engage in hostile takeover litigation. Part II identifies the French trends of state intervention in the private sector and exclusivity in corporate directorship. These trends help facilitate the European corporate culture of resolving shareholder-board disputes through genteel and conciliatory methods. Although not necessarily institutional or legal in nature, these trends of state intervention and the exclusivity of corporate directorship accent and promote the concentrated nature of shareholder power in French corporations. By increasing the economic interests of boards and shareholders, these factors enhance the significance of concentrated shareholding.

Subsequently, Part III describes general Dutch and French corporate law, as well as the growing influence of U.S. market-oriented models upon European corporate structure. Part IV presents the case of the hostile takeovers involving Gucci and BNP. These takeovers point to a trend in Europe where corporations shift toward a more market-oriented model. Part V discusses recent developments concerning the EU Takeover Directive and illustrates new articles and provisions in the most recent proposal. Part V also considers the political constraints that the Directive faces and examines the central legal provisions proposed under the Directive.

In Conclusion, this Article analyzes why these European takeover attempts were so dramatic, so prolonged, and were met with such resistance by the target corporation's directorships. The Conclusion also considers how the Directive could have altered the Gucci and BNP bids.

I. BANK-ORIENTED CORPORATE STRUCTURES: CONCENTRATED SHAREHOLDER POWER IN EUROPE

Observers note two different approaches to corporate structure in the United States and Europe.[10] U.S. corporations conform to a market-

10. *See, e.g.*, William W. Bratton & Joseph A. McCahery, *Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross Reference*, 38

oriented model, whereas most European corporations are organized according to a bank-oriented model. These two models serve as important analytical references, because they diagram the relationship between shareholders and corporations.[11] Shareholders own a corporation, and the board controls the corporation.[12] The different approaches to corpo-

COLUM. J. TRANSNAT'L L. 213, 216–18 (1999) (contrasting "market systems," found mainly in English-speaking countries, with "blockholder" systems, found with many variations in Europe, East Asia, and most other capitalist economies); Lawrence A. Cunningham, *Commonalities and Prescriptions in the Vertical Dimension of Global Corporate Governance*, 84 CORNELL L. REV. 1133, 1135–42 (1999) (discussing the market model of the United States and United Kingdom; the bank/labor model of Germany and France; and the bank model of Japan); Mark G. Robilotti, *Codetermination, Stakeholder Rights, and Hostile Takeovers: A Revaluation of the Evidence from Abroad*, 38 HARV. INT'L L.J. 536, 538 (1997) (endorsing American model of corporate law, "with its emphasis on the duties of directors to shareholders," over German and Japanese "constituency-based" corporate laws); Patrick Speeckaert, *Corporate Governance in Europe*, 2 FORDHAM FIN. SEC. & TAX L.F. 31, 33–39 (1997) (comparing the German/Dutch two-tier board model with the classic American model of corporate governance); Gustavo Visentini, *Compatibility and Competition Between European and American Corporate Governance: Which Model of Capitalism?*, 23 BROOK. J. INT'L L. 833, 833 (1998) (contrasting the market-oriented American model, in which "firms have a greater choice of financing alternatives and enjoy greater competition among suppliers of capital," with the bank-oriented European model, in which a single bank, or bank group, "dominate[s] the financing of the firm.").

11. The use of two boards of directors is another important characteristic of European corporate structure. *See* Thomas J. Andre, Jr., *Some Reflections on German Corporate Governance: A Glimpse at German Supervisory Boards*, 70 TUL. L. REV. 1819 (1996) (discussing German model of two-tier board of directors); Lauren J. Aste, *Reforming French Corporate Governance: A Return to the Two-Tier Board?*, 32 GEO. WASH. J. INT'L L. & ECON. 1 (1999) (considering how to reform the two-tier system in France); Benjamin Mojuye, *French Corporate Governance in the New Millenium: Who Watched the Board in Corporate France*?, 6 COLUM. J. EUR. L. 73, 92–98 (2000) (discussing the composition of corporate boards in France). This Article does not go into detail about this difference, because this Article does not specifically relate supervisory boards with concentrated stockownership or changing trends in European corporations. However, many European corporations have both a management board and a supervisory board. The management board engages in the management and business affairs of the corporation. The supervisory board elects and oversees the management board. The two-board structure is permitted in French public corporations, but required for Dutch public corporations.

12. The classic argument is that dispersed shares and increased numbers of shareholders result in a division between ownership and control of a corporation. *See* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY

rate structure affect the influence shareholders have in the management of a corporation.

The most important characteristics of the bank-oriented model are concentrated ownership of shares and the exchange of shares by banks.[13] By contrast, in the market-oriented model, share ownership is widely dispersed among many owners, with intense public exchange of shares.[14] In the U.S., shareholders traditionally play an active role in directing a corporation, while European shareholders play a less active role.[15]

A. Bank-Oriented Corporate Models

The most significant characteristic of the bank-oriented model is the concentrated ownership of shares.[16] Typically, shares are held by a family, an economic group or a bank. Often the shareholders are limited to one, two, or three investors. Shareholders are fewer in number as compared to the U.S. market-oriented model. Consequently, the largest shareholder plays a decisive and disproportionate role in controlling the corporation. Minority shareholders have little effective control. Under

119 (1932) (noting that the now common division between the ownership of a business enterprise and the management of that same enterprise started to become more commonplace during the industrial revolution); Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931) (stating that all powers granted to and exercised by the management of a corporation must be done with a view to benefiting the shareholders—the owners of the corporation); Edwin Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1145 (1932) (stating that the manager "is a fiduciary who must loyally serve his principal's interests.").

13. *See* Visentini, *supra* note 10, at 837 (noting that the European bank-oriented system allows banks to own "significant amounts of stock in the corporations.").

14. *Id*. at 836–41.

15. *See* Speeckaert, *supra* note 10, at 36 (stating that "Europeans are not accustomed to exercising their influence as shareholders.").

16. In 1990, other French companies held 46.8% of the shares of 155 industrial and commercial quoted French companies. Families, trusts, institutional investors, and foreign companies were, in descending order, the next largest owners of shares. *See* Julian Franks & Colin Mayer, *Corporate Ownership and Control in the U.K., Germany, and France*, *in* STUDIES IN INTERNATIONAL CORPORATE FINANCE AND GOVERNANCE SYSTEMS: A COMPARISON OF THE U.S., JAPAN AND EUROPE 281–83, 286 (Donald H. Chew ed., Oxford Univ. Press 1997); *see also* Bratton & McCahery, *supra* note 10, at 225–26; Cunningham, *supra* note 10, at 1139–40; Visentini, *supra* note 10, at 839. The bank-oriented model is often referred to as the blockholder system. *See, e.g.*, Bratton & McCahery, *supra* note 10, at 225–26.

the European system, minority shareholders do not expect to exert any influence in the management of the corporation.[17]

The bank model is also characterized by a close affinity between shareholders and managers, which provides for more effective monitoring than in the U.S. market model.[18] Majority shareholders are often well versed in the developments of a corporation; however, this closeness also reduces objectivity.[19] Trading of shares tends to be less liquid in the bank model than in the market model.[20]

The European tradition of concentrated stockownership leads to deep economic interests by the majority shareholders and the corporate boards in the development of their corporation. This contrasts with the situation in the United States, where stockownership is dispersed among many persons, economic risks are mitigated and vested economic interests are not as pronounced. With ownership heavily concentrated in a few actors, boards and shareholders in European corporations have much more at stake in their corporations.

B. Market-Oriented Corporate Models[21]

In the market-oriented system, stockownership is widely dispersed and not concentrated as they are in Europe.[22] Corporate ownership is diffused among many individual shareholders, creditors, and institutional shareholders. Shareholders own the corporation, and a board of directors manages the corporation.[23] Ownership and management are separate.[24] With such dispersed ownership, a complex corporate legal

17. *See* Speeckaert, *supra* note 10, at 36.

18. *See* Bratton & McCahery, *supra* note 10, at 226 (stating that "large-block investments imply a closer level of shareholder monitoring.").

19. *Id*. at 226–27.

20. *See* Cunningham, *supra* note 10, at 1139–40 (noting that the "concentration of ownership and debt holdings" in the banking model "reduces the pressure for the development of actively functioning, deep, and liquid capital markets.").

21. For this Article, this model is also called the market model or the shareholder model.

22. *See* Visentini, *supra* note 10, at 836–37 (noting that in the market-oriented model "[s]ecurities are spread out among the public at large" whereas in the bank-oriented model the banks own "significant amounts of stock in the corporations.").

23. *See* BERLE & MEANS, *supra* note 12, at 119–20.

24. *See id*.

system is necessary to delineate the rights and duties of shareholders, corporate directors, corporate managers, and the corporation.

The market system places emphasis on protecting the shareholder's rights.[25] This protection is afforded to the shareholder as an individual.[26] Minority shareholders have rights, which majority shareholders have a duty to protect.[27] An example of this protection is the U.S. corporate governance trend of promoting disclosure and arm's-length transactions.[28] Another example is the rigid filing and disclosure requirements for securities exchanges.[29] Such emphasis on transparency and fairness in American corporate law exists so that all shareholders will be aware of how the corporation is functioning.[30] This contrasts with European corporate governance, where there is little emphasis on protecting the rights of minority shareholders.

The market system has two important disadvantages: the "shareholder-management agency" problem and the "time-horizon cost" prob-

25. *See* Visentini, *supra* note 10, at 841.

26. *See id*.

27. In the United States, minority shareholders have the right to be well-informed about decisions made by the board and by majority shareholders. *See* Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983) (stating that "one possessing superior knowledge may not mislead any stockholder by use of corporate information to which the latter is not privy."). *See generally* Sinclair Oil Corp. v. Levien, 280 A.2d. 717, 723 (Del. 1971) (stating that a parent corporation's decision to dominate its subsidiary resulted in self-dealing which was intrinsically unfair to the minority shareholders of the subsidiary).

28. *See* DEL. CODE ANN. tit. 8, § 144 (2003) (stressing any self-dealing transactions between a board member or officer and the corporation should include the disclosure of the relationship).

29. *See* Cunningham, *supra* note 10, at 1137 (noting that the United States' disclosure laws, "which promote the transparency of corporations' performances," allows shareholders to hold managers of corporations accountable).

30. *Id*. Delaware law, for example, provides shareholders the right to inspect the list of shareholders and sets a penalty if the corporation refuses to provide this list. *See* DEL. CODE ANN. tit. 8, § 220 (2003). Similarly, as one of the few takeover codes in Europe, the German code stresses transparency in takeovers, equal treatment for all participants, information disclosures, and fair share prices for all shareholders during takeovers. Karl-Hermann Baumann, *Takeovers in Germany and EU Regulation: Experience and Practice*, *in* COMPARATIVE CORPORATE GOVERNANCE: THE STATE OF THE ART AND EMERGING RESEARCH 659, 660 (Klaus J. Hopt et al. eds., 1998).

lem.[31] The first problem refers to the difficulty in reaching consensus among shareholders and managers. The board of directors and managers serve as agents for the shareholders who own the corporation. The actions and decisions of the board and managers typically seek to increase and maximize the economic return on the shareholders' investment. This is where the shareholder-management agency problem may arise.[32] Often the board and shareholders have different points of views. While shareholders want to maximize the return on their investment, the Board must also consider proper management of the corporation. Bratton and McCahery argue that hostile takeovers, derivative lawsuits, and the use of outside monitors on the board of directors may correct such agency problem in U.S. corporations.[33]

The "time horizon cost" problem refers to the shareholders' expectation for a quick return on their investments.[34] This problem arises when the board of directors makes decisions with a view to long-term effects but with a limited immediate return on shareholder investments.[35] In these cases, shareholders may act to terminate a board's tenure. This may effectively limit the board's decisions primarily to those that yield a quick return on shareholders' investment.[36]

Bratton and McCahery also present important advantages of the market model. Dispersed stockownership enables investors to reduce

31. *See* Bratton & McCahery, *supra* note 10, at 222–23 (stating that in the former situation, the managers may take advantage of their position to the detriment of the shareholders, while in the latter situation shareholders may place too much emphasis on the short-term performance of the corporation).

32. *See id*. at 223.

33. *See id.*

34. *See id.*

35. In presenting the position that corporate managers should be free from shareholder pressure, Lawrence Mitchell points out that in U.S. corporations short-term stock price is the measure of management and the cause of "irresponsible management." *See* LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT 4–5 (Yale Univ. Press 2001); *see also id*. at 185 (stating that "[L]et managers manage; trust them to run their corporations in responsible and accountable ways, taking into account the moral and social propriety of their behavior as well as the profitability of their actions," away from shareholder pressure).

36. *See* Bratton & McCahery, *supra* note 10, at 223 (stating that the short-term outlook of many shareholders may cause "managers to look for quick fixes to keep the shareholders satisfied").

their economic risk.[37] Intense public trading of securities fuels shareholder liquidity and facilitates corporate financing.[38] Lawrence Cunningham argues the market model has the advantage of "adaptability to changing environments."[39] The fluid nature of the capital markets allows a corporation to decrease or increase in size according to its situation and needs. Cunningham adds that European corporations do not enjoy such adaptability.[40]

European corporations are moving towards a market model. As a result of this shift, European corporations are suffering from the problems of "shareholder-management agency" and "time-horizon cost." The Gucci and BNP hostile bids illustrate that shareholders and managers may have intense disagreement concerning the direction of corporations, e.g., the shareholders of LVMH and those of BNP believed that their respective boards of directors, as their agents, were not acting in their best interests. Both LVMH and BNP shareholders preferred the target company's stock sold on the market where they could realize an immediate return, while their boards preferred the shares to remain in their control so that their value may be preserved. This disagreement produced litigation focused on minority shareholders' rights, a corporate board's duty to its shareholders, and the transparency of management. Both the Gucci and BNP hostile bids showed an intense desire of the shareholders and the board to shape corporate decisions to realize an immediate return on investments. In essence, this shift to a market model triggered agency and time horizon problems. The dramatic, prolonged, and contentious experience of the Gucci and BNP bids show that European government must address these issues.[41]

37. *See id.* at 224 (commenting that in market systems "shareholders can cheaply reduce their risk through diversification.").

