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The name "Gucci" usually inspires images of fashion, runways, photographers, and supermodels. Recently, however, the Italian fashion house's name has been in the news, not for its new designs, but for its continued efforts to stave off a takeover attempt. Starting in January 1999, Moet Hennessy Louis Vuitton [hereinafter LVMH], the world's largest maker of luxury goods, run by French billionaire Bernard Arnault, bought up large amounts of Gucci stock to bring LVMH's holdings in Gucci from less than five percent to over thirty-four percent. In an unexpected defensive dodge, Gucci offered its employees money to buy up to thirty-seven million new shares of stock that the corporation issued. The employees used the money to buy twenty million shares, equaling LVMH's shares, so that LVMH's stake in Gucci was reduced to twenty-six percent.

LVMH took the matter to a Netherlands court, arguing that Gucci's activities abused shareholder rights. Gucci accused LVMH of using what is commonly known as a "creeping takeover," which is illegal in some countries because of the effects it has on stockholders. In this type of takeover, a hostile corporation buys a
majority stake in the corporation it is seeking to take over, but it does not make an offer to the shareholders for all of the stock.\(^7\) Instead, the hostile corporation seeks to take control of the target corporation with just a majority stake, and without having to pay for all the extra shares of circulating stock.\(^8\) However, in the Gucci situation, the Dutch court sided with LVMH and dismissed Gucci’s accusations.\(^9\)

Gucci then tried to keep the corporation out of LVMH’s hands by quickly forming a deal with another French billionaire, Francois Pinault of Pinault Printemps Redoute.\(^10\) In return for Gucci selling a forty-two-percent stake in the corporation to him, which further reduced LVMH’s stake to under twenty-percent, Mr. Pinault promised to help Gucci become a major competitor of LVMH.\(^11\) LVMH countered by asking the Dutch courts to invalidate the deal. However, at the end of May 1999, the court ruled in Gucci’s favor, thus ending the fight for control of the fashion house.\(^12\)

(1996). Comparatively, in a normal takeover situation, after the hostile corporation has purchased stock, it will make an offer to the company and other shareholders to buy the rest of the stock at a certain price per share. Id. Since the target corporation in a takeover situation is usually run by the new corporation, it is fair for the hostile corporation to compensate the stockholders for the loss of the company in which they invested their money. Id.


8. Tagliabue, supra note 7, at C2. Mr. Arnault said that LVMH did not make an offer to buy the whole corporation because of the risk. John Carreyrou, LVMH's Arnault Wants Louis-Vuitton-Gucci Alliance, DOW JONES INT'L NEWS SERV., Mar. 18, 1999, available in WESTLAW, Euronews Database. Mr. Arnault said that although Gucci has recently made “strides,” it “has yet to completely live up to its potential.” Id.


10. Tagliabue, supra note 7, at C2.

11. Id. After Mr. Pinault entered the picture, LVMH offered different bid scenarios, depending on whether the court would invalidate the deal made with Mr. Pinault. Battling LVMH, Gucci Officials to Meet as Key Court Hearing Begins, DOW JONES ONLINE NEWS, Apr. 21, 1999, available in WESTLAW, Euronews Database [hereinafter Battling LVMH].

12. John Tagliabue, Court Rules Against LVMH in Battle Over Gucci, N.Y. TIMES, May 28, 1999, at C1. LVMH argued that Gucci should have asked for its shareholders’ approval before issuing the employee stock option plan and selling a majority stake to Mr. Pinault. Battling LVMH, supra note 11. The court upheld the alliance with Mr. Pinault, but ordered Gucci to abandon the employee stock option plan. LVMH/Suits -3: Also Seeking Damages From Gucci, PPR, DOW JONES INT'L NEWS SERV., June 9, 1999, available in WESTLAW, Euronews Database. Just recently, Pinault of Gucci and Arnault of LVMH dropped their libel lawsuits against each other, but many bad
Several other corporations in the European Union [hereinafter EU] have also recently faced hostile takeover attempts. Some attribute the origin of this trend to the introduction of the “euro,” the currency that will soon be used

feelings still exist over the deal. World Business Briefing: Europe; Libel Suits Dropped, N.Y. TIMES, July 17, 1999, at C2. Since the case ended, Gucci’s shareholders overwhelmingly voted to approve the deal with Mr. Pinault. Glenn Drekhage, Deals of the Year 1999: Most Innovative Deal: Winner: Gucci/PPR (vs. LVMH), CORP. FIN., Dec. 1, 1999, at 53. Also, Gucci has acquired Sanofi Beaute, the corporation that controls brands such as Saint Laurent and Fendi, and has been talking with the Italian shoemaker corporation Sergio Rossi about a possible acquisition. Thomas Kamm & Charles Fleming, Italian Luxury Firm to Pay $552 Million in Effort to Better Rival LVMH, WALL ST. J., Nov. 15, 1999, at A25. LVMH has since launched a takeover bid on the Italian fashion house Stefanel SpA. French Giant Prepares Takeover Bid on Stefanel (Il colosso francese, dopo lo scacco su Gucci, prepara un’Opa per l’azienda veneta), IL SOLE 24 ORE, Oct. 7, 1999, available in WESTLAW, Euronews Database.