38. *See id.*

39. Cunningham, *supra* note 10, at 1144.

40. *See id.* at 1145. Although less adaptable, these corporations provide their workers long-term security. Robilotti observes, however, that the American market model encourages risk taking and enterprise more than the European model. *See* Robilotti, *supra* note 10, at 566 (comparing the American entrepreneurial system with the European job stability system and stating, "Future productive efficiency will be provided best through entrepreneurial risk-taking rather than job stability in outmoded industries.").

41. *See* discussion, *infra* Part V; *see generally European Takeovers: Barriers to Entry*, ECONOMIST, Dec. 18, 1999.

II. CONCENTRATIONS OF SHAREHOLDER POWER: STATE INTERVENTION AND EXCLUSIVE CORPORATE MANAGEMENT

The exclusive nature of corporate management and the tradition of state intervention in corporate affairs are a significant influence on European corporations.[42] These factors are not necessarily institutionally created, nor are they written into domestic law. While not completely owned by the government, many corporations still fall under the influence of the government.[43] Furthermore, the management of many corporations represents a relatively closed or exclusive sector of society. Members of supervisory boards and management boards generally come from similar professional training and from a limited number of families.[44] These directors often have appointments to serve on the board of more than one corporation.[45] With such exclusivity, corporate boards in Europe have traditionally resolved disputes with genteel and conciliatory methods.

42. *See generally* Aste, *supra* note 11, at 11–18 (listing state intervention, leadership by an educated elite, cross-shareholding and interlocking boards among the most influential factors that have contributed to the exclusive nature of European corporations); Mojuye, *supra* note 11, at 77–92 (providing the historical background for the "everpresent involvement of the French State in the ownership and management of large public corporations.").

43. *See generally* Mojuye, *supra* note 11, at 79–81 (discussing increased state involvement in the affairs of large corporations in post-World War II France). "The role of the State was transformed from that of a co-manager of the economy to that of a vibrant activist, as France's 'First Business Man.'" *Id*. at 80.

44. *See* Aste, *supra* note 11, at 14 (discussing the role of the French government in training an elite group of future corporate executives at such state schools as *Ecole normale*, *Ecoles des mines*, *Ecole des ponts et chausses*, *Ecole polytechnique*, and *Ecole nationale d'administration*).

45. *See id.* at 16 (describing the cross-shareholder structure, or *noyaux durs*, found in many French industrial and financial corporations as one where "one 'friendly company' holds a large percentage of stock in another company, and vice versa"); Mojuye, *supra* note 11, at 83 (explaining that in France, a networking ownership structure developed in private corporations, major banks and public corporations, "as their capital became intertwined.").

A. Government Influence in France's Corporations

French stands out as a vivid example of state intervention[46] in private corporations. Benjamin Mojuye traces this characteristic as an outgrowth of France's Absolutist monarchies of the seventeenth century.[47] These monarchies facilitated the development of France's first national industries, which eventually gave way to public sector industries in energy, transport, and communications. These enterprises were "created, wholly owned, directly controlled and managed by the state."[48] While this role is now not as prevalent as in the past, recent government attempts to privatize public industries have had "little impact thus far."[49] Mojuye emphasizes "as a quintessential characteristic of French Corporate Governance the traditional and ever-present involvement of the French State in the ownership and management of large public corporations."[50]

Nonetheless, the French government has attempted to privatize many state-owned enterprises. Lauren Aste notes that this decrease in state participation signals a new need for improved corporate governance.[51] With state intervention, government officials act as a monitor for many enterprises.[52] This role is particularly evident in the office of

46. For this Article, "state intervention" refers to the influence a government may have in the ownership of a corporation. Examples include state-owned enterprises, government (non-judicial) settlement of disputes involving corporations, restrictions on foreign participation in businesses, and national industrial policy. "State intervention" is consistent with the view that the state has a right to determine and influence corporate development. In the opposing model, corporations are "fictitious persons" who may resolve disputes through judicial means like any other person. The state seeks only minimal influence over corporate development, resolves corporate disputes through judicial means, and does not determine national industrial policy.

47. *See generally* Mojuye, *supra* note 11, at 77–83.

48. *See id*. at 77–78 (noting "royal absolutism called for political unity and demanded a cohesive social corps as well as an economy entirely controlled by the king.").

49. *Id*. at 81.

50. *Id.* at 81. Franks and Mayer report that, in 1990, the French state had a fifty to seventy-five percent stake in roughly one-third of 155 French industrial and commercial quoted companies, a twenty-five to fifty percent stake in one-third of the companies, and a five to fifteen percent stake in one-fifth of the companies. *See* Franks & Mayer, *supra* note 16, at 288 (depicting percentages in Figure 8, Panel B).

51. *See* Aste, *supra* note 11, at 13.

52. *See id*.

President Directeur General (PDG), which is the equivalent of the head of the board of directors.[53] Aste explains that "the PDG became a sort of government liaison through which the government exercised its dirigiste policies."[54]

As European corporations become subject to increased shareholder activism, state intervention may become the only way to resolve disputes between activist shareholders and corporate boards. The traditional method of resolving disputes, state intervention, will have to serve until new rules regarding shareholder rights and board obligations are developed.

B. An Exclusive Culture of Corporate Directors

Another important factor of corporate structure in France is the relatively closed and exclusive nature of corporate executive ranks.[55] Exclusivity is key to the genteel and traditionally conciliatory interaction among shareholders, boards, the state and competitors.[56] Exclusivity permits all players to know with whom they negotiate and what the rules of the game are. Particularly, interlocking board memberships, similar professional training background and control by certain families characterize traditional corporate management in France.[57]

The exclusivity of the French directorship class is important for many reasons. First, it suggests that only a limited number of opinions or perspectives exist in corporate management, as there is a disproportionate concentration of influence on the corporate directorship.[58] Second, the limited size of the directorship class indicates that there has traditionally been less of a need for transparency.[59] The closeness between

53. *See id*. at 12.

54. *Id*.

55. Franks and Mayer refer to this exclusivity as an "insider system" in which "the corporate sector has controlling interests in itself and in which outside investors, while participating in equity returns through the stock market, are not able to exert much control." Franks & Mayer, *supra* note 16, at 290.

56. Anglo-Saxon businessmen often repeat the adage: "In France, all decisions are made over dinner and never in the Boardroom."

57. *See* Aste, *supra* note 11, at 14–16.

58. *See*, *e.g.*, *id*. at 18 (describing the system of interlocking corporate boards where a small number of directors hold many positions thus leading to collusion).

59. *See*, *e.g.*, *id*. at 54 (suggesting that directors have an incentive to engage in less than transparent accounting practices because of the large scope of their duties); *see*

shareholders and boards may have made informational exchange less necessary. Third, such exclusivity suggests that any change in corporate governance will have to come from outside these interests. Fourth, and most importantly, by determining who makes decisions and who owns shares, the exclusive nature of French directorship reifies the concentrated nature of corporate ownership.

Interlocking boards illustrate the exclusive nature of corporate management in France. Business leaders often have appointments on more than one supervisory board. This is accomplished by "cross-shareholding" arrangements where "one 'friendly company' holds a large percentage in another company, and vice versa."[60] For a friendly company to protect its investment in another company, the friendly company secures for one of its directors a seat on the other corporation's supervisory board.[61] In essence, this board member works for one company and has monitory authority over the other company.[62]

Corporate management is also influenced by professional training, which involves a limited number of elite schools and public services.[63] PDGs follow a standard career path that begins with training at an elite school. This is followed by a short tenure at one of the state administrative agencies, before they move to the private sector.[64] Without this training, it is impossible for an individual to join the corporate executive ranks.

With a great deal of stockownership, families are another important contributor to an exclusive corporate culture. Mojuye writes: "In 1988, 30 out of 200 of France's largest companies were owned or directly controlled by families."[65] This concentrated power has existed since the

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also id. at 56 (noting the "overall lack of information that directors provide small shareholders.").

60. *See* Aste, *supra* note 11, at 16.

61. *Cf.* Mojuye, *supra* note 11, at 90 (explaining how the PDG generally selects directors who are relatives or friends of the directors of the networking corporations already on the board).

62. Aste, *supra* note 11, at 18 (noting that in 1989 fifty-seven people held 25% of the board seats at the 100 largest French companies).

63. *See id*.

64. *See*, *e.g.*, *id.* at 14 (noting that "this interchange between the public and private sectors creates a strong relationship between government and industry in France, often resulting in indirect state pressure on elite corporate leaders as they make business decisions.").

65. Mojuye, *supra* note 11, at 87.

seventeenth century. Such power structure has added new players, but the influence of a small number of individuals remains constant in French corporate culture. Mojuye describes the end result: "these individuals preside over their corporations as rulers over their empires. As both owners and managers, they wear many hats: they hire the board, mostly composed of family members and friends, and have the power to fire them."[66]

The exclusive nature of the directorship class exacerbates disputes between shareholders and boards, as Europe moves toward a more market-oriented corporate model. Europe's shareholders are growing in number and becoming more diverse. Shareholders are beginning to exert more influence in direction and control. As a new sector of shareholders seeks influence through activism, the traditional corporate directorship will be threatened. Within the traditional executive culture, disputes among competitors, boards, and shareholders were resolved with genteel and conciliatory methods. Interlocking boards and exclusive directorship may now be forced to put up much more resistance to hostile takeover bids. The key to any defensive measures against hostile takeover bids will lie in the use of traditional instruments such as interlocking boards and cross-shareholding arrangements.

III. European Shareholder Activism: Lack of Experience and Open Territory for Aggressors

A. Docile Shareholders

The traditional perspective is that European shareholders are not as active as their U.S. counterparts.[67] Shareholders in Europe do not regularly appear at shareholder meetings.[68] They do not vote in most corporate matters. They rarely solicit proxies.[69] Shares are typically not registered.[70] Shareholders invest within a context where they exert little influence over the direction of the corporation. Corporate management

66. *Id.*

67. *See* Speeckaert, *supra* note 10, at 35–37 (describing European shareholders as passive, and unaccustomed to "exercising their influence as shareholders").

68. *See id.*

69. *See id.*

70. *See id.*

operates without much resistance or influence from shareholders. Because investors do not traditionally play an active role, there is limited, if any, disclosure requirements between the board and shareholders. Boards often operate without providing shareholders a detailed description of their operations. Proxies, if permitted, occur with minimal disclosure requirements.[71]

European corporate law provides shareholders with the right to vote at annual meetings. Several factors, however, inhibit active participation by most shareholders.[72] For instance, meeting agendas are not regularly distributed.[73] Meeting times are not disclosed with the same fervor as in the United States. Also, the concentration of shares in a few holders[74] often acts as an inhibitor for minority shareholders to participate. Minority interests find their voice ineffectual, when compared with the influence of majority shareholders, the supervisory board, and the management board.[75] Limited disclosure requirements make it difficult for an individual shareholder to make an educated decision.[76] Under these circumstances, voting appears futile.[77]

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71. *See id.*

72. *See id*. (describing how typically "companies publish a small sized advertisement in a financial newspaper giving notice of the meeting. If shareholders want to vote, they have to bring their shares, or deposit them in a bank, because European shares are bearer shares.").

73. *See id.*

74. *See id.*

75. *See* Howard D. Sherman, *Corporate Governance Changes Make Inroads in Europe*, *in* STUDIES IN INTERNATIONAL CORPORATE FINANCE AND GOVERNANCE SYSTEMS: A COMPARISON OF THE U.S., JAPAN AND EUROPE 345 (Donald H. Chew ed., Oxford Univ. Press 1997) (explaining that pension funds have played a key role in the introduction of market forces to European corporations). Howard Sherman states that "[m]arket forces have made Europe's transformation towards improved corporate governance inevitable. One of Europe's greatest challenges now is how far local institutions will go to protect the rights of minority shareholders and exert meaningful pressure on entrenched management and controlling institutions." *Id*.

76. *See* Speeckaert, *supra* note 10, at 35–37 (describing how this "ordinarily leads the shareholder to take the approach that: 'if we like them, we invest in them; if we do not, we walk.'").

77. If they do not have influence on the board, European shareholders will typically follow a Wall Street mentality. They sell their shares if they do not like how the corporation is managed. *See id*. This approach is in marked contrast with contemporary U.S. activism. U.S. shareholders, if they do not like how a corporation is run, will seek to influence the corporation's direction by voting for members of the board, soliciting

B. Dutch Corporate Law

The Netherlands is an attractive country to incorporate because of tax benefits.[78] Dutch public corporations are organized and abbreviated as "n.v.," or *naamloze vennootschap*.[79] An N.V. corporation has a compulsory two-tier board structure with a board of directors which manages the corporation and a supervisory board which advises and monitors the board of directors.[80]

In such organization, the board of directors is not subordinate to the shareholders, nor do the shareholders of Dutch corporations have ultimate authority over the management of the corporation.[81] A board of directors of a Dutch corporation has its own "fraternal" character, which exists as more than just a contract between the shareholders and the corporation.[82] At the shareholders' general meetings, "shareholders may only exercise that authority which is specifically reserved to it and all other management functions belong to the board."[83]

The board's obligation to "protect the interests of the company" further reduces the influence of shareholders. Dutch law prescribes these interests to include shareholders, employees, and creditors.[84]

C. French Corporate Law

In France, a Société Anonyme (S.A.), the equivalent of a corporation, is publicly held with the procedure of "*constitution avec appel pub-*

proxies from other shareholders, appearing at shareholder meetings, or undertaking a derivative law suit.

78. *See* Suzanne Kapner, *Gucci Award of Options Is Challenged*, N.Y. TIMES, Nov. 28, 2000, at W1.

79. ADRIAAN DORRESTEIJN ET AL., EUROPEAN CORPORATE LAW 24 (Kluwer Law & Tax. Publishers 1994).

80. *See id.* at 123–24.

81. *See id*. at 121 (noting that individual shareholders may bring an action against the directors only if they can prove damage "out of proportion to their share of the capital"); *id*. at 119 ("All powers of management of the company are entrusted . . . to the board of directors.").

82. *Id.* at 120.

83. *See id.* at 122.

84. With the Work Council Act of 1948, Dutch law provides employees the right to comment on business decisions made by the corporation. *See id*. at 154.

lic à l'épargne."[85] The duration of such a corporation is limited and exists only as "an agreement between its shareholders" until it is registered.[86] An S.A. may choose to be organized with a one- or two-tier board structure.[87] The latter structure encompasses an executive board and a supervisory board. In both structures, the shareholders general meeting has some controlling function for "basic issues."[88]

French law subjects directors, executive officers, and supervisory board members to various controls. For instance, French law regulates transactions between these individuals and the corporation.[89] The directors are to act in the corporation's interests, and not for their own benefit.[90] Actions may be brought on behalf of the corporation against these individuals.[91] Criminal law also punishes many self-interested acts by directors.[92]

85. *See id*. at 69 (distinguishing the two procedures for incorporation between the publicly held, or "*avec appel public à l'épargne*," and non publicly held, or "*sans appel public à l'épargne*," company).