13. The EU, originally known as the European Economic Community [hereinafter EEC] was formed by the 1957 Treaty of Rome in order to develop a common market between all the Member States. Uwe Blaurock, Steps Toward a Uniform Corporate Law in the European Union, 31 CORNELL INT’L L.J. 377, 378 (1998). The six original members of the EEC were Belgium, France, Italy, the Federal Republic of Germany, Luxembourg, and the Netherlands. RALPH H. FOLSOM ET AL., INTERNATIONAL TRADE AND INVESTMENT IN A NUTSHELL 265 (1996). In 1973, they were joined by Denmark, Ireland, and the United Kingdom. Id. Greece joined in 1981, Spain and Portugal in 1986, and Austria, Finland, and Sweden became members in 1995. Id. There are a number of other countries who are now trying to join the EU, including Lithuania, Estonia, Latvia, Slovakia, the Czech Republic, Cyprus, Malta, Poland, Romania, Bulgaria, Slovenia, and Hungary. Id. at 266. The Community was originally established under the name “European Economic Community,” but the 1993 Treaty of Maastricht officially shortened the name to the “European Community” [hereinafter EC]. VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE 1 (6th ed. 1997). However, the Treaty of Maastricht also refers to the EC as a Union, because the Community now embraces interests other than purely economics; therefore, the name “European Union” is used more frequently when referring to the union of Member States. T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 6 (4th ed. 1998).

14. Dixon, supra note 1, at 17. Olivetti, an Italian technology and telecommunications group, has made a hostile bid for Telecom Italia, another telecommunications group, and two French banks, Societe Generale and Paribas, are in danger of a takeover by the Banque Nationale de Paris. Id. Additionally, two Italian banks, UniCredito and SanPaola IMI, are attempting takeovers of two other Italian banks, Banca Commerciale Italiana and Banca di Roma. Id.; see also Robin Sidel, Poison Pill Kills the ‘Pac-Man’, BIRMINGHAM POST, July 31, 1999, at 21 (describing the hostile bid and counterbid between rival French oil companies Elf Aquitaine and TotalFina); Unicredito Italiano Bids $16.4 Billion for Rival, N.Y. TIMES, Mar. 22, 1999, at C2 (discussing further information about the takeover attempt of Banca Commerciale Italiana by Unicredito Italiano).

15. The “euro” is the name of the uniform EU currency that has been introduced into the market and will eventually replace the individual
The euro has inspired a new form of capitalism in Europe that includes the use of "previously foreign techniques," such as the hostile takeover. Besides changing the face of European business, these takeover attempts have exposed inconsistencies between the laws of the various EU countries. Accordingly, there have been discussions about developing a single EU takeover regime. However, in the debate over governmental intervention, the prevalent notion among the EU countries is that it is best for the governments to stand on the sidelines and avoid involvement.

Currencies of all the participating EU countries. Paul Beaumont & Neil Walker, Legal Framework of the Single European Currency 17 (1999). Of the 15 countries currently belonging to the EU, 11 adopted the euro as their form of currency on January 1, 1999: Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and Spain. Id. at 7, 17. However, Denmark, Greece, Sweden, and the United Kingdom are keeping their own currencies. Id. at 7. The countries adopting the euro will continue to accept the currencies of the other countries until 2002. Id. at 17. Although the EU is not physically using the euro yet, it is being valued in relation to other currencies, and therefore its adoption has had the effect of erasing country borders and facilitating the new hostile takeover trend, which has rarely been seen before in European business.

16. Dixon, supra note 1, at 17. Before the introduction of the euro, each country had a largely independent market. Id. Because of risk factors, such as currency valuation risk, not much inter-investment activity existed among the private sectors of different European countries. Id. However, the single currency has now alleviated many of those risks, and a new "Americanized" form of capitalism is quickly arising. Id. This form favors returns and increases in shareholder wealth over control of the relatively small market. Id.

17. Id.

18. Id. The Gucci and LVMH case presents examples of this. In the Netherlands, it is very difficult to accomplish a takeover because under Dutch law, companies can use a variety of defensive measures, such as issuing new shares without getting shareholder approval and stripping shares of voting powers. Kamm, supra note 9, at A12. There is "no obligation to launch a bid." Id. By comparison, France requires a corporation to launch a bid as soon as it reaches a 33% stake in the target corporation, and another corporation, such as Mr. Pinault's PPR, can only come in through a counterbid. Id. Thus, although Mr. Pinault and Mr. Arnault were both Frenchmen, they could take advantage of the liberal Dutch laws and act in ways that would be illegal in their own country. Id. This is because, under EU law, the individual Member States can have their own laws as long as they do not conflict with the EU laws. Spencer Weber Waller, The Internationalization of Antitrust Enforcement, 77 B.U. L. Rev. 343, 354-55 (1997). During the takeover battle, LVMH complained about the lack of uniform regulations, saying, "[w]e build a single market with a single currency, and at the same time, we let an Italian company use Dutch law to defend itself from a French company." Kamm, supra note 9, at A12. This statement clearly demonstrates the problem: while Europe has taken so many steps to unify itself and form uniform regulations, somehow the takeover rules have slipped through the cracks.

19. Dixon, supra note 1, at 17.

20. Id. In France and Italy, the governments initially took sides in the
Still, the EU countries are currently negotiating to develop a directive to harmonize takeover laws.\(^2\)

Part I of this Comment discusses the current competition laws of the EU. Part II analyzes EU competition law, demonstrating how the laws are applied and discussing situations in which national competition laws would apply. Part III discusses the problems with the current national competition laws and the lack of uniformity among the Member States. Part IV proposes an amendment to the current EU competition laws that would act to regulate the recent boom in hostile takeovers of corporate Europe.

I. EUROPEAN COMPETITION LAWS: A BACKGROUND

The EU was established in 1957 by the Treaty of Rome, with the stated purpose of "establishing a common market and an economic and monetary union and...implementing...common policies or activities...to promote throughout the Community a harmonious and balanced development of economic activities...and economic and social cohesion and solidarity among [Member]States."\(^21\) One of the activities that the Treaty set forth in order to accomplish these goals was the development of a legal system that would promote and regulate competition in the corporate realm.\(^22\) Competition has long been an important recent takeover attempts of the banks, but have now backed off in the apparent belief that "they should not prevent shareholders [from] having their say." \(^2\) Id.; see supra note 13 and accompanying text (discussing the takeover attempts of French and Italian banks); see also Keep Takeovers Out of the Courts, THE LAWYER, Apr. 26, 1999, at 14 (discussing efforts to unify European takeover laws, but pointing out possible problems throughout the EU due to the ever-present conflicts between the United Kingdom's common law and other European countries' civil law systems); Hilary Clark, Spain Blocks UK's Merger Reform, INDEP. (London), June 20, 1999, at 1 (discussing Britain's original objections to the directive, Germany's compromise, and Spain's problems with the effects of the compromise).