86. *See id*.

87. *See id*. at 104. In the single board structure, the executive board is charged with the management function. Here in practice, the chairman and the executive officers manage while the non-officer members of the board execute a controlling or monitoring function. With a two-tier board structure, the management and monitoring functions are more clearly distinguished. The supervisory board monitors or controls, while the executive board manages. *See id*.

88. Dorresteijn explains that the key difference between the two structures lies in defining duties and assigning liabilities. With the two-tier structure "the management and control functions of the two boards and their members are rigidly defined and their liabilities set out accordingly." *See id*.

89. *See id*. at 107–108.

90. *See id*. at 108.

91. *See id*.

92. *See id*.

D. "Here Come the Gringos," or "They Are Acting like Stupid Americain Shareholders": Threats Posed by U.S.-Style Shareholder Activism[93]

Recently, scholars have noticed a gradual change in European corporate structure toward a more dispersed stockownership and increased shareholder activism.[94] These trends resemble many aspects of the market-oriented model.[95] Observers note that shareholders are becoming

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93. Lawrence Mitchell argues that, based on shareholder profit maximization and the benefits of limited liability status, U.S. corporations have set an example for European corporations. Specifically, he writes "the overwhelming power and influence of American capital are changing everything, creating nearly irresistible pressures on corporate systems throughout the world to replicate the U.S. model for the benefit of American investors." MITCHELL, *supra* note 35, at 275.

94. *See* James A. Fanto, *The Transformation of French Corporate Governance and United States Institutional Investors*, 21 BROOK. J. INT'L L. 1, 28–49 (1995) (analyzing French corporate governance in global corporations and pressures to change); Rebecca Schoenfeldt, *Competition Laws of the European Union in the Face of the New Single Currency Market*, 33 J. MARSHALL L. REV. 715, 741 (2000) (speculating that the EU should pass new regulations setting a uniform threshold percentage of stock necessitating the launch of a bid); Sherman, *supra* note 75, at 347–51; Speeckaert, *supra* note 10, at 38–39 (noting however that corporate governance models will shift sooner in Eastern European countries "than in the old, more placid Western European countries like France, Germany and the Netherlands"); Visentini, *supra* note 10, at 847-48 (arguing that the globalization of finance, including "the plurality of sources of finance for firms becom[ing] more diversified," will force changes to European corporate governance structures); Cunningham, *supra* note 10, at 1148 (positing that harmonized accounting rules have led Europe towards "integration of corporate finance and governance"); Robilotti, *supra* note 10, at 565–67 (finding that the U.S. model of corporate governance works better than German or Japanese models because "future productive efficiency will be provided best through entrepreneurial risk-taking rather than job stability in outmode industries").

95. Perry E. Wallace analyzes a series of developments in French corporate governance which illustrate France has bee forced "to wrestle with a central question: whether governance of major companies will take on more characteristics of the 'Anglo-Saxon' approach." *See* Perry E. Wallace, *The Globalization of Corporate Governance: Shareholder Protection, Hostile Takeovers and the Evolving Corporate Environment in France*, 18 CONN. J. INT'L L. 1, 3 (2002). Wallace argues that "American corporate governance practices will continue to have a powerful influence on the development of market-oriented global corporate governance." *See id*. Examples of this increase include hostile takeovers such as the BNP bid, foreign investors' influence on the French company Alcatel's governance, and rising importance of minority shareholder activism. *See id*.

more active, as institutional shareholders and international investors play a larger role.[96] Globalization has attracted new foreign capital, and economic integration has united domestic economies by eliminating political barriers. Creation of the Euro has eliminated foreign exchange costs and greatly promotes foreign portfolio investment. All these trends have facilitated the new role of shareholders.

Cunningham provides six factors which point to a "movement towards a Shareholder Market Model."[97] First, following the EU, many European countries have lowered barriers against cross-border capital. This has encouraged investors to participate as shareholders in foreign corporations.[98] Second, many accounting rules have been harmonized in Europe, facilitating cross-border transactions and financial activity.[99] Third, the United Kingdom, along with the United States, has influenced European corporations to move towards a shareholder model.[100] Cunningham points to privatizations and corporate governance reforms in France as examples.[101] Fourth, 1999 saw a "wave of European merger activity," such as BNP's $38 billion hostile bid for SG and Paribas, Olivetti's $60 billion hostile bid for Telecom Italia, and LVMH's hostile bid for Gucci.[102] Fifth, regulatory competition, such as favorable corpo-

96. In particular, there has been a "veritable explosion" in international proxy voting, by international investors. This has been caused by increases in foreign investment and private pension funds as investors. *See* Corinna Arnold, *Voting Abroad: Practical Experiences*, *in* SHAREHOLDER VOTING RIGHTS AND PRACTICES IN EUROPE AND THE UNITED STATES 391–99 (Theodor Baums & Eddy Wymeersch eds., 1999).

97. *See* Cunningham, *supra* note 10, at 1148 (delineating these factors as "(1) a requirement of uniform formats for financial statements; (2) common valuation principles . . . (3) a general mandate that financial statements show true and fair value; (4) an annual audit; (5) public filings; and (6) consolidation principles").

98. *See id*. at 1147.

99. *See id*.

100. *See id*. at 1148.

101. *See id.* at 1149.

102. *See id*. at 1150; *See*, *e.g.*, Anne Swardson, *In Europe, an Urge to Conquer*, WASH. POST, Mar. 11, 1999, at E01 (arguing that the drive for companies to become larger and more efficient has led to recent hostile takeovers).

rate tax laws, has led investors to seek opportunities in new countries.[103] Sixth, European capital markets are becoming further integrated.[104]

All these factors illustrate that political barriers between domestic economies are being reduced for the participation of foreign shareholders. These changes represent a movement toward a market-oriented model. Specifically, European corporate finance is beginning to rely less on concentrated stockownership; investors are growing in number and becoming more diverse; shareholders are beginning to request more transparent rules of exchange; and foreign shareholders are beginning to demand participation in determining the direction of companies.

Individuals are investing in foreign corporations as part of their effort to reduce risk. The rationale is that investing only in one economy makes the investments susceptible to all the risks of that economy. By spreading investments among many economies, however, an investor is less vulnerable to the effects of any one nation's economic rupture.[105]

These new investors present European corporations with new levels of shareholder activism. James Fanto explains that a reason for foreign investor activism abroad is that the "shareholder-owner oversight of the management-agent could improve corporate governance and productivity."[106] Foreign shareholders "demand more than a cursory treatment of voting rights or 'rubber stamping' of all management boards."[107] Fanto adds that the best examples of this new activism are the creation of organizations to assist foreign investors in their voting. These entities include the Investor Responsibility Resource Center, Global Proxy, and

103. *See*, *e.g.*, Cunningham, *supra* note 10, at 1151 (describing how "[t]he forces of regulatory competition also are driving forum shopping by corporations that look to locate in host countries with attractive laws, thereby further promoting sovereign state competition.").

104. *See*, *e.g.*, *id.* (noting the integration of facilities and trading between the Frankfurt, France, and London Stock Exchanges; and the desire of exchange officials in Milan, Madrid, Amsterdam, and Brussels to gain admission into this alliance).

105. *See also* Fanto, *supra* note 94, at 12–13 (noting "an institutional investor reduces its risk by diversifying its portfolio, not only over a national market . . . but also over the global market. Thus, an overall decline in the value of investments in one country's market or industries could be balanced or hedged by growth in other investments in other countries.").

106. *See id*. at 19.

107. *See id*. at 20.

Institutional Shareholder Services.[108] The new foreign shareholders demand transparency and fairness to minority shareholders.[109]

Perry Wallace explains how many foreign companies seeking U.S. investors end up "paying a price."[110] He describes certain benefits of the U.S. securities market, such as the availability of "a liquid and powerful market," the ability to raise capital "efficiently and economically" and increased visibility of a company.[111] Wallace states, however, that the burdens are strict regulatory requirements, disclosure requirements, and risks of securities litigation.[112]

In the following sections, this Article will examine the effect of the trend of increased shareholder activism by analyzing what happens when activist shareholders penetrated traditionally European corporate structures. The inquiry will also look into what happened when activist shareholder forces (in LVMH and BNP) collided with corporate structures characterized by concentrated holding of shares, state interventionism, and low shareholder activism.

108. *See id*. at 27.

109. *See*, *e.g.*, *Overtaken by Events*, ECONOMIST, Dec. 18, 1999 (discussing Europe's proposed takeover code which aims to mirror Britain's code of transparency, fairness, and protection of minority shareholders).

110. *See, e.g.*, Wallace, *supra* note 95, at 37 (noting that foreign companies wishing to partake in American securities markets must pay the price of being influenced by American corporate governance).

111. *See id*. at 38.

112. *See id*. at 16–20, 38.

IV. "DON'T YOU KNOW THAT I AM A SHAREHOLDER!"—"I WANT THE BAG, THE SHOES, AND THE CORPORATION !"—"I WANT BOTH BANKS !": THE GUCCI AND BNP EXPERIENCES WITH HOSTILE TAKEOVERS

A. "Champagne Wishes" and Aggressive Shareholder Dreams: LVMH Relentlessly Bids for Gucci

Gucci's history is one of intense family involvement, headline-grabbing drama, financial highs and lows, and eventual transformation into a large multinational luxury conglomerate.[113] As developments in 1999 through 2001 illustrate, a family business with family/business problems transformed into a public multinational corporation with shareholder problems. Gucci started as an Italian family-owned business and then became a privately held corporation in Italy. The company was founded in 1921, as a maker of luxury bags and leather goods for equestrians. Gucci's rise to luxury goods fame began in the 1940s and increased with remarkable strides through the 1980s. For most of its history, Gucci was controlled by the Gucci family. This history is characterized by intra-family fighting, vendettas, ego conflicts, and violence. These problems led to Gucci's financial failure by the late 1980s. The investment company Investcorp purchased all the shares owned by the Gucci family in 1993.[114]

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113. *See generally* SARA GAY FORDEN, THE HOUSE OF GUCCI: A SENSATIONAL STORY OF MURDER, MADNESS, GLAMOUR AND GREED (1st Perennial ed. 2001) (providing a history of the corporation and a narrative about the recent developments involving Gucci since 1996); *see also* "CEO Message," Gucci Group N.V. Company Overview (summarizing Gucci's operations in the U.S., Britain, France, Italy, and Japan in a letter from CEO of the Gucci Group to investors), *available at* http://www.guccigroup.com/grpProfile/default.asp?ReqView=companyoverview (last visited Sept. 18, 2003). Gucci's pre-public corporation history is so dramatic and eye-catching that the U.S. film maker Martin Scorsese is planning to make a movie about the family's troubles and dramas related to the luxury good maker. *See* Hallie Levine, *Inside the Deadly Gucci Family Feud: Book Reveals Why Designing Woman Plotted Ex's Murder*, N.Y. POST, Sept. 13, 2000, at 30.

114. *See* FORDEN, *supra* note 113, at 247 (discussing details of Investicorp's restructuring of Gucci's debt).

Gucci incorporated in the Netherlands in 1994[115] as an N.V. The year 1995 marked the beginning of Gucci's recent climb in popularity in the fashion world and rise in economic performance.[116] The dual leadership of Tom Ford as Creative Director and Domenico De Sole as President and CEO is seen as the key factor for these improvements.[117] These developments are best quantified with a five-year increase (1994 to 1999) in sales from $200 million to $1 billion.[118] In October of 1995, Gucci went public on the Amsterdam and New York Stock Exchanges.[119] Popularity on the run-way and financial success followed the public offering.[120] With these impressive strides and remarkable turn around, shareholders kept a keen eye on Gucci as a lucrative investment.

Eyeing this promising investment, LVMH began its bid for Gucci in 1999. LVMH began buying shares through a phantom corporation in 1998.[121] As Gucci's financial success and popularity climbed so did LVMH's interest in Gucci. At first, LVMH explained its investments were "passive," "strategic," and did not represent a bid for Gucci.[122]

115. *See, e.g.*, *Gucci's Profit Falls 27 Pct in 2002*, AGENCE FRANCE-PRESSE, Mar. 23, 2003, *available at* 2003 WL 2764796.

116. *See* Samantha Conti, *First and Always: The Italians See Themselves as Pioneers at Luxury Branding, and Old Hands at the Follow-Through As Well*, WOMEN'S WEAR DAILY, May 30, 2000 [hereinafter Conti, *First and Always*]; *Families Out of Fashion: Italy's Family Firms Get Out of Luxury Goods*, ECONOMIST, Mar. 4, 2000 (presenting Gucci as an example of an Italian luxury goods firm that has profited from its reputation and converted itself from a family business to a multinational corporation).

117. *See* Conti, *First and Always*, *supra* note 116.

118. *See* FORDEN, *supra* note 113, at 322 (noting Domenico De Sole's speech where he said he and Tom Ford had accomplished this growth).

119. *See* Alice Rawsthorn, *Gucci Offer Share to be Increased*, FIN. TIMES, Oct. 19, 2000, at 30 [hereinafter Rawsthorn, *Gucci Offer*].

120. Gucci was named "European Company of the Year 1998" by the European Business Press Federation. *See* *Gucci History*, *available at* http://www.gucci.com/about-gucci/history (last visited Sept. 19, 2003).

121. *See* FORDEN, *supra* note 113, at 313 (noting that a corporation with the same address as LVMH in Paris purchased almost 3 million Gucci shares in 1998).