21. Clark, supra note 20, at 1. The Commission has in the past few years been trying to come up with a set of uniform rules, but cannot reach a consensus, and have the added problem that some of the Member States don't want their laws changed by a new set of EU rules. Kamm, supra note 9, at A12. See also Dixon, supra note 1, at 17 (reporting that Germany has proposed to "unblock the European takeover directive").

22. THE TREATY OF ROME CONSOLIDATED AND THE TREATY OF MAASTRICHT 1, 588 (Neville March Hunnings & Joe MacDonald Hill eds., 1992) [hereinafter TREATY CONSOLIDATED] (citing Article 2 of the EC Treaty, Maastricht Version). Article 3 continues by explaining the activities that will accomplish the purposes of Article 2, which include "(a) the elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect; (b) a common commercial policy; (c) . . . the free movement of goods, persons, services and capital . . . ." \(^2\) Id.

23. \(^2\) Id. at 589. This was originally section (f) of Article 3 of the Treaty of
method of promoting the goals of the EU; it increases economic activity between the Member States and strengthens the economic power of the EU in the world market.\textsuperscript{24}

Articles 85 and 86 of the Treaty of Rome and its progeny, the Treaty of Maastricht,\textsuperscript{25} set forth the laws governing competition in the EU.\textsuperscript{26} Article 85(1) prohibits “... all agreements between undertakings... and concerted practices which may affect trade between Member\textsuperscript{[\textregistered]}States and which have as their object or effect, the prevention, restriction or distortion of competition within the common market...”\textsuperscript{27} Article 86 prohibits “[a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it... in so far as it may affect trade between [M]ember\textsuperscript{[\textregistered]}States.”\textsuperscript{28}

In the Treaties of Rome and Maastricht, the term “competition” is never actually defined.\textsuperscript{29} However, these competition laws apply whenever freedom of trade may be affected.\textsuperscript{30} In order to better understand the competition laws and
how they work, it is first necessary to look at the dynamics of Articles 85 and 86 separately, and then to discuss the Merger Regulation, which was enacted more recently.

A. Article 85

In forming the EU, the 1957 Treaty of Rome established four centralizing institutions, each independent of the others. The two institutions that are most pertinent to the subject of this Comment are the European Court of Justice and the Commission. The European Court of Justice is responsible for ensuring that the laws of the EU are observed in all activities throughout the EU. To do so, it reviews the legality of acts and regulations that are put into effect by the Commission.

The Commission is responsible for ensuring that EU countries comply with the provisions in these acts and regulations. The Commission also proposes and drafts EU legislation and forwards it to the Council, which reviews the legislation and consults with the Parliament before enacting the legislation. The Commission also plays an important role in the area of competition law. The Commission is responsible for reviewing and issuing decisions regarding whether an activity falls within the Articles on competition.

The European Court of Justice and the Commission look at Article 85 differently than an American court would. Instead of paying close attention to the exact wording of the Article, the Court and Commission look more to the underlying purpose of the law. Despite the Court's methodology, however, a complete
understanding of Article 85 still requires a basic examination of its wording.

The first important concept in Article 85(1) requires the involvement of “undertakings.” European courts define an undertaking broadly to include any organization, from State bodies to publicly-owned associations to private individuals to corporations, that is involved in “an exchange of economic values...” To be an undertaking, however, the organization must be able to assume legal rights and duties and be able to contract with other organizations.

The second element in Article 85(1) requires the undertakings to enter into an “agreement[,]” a “concerted practice[,]” or a “decision[.]” European courts have held that an “agreement” exists when there is a sufficient understanding between two undertakings concerning a bargain. A “decision” is relatively easy to recognize. It is a situation where an association of undertakings makes rules or recommendations, even if they are not binding on the individual undertakings making the decision.
The term "concerted practices" covers activities that are not extensive enough to constitute an agreement or a decision.\(^{45}\)

The third element of Article 85(1) is that the trade among Member States be "affect[ed]." European courts have interpreted the term "trade" broadly.\(^{46}\) The concept includes commercial activities, services, and exchanges with other European countries who may or may not be members of the EU.\(^{47}\) This trade between Member States will be "affected" if an activity has a considerable impact on market conditions.\(^{48}\)

Finally, for an agreement to be prohibited under Article 85(1), it must have "as [its] object or effect the prevention, restriction or distortion of competition within the common market..."\(^{49}\) These restrictions can be either horizontal or vertical,\(^{50}\) as long as they restrict competition.\(^{51}\) To fall under the provisions of the Article,