122. *See id*. at 311 (quoting a French lawyer representing LVMH as reiterating the president of Louis Vuitton's message as "This is a *passive* (sic) investment"); Jim Ostroff & Thomas J. Ryan, *LVMH Goes Shopping, Spends an Additional $337M for More Gucci*, WOMEN'S WEAR DAILY, Jan. 26, 1999. Already owning over 15% of Gucci shares, Bernard Arnault, Chairman of LVMH, announced "[t]he LVMH Group confirms that . . . it has no intention of making a tender offer for shares of Gucci." *See*

LVMH did tell Gucci it intended "to exercise its rights as a shareholder."[123] This signaled its intention to use shareholder rights and be active. By January 26, 1999, LVMH reported to the SEC that it had invested $337.5 million to attain 34.4% of shares in Gucci.[124]

Observers, including Gucci, knew that LVMH's reputation as an aggressive shareholder made it a prime candidate as a hostile bidder. Much of this was based on LVMH Chairman Bernard Arnault's reputation in the French press as the "The Terminator," "The Wolf in Cashmere," and "Tin Tin."[125] Arnault had amassed a huge luxury firm empire including brands such as Louis Vuitton, Moët & Chandon, Krug, Dom Perignon, Fred, Ebel, Chaumet, Hennessy, Christian Dior, Givenchy, Christian Lacroix, Kenzo, Celine and Lowe, and stores such as DFS duty-free and Sephora.[126] He was described as "bringing American hardball tactics to the genteel world of French business."[127]

Knowing LVMH's reputation and because it was its main competitor, Gucci interpreted LVMH's investment as a hostile bid. De Sole asked Arnault to stop purchasing Gucci stock or to make a full bid for Gucci.[128] Commenting on his meeting with De Sole on January 22, 1999, Arnault said "I asked him to lunch" and "he asked me to Morgan Stanley."[129] Following the traditional French corporate culture, the meetings between the two chairmen continued with the characteristics of genteelness and cooperation. De Sole offered LVMH two seats on the Gucci board in exchange for LVMH reducing its voting rights from 34.4

Sarah Raper, *Arnault Says No Gucci Takeover Planned "Now,"* WOMEN'S WEAR DAILY, Jan. 14, 1999.

123. *See* Ostroff & Ryan, *supra* note 122.

124. *See id.*

125. *See* FORDEN, *supra* note 113, at 311–12 (noting that "the devastated families, smear campaigns, and forced retirements he left in his wake earned him unflattering nicknames in the French press" and that he had been "dubbed 'Tin Tin' after the Belgian carton character for his dark, circumflex-shaped eyebrows.").

126. *See* Sarah Raper, *LVMH's Arnault: The Tower and the Glory*, WOMEN'S WEAR DAILY, Dec. 6, 1999.

127. *See* FORDEN, *supra* note 113, at 312 (indicating "his image had remained ruthless rather than kind.").

128. *See id.* at 318 (noting "De Sole's fear was that Arnault could buy up enough Gucci shares to effectively control the company without making a fair offer to all of its shareholders for 100% of stock.").

129. *See id.*

% to 20%.[130] De Sole and Arnault's initial communication pointed to the traditional genteel French mode of negotiating shareholder and board disputes.

The tensions of a shareholder seeking more shares, a shareholder seeking control of a corporation, and corporate board resisting shareholder activism converted this into an American style corporate battle. In such battles litigation becomes the avenue to express and defend shareholders rights.[131] By the third meeting, Arnault declined De Sole's offer and threatened to sue De Sole and the board personally.[132] On February 10, 1999, with the justification of exerting his rights as a shareholder, Arnault requested Gucci hold an extraordinary meeting and appoint LVMH representatives to the Gucci board.[133]

Convinced that LVMH represented a hostile bid that must be resisted, the Gucci board began looking for ways to defend itself.[134] These defenses led to a series of legal disputes from 1999 to 2001 over the Gucci board's actions. The two sides of the legal coin were: (1) LVMH had rights as a shareholder to exert control over the board and to purchase shares of Gucci; and (2) the Gucci board could resist a bid by LVMH because the bid was not in the interest of Gucci. European corporate culture had not been versed in resolving these conflicts.[135] Shareholder activism of the LVMH variety had also been rare. Agreements to limit share purchases for a place on the board used to resolve most European corporate tensions. Traditionally, face-to-face communication

130. *See id.* at 319 (indicating there was positive sentiments and that De Sole went to this meeting with a Gucci purse for Arnault's wife).

131. *See* Jo Johnson, *LVMH Break in Gucci Battle*, FIN. TIMES, Mar. 9, 2001, at 25 ("The battle for Gucci between Mr. Pinault and LVMH's Bernard Arnault has been one of the most acrimonious European corporate clashes of the past decade."); *see* Julia Finch, *The Battle for Gucci Turns Personal*, GUARDIAN, Mar. 9, 2001, at 25 (noting that in France, the LVMH-Gucci litigation battle is referred to as "the war of sharks" (or *la guere de requins*) and in London, it is called the "Battle of the Handbags.").

132. *See* FORDEN, *supra* note 113, at 319 (noting both parties were "frustrated").

133. *See id.*

134. *See* Christian Kirchner & Richard W. Painter, *Takeover Defense under Delaware Law, the Proposed Thirteenth EU Directive and the New German Takeover Law: Comparison and Recommendations for Reform*, 50 AM. J. COMP. L. 451, 452 (discussing that corporate boards in the U.S. have devised a variety of defense measures with colorful names such as "white knight," "poison pills," "sale of crown jewels," "lock-up options," "green mail," "golden parachutes" and the "PacMan Defense.").

135. *See* discussion *supra* Part III.D.

resolved disagreements between competitors and between management and shareholders.

The LVMH-Gucci battle presented Dutch courts with new issues, to which they were not accustomed. Gucci and LVMH had the intention to stick to their positions of hostile raider/shareholder enforcing its rights and reticent target/management acting for the good of the corporation. Both sides had U.S. market-model objectives. Both sides were represented by legal counsel determined to litigate with endless conviction and massive personnel. Dutch courts lacked the experience to decide how ultimately to resolve the issue. Up until September 2001, Dutch courts continued to investigate facts surrounding events of over two years before. The courts investigated issues such as minority shareholder rights and a board's management's practices.

In February of 1999, Gucci began looking for defense responses. It could negotiate with LVMH, which would limit LVMH's control of Gucci; or it could find a defense written in its articles of incorporation, which could offset LVMH's potential control as a shareholder over Gucci; or it could find a white knight, which could purchase enough shares of Gucci and cooperate with the Gucci board. However, with no substantive defenses, Gucci's bylaws had been written to facilitate a takeover.[136] Gucci's defense provisions were limited to "golden parachute" provisions for Ford and De Sole.[137]

Gucci's first defensive maneuver encompassed issuing an Employee Stock Ownership Plan (ESOP). On February 18, with an ESOP,

136. Forden explains that when Investcorp purchased Gucci, it wanted an easy way out of such a risky investment. Accordingly, it drafted Gucci's bylaws with provisions for an easy taking of control by a third party who purchased enough shares. *See* FORDEN, *supra* note 113, at 316.

137. These clauses permitted the two leaders to leave Gucci and cash in on stock options. For Ford, the condition to set off the "golden parachute" was if a single shareholder amassed over 35% of the company's shares. For De Sole, the clause's condition was if any single shareholder had "effective control" of Gucci. Dubbed the "human poison pill," the rationale was that without Ford or De Sole, Gucci lost all its worth. Setting off these golden parachutes provided these two leaders a way to lower the value of Gucci shares and thus lessen a raider's interest in the target. Using these provisions implied an enormous risk. Because it meant eliminating the human capital which was Gucci's most valuable asset, implementing the provisions meant destroying what Ford, De Sole, and the Board wanted to protect from a raider. The provisions meant LVMH would not get Gucci's value nor would Gucci. Consequently, with this destroying force the golden parachute could only serve as a last resort. *See id*. at 319.

the Gucci board issued 37 million common shares to Gucci employees.[138] The effect of the issuance would be an additional number of shares in Gucci's capital stock. Additional shares diluted LVMH's voting power. LVMH now only had a 25.6% stake in Gucci.[139] Theoretically with the new shares issued, Gucci could mitigate the LVMH threat. The ESOP was controversial because it was illegal under U.S. law for a corporation to suddenly issue shares worth more than 20% of its capital.[140] As a foreign corporation, Gucci was not prohibited by U.S. law to issue these shares.[141]

LVMH responded by suing Gucci in the Enterprise Chamber of the Amsterdam Court of Appeals (Enterprise Court).[142] The raider claimed that the ESOP was illegal, because the ESOP's only objective was to limit LVMH from attaining more shares, and the ESOP had no benefits for the employees.[143] Gucci's legal defense was the ESOP was enacted because the board feared for the company's "future well-being, interests and independence of the company, its employees, independent shareholders and other stakeholders."[144] Issuing shares to the employees guaranteed employees received an interest in the company and control of the company lay with the interest of labor.[145]

138. *See id*. at 320 (reiterating that De Sole's banker noted that De Sole "started to enjoy the game as we moved on" and "became determined to win.").

139. *See id*.

140. *See id*.

141. Dutch law governed this issue because Gucci is incorporated in the Netherlands. *See, e.g.*, *Gucci's Profit Falls 27 Pct in 2002*, *supra* note 115.

142. *See, e.g.*, Thomas Kamm, *LVMH, Gucci Head for Court As Battle Heats*, WALL ST. JOURNAL, Feb. 26, 1999, at A12.

143. *See* Isabel Conway, *LVMH vs. Gucci: It's a Standoff*, WOMEN'S WEAR DAILY, Mar. 4, 1999 [hereinafter Conway, *LVMH vs. Gucci*] (noting that LVMH's lawyer claimed that Gucci's ESOP "was a sham with no benefits whatsoever to employees except to exist in order to create voting rights controlled by management.").

144. *Id*. *See also* Gucci Group Press Release: Response to LVMH's Litigation [hereinafter Gucci Response] (stating that the ESOP was implemented in order to protect the company from the attempt of "one of Gucci's principal competitors" to obtain control of Gucci "based on a minority stake to the detriment of all stakeholders"), *available at* http://www.guccigroup.com/press/pressArchives/1999/19990225-13561.asp (last visited Sept. 1, 2003).

145. *See* Conway, *LVMH vs. Gucci*, *supra* note 143 (stating that Gucci's defense differed from typical Dutch defenses against hostile takeovers because the ESOP was financed by a company loan; because the loan was from Gucci, LVMH declared the

In early March 1999, the Enterprise Court proceeded to suspend the voting rights of LVMH and the ESOP shares until a future court hearing, in May 1999.[146] Furthermore, the court ordered LVMH and Gucci to hold "serious talks" about how to resolve the dispute.[147] Even though the court declared that the ESOP stood on dubious legal grounds,[148] the ESOP provided Gucci with the time needed to find a way to neutralize LVMH's stake in Gucci. As the dispute moved from faxes and phone conversations to court rooms, personal tensions rose.[149]

With a window to close on March 19, 1999, in court-ordered talks, Gucci began to look for a white knight.[150] De Sole discussed merger and alliance options with nine companies with no success.[151] On March 12, 1999, De Sole began discussing with an interested company named Pinault-Printemps-Redoute S.A. ("PPR"). PPR is known in France as owner of such retails stores as the Printemps department stores, FNAC (electronics), and the mail-order catalog Redoute. François Pinault was PPR chairman and key figure in the negotiation.[152] Pinault was inter-

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shares "would never be distributed to the employees and could not be transferred by the management-controlled foundation except back to the company."). LVMH argued that without a transfer in ownership, these shares only had one purpose: dilute LVMH's voting power. *Id*.

146. *See Fashion Faux Pas: Gucci & LVMH* (noting, however, that the Amsterdam court "did invoke a voting rights injunction on both the newly issued employee shares and LVMH's shares"), *available at* http://www.t-bird.edu/pdf/about_us/case_series/a06020007.pdf (last visited Sept. 1, 2003).

147. *See* Samantha Conti, *LVMH Wins a Round As Court Tells Gucci: Open "Serious Talks"*, WOMEN'S WEAR DAILY, Mar. 23, 1999 [hereinafter Conti, *LVMH Wins a Round*]. This court action, however, made uncertain whether the planned extraordinary Gucci shareholder meeting scheduled for March 23, 1999 would take place. *See* Conway, *supra* note 143 (noting that "it was unclear whether LVMH could cancel a meeting already set by the [Gucci] supervisory board.").

148. *See* Conway, *LVMH vs. Gucci*, *supra* note 143.

149. Each side kept a vigilant eye on the other's moves. De Sole ordered the Gucci offices be checked for hidden microphones. Tom Ford noticed private investigators were sleeping in cars outside his apartment, waiting to report on his every move. *See* FORDEN, *supra* note 113, at 321.

150. *See* Conti, *LVMH Wins a Round*, *supra* note 147.

151. *See* FORDEN, *supra* note 113, at 317 (describing how De Sole was looking for "another company that could come in as a partner and stave off LVHM's advance.").

152. *See Creative Businessman: Francois Pinault*, ECONOMIST, Feb. 19, 2000 (describing Pinault as a businessman who "has repeatedly shown that he can take risks,

ested in buying enough of Gucci to dilute LVMH's as a threat, but he conditioned the deal on a completion deadline by March 19.[153]

Gucci and PPR reached a purchase agreement as two important things happened. First, LVMH made an offer to purchase more Gucci shares; and second, the Dutch Enterprise Court ruled on whether the ESOP was illegal. The Gucci-PPR agreement included the purchase of 40% of Gucci shares for $ 2.9bn.[154] This deal valued Gucci stock at $75 per share and decreased LVMH's stake from 34.4% to 21%.[155] Meanwhile, LVMH had attempted to negotiate a full bid to purchase Gucci shares at an initial price of $81 per share.[156] Surprised as PPR stepped in as the white knight, LVMH increased the bid price to $85 per share for the rest of the shares.[157] This price was significantly higher than the PPR-Gucci alliance price.

Meanwhile based on claims brought earlier in the year, the Enterprise Court ruled: (1) Gucci must consider the $81 and $85 per share offers by LVMH; (2) this consideration cannot be done with any PPR member on the board; (3) LVMH's voting rights should be unfrozen; and (4) ESOP voting rights should be kept frozen.[158]

At this point, LVMH took the fight to the shareholders, seeking support for the position that the Gucci board was acting against the shareholders interests.[159] Specifically, LVMH reasoned the ESOP diluted its shareholder rights, Gucci was not acting in good faith consider-

move quickly and restructure companies with all the determination of an Anglo-Saxon raider.").

153. *See* FORDEN, *supra* note 113, at 323 (noting this deadline was the "date on which court-ordered negotiations between Gucci and LVMH were to resume.").

154. *See* Alice Rawsthorn, *Gucci Is to Look at LVMH Offer of $81 a Share*, FIN. TIMES, Mar. 23, 1999, at 27 (noting that part of the bid LVMH made at $81-a-share included the shares that had been issued to Pinault-controlled PPR, previously excluded in the prior week's offer) [hereinafter Rawsthorn, *Gucci to Look*].

155. *See* FORDEN, *supra* note 113, at 324 (noting the deal also "shouldered him out of any decision making.").

156. *See* Rawsthorn, *Gucci to Look*, *supra* note 154 (noting "after the stock market closed, a Dutch court ruled that Gucci must consider the $81 offer" even though LVMH had tabled it on Sunday and increased their offer to $85 per share).

157. *See* Alice Rawsthorn & Samer Iskandar, *White Knight Pinault Pushes LVMH into Offer for 100% of Gucci*, FIN. TIMES, Mar. 20, 1999, at 1.

158. *See* Rawsthorn, *Gucci to Look*, *supra* note 154.

159. *See LVMH Fires New Weapon: Letter to Gucci Shareholders*, WOMEN'S WEAR DAILY, Apr. 16, 1999.

ing LVMH's full bid, and the PPR alliance was done only to dilute shareholder rights and provide PPR with control of Gucci. LVMH's central tenet was that Gucci's defenses violated LVMH's right as a shareholder.[160]

LVMH's objective was to make its legal complaints before the Enterprise Court at the April 22nd hearing. This hearing concerned the fairness of Gucci's defense against the LVMH bid.[161] In court, LVMH charged Gucci with mismanagement. It wanted the court to appoint an investigator to examine if the Board had violated any shareholder rights.[162]

On May 27, 1999, the Enterprise court ruled against LVMH and declared the Gucci-PPR alliance legal.[163] The Court also invalidated the ESOP Gucci issued in February. With these holdings, Gucci and PPR stood secure in their alliance. LVMH's options were to remain as a shareholder without full control of Gucci or sell its Gucci shares. Alternatively, LVMH could appeal the Enterprise Court decision to a higher court. By doing this LVMH could seek to annul the PPR alliance, because it allegedly violated LVMH's rights as a minority shareholder. This would force LVMH to spend exorbitant amounts in legal fees to secure its position as largest shareholder in a company hostile to its interests.

Illustrating the personal frustration, the parties involved initiated two separate law suits, in addition to the corporate law suits before the Dutch Courts. First, Pinault and Arnault sued each other in French courts for criminal defamation.[164] Second, Gucci filed an antitrust complaint to the European Union Commission against LVMH in November

160. *See id.*

161. *See* Sarah Raper, *LVMH, Gucci Debate Their Futures Today in Amsterdam Court*, WOMEN'S WEAR DAILY, Apr. 22, 1999.

162. *See id.*

163. *See* FORDEN, *supra* note 113, at 324 (noting Arnault filed these lawsuits to stop the deal but even though the ESOP was struck down by the court, it worked as a poison pill to get Gucci enough time to find its white knight); Sarah Raper et al., *Gucci's the Victor in Takeover War; LVMH May Appeal*, WOMEN'S WEAR DAILY, May 28, 1999.

164. These developments arose from an interview of Arnault by the magazine Paris Match, where Arnault explained Pinault had "defrauded minority shareholders" by purchasing a 42 % stake in Gucci. *See* Samantha Conti, *LVMH Shoots Back at Gucci with Its Own Defamation Suit*, WOMEN'S WEAR DAILY, Dec. 1, 2000 [hereinafter Conti, *LVMH Shoots Back*]. Arnault then brought a criminal defamation suit against De Sole. *Id*.

of 2000.[165] Gucci claimed that LVMH was abusing its 20.6% share stake in Gucci.[166] Specifically, LVMH was Gucci's main competitor and was frustrating Gucci's acquisitions strategy. Since Gucci allied with PPR, it had also acquired such other luxury firms as Yves Saint Laurent, Sergio Rossi, and Boucheron.[167] These acquisitions stood as a direct competitive threat to the luxury goods conglomerate LVMH.

Building on this tension, LVMH appealed the Enterprise Court decision. On September 28, 2000, the Dutch Supreme Court ruled that the lower court had not properly investigated Gucci's management practices when it approved the PPR alliance.[168] The Supreme Court reasoned the Enterprise Court erred in its choice of procedure—not to appoint an independent investigator—and it did not necessarily err in its judgment. Specifically, the Supreme Court held the Enterprise Court "lacked jurisdiction to make substantive findings at a preliminary stage" because it "did not conduct a formal investigation."[169]

The central issue which the Enterprise Court did not initially consider was whether LVMH's minority shareholder rights were violated when the PPR alliance was negotiated.[170] Gucci's defense to this claim was that it had the right to defend itself from a hostile bid by a competitor and that its actions were done to enhance shareholder returns, which the PPR alliance accomplished.[171]

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165. *See Another Gucci Salvo with LVMH Surfaces*, WOMEN'S WEAR DAILY, Jan. 18, 2001.

166. *See* Deborah Hargreaves & Raphael Minder, *Gucci Takes Fight to Brussels*, FIN. TIMES, Jan. 18, 2001, at 29 (noting Gucci's claim that LVMH was trying to "frustrate Gucci's business plans" and that LVMH was "calling on the Commission to force the divestment of the shareholding.").

167. *See* Conti, *supra* note 164.

168. *See* Samantha Conti, *The Battle Rages On: Both Gucci and LVMH Claim Victory in Court*, WOMEN'S WEAR DAILY, Sept. 28, 2000.

169. *See Gucci Welcomes the Decision of the Dutch Supreme Court*, PR NEWSWIRE, Sept. 27, 2000. In its initial decision, the Enterprise Court determined a formal inquiry was not needed, because it had all the relevant facts to determine whether the alliance was legal [hereinafter PR NEWSWIRE, Sept. 27, 2000].

170. *See* Samantha Conti & Robert Murphy, *Undoing the Past? Gucci/LVMH/PPR Case Might Be Retired*, WOMEN'S WEAR DAILY, June 26, 2000 (announcing the Dutch Attorney General's reasoning in a non-binding report that Gucci violated LVMH's shareholder rights by not consulting with LVMH when negotiating the PPR alliance).

171. *See* PR NEWSWIRE, Sept. 27, 2000, *supra* note 169 (noting De Sole's assurance that Gucci management's main objective "will continue to be, as it has always been, to protect shareholders' interest and maximize shareholder value.").

At the hearing before the Enterprise Court on November 28, LVMH presented a new claim against Gucci.[172] LVMH argued the Board had issued stock options to Ford and De Sole in June and December of 1999 at the expense of minority shareholder rights. The stock options totaled $8 million. LVMH contended the stock options were issued to guarantee De Sole and Ford's support for the PPR alliance.[173] These stock issues diluted LVMH's shares. LVMH also argued issuing the stock options violated transparency obligations for public companies set in Dutch corporate law.[174] LVMH reasoned the stock options were announced and approved at shareholder meetings in June of 1999 and 2000, but that the board's announcement indicated the stock options were for all employees.[175] According to LVMH, the shareholders did not approve the stock options for De Sole and Ford.[176]

Unable to resolve the dispute between a shareholder preaching its rights and corporate board resisting a hostile bid, Dutch Courts kept the conflict in a never ending holding pattern. On March 8, 2001, or two years after the events in question, the Enterprise Chamber of the Dutch Court of Appeal ordered an independent investigation of Gucci's management practices for the January to May 1999 period.[177] The particular issue to be looked at on remand was whether the PPR-Gucci alliance "ignored the legitimate interests of its shareholders, including LVMH."[178] The alliance secured a lower share price than what LVMH

172. *See* Kapner, *supra* note 78, at 1 (noting LVMH brought a claim to "annul a stock deal that gave Pinault-Printemps-Redoute control of the Gucci Group").

173. *See* Raphael Minder, *Gloves off in Bitter Battle over Gucci*, Nov. 30, 2000, FIN. TIMES, at 32 (noting Gucci "insisted that both share option plans were negotiated 'well after' the agreement with PPR.").

174. *See Gucci Confirms Secret and Enormous Options for Two Top Executives; LVMH to File Complaint with U.S. Securities Authorities*, BUS. WIRE, Nov. 29, 2000 (noting the failure to disclose was "a violation of the most fundamental rules of transparency applicable to publicly listed companies.").

175. *See* Kapner, *supra* note 78, at 1 (noting "the company said only 7.5 million options were granted, but declined to give details regarding the strike price.").

176. *See* Samantha Conti, *Clash of the Titans*, WOMEN'S WEAR DAILY, Dec. 18, 2000.

177. *See* Samantha Conti, *Score One for LVMH: Court Orders Probe of Gucci-PPR Alliance*, WOMEN'S WEAR DAILY, Mar. 9, 2001.

178. *See* John Tagliabue, *Court Orders Inquiry into '99 Gucci Stock Deal*, N.Y. TIMES, Mar. 9, 2001, at 1 (quoting the court's order for the panel they appointed, consisting of three business experts).

was offering. The Court explained Gucci was "free to take measures necessary" to stop the unsolicited bid, but PPR paid $74 per share, while LVMH offered prices of $ 81 and $85 per share.[179] As expected, the court order showed no sign of moving the dispute towards resolution. On March 28, Gucci appealed the court order calling for an investigation of the ESOP and the PPR alliance. It explained, "The facts have not changed and the law has not changed since 1999 when the Court did not find it necessary to order an inquiry. Gucci will continue to defend vigorously its Strategic Alliance with PPR, which it believes was entered into in accordance with Dutch law."[180]

In September 2001, LVMH and Gucci finally came to an out of court agreement, with PPR purchasing 8,579,337 of LVMH's Gucci shares.[181] PPR purchased a little over 40% of LVMH's Gucci shares. This leaves PPR with over 51% of the Gucci shares and LVMH with 12% in its competitor.[182] This agreement ended all litigation. PPR agreed to buy the LVMH shares for $94 a share,[183] while Gucci agreed to pay a special $7 cash dividend to all non-PPR shareholders.[184] Similarly, the Agreement set April 2004 as a date when "Gucci shareholders have the right, but not the obligation to put their share to PPR at $101.50 a share."[185] This effectively was an effort to protect the rights of minority shareholders, which Dutch Courts had been worried about.[186] The Agreement also did two important things. First, it secured minority shareholder board participation rights until April 2004. Up until that

179. *See id*.

180. *See Gucci to Appeal Dutch Court Order for Inquiry*, Gucci Group Press Release, Mar. 28, 2001, *available at* http://www.guccigroup.com/press/default.asp?ReqView=archive.asp?archiveYear=2001 (last visited Sept. 19, 2003).

181. *See Gucci Group N.V.-Pinault-Printemps-Redoue S.A. – Information Circular*, Gucci Group Press Release, Jan. 31, 2002, *available at* http://www.guccigroup.com/press/default.asp?ReqView=archive.asp?archiveYear=2001 (last visited Sept. 19, 2003) [hereinafter Gucci Press Release, Jan. 31, 2002] (announcing closing of settlement agreement among Gucci, PPR and LVMH).

182. *See* Jo Johnson, *Peace Breaks Out in Gucci War*, FIN. TIMES, Sept. 11, 2001, at 17 (describing financial agreement in detail).

183. *See* Gucci Press Release, Jan. 31, 2002, *supra* note 181; *see also* Johnson, *supra* note 182.

184. *See* Gucci Press Release, Jan. 31, 2002, *supra* note 181.

185. *See id*.

186. *See id*.

date, the Supervisory Board will be expanded from nine to ten members with an equal number of Independent and PPR Directors, with the chairman being an independent member.[187] Second, in April 2004, PPR will have easier control of the board. PPR will have the right to nominate the chairman of the board, subject to the approval of the board, which must include at least two independent directors.[188]

B. "Je voudrait les duex banques": BNP's Unsolicited Dual-Bid for SG and Paribas

In 1999, the financial world witnessed an unlikely event: a hostile bid in France's financial sector. After SG and Paribas had announced a friendly merger, BNP launched an unsolicited bid for both SG and Paribas.[189] The hostile bid and its defense by both SG and Paribas boards lasted seven months.[190] It ultimately ended with the French government intervening and declaring BNP could only have control of SG.[191]

The prolonged hostile bid was unique for many reasons. Hostile bids are uncommon in France. Even more rarely, the bid was a dual bid for two banks. The French government prohibited the entry of a foreign institution to serve as SG's or Paribas' white knight.[192] The corporate executives involved made a big leap from France's cooperative and friendly style of business negotiation toward U.S. style market-oriented corporate culture.

The dual bid was prolonged because the fervor of the SG and Paribas boards as targets and BNP as the raider was high. French corporate governance was not equipped to respond to such spontaneous shareholder activism. The dual bid illustrates what happens when corporate structures with little experience with shareholder activism face hostile takeovers. What happens is: (1) the board and the raider will proceed with their defenses and bids by any means necessary; and (2) the con-

187. *See id*.

188. *See id*.

189. *See* discussion *supra* Part II.

190. *See id*.

191. *See id*.

192. *See* Clay Harris, *Consolidation Route Is Unclear*, FIN. TIMES, Sept. 24, 1999, at 18 (noting that "the warning growls given to SG's friends in the wings, the Spanish bank BSCH and UK insurer CGU, give credence to this.").

centrated share ownership of the corporation will exacerbate this tension and prolong the battle. The BNP bid suggests the raider and the board will respond to secure their interests. This example demonstrates the state will intervene to resolve the issue.

The events of 1999 followed dramatic changes in the French and European financial sector.[193] Economic integration brought on by the EU and the creation of the Euro facilitated European banks to look beyond their domestic markets. In particular, German and Spanish banks began looking at where in Europe to expand their services. France's financial sector was seen as too "crowded."[194] Not all of its banks would withstand the new competition.[195] European banks started looking for new markets and/or a new partner with whom to merge. This expansion forced smaller or inefficient banks to question if they could remain independent and withstand foreign competition. With this domestic and international context, in 1999 French banks faced a situation where they had to change their structure or face economic losses brought on by international competition.

On February 1, 1999, SG announced a friendly all-share bid for Paribas. Before the merger, SG stood as France's largest bank and Paribas as second.[196] The new bank would be named SG Paribas, with combined assets totaling $770 billion.[197] It would be the fifth largest European bank and the tenth largest bank in the world.[198] Observers noted the two banks did not represent much overlap in their services: Paribas focused on investment banking, while SG concentrated on retail banking.[199] Representatives of SG and Paribas explained that the

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193. *See The Bank-Merger Splurge*, ECONOMIST, Aug. 28, 1999, at 15 (arguing that the "mania for megabanks" brought size which resulted in "at least three dangers.").