\begin{itemize}
  \item \textit{Id.} A concerted practice is defined by the Court of Justice as "a form of cooperation between undertakings which... knowingly substitutes practical cooperation between them for the risks of competition." \textit{Id.} Unusual behavior, such as the trading of information between competitors, may indicate that the undertakings have "acted in concert." \textit{Id.} at 14-12 to 14-13.
  \item \textit{TREATY CONSOLIDATED, supra} note 22, at 626.
  \item \textit{GOYDER, supra} note 29, at 115.
  \item \textit{Id.} Trade includes "manufacturing and distribution, banking, insurance, financial services[,] the provision of exhibitions and trade fairs, television [shows], sport[s events], and other cultural activities." \textit{Id.}
  \item \textit{Id.} at 116. As a prerequisite, an undertaking must have at least a five percent market share for horizontal agreements, and a ten percent share for vertical agreements. \textit{Id.} at 110. \textit{See infra} notes 51 and 52 and accompanying text for descriptions and examples of horizontal and vertical agreements. The standard for reviewing whether trade is affected is whether the agreement, as a whole, will likely have such an effect. \textit{GOYDER, supra} note 29, at 111.
  \item \textit{TREATY CONSOLIDATED, supra} note 22, at 626. Article 85 lists five examples of agreements that will be held to prevent, restrict, or distort competition within the common market if they do any of the following:
    \begin{itemize}
      \item (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
      \item (b) limit or control production, markets, technical development, or investment;
      \item (c) share markets or sources of supply;
      \item (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
      \item (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which by their nature or according to commercial usage, have no connection with the subject of such contracts.
    \end{itemize}
  \textit{Id.} at 626-27. However, these five situations are only examples, and are not meant to be a complete or exclusive list. \textit{GOYDER, supra} note 29, at 121.
  \item \textit{See CARSWELL & DE SARRAU, supra} note 24, at 14-13. Horizontal undertakings are "at the same level of production or distribution," whereas vertical undertakings are at different levels, an example being franchisor and franchisee. \textit{Id.}
  \item \textit{Id.} Examples of horizontal restrictions include "price-fixing, market-sharing, and information exchange." \textit{Id.} Vertical restrictions include export
the agreement must either intend to restrict competition or actually do so. If all four elements of Article 85(1) are present, then Section (2) of the Article states that the competitive agreements or decisions affecting trade "are automatically void." However, 85(3) allows the Commission to grant an exemption for certain agreements that are prohibited under Section (1). Four conditions must be met for an agreement to qualify for the exemption under Section (3) of Article 85. The agreement, decision, or concerted practice must: 1) contribute "to improving the production or distribution of goods or to promoting technical or economic progress..." The agreement, decision, or concerted practice must also 2) "allow... consumers a fair share of the resulting benefit..." However, the agreement cannot 3) "impose on the undertakings... restrictions which are not indispensable to the attainment of these objectives [already referred to]," or 4) "afford [the] undertakings the possibility of eliminating competition in respect of a substantial part of the products in question." In order to qualify for the exemption, the answer to prohibitions and restrictions on parallel imports. Id. 53. GOYDER, supra note 29, at 120. The Court has stated that it first looks to the object or purpose of the agreement; only if it is not restrictive on its face is it necessary to look at the effect it has on competition. Id. 54. TREATY CONSOLIDATED, supra note 22, at 626-27. 55. CARSWELL & DE SARRAU, supra note 24, at 14-27; TREATY CONSOLIDATED, supra note 22, at 626-27. The Commission has the sole power to decide whether to grant an exemption; even when the national courts have jurisdiction, they can only determine whether section (1) has been violated. CARSWELL & DE SARRAU, supra note 24, at 14-27, 14-29. However, to qualify for the exemption, either the Commission must be notified of the agreement, or a restrictive agreement must be "drafted to comply with the terms of a block exemption regulation." Id. 56. GOYDER, supra note 29, at 136; TREATY CONSOLIDATED, supra note 22, at 627. 57. TREATY CONSOLIDATED, supra note 22, at 627. The first condition is often seen as the most important, and is a balancing test between the economic benefit and the detriment that the restrictions will have on trade. GOYDER, supra note 29, at 137. However, the burden of proof is on the parties to the agreement to show that the improvement and progress will happen and will benefit not only the parties, but also the whole EU. Id. at 138-39. 58. TREATY CONSOLIDATED, supra note 22, at 627. The second condition interprets both the "consumer" element and the "benefit" element broadly. GOYDER, supra note 29, at 140-41. 59. TREATY CONSOLIDATED, supra note 22, at 627. For the first negative condition, the parties to the undertaking need to "show that the individual restrictions, individually and collectively, are tailored strictly to the valid purposes of the agreement, and that subsequent damage to the competitive process does not spill over to wider effect." GOYDER, supra note 29, at 141-42. The "final condition relates to the external effect of the agreement" and calls for "market analysis... on both the product range and the geographic range of that market." Id. at 144. The Commission will "look... to the nature of the
the first two conditions must be affirmative, and the answer to the second two conditions must be negative. These four conditions do not operate as a single balancing test, but are four separate tests that must all be satisfied. If three are answered in the affirmative and one in the negative, there is no leeway for the Commission to decide that the benefits of allowing the restriction outweigh the damage. The agreement, decision, or concerted practice will be automatically prohibited under Article 85(2).

B. Article 86

While Article 85 deals with agreements and concerted practices between EU organizations, Article 86 prohibits a corporation in a dominant EU market position from abusing its position and affecting trade between Member States. Under this Article, the Commission must first determine the corporation's position in the market. If the Commission finds that the market involved, and "ask whether particular forms of competition exist... which may be especially damaged by the agreement," such as what may occur with inter-brand competition. Id.

60. GOYDER, supra note 29, at 136.
61. Id. at 144-45.
62. Id. This is why Article 85(3) cannot be compared with the United States' "Rule of Reason." Id. American antitrust law is different from EC competition law. For example, American antitrust law does not prohibit any practice that may have an effect on competition, only one that "unreasonably restrict[s] competition." Hefti, supra note 31, at 652. However, Article 85 does not follow similar reasoning; if a practice may affect competition, then it is prohibited. Id.

63. CARSWELL & DE SARRAU, supra note 24, at 14-44. The text of Article 86 reads: "[a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market and as affecting trade between Member States." TREATY CONSOLIDATED, supra note 22, at 627. "Dominance" is determined based on market power, and is defined as "the ability to act to an appreciable extent independently of competitors, customers, and ultimately of consumers." CARSWELL & DE SARRAU, supra note 24, at 14-44. It is the abuse of dominance that is prohibited, not dominance itself. Id.