194. *See Summaries: Business This Week*, ECONOMIST, Feb. 6, 1999, at 5 (noting that France's banking sector "began thinning itself out" finally after the rest of Europe).

195. *See id*.

196. *See id*.; *see also See French Banks: Gigantisme, Quand Meme*, ECONOMIST, Feb. 6, 1999, at 78 (noting that the union of SG and Paribas "increases the pressure on others" to find mates for mergers).

197. *See id.*

198. *See French Powerhouse in the Making*, PRIV. BANKER INT'L, Apr. 1, 1999, at 13 (noting that "SocGen and Paribas had big ambitions in private banking.").

199. An overlap in the workforce is always an issue in mergers, because such overlap may force reduction of the workforce. However, France's employment laws make it difficult to lay off workers. This contrasts with U.S. corporations where mergers typically involve massive job lay-offs. *See* DAVID M. GORDON, FAT AND MEAN: THE

merger's objective was to expand services in investment banking and compete internationally in this market.[200] BNP, however, stood as SG Paribas' main competitor.[201]

On March 10, 1999, BNP launched a surprise all-share bid for its two main competitors, SG and Paribas.[202] The fusion of a bank between BNP, SG, and Paribas would have created the world's first $1 trillion asset bank.[203] The bid was unexpected, because hostile takeovers are rare in France and two bids are even more uncommon, and because BNP stood to gain little economic efficiency from a union involving so much overlap. Despite the fact that SG and BNP shared much of the same branch market and the branch market was too crowded, BNP promised "to sack nobody, close no branches, and keep all banks' intact."[204] Commenting on French business practices and economic realities, *The Economist* asked: "So what is the point?"[205]

BNP essentially launched the bid in order to thwart international competition. Specifically, BNP wanted to be "too big to be taken over, and … it would relish the title of national champion of French banking."[206] Europe's banking sector was too crowded and consolidation between banks was seen as the only answer. In order to avoid being the target of a foreign bank's bid, BNP looked to expand its size to be too big. BNP attempted this with the dual hostile bid for SG and Paribas.

CORPORATE SQUEEZE OF WORKING AMERICANS AND THE MYTH OF MANAGERIAL "DOWNSIZING" (1996).

200. *See id*.

201. *See id*.

202. In his detailed account of how all the actors used France's various administrative and judicial institutions during this hostile bid, Wallace explains that BNP's bid transpired through a procedure called "*Offre publique d'échange*" or OPE. *See* Wallace, *supra* note 95, at 6 (noting that "interestingly" Societe Generale had announced its acquisition of Paribas through an OPE as well one month prior).

203. *See id*.

204. *See Folie de Grandeur: Does the "Hostile" Bid by Banque Nationale de Paris for Two Other French Banks Herald Consolidation in the Industry? You Must Be Joking*, ECONOMIST, Mar. 13, 1999, at 19.

205. *Id.*

206. *Id.* According to Wallace, the importance that the global economy places on identifying a financial firm with a nation drove this attitude. *See* Wallace, *supra* note 95, at 8.

BNP's desire to expand was done in the face of resistance from the target boards and France's labor laws.[207]

The SG and Paribas boards responded by declaring the bid hostile.[208] They rejected the BNP offer and vowed to continue their own SG-Paribas union.[209] Strangely, BNP had been in conversations with SG for eighteen months prior to the SG Paribas deal.[210] A non-hostile deal was attempted between BNP and SG. The merger fell through as it could not be decided whether a SG or BNP executive would serve as director. France's traditional corporate culture of cooperation and closely negotiated deals failed to complete the deal. The threats of international competition and activist shareholders proceeded to continue with the merger's objective.

Driven by the need to satisfy shareholder desires and maximize profits, BNP proceeded in a manner atypical in France. It made two unsolicited bids. It actions resembled Anglo-Saxon market-model corporate activity, as opposed to the French style of conciliation and close negotiation.[211] *The Economist* noticed these shareholder-driven actions: "[T]he most vicious skirmishes in the campaign have been over profitability—another break with French tradition. The markets have so far favoured BNP: all the banks' share prices rose after its bid. Market capitalisation is what this battle is all about. All three banks are small by European, let alone world, standards."[212] Specifically in justifying its

207. SG and Paribas felt threats of international competition. Specifically, Paribas and SG feared U.S. investment banks and both banks feared the entry of new European banks. *See* Peter Martin, *Doomed Marriages: Bank Mergers Are No Substitute for Controlling Costs, Improving Services and Innovating Technology,* FIN. TIMES (London), Mar. 16, 1999, at 22 (discussing BNP's motivations for a merger).

208. *See Société Générale Board to Discuss BNP Bid*, Agence France-Presse, Mar. 12, 1999, *available at* 1999 WL 2562486 (outlining SG's and Paribas' complaints that they were told of the bid one hour before the announcement).

209. *See Société Générale, Paribas Boards Reject BNP Bid*, Agence France-Presse, Apr. 6, 1999, *available at* 1999 WL 2578571 (discussing SG's and Paribas' confidence in their own merger and belief that the proposed three-way merger was not in the interest of their companies, shareholders or partners).

210. Peter Shearlock, *Investment Banking: Merger Mystery Deepens: Peter Shearlock Reports on the Comings and Goings Behind the Merger of SocGen and Paribas,* BANKER, Mar. 1, 1991 [hereinafter Shearlock, *Investment Banking*]; *Two into Three Won't Go*, ECONOMIST, Apr. 10, 1999 at 69.

211. *See Two into Three Won't Go*, *supra* note 210.

212. *See id*.

bid and seeking shareholder support, BNP predicted it would improve its return on equity (ROE) from around 12% for BNP alone to 16% with BNP-SG-Paribas combined within six years.[213]

An important player in this battle was the French insurance company AXA, which as an institutional shareholder had significant shares in Paribas, SG, and BNP.[214] AXA was Paribas' largest shareholder with 7% of its shares and was viewed as unhappy with the Paribas board.[215] AXA supported BNP's hostile bid for Paribas.[216] AXA held 6% of BNP shares and as member of BNP's board voted in favor of the BNP bid for SG and Paribas.[217] AXA's key figure was Claude Bebear, who also sat as a member of SG's board. Initially, Bebear supported Andre Levy-Lang, Chairman of Paribas, in the friendly SG-Paribas union in January of 1999.[218] Bebear, however, changed his mind and supported BNP's dual bid. The Guardian provides this illustration of Bebear's significance representing an institutional and active shareholder:

> According to head of strategy Laurent Treca, Bebear was the key to the whole bid, which has already broken every unwritten rule in the French corporate books. Hostile bids are rare and the regulators have, until now, always been expected to step in to protect their charges. All this changed, predominately because of Bebear's role.[219]

Bebear and AXA participation in all three boards illustrates what can happen when shareholder activism penetrates traditional French corporate structure. Specifically, activist shareholders take advantage of traditional practices of interlocking boards and cross-holding arrangements.

French regulators tried to avoid the hostile bid from proceeding. The bid was hostile, resisted by the targets, a surprise to the authorities,

213. *See id*.
214. *See* Shearlock, *Investment Banking, supra* note 210.
215. *See id*. (noting that AXA's chairman took several hits at the Paribas management and its strategy).
216. *See Société Générale, Paribas Boards Reject BNP Bid*, *supra* note 209.
217. *See id*.
218. *See* Jill Treanor, *A Feud Among Friends*, THE GUARDIAN, Apr. 23, 1999, at 26 (noting that without Bebear's backing, BNP could not have taken such an unprecedented action).
219. *See id*.

and generally contrary to French corporate culture. Speaking on behalf of the Comité des Établissements de Crédit et des Entreprises d'Investissement (CECEI), the Governor of the Banque de France of Jean-Claude Trichet asked all sides involved to sit down and settle the hostilities.[220] The CECEI played a key role in the resolution of this dispute. Wallace describes the CECEI as "a committee who state-appointed members have the power to regulate banking and investment firms to promote 'stability' in the financial sectors."[221] Despite a week of efforts by the government, the sides would not sit down.[222] They even refused to "speak let alone entertain the idea of dining with them, such an important feature of the French business world."[223] The French government also prohibited the entry of foreign banks into the BNP hostile bid struggle.[224] In sum BNP's stubborn effort to purchase SG and Paribas shares illustrates a huge step towards American style shareholder activism and away from Gallic genteelness.

The fight proceeded to the shareholders market, where all three sides attempted to buy enough shares to control its respective fate. For SG and Paribas their goal was to be independent. For BNP its goal was control of SG and Paribas. On April 22, 1999, the Council of Financial Markets (CMF) announced that all three bids should be done concurrently.[225] Regulators set the minimum level for BNP to have control of SG and Paribas at 50% of the shares of each bank.[226] On July 1, 1999,

220. *See* Shearlock, *Investment Banking*, *supra* note 210.

221. *See* Wallace, *supra* note 95, at 9–10 (explaining the CECEI received much criticism for letting the state intervene so much in this dispute).

222. *See* Samer Iskandar, *Takeover Troubles (BNP's Plans to Take Over Société Générale and Paribas Spells Trouble for the French Banking System)*, BANKER, June 1, 1999 (showing mediation never progressed to the initial stages).

223. *See A Feud Among Friends*, *supra* note 218. French regulators, though, had no legal justification to prohibit the dual bid. *See* Iskandar, *supra* note 222 (explaining that the parties' inability to reach the bargaining table made discussing short-term profitability impossible).

224. *See The Bank-Merger Splurge*, *supra* note 193 (stating that "the French authorities made clear to those foreign banks that might have been interested—Britain's Lloyd's TSB, for example, or Germany's Deutsche—that they were unwelcome.").

225. *See A Feud Among Friends*, *supra* note 218.

226. *See Paribas CEO Says Ruling on BNP Merger Plan Leaves Uncertainty for Shareholders*, AFX NEWS, Mar. 30, 1999 (noting that "[i]n a joint statement, the chairman welcomed the committee's decision to raise the minimum percentage ownership required for BNP to proceed with its offer to at least 50 percent of each bank.").

BNP increased its stakes in the dual bid by improving its terms for the SG and Paribas bids.[227] It offered a cash bonus for SG shareholders and its guaranteed future performance for Paribas shareholders.[228] By August, the institutional shareholders on all sides had made their decision of who to support in the bid war. With this though, no side (BNP, SG, Paribas) had enough voting shares to control the necessary boards. With a deadline imposed by the CMF, the future of three banks lay in the "floating" or non-institutional shareholders.[229] How they would vote was unknown.

With the fate of the dual bid decided by shareholders, the firms involved found themselves taking on a more open and transparent attitude to their shareholders. In May 1999, amidst all the legal and market drama, BNP published its first ever quarterly accounts.[230] *The Financial Times* reported BNP's policy of non-transparency contrasted SG and Paribas, who published quarterly reports and had many shares (almost half for Paribas and nearly 40% for SG) in foreign hands.[231]

With the market deciding the future of the two targets, SG and Paribas initiated court action appealing the CMF's decision permitting the two bids to continue. Specifically, the two targets contested AXA's decision to sell its Paribas shares.[232] Previously, the Commission de Operations de Bourse (COB), the stock market regulator, invalidated cross-

227. *See* Samer Iskandar, *BNP Sweetens Its Offers for Targets SG and Paribas*, FIN. TIMES, July 2, 1999, at 19 (noting that while "the sweetened offers" would "increase BNP's chances of rallying support from a majority of its targets' shareholders," it also "raise[d] the risk of a second counter-attack from SG.").

228. *See id*.

229. *See* Robert Graham & Samer Iskandar, *Up in Smoke*, FIN. TIMES, Aug. 3, 1999, at 17 (explaining that "[w]hile the big institutional players have made their bets, analysts believe there are a large number of 'floating voters'. . .But it is not easy to predict how the undecided will behave when financial terms of the rival bids-involving shares, cash and derivatives guaranteeing future share performance-are hard to compare.")

230. Michel Pebereau, BNP Chairman, explained that this transparency was not BNP's policy because it fostered "short-termism." *See* Samer Iskandar, *BNP Publishes First Quarterly Accounts*, FIN. TIMES, May 11, 1999, at 28 (stating BNP "reluctantly took a step towards more transparent U.S.-style corporate governance practices.").

231. *See id*.

232. *See Investment Banking: The Daring Bids of May*, BANKER, Vol. 149, No. 879, May 1, 1999 (quoting a CSFB employee as saying, "it is unacceptable that at the time it bids, an offeror does not disclose the level of its holdings - or those of its partners in the target company.").

shareholding arrangements between Paribas and AXA. The two targets contended AXA should not be free to pass its 11%-plus voting stake in Paribas to BNP, the raider. Paribas' argument for the prohibition rested on a ten-year old agreement between Paribas and BNP, which prohibited either bank from selling its corresponding voting stock in the others corporation.[233] Paribas' argument stemmed from France's tradition of interlocking-boards and cross-shareholding arrangements.[234] BNP and AXA conduct was inspired by market-driven influences. The ten-year old agreement was a vestige and an example of traditional corporate culture. Traditional French corporate culture was unprepared to respond to this kind of activist shareholder.

By August, the shareholder market demonstrated BNP gained control of Paribas. And it did not have enough voting shares to control SG. In over six months of gallic drama, BNP and SG made six separate offers for Paribas.[235] BNP gained 65.1% of Paribas.[236] BNP only gained 37.1% of SG shares, which was not enough for control.[237] French regulators then proceeded to order BNP to return all tendered shares of SG to their owners.

V. THE EUROPEAN UNION KEEPS TRYING TO REGULATE TAKEOVERS

As shareholders begin to look across national boundaries to invest their funds and exert their influence in foreign companies, the European Union has had to confront the international phenomenon of active shareholders. Hostile takeovers and the changing makeup of shareholders in Europe have illustrated how important it is to set rules and institutional mechanisms to resolve shareholder-corporation disputes.[238] Analysts,

233. *See id.*

234. *See id.*

235. *See* Jeffrey Keegan, *Deals of the Year: Hostilite dans les Banques Francais*, INVESTMENT DEALERS' DIGEST, Dec. 13, 1999 (explaining that BNP tried to buy both Soc Gen and Paribas but Soc Gen felt the offer was too low, which led to a battle between BNP and Soc Gen for Paribas).

236. BNP accomplished this with its offer of twenty-nine BNP shares for twenty Paribas shares. *See id.*

237. *See id.*

238. Wallace explains how EU integration (including EU legal objectives such as creation of a single market, the free movement of capital, and an economic and monetary union) has brought the issue of harmonizing corporate law to the forefront. *See* Wallace, *supra* note 95, at 32 (stating that "'harmonization' of the laws of the individ-

attorneys, CEOs, and politicians quickly look to the EU's multilateral focus to set common corporate governance rules across the EU. The multilateral focus is seen as key, because a basic assumption is that national laws may be too limited in scope, or that they may vary too much for an integrated financial market. In these scenarios, investors cannot rely on one set of common rules.

This attention has increased the importance of the European Union's Thirteenth Directive.[239] The Directive's purpose is to harmonize EU member countries' national laws on corporate takeovers.[240] National laws must comply with the Directive's provisions by January 1, 2005.[241] The European Parliament has yet to approve a text of the Directive; as such, the Directive remains a hotly debated proposal. The proposal, hearings, debate, and lobbying process has for over a decade captured the attention of the EU's Council, Commission, and Parliament.[242] Meanwhile, shareholders and corporate boards remain subject to a di-

ual Member states, in the interest of promoting efficient, advantageous cross-border activity, has been a principal law-making approach.").

239. The Directive's Scope is that it "applies to companies governed by the law of a Member State all or some of whose securities are admitted to trade on one or more stock exchanges of the European Union." Commission of the European Communities, *Commission of the European Communities Communication on the Proposal For a Directive of the European Parliament and of the Council on Takeover Bids*, 1347 PLI/CORP 915, 923 (2002) [hereinafter Commission Proposal].

240. *See* Frits Bolkestein, The Takeover Directive: A Commission Perspective, Address at the Centre for European Policy Studies (Mar. 4, 2003) (stating that the objective of the Directive "is to draw up fair common rules for take-over bids in the EU for all interested parties"), *available at* http://europa.edu.int/comm./internal_market/en/spches/index.htm; *see* Commission of the European Communities, *Proposal for a Directive of the European Parliament and of the Council on Takeover Bids* (Feb. 10, 2002), *available at* http://europa.eu.int/eur-lex/en/com/pdf/2002/cpm2002_0534en01.pdf (on file with author) [hereinafter Proposal on Takeover Bids].

241. *See* Proposal on Takeover Bids, *supra* note 240. The Proposal permits postponing for three additional years (from general compliance) compliance with Article 9 "neutrality principle." *Id*.

242. *See* Pull Up the Drawbridge, *infra* note 244 ("After 12 years of work, it looks as if it is back to the drawing board for the takeover directive."). In order to be implemented as EU law, the Proposal must be approved by two EU institutions: the Council of Ministers and European Parliament. This legislative process is called "co-decision." *Key Players in the EU Legislative* Process, *available at* http://europa.eu.int/eur-lex/en/about/pap/process_and_players3.html (last visited Sept. 13, 2003).

verse or non-existent set of domestic rules. The Directive's most recent proposal submitted in October 2002 by the Commission of European Communities faces a variety of challenges, which greatly impair the likelihood of any EU harmonization of laws on corporate takeovers.[243] Specifically, the political issues surrounding its approval make it unlikely that EU will be able regulate cross-border shareholder activism. Although the proposal contains many controversial provisions and sparks much controversy, in its present form it could provide needed legal clarity across the EU for takeover regulation.

The Directive's history is long and characterized by political controversy, which has impeded its approval by the European parliament.[244] Essentially, corporate board, labor, and government interests are against almost any article, which would prohibit defensive measures by a board. In the EU nomenclature these measures are called "frustration of the bid."[245] This position has stunted most of the Directive proposals. Lobbying by all sides has resulted in an inability of the European Parliament to approve a proposal. The first attempt to harmonize these laws occurred in 1974. Subsequent attempts developed in sophistication, popularity and controversy with efforts in 1989, 1990, 1995, 1997 and 2000.[246] In July 26, 2000, the Commission and the Council presented a proposal, which came closest to attaining the Parliament's approval.

A dramatic vote on July 4, 2001, resulted in the Proposal being defeated.[247] In the closest vote ever in the European Parliament's history, the vote was split 273-273. With this even split, the proposal was defeated. This defeat signaled an enormous setback for European liberals who aimed to create an integrated capital market in Europe by 2005.[248] The Directive was seen as a key step in this larger goal of financial inte-

243. *See* Commission Proposal, *supra* note 239.

244. *See Pull Up the Drawbridge*, ECONOMIST, July 7, 2001, *available at* 2001 WL 7319638 (stating that various European countries opposed the takeover directive which was defeated by a 273-273 vote in the European Parliament); *see Sugaring the Pill*, ECONOMIST, June 9, 2001, *available at* 2001 WL 7319271 (taking special notice of Germany's long opposition to the takeover directive and expressing doubt about the directive's prospects when voted on); *see Takeover Troubles*, ECONOMIST, May 12, 2001, *available at* 2001 WL 7318928 (describing the ten-year directive history as "tortuous.").

245. *See* Proposal on Takeover Bids, *supra* note 240.

246. *See* Kirchner & Painter, *supra* note 134, at 455.

247. *See* Commission Proposal, *supra* note 239, at 919.

248. *See* Bolkestein, *supra* note 240.

gration. For liberals, the step had to be achieved. For anti-EU forces, pro-board forces and often labor, the step had to be resisted by all means.

Similarly, the July 2001 defeat was a big blow to shareholder activists. They see the Directive as a method to bolster shareholder rights in European corporations at the expense of boards. Their general position is that the boards are inefficient or self-serving and investors should be able remedy this. The Directive provides a clear set of rules across Europe. Without the Directive, takeovers will take place and be contested with unclear laws and undetermined judicial settings.

On the other hand, nationalist interests (be they boards, labor, governments, or threatened industries) hailed the defeat a victory for companies seeking to protect stakeholders and not only shareholders. Their line of argument is that a government should permit the board to protect itself, the corporation, its employees, and the stakeholders. The Directive's "neutrality" principle prohibits this.[249] In sum, the present state of affairs is there are many interests seeking to not approve the Directive, and there is not enough support to overcome this resistance.

In its presentation of the most recent proposal in October 2002, the Commission argues three "political considerations" motivated the defeat on July 4, 2001.[250] They are: (1) rejection of the Directive's provision that any defensive measure by a board requires approval by the shareholders once the bid has been made; (2) "regret" that the Directive provided insufficient protection for a company's employees; and (3) the proposal does not achieve a "level playing field with the United States."[251]

With this great turn of events, the Commission was forced to draft a new proposal. The proposal needs approval from the Council and the Parliament, in order for it to bind EU members.[252] This time, the Directive needs to more successfully mediate the two sides of shareholders (seeking protection for their rights/activism) and corporate boards (seeking control of corporate bids). To accomplish this, the Commission so-

249. This Principle exists in Article 9 "Obligations of the Board of the Offeree Company." *See* Commission Proposal, *supra* note 239, at 925. This Principle was presented in the prior Proposal in Article 9 and is taken from London's City Code in Principle 7. *See* Kirchner & Painter, *supra* note 134, at 456.

250. Commission Proposal, *supra* note 239, at 919.

251. *See id*.

252. *See* Proposal on Takeover Bids, *supra* note 240.

licited advice from a group of legal experts in corporate law and actively listened to the European Parliament's positions.

A. Political Problems Continually Impede Approval and Implementation of the Takeover Directive.

The Commission offered the most current proposal in October of 2002. The Commission is presently attempting to seek approval from the Parliament, in order to make the Directive a legal reality. A variety of political factors make the approval unlikely. First, a deadline of March 2004 has been artificially set by the Commission. As Frits Bolkestein, member of the Commission in charge of Internal Market and Taxation, explained, after this date a new European Parliament will have to be elected.[253] It is unlikely that EPs would vote on such a controversial measure, when election looms in the near future. With the legislative support unclear, the Directive will have to wait after another Parliament is in session.

Second, EU enlargement may further complicate the Directive's approval.[254] As more countries participate in the legislative process, there is increased chance for prolonged lobbying. Currently the EU is comprised of fifteen current members. Simultaneously, the EU is poised to begin negotiating deals and timetables for ten other countries to join. These include: Poland, Hungary, the Czech Republic, Slovakia, Slovenia, Lithuania, Latvia, Estonia, Cyprus and Malta. The countries represent economies far less liberalized than their current EU counter parts. With this, their EP's interests may tend to be protecting corporate boards and nationalistic motives.

Third are substantive legal concerns.[255] In essence, the proposal does not escape highly controversial provisions, which may easily spell its legislative defeat. The proposal continues to support the "neutrality" position and offers little guidelines for how workers are protected or have a voice during a bid.[256] These two concerns are the main reasons

253. *See* Bolkestein, *supra* note 240.

254. *See id.*

255. For an analysis of the Proposal advantages and disadvantages, see Kirchner & Painter, *supra* note 134, at 455–462. For a detailed critique of each article of the Proposal, see The Law Society's "Comments submitted to the European Commission on the text of the draft Takeover Directive dated 2 October 2002" (Dec. 2002 No: 452).

256. *See* discussion *infra* Part V.C.

why the 2001 proposal was defeated. Because there is no change in these issues, the Directive may face substantial legislative resistance.

B. The New Directive Proposal Offers New Solutions

The October 2002 proposal does present new provisions, which respond to some of the problems found in earlier versions.[257] For instance, the proposal states rules for how to determine an "equitable price," that a bidder must offer when it is obligated to make a mandatory bid.[258] The basic formula for the price is the highest price paid for the same securities by the bidder during the periods of six and twelve months before the bid. As such, this provision provides legal certainty by determining the price as of when a bidder solicits the control share of the stock.[259] This avoids a scenario where initial shareholders who sell receive one price, while later sellers receive an undetermined price. With an implemented Directive, all actors will know how the price will be determined. This provides shareholders certainty to determine their "sell" or "no-sale" position. Presently, this certainty does not exist in many states or in a multinational setting.

Likewise, the Proposal contains impressive new requirements for corporate transparency.[260] This offers investors and governments needed information to make decisions of supporting or contesting the bid. Companies under the Directive's scope will be required to publish annual reports. The reports must make reference to structures and measures, which may impede or hinder an acquisition and/or control of the company.[261] Shareholders must vote on these measures every two years.

With the purpose of establishing a "level playing field" with the United States, the Proposal prohibits a series of restrictions on transfers of securities and voting rights.[262] These restrictions are argued to impede bids. For "restrictions on voting rights in the target company" (whether as part of bylaws, contracts, or shareholders' agreements), the Proposal makes them unenforceable against the bidder during the bid pe-

257. For a brief description of these new additions, see Bolkestein, *supra* note 240; Freshfields Bruckhaus Deringer Financial Services News, Oct. 21, 2002.

258. *See* Proposal Art. 5:4.

259. *See id*.

260. *See* Proposal Art. 10.

261. *See* Proposal Art. 10:1(b)–(k).

262. *See* Proposal Art. 11.

riod and eliminates their applicability during the general meeting to approve the board's defensive action.[263] Also, the Proposal nullifies rights a shareholder may have with respect to appointment or removal of board members. These provisions do not affect "golden shares" (shares owned by the state or shares with "multiple voting rights") and are only limited to private restrictions.[264] Accordingly, this Proposal does not limit a state's power to influence voting or board makeup.

The Proposal also contains new provisions for "squeeze-out rights" and "sell-out rights."[265] Here, after a bid is made to all shareholders of a target, the bidder may require all remaining shareholders to sell their shares. This "squeeze-out" power exists when a bidder has 90% of all the shares.

C. The New Directive Proposal Does Not Address Recognized Legal Contentions, Which in the Past Spelled Its Legislative Defeat.

The most current proposal does not sufficiently address the political considerations, which led to the Proposal's legislative defeat in 2001. Most importantly, it continues to promote the "neutrality" concept.[266] Accordingly, a board must be neutral and cannot implement defensive measures against an unwarranted bid. Any defensive measure requires a general meeting of all the shareholders.[267] This vote must take place during the bid period. It is argued that this will take too long and it will severely restrict a board's options.[268]

263. *See* Proposal Art. 11:2–4.

264. *See* Freshfields Bruckhaus Deringer Financial Services News (Feb. 10, 2003) (reporting many analysts have presented their concerns about multiple voting shares to the Commission's Legal Affairs Committee); Kirchner & Painter, *supra* note 134, at 460 n.38 (stating that these shares are common in Germany and presenting how EU courts have recently found that they violate free movement of capital); Macfarlanes, '*Here we go again?: New Proposal for an EU Takeover Directive'* Nov. 2002, at 4 (arguing these shares are used in "France, Portugal and Germany" and other EU members).

265. *See* Proposal Art. 14 and Art. 15, respectively.

266. *See* Proposal Art. 9.

267. *See* Proposal Art. 9:3 and 9:4.

268. In the United States, Delaware courts use a "modified business judgment rule." In order to defend itself from a hostile bid, a board must illustrate "a good faith and reasonable investigation" that the bid posed a danger to "corporate policy and effectiveness." Kirchner & Painter, *supra* note 134, at 452. For a detailed comparison of EU,

Similarly, the Proposal faces problems because it does not define what control of a company's shares means. This is vital to the Directive's principal of a "mandatory bid" included in Article 5. This Article's aim is to protect minority shareholders by forcing bidders to make an offer to all shareholders.[269] Specifically, the Article requires a bidder to "address" "all holders of securities for all their holdings at an equitable price," in situations when the bidder directly or indirectly has a "specified percentage of voting rights" which confer "the control of the company."[270] The Directive does not define the percentage of voting rights that would amount to control. Each individual state is required to determine what percentage equals control.[271] With this variance, each EU member may have a different definition of control. This creates uncertainty, especially since many corporations and shareholders may fall under more than one Member's law. A percentage set by an EU Directive would provide essential clarity.

Similarly, the Proposal provides member-states no real guidance with regards to the role a company's employees and stakeholders have during the bid process. A central controversy of prior proposals was that labor had no voice during a bid or the board could not act in the interests of employees.[272] Article 13 makes specific reference to these concerns. It states that "national provisions" and existing Directives will govern issues of "information" and "consultation" with representatives of employees.[273] This, however, provides no new right for employees or specific obligation for a bidder, corporation, or member state. The Article merely states that laws already exist and they govern. This lack of guidance and failure to meet state obligations has been criticized by European Parliament lobbying forces.[274]

Delaware and German perspectives on defense measures, see Kirchner & Painter, *supra* note 134, at 452–55.