64. CARSWELL & DE SARRAU, supra note 24, at 14-44. To be affected by Article 86, the corporation must first be determined to hold a dominant position in the market. Id. To determine whether the corporation holds a dominant position in the market, the Commission first defines the relevant market, looking at both the "product market" and the "geographic market." Id. at 14-44 to 14-45. In reviewing the product market, the Commission uses "the test of demand substitutability, i.e., the extent to which the demand for the product may be satisfied by products which are sufficiently similar in function, price and attributes to be regarded by users as reasonable substitutes for each other." Id. Factors such as specific use, characteristics that make a product suitable for a purpose, and price elasticity are all considered. Id. at 14-45. Meanwhile, the geographic market is decided in relation to the area of effective competition, which in turn is determined by defining whether there are barriers to interstate trade and by looking at "patterns of supply and demand and cross elasticities of supply." Id. at 14-45
corporation is dominant, then the Commission must examine whether the corporation is abusing its position.65 This is a two-part analysis; simply finding that a corporation's position is dominant does not mean that the corporation is abusing its position.66 As long as the corporation is trying to protect itself, is not ultimately seeking to "strengthen or abuse a dominant position," and is using appropriate measures, Article 86 will not impact the corporation or its activities.67

C. The Merger Regulation

In 1990, the EU Merger Regulation was enacted to cover mergers [hereinafter concentrations]68 that were falling outside the
reach of Articles 85 and 86. It was intended to replace Articles 85 and 86 as the "only instrument" applicable to concentrations at the Community-wide level. Under the Merger Regulation, the Commission is given the power to prevent the creation of any concentration of undertakings that either creates or empowers a dominant position in the EU. In the event of any "merger, acquisition, joint venture agreement, . . . announcement of a public bid, or . . . acquisition of a controlling interest," the undertaking or corporation must notify the Commission within one week. The Commission has an initial thirty days to determine whether the transaction is subject to its Merger Regulation, and if it finds that the transaction is subject to the regulation, it has another four months to investigate and determine whether to invalidate the proposed concentration. Of course, if the transaction does not fall under the regulation, it may nonetheless be affected by Article 85.

69. Waller, supra note 38, at 72-73. The Commission may "block any concentration that creates or strengthens a dominant position within the Community." Id. at 74. The Commission will analyze a concentration that satisfies certain threshold requirements:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than 2,500 million ECU; (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than 100 million ECU; (c) in each of at least three Member States included for the purpose of point (b), the turnover of at least two of the undertakings concerned is more than twenty-five million ECU each; and (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than one hundred million ECU, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within a single Member State.

GOYDER, supra note 29, at 389 (emphasis added). "Aggregate turnover" is the amount the undertakings have earned from their ordinary business activities in the previous financial year, after taxes. CARSWELL & DE SARRAU, supra note 24, at 14-78. The term "ECU" stands for "European Currency Unit" and was used as a valuation prior to the introduction of the euro. BEAUMONT & WALKER, supra note 15, at 17-19.

70. CARSWELL & DE SARRAU, supra note 24, at 14-98.
71. Waller, supra note 38, at 74.
72. Id. at 75.
73. Id. The Commission can decide that the activity is not within the Merger Regulation, or that it falls under the Merger Regulation but "does not raise serious questions as to its compatibility with the common market." Id. The Commission can also decide to begin proceedings because the activity falls within the Merger Regulation and there are serious issues of whether it is compatible with the common market. Id. If the Commission institutes proceedings, it then has four months to investigate and "invalidate" a proposed concentration. Id.

74. Id. at 73. If the concentration does not satisfy the threshold requirements for the Merger Regulation, then it falls to the national courts of the Member States to determine whether it violates the national competition
II. ANALYSIS OF EU COMPETITION LAW

The EU has developed a very sophisticated system of competition law, especially considering that the EU has existed only since 1957.75 The system of law is continually changing and growing. This is evident from treaties subsequent to the Treaty of Rome77 and from the regulations that have been enacted to provide for inadequacies in the current law of the EU.78 Accordingly, the EU has shown that it is willing to amend its current laws whenever there is a need for change.79 The new age of a single currency market may signify a need for amendments by the EU.80

The first step in deciding whether a change in EU law is necessary is to analyze what steps the Commission will take when there is a hostile takeover attempt. The second step is to determine whether the actions taken by the Commission could discourage a corporation from pursuing a hostile takeover. This also requires a determination whether the Commission's actions could affect the tactics that the corporations may use in attempting and defending against a hostile takeover.

A. Articles 85 and 86

Although Articles 85 and 86 govern most of the competition laws. CARSWELL & DE SARRAU, supra note 24, at 14-95. The national competition laws of the Member States for the most part closely resemble Articles 85(1) and 86. GOYDER, supra note 29, at 519. 75. Waller, supra note 38, at 55-56. The competition law of the EU was first adopted in 1957 with the Treaty of Rome. Id. 76. Id. at 56-57, 77. HARTLEY, supra note 13 at 6-8. 77. Id. at 72-73; Hefti, supra note 31, at 616-17, 629-30. Examples of regulations enacted to supplement the Treaties of Rome and Maastricht are Regulation 17 and the Merger Regulation. Id. at 629-30. An analysis of Regulation 17 is beyond the scope of this Comment. 79. Articles 85 and 86, the basis of competition law in the EU, were adopted in 1957, and although they remain unchanged, the subsequent regulations adopted (such as Regulation 17 and the Merger Regulation) have exposed deficiencies in the Articles. Yet, the fact that changes were made pursuant to problems discovered in the law demonstrates that the EU is willing to make changes for the better when needed. 80. As discussed in the Introduction of this Comment, the new single currency has brought about a new kind of market and a new way of thinking because of the new risks the euro creates. The new trend of hostile takeovers, through the use of dirty tactics, has arrived in the EU, but there is no legislation to discourage or punish any of these tactics. See TREATY CONSOLIDATED, supra note 22, at 626-28 (failing to enumerate in Articles 85 and 86 the types of behavior that can lead to possible violation of the Articles); Waller, supra note 38, at 73-76 (discussing the Merger Regulation, which only governs when violations occur, but does not provide for underlying activities in forming concentrations). For this reason, it is time for the EU to again amend its current laws to discourage and control this new trend.
issues that arise, the EU has found it difficult to apply them to mergers and acquisitions.\textsuperscript{81} Prior to the adoption of the Merger Regulation, the Commission used Article 86 to control concentrations between dominant firms, but did so with limited success because many loopholes existed.\textsuperscript{82} The Commission used Article 85 to try to fill in the gaps as best as possible.\textsuperscript{83}

Because Articles 85 and 86 were not completely effective in regulating concentrations, the Commission convinced the Council to adopt the Merger Regulation.\textsuperscript{84} Since then, the Merger Regulation has been controlling in cases involving concentrations.\textsuperscript{85} However, even though Articles 85 and 86 no

\textsuperscript{81}. \textsc{carswell \& de sarrau, supra} note 24, at 14-70 to 14-71. The main reason is that the Treaty of Rome and subsequent Treaty of Maastricht never provided for merger (concentration) control. \textit{id.} at 14-70.

\textsuperscript{82}. \textit{id.} at 14-70 to 14-71. Until the enactment of the Merger Maastricht, Article 86 usually applied to concentrations. \textit{id.} at 14-70. In the landmark 1973 case \textit{continental can}, the Court held that Article 86 prohibited a dominant firm from acquiring a majority position in a competing corporation because the effect would impair effective competition. Case 6/72, \textit{europemballage corp. \& continental can co. v. commission}, 1973 E.C.R. 199, 245. The Court declared, after looking at "the spirit, structure and working of Article 86," that the "strengthening [of a dominant] position of an undertaking [through a merger] may be abusive and prohibited by Article 86..." \textit{id.} at 243, 245. However, Article 86 was never a fully effective solution, because when the corporations are not initially dominant, Article 86 cannot prevent a merger or acquisition, but only subsequent activities by the new enlarged corporation. \textsc{carswell \& de sarrau, supra} note 24, at 14-70 to 14-71. There was also a question as to whether Article 86 would apply to mergers and acquisitions that did not lead to market shares large enough to resemble a monopoly. \textit{id.} at 14-71. However, possibly the greatest problem was in enforcement, because there was no requirement of notification prior to a merger or concentration, nor could the Commission suspend any activity while it investigated the matter. \textit{id.} at 14-72.

\textsuperscript{83}. \textsc{carswell \& de sarrau, supra} note 24, at 14-73. In \textit{british am. tobacco co. \& reynolds indus. v. commission}, the court stated that:

Article 85(1) may apply to the acquisition of a minority shareholding when (1) the acquirer gains \textit{de facto} or \textit{de jure} control over the target undertaking; (2) the minority acquisition is part of a long-term plan leading to the reinforcement of the minority investment in, or the complete take-over of, a competitor; or (3) the arrangement gives rise to a structure of cooperation between the acquirer and the other party. \textit{id.} at 14-72 (discussing joined cases 142/84 \& 156/84, \textit{british am. tobacco co. \& reynolds indus. v. commission}, 4 C.M.L.R. 24 (1988)). However, the case still left open the question of whether Article 85 could apply to majority acquisitions or hostile takeovers. \textit{id.} at 14-72 to 14-73. Thus, until the Merger Regulation was enacted, the Commission tried to apply Article 85 to concentrations by using the risk of collusion, and to force informal settlements. \textit{id.} at 14-73.

\textsuperscript{84}. \textsc{waller, supra} note 38, at 72-73. The Merger Regulation went into effect in September 1990, \textit{id.} at 72, and from then on was intended to be the "only instrument" applicable to concentrations, at the Community-wide level. \textsc{carswell \& de sarrau, supra} note 24, at 14-98.

\textsuperscript{85}. \textsc{carswell \& de sarrau, supra} note 24, at 14-98.
longer apply to concentrations that are sufficient to satisfy the requirements under the Merger Regulation, the Articles may still be used by national courts\textsuperscript{86} when they have to decide concentration issues.\textsuperscript{87} Accordingly, understanding both the Articles themselves and how they are applied is still important. The discussion of how Articles 85 and 86 affect national legislation will be addressed in Part III.

**B. Scenario A: Evaluation Under the Merger Regulation**

Suppose that Corporation A is planning to mount a hostile takeover of Corporation B. Neither corporation holds a dominant position in the market as prohibited by Article 86. However, the merging of the two corporations would result in the new corporation holding a dominant market position in the EU, for example, a fifty percent market share.

Under the Merger Regulation, once Corporation A has acquired a controlling position or has publicly announced a bid, it must notify the Commission of its action within one week.\textsuperscript{88} The Commission has thirty days to determine whether this takeover attempt falls under the regulation.\textsuperscript{89} For the Merger Regulation to apply, the threshold requirement is that the two corporations together have sufficient "community dimension."\textsuperscript{90} That is, if two corporations conduct a significant amount of business both worldwide and Community-wide, without too much activity centered within any one Member State, the corporations have a sufficient presence in the EU to constitute community dimension.\textsuperscript{91}

Once sufficient community dimension has been exhibited, the next step in the Commission's analysis is to determine whether

\textsuperscript{86} Id. at 14-95. The Commission has jurisdiction over all competition matters, but when an issue does not satisfy the threshold levels, then it falls to the national courts of the individual Member States to decide the matter. Id. at 14-95 to 14-96. The national courts must comply with EU law. Id.