269. *See* Proposal Art. 5; Freshfields Bruckhaus Deringer "Takeover Directive" 5 (commenting on the July 2001 proposal which was unchanged by the current proposal).

270. *See* Proposal Art. 5:1.

271. *See* Proposal 5:3.

272. *See* Proposal Art. 1.

273. *See* Proposal Art. 13.

274. *See* EuroParl News Report (Jan. 30, 2003) "New takeover directive needs further improvement, says experts" (stating that at a Public Hearing held by the Commission's Legal Affairs Committee "all speakers were united in their condemnation of the Commission proposal for not sufficiently protecting workers' rights.") and Financial Director "EC Takeover Directive Revised," Nov. 2002 (reporting "employee rights will

D. *As a Directive the Proposal May Fail to Sufficiently Harmonize EU Laws on Takeover Bids*

The Directive provides EU members directions on what laws must be implemented to regulate corporate takeovers. This is different from a multilateral harmonization of EU takeover regulations, because the Directive sets minimum standards.[275] These standards can, and most likely will, be implemented differently by each state.[276] An EU Directive binds Member States to implement laws in accordance with its provisions within a certain time-limit.[277] Directives defer to national authorities the choice of form and means to be used. Directives have to be implemented in national legislation in accordance with the procedures of the individual Member States. Once implemented, the Thirteenth Directive binds Members to implement their own national takeover laws in accordance with the Directive. This is different than an EU harmonization of existing laws or a required standardization of future corporate laws.

As such, the most a Directive can do is set minimum standards for all EU member states. This is different than imposing the same standards for all EU members. As such, one EU state may have one regulation such as a "70 percent of shares equals control," while a neighboring state can set the percentage at 99. With these discrepancies, takeover regulations are not completely harmonized. At times there may be great variance among states with regards to substantive rights and procedural obligations of takeover bids.

not be protected with any new rules—in particular there are no new information or consultation rights" and "the new directive will simply provide a reminder of existing rules regarding staff councils, collective redundancies and employee consultation"), *at* http://europa.eu.int/eurlex/en/about/pap/process_and_players2.html#2 (last visited May 11, 2003).

275. *See* Freshfields at 1.

276. *See* Proposal Art. 1 (stating the Directive lays down minimum requirements).

277. *See* European Union "About EU Law: EU law definitions" (stating Directives "bind Member States as to the objectives to be achieved within a certain time-limit while leaving the national authorities the choice of form and means to be used. Directives have to be implemented in national legislation in accordance with the procedures of the individual Member States.").

E. By Securing Minority Shareholder Interests, New Levels of Corporate Transparency, and Institutional Clarity, the Directive Provides Much Legal Certainty for Takeovers

Despite many controversial provisions (which may easily result in non-approval by the European Parliament), the Directive provides corporations and governments needed legal certainty for issues involving takeover bids. The Directive accomplishes important developments in terms of the legal rights of shareholders during a bid, a government's institutional responsibility, and procedural requirements for a bid.[278] With this, shareholders, bidders, and the governments acquire clearer rules. This results in all actors having the added power to predict what may be legal and what may be illegal. This differs greatly from a scenario where, as evident in the Gucci and BNP bids, governments, shareholders, bidders, banks, and boards could not predict whose role it was to resolve these issues or what legal rights were at stake. This ability to predict is much needed, because many states may not have developed corporate jurisprudence on these issues. The Gucci-LVMH litigation lasted over a year and half. Similarly, laws implemented in accordance with the Directive provide private actors and states the right to seek judicial resolution of takeover bids disputes. With these developments, the Directive may result in many impressive benefits, which currently exist in no multinational form. Because shareholders, corporate boards, corporate registration, and stakeholders may easily be from a variety of European nations, it is important that the EU implement some uniformity in this field.

278. For instance, the Directive requires member-states to: "designate a supervisory authority" for all aspects of the bid and compliance with the Directive's rules by all parties (Proposal Art. 4); to implement regulations forcing a mandatory bid in cases when a bidder controls the corporation (Proposal Art. 5); to implement laws requiring disclosure of "sufficient information about the terms of the bid" (Proposal Art. 6); to determine a "Period of Acceptance" to "not normally be less than two weeks or more than ten weeks" (Proposal Art. 7); to avoid the creation of "false markets" (Proposal Art. 8); and to impose "adequate sanctions in the event of infringement of the measures taken pursuant to the Directive" (Proposal Art. 16).

CONCLUSION

European corporations and governments are faced with the dilemma of responding to market-driven shareholders. Foreign shareholders and institutional shareholders demand more from their European corporations than traditional European shareholders. They demand more in terms of voting rights, participation in management decisions, information disclosures by the board of directors, and the ability to defend their rights in court as shareholders. Because they imply a shareholder using its voting rights and purchase power of shares to take control of a corporation, hostile bidders represent a dramatic example of the active shareholder.

The LVMH and BNP hostile takeovers attempts were prolonged because: (1) the corporate boards had little experience with hostile bidders; and (2) traditional corporate culture's method of resolving disputes through conciliation failed with hostile bids. Regarding government response to hostile bids, this Article argues: (1) state intervention may serve as the method to resolve shareholder-board disputes; (2) with inexperience in resolving these disputes, judicial systems may fall victim to extremely prolonged litigation; and (3) because of legislative resistance posed by a multilateral system and vested economic interest (which support a board's frustration of a bid), the EU currently offers little resolution for these problems in the near future.

Dutch courts were inexperienced in resolving hostile takeover disputes. Faced with the dilemma of an aggressive shareholder seeking control of a reluctant corporation and demanding enforcement of its shareholder rights, Dutch courts attempted to resolve LVMH's (raider) corporate law suits against Gucci (target). Litigation in the LVMH Gucci bid continued for over two years after the events in question. The events occurred in March of 1999 and the settlement took place in September of 2001. For over two years, Dutch courts investigated the facts surrounding the PPR-Gucci alliance, which was made in March of 1999, and the ESOP, which was made in February of 1999. Shareholders, the board of directors, and financial institutions remained observant and waiting for over two years, which had a destabilizing effect on corporate strategy and the share's price. The threat of prolonged appeals litigation and the threat of court ordered nullification of the PPR alliance destabilized the price of Gucci shares. Shareholders knew the share price could be changed by a court ordered remedy. Accordingly, shareholders suffered. Likewise, the corporate board had the looming threat that a negative court decision could force a sale of Gucci shares. Consequently, the corporate board was negatively impacted by this prolonged litigation.

Legal issues to be resolved concerned shareholder rights and the fairness of a board's actions. The hostile bid introduced Dutch courts to new substantive corporate law issues. The Enterprise court needed to decide issues such as minority rights, required information disclosures, board duties, and board transparency. LVMH filed its complaint in March of 1999 and in March of 2001 independent investigators were appointed to examine the PPR alliance. Judicial resolution was slow. Procedurally, Dutch courts need to develop methods to resolve shareholder-board disputes; or else endless litigation seems inevitable.

Similarly, the Gucci board was unaccustomed to responding to such shareholder activism. It responded with an ESOP with dubious business justifications, since the board made the loan to purchase the employee shares. Similarly, in haste to avoid a takeover, the board agreed to a lower share price with the PPR alliance, compared to LVMH's bid price. Shareholders would have benefited more from the LVMH \$85 share price as compared to the PPR alliance \$71 share price. LVMH, however, was a shareholder that was economically damaged by the ESOP and the PPR alliance. Both of these facts suggest that the board did not take minority shareholder interest into account.

When initially faced with the bidder-target dispute, LVMH and Gucci attempted to resolve the issue with traditional genteelness and conciliation. This failed, because both sides were driven by market forces. Gucci and LVMH wanted to make the most amount of money from their Gucci investments. LVMH wanted to either control Gucci, drive Gucci out of business, or get the highest price possible for its Gucci shares. Gucci did not want LVMH to control Gucci and wanted to buy LVMH's Gucci shares at the lowest price. De Sole and Arnault met on various occasions, representing target and raider respectively. Gucci offered LVMH seats on the supervisory board in exchange for stopping its stock purchases. These conciliation attempts gave way to U.S. style corporate litigation, which did not end for two years. Furthermore, both sides involved themselves in defamation and antitrust lawsuits. Without a doubt in this case, market forces were too much for the traditional European method of shareholder-dispute resolution.

French regulators were just as unprepared to resolve the dispute between a raider (shareholder/BNP) and a target (board/SG/Paribas). Ultimately, the government decided: (1) foreigners could not participate in the bids; (2) what would be the percentages needed for control; and (3) the deadlines to complete the bids. Following centuries of French corporate culture, the state resolved the dispute. The French government intervened when faced with market-driven shareholder activism.

Traditional French corporate culture could not resolve a hostile bidder-corporate board dispute. Signaling the importance of institutional and active shareholders, the key to the dispute was AXA's support for BNP's dual bid. AXA had representatives on the boards of BNP (raider) and SG and Paribas (targets). AXA's position was unique because it sat on all boards and had cross-sharing agreements with the boards. AXA sat as a traditional French shareholder, but in 1999 it acted like an active U.S.-style shareholder. This illustrates the tensions which arise when market-driven shareholder forces penetrate European corporate culture.

Traditional French conciliation repeatedly attempted to resolve the dispute. For instance, Paribas and SG relied on AXA keeping its word on an agreement not to sell its Paribas shares. These agreements were typical of the traditional French corporate method of conciliation to resolve disputes. Likewise, the French government ordered all actors to sit down and settle the dispute, as if the traditional gallic way were still the norm. BNP launched the hostile bid only after its initial friendly merger with SG failed.

The EU has attempted to establish a multinational order for how members regulate takeovers. Central to this has been the Thirteenth Directive. It is argued that establishing a set of takeover rules is vital to creating a unified financial market. This market can only compete with the United States by having a sophisticated system of access to capital markets and especially with reliability for foreign investors. These investors tend to be more active than typical European shareholders. Given the problems illustrated by the two examples in this Article and the context needed to legally create an integrated EU financial market by 2005, the Takeover Directive becomes an extremely important piece of EU legislation. The BNP and Gucci hostile takeovers demonstrate a great deal of legal confusion, with shareholder rights, a board's options, and legal forum not clearly defined. The Thirteenth Directive may help clear up some of this confusion.

Although past proposals failed to attain legislative approval from the European Parliament, the Directive does offer advantages. Specifically, it provides a set of minimum standards for takeover rules, which all members must implement as national law. Although the laws will not be identical, an order will begin to emerge. Institutional obligations and jurisdiction will be set. The legal procedures for takeover bids will be more clearly defined, while rights for bidders, boards, and minority shareholders gain legal backing.

A comparison of the rights established by the Directive and a look back at the legal issues surrounding the Gucci and BNP bid suggest the Directive could have a beneficial impact.[279] For instance, the Directive requires Members to designate one supervising authority to regulate corporate takeovers. This could have been beneficial in both bids, since at times legal battles took place before more than one court or before more than one government agency. The Directive eliminates to a substantial degree the question of "which government entity enforces the takeover regulations or adjudicates disputes." In the Gucci bid, shareholders and the board remained uncertain if LVMH did or did not want to make a full bid for the corporate control. The Directive would require a Member to have regulations, which specify what amount of shareownership is control. When this percentage is reached, the bidder must make a mandatory bid for all the shareholders. In the Gucci bid, the deal with PPR resulted in many minority shareholders arguing they did not receive a fair price for their shares. The Directive's determination of an "equitable price" would provide shareholders, bidder, and boards with a legally enforced measuring stick to decide what prices will be determined. Similarly, during the hostile bid, LVMH insisted it wanted its representatives on the board. Directive rules on board appointments and voting rights suggest that there should be added clarity on this issue. Regarding defense measures, the Directive would obligate boards to publish all their defense measures in annual reports. Should any measure be used, a meeting of all shareholders is required. These two developments provide clarity for investors, who will have more information about what may happen during a bid. The multinational and substantive legal clarity that a binding Directive creates is better for investors, gov-

279. This Article does not attempt to provide a thorough examination of the Thirteenth Directive and how if it was binding it could have influenced past events. Nor does this Article attempt to analyze Dutch and French corporate governance developments in the past, in order to see where the Directive succeeds or fails. Instead, this Article offers a brief "issue spotting" of how the recent examples of shareholder activism suggest the Directive, if implemented and binding, could provide legal certainty, which is currently lacking.

ernments, and boards, than the confusion currently present. In this respect, with the Directive's provisions, Gucci's ESOP and golden parachutes gain a clearer position of legal or illegal.

Despite the simplified picture just painted, the Gucci and BNP bids show that the Directive still avoids adequately treating important issues. The French state intervention during the BNP bid indicates that "golden shares" may play a big role, since the state often sees its role during a bid in terms of national protection for a firm. It is conceivable that a government agency would support defending an industry or a firm from a takeover bid for nationalistic reasons or fear of national economic impacts. Accordingly, there is still room for larger public concerns overshadowing shareholder rights. Similarly, labor heavily influenced the discussion during negotiations between BNP, Paribas, and SG. The Directive is silent on these issues of labor and employees, leaving analysts looking to national law.

Similarly, it is wrong to assume that a binding Directive will eliminate hostile takeover litigation in the EU. Millions or billions of Euros are typically at stake. For this reason alone, shareholders and boards will contest any bid or board response, especially since litigation slows the bid process and adds uncertainty to the outcome. This results in an economically unfavorable context for the bidder by adding litigation costs to the bid. In the EU financial market, the legal environment is very international, with many countries involved and a great deal of laws to apply, lawyers to argue and courts to hear disputes. Investors and boards will eagerly seek legal counsel to find a national, EU, or foreign law to support their interest. Given this large patchwork of interests and current confusion, the Directive suggests that a multinational response may provide some needed legal certainty. It is doubtful that national laws can effectively treat such an international and cross-border force as foreign investors who are active shareholders. Perhaps a multinational regime is best suited to treat such an international phenomena.

In sum, the Gucci and LVMH examples illustrate that shareholder activism facilitates the prolonged and antagonistic nature of European hostile takeovers. Specifically, active shareholders present new dilemmas for traditional corporate cultures, corporate boards, and governments. Until new methods to resolve these disputes are developed, prolonged and antagonistic hostile bids may become more commonplace.