\textsuperscript{87} GOYDER, supra note 29, at 423. If a concentration is not sufficiently large to satisfy the requirements under the Merger Regulation, then the issue will fall to the national courts. CARSWELL & DE SARRAU, supra note 24, at 14-99. Because only the Commission and the Court of Justice apply the Merger Regulation, the national courts instead apply their own competition laws, which usually resemble Articles 85 or 86. GOYDER, supra note 29, at 422-23. It is more likely that Article 86 would be used to block concentrations in the national courts because it can be applied immediately, whereas with Article 85, the Commission must first analyze the situation under section 85(3). Id. at 423.

\textsuperscript{88} Waller, supra note 38, at 75.

\textsuperscript{89} Id.

\textsuperscript{90} CARSWELL & DE SARRAU, supra note 24, at 14-77. But see GOYDER, supra note 69, at 389 (providing different requirements needed to satisfy "community dimension").

\textsuperscript{91} CARSWELL & DE SARRAU, supra note 24, at 14-77 to 14-79.
the concentration is within the scope of the regulation. Because Corporation A has acquired a direct controlling position in Corporation B through the purchase of Corporation B's shares, the takeover attempt involves a concentration that is within the scope of the Merger Regulation. The Commission then has four months to investigate the takeover and determine whether it is "compatible with the Common Market." The two corporations together would constitute a fifty percent market share, and therefore would be in a dominant market position, so the Commission may conclude that the new corporation impedes effective competition within the EU, depending, of course, on other market factors.

If the Commission finds that the takeover violates the Merger

92. Id. at 14-80. A concentration is within the scope of the regulation if there is a merger between two or more previously independent corporations, or when a corporation acquires direct or indirect control of all or part of another corporation. Id. "Control" includes "(a) ownership of the right to use all or part of the assets of an undertaking; [or] (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of [the corporation]." Id. at 14-81.

93. Id.

94. Waller, supra note 38, at 75.

95. CARSWELL & DE SARRAU, supra note 24, at 14-82. The issue is whether "a concentration creates or strengthens a dominant position as a result of which effective competition is significantly impeded in the Common Market or a substantial part thereof." Id. As in the application of Article 86, the Commission looks to both the product and geographic markets to determine the economic power of the merging corporations. Id. To then determine whether this economic power creates a dominant position which will impede effective competition, the Commission takes into account:

(a) the need to preserve and develop effective competition within the Common Market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or out with the Community;

(b) the market position of the undertakings concerned and their economic and financial power, the opportunities available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

Id. at 14-84 to 14-85. The Commission also gives major consideration to the market share that the concentration would have following the merger. Id. at 14-85.

96. Id. "However, a higher market share does not necessarily lead to dominance." Id. In one case, the Commission held that although the concentration would have resulted in a market share of 54% in France and 48% in Portugal, the high market shares would not allow the newly merged corporations to prevent "effective competition" from other companies. Id. The Commission also noted that the market was "highly competitive" in price and in terms of innovations, so although the concentration would result in a dominant position in terms of market share, this would in no way reduce effective competition. Id.
Regulation, then the Commission could refuse to allow the takeover to occur, and could instead force a separation of the assets already combined. Thus, in the current scenario, if the takeover were found to violate the Merger Regulation, Corporation A would not be required to pay any damages to Corporation B, but the takeover would not be allowed to proceed. Corporation A would lose the time, money and manpower it expended in the attempted acquisition, but it would not cost the corporation money in the form of damages. As a result, Corporation A could sell the shares of Corporation B that it had acquired without being any worse off. Of course, if the Commission were to find that effective competition would not be impacted by Corporation A’s acquisition of Corporation B, the attempted acquisition would be allowed to proceed despite A and B’s dominant market share. Consequently, Corporation A has nothing substantial to lose by attempting the takeover, but much to gain if it is allowed to proceed.

Thus, the Merger Regulation, while effective in prohibiting concentrations that will harm competition, does not appear to discourage corporations that are considering a hostile takeover. Moreover, along with the absence of penalties for takeover attempts that violate the Merger Regulation, there are no penalties for particularly underhanded methods of attempting hostile takeovers. When comparing the potential benefit of acquiring a corporation to the potential detriment, which includes only a possibility of fines, the hostile corporation has a strong

97. Id. at 14-95. The Commission can refuse to allow the concentration to take place, and in the case of an operating concentration, the Commission can force a separation of the assets or order any other action that will re-establish conditions of effective competition. Id. The Commission also has the power to impose fines for any failures to notify or cooperate in the investigation. Id.

98. CARSWELL & DE SARRAU, supra note 24, at 14-51. The Commission is allowed to impose administrative fines, which it would more likely impose in the instance of a blatant attempt to create dominance and affect competition, or penalty payments, which would be imposed for failure to comply with the investigation or decision of the Commission. Id. at 14-51, 14-95. However, the Commission has no power to award damages to injured parties. Id. at 14-51. Only the national courts have that power. Id.

99. Id.

100. Id. at 14-95.

101. Even if the concentration were held to be in violation of the Merger Regulation, and Corporation A were required to pay a fine, it would still own the stock of Corporation B, which it could sell, most probably, for a profit. The stock price would most likely rise, since Corporation B would no longer be the target of a hostile takeover. However, if the Commission were to hold that this was not a violation, Corporation A stands to gain much in the acquisition of new undertaking.

102. CARSWELL & DE SARRAU, supra note 24, at 14-98.

103. GOYDER, supra note 29, at 521. While the Commission cannot impose any damages, if the concentration does not satisfy the requirements of the
incentive to use whatever means it deems necessary to acquire the target corporation.

C. Scenario B: Failing to Meet the Threshold Requirements of the Merger Regulation

If Corporation A and Corporation B together did not have sufficient aggregate worldwide or Community-wide turnover, or received two-thirds of their business from one Member State, then the concentration would not satisfy the threshold requirement of having community dimension. When a concentration does not fall under the Merger Regulation due to lack of community dimension, the Member State or States in which the concentration is located have sole discretion to examine the concentration. Neither Article 85 or 86 of the EU nor the Merger Regulation apply; review of the activity falls outside of the Commission’s hands and into the jurisdiction of the individual Member States. Thus, since the competition policies of the individual Member States can vary as long as their policies do not conflict with the enforcement of the EU competition law, multiple and conflicting laws have arisen, each with the possibility of affecting a situation differently.

III. EU Laws VS. LAWS OF THE MEMBER STATES

Each of the Member States of the EU has also adopted national laws that relate to competition, usually closely resembling Article 85(1) and (2) and Article 86. EU law readily accommodates the individual competition policies of the Member States, as long as those policies do not conflict with EU competition law. In case of a conflict, the EU competition law is supreme.

Merger Regulation and is thus analyzed under national law, the national courts have the ability to require the hostile corporation to pay damages. Id. at 514.

104. Id. at 386. See supra note 69 for a definition of community dimension.
105. CARSWELL & DE SARRAU, supra note 24, at 14-95. Thus, if the Merger Regulation does not apply to a concentration, then national legislation of the Member State-State applies. Id.
106. Id.
107. Waller, supra note 18, at 354. See supra note 18 (discussing the differences between Dutch law and French law with regard to regulating takeover tactics).
108. CARSWELL & DE SARRAU, supra note 24, at 14-8. The national competition laws are usually based on, and very similar to, if not the same as, Article 85(1) and (2) and Article 86. GYDER, supra note 29, at 519.
110. Id. When there are any conflicts, the Court of Justice has held that the “parallel application of the national system can only be allowed in so far as it does not prejudice the uniform application throughout the common market of the Community rules . . . and of the full effect of the measures adopted in
Because the national laws are modeled after the EU Articles 85 and 86, there are no direct conflicts. However, problems remain because the Articles leave loopholes open. When a concentration does not satisfy the threshold of the Merger Regulation, it is sent to the Member States for a determination of whether the concentration violates the national competition laws. However, when the analysis is done under the Member States' adoptions of Articles 85(1) and 86, the same problems arise as did at the Community-wide level before the enactment of the Merger Regulation, because these Articles are not designed to recognize and control mergers that may affect competition. Thus, Member States' competition laws should be changed so that mergers which will affect competition can be recognized and stopped.

While EU law is supreme when a conflict of law arises, if the EU is silent in an area of law that a Member State has addressed, the Member State's law will apply within that State. The policy behind this rule is to help each Member State keep its autonomy within the context of economic integration of the Community. Currently, the EU's competition laws do not regulate the tactics and defenses that may be used during takeover attempts. Therefore, each Member State is free to enact its own laws in this area, which has led to problems. In the Gucci/LVMH case, for example, Gucci used the liberal Dutch laws to increase its defenses against LVMH's takeover attempt. Because Gucci was registered in the Netherlands, these defenses were available to it. However, if Gucci had been registered in France, the same defenses would not have been available. The reason for the differences in law is due to the differences in history and culture among the Member States. For example, the French and the
Germans have very different ideas concerning the policy behind competition law and what role it should play in business. The EU competition law is closer to France's view, and thus friction is created when EU law applies in Germany.

Because there are no uniform takeover regulations throughout the EU governing what tactics and defenses may be used in a hostile takeover, problems may arise. During a takeover attempt, the national laws of the country in which the target corporation is registered apply. Because some Member States' laws are more liberal than others', a takeover attempt could have drastically different results depending upon the State law that is governing. For example, if a certain Member State's laws apply, and these laws allow a greater variety of defensive tactics, a hostile corporation may be deterred from launching a takeover attempt. Thus, competition law becomes a game of forum-shopping.

However, if uniform laws prohibiting some of the more egregious tactics were enacted by the EU, inconsistent legislation of the Member States would be preempted, and the law would then

122. *Id.* The French view of competition law is that it is a means for reaching economic goals, while the German view holds that competition law should only maintain the competitive order. *Id.* at 390. Germany strictly restricts the use of competition law as a means of "achieving" specific public policy goals." *Id.*

123. *Id.* at 401-02. For example, Germany is "frustrated" with the Merger Regulation, which it feels "represents a victory of industrial policy over competition policy." *Id.* at 401. In the Merger Regulation, a clause referred to as the "French clause" instructs the Commission to take into account the competition of other corporations located outside of the Community when deciding whether the merger should be allowed. *Id.* at 402. Germany feels that this brings politics into what should be an objective decision-making process. *Id.*

124. Dixon, *supra* note 1, at 17. Since in the past hostile takeovers have not been prevalent in the EU, and rarely crossed national lines, Community laws never developed controls. *Id.* Moreover, when hostile takeovers did occur in the past, underhanded tactics, such as those now emerging, were not as prevalent. *Id.* Therefore, historically, there was no reason to enact uniform Community-wide laws to control the methods used by hostile corporations. *Id.* However, there is a new trend of hostile takeovers that often cross national lines, and hostile corporations are using new tactics of questionable legality. *Id.* For example, the "creeping takeover" technique that LVMH used to acquire a majority share of Gucci, though not found by the Dutch court to violate any law, is an illegal tactic in France, where a corporation must make a bid once it acquires over thirty-three percent of another corporation. Kamm, *supra* note 9, at A12.


126. Kamm, *supra* note 9, at A12. For example, if Gucci had been registered in France, LVMH would have made a bid when it acquired thirty-four percent, and the defensive tactics that Gucci used in this case would not have been available to it under French law. *Id.*

127. *See supra* note 126 for an example of this.
be clear for everyone. Hostile corporations pondering a takeover attempt would know what type of tactics were allowed. Similarly, target corporations would know in advance what defenses were available to them. A uniform law would prevent situations like that which occurred in the *Gucci/LVMH* case, where the two corporations went to court a number of times simply to determine the legality of certain tactics.

**IV. PROPOSAL FOR NEW LEGISLATION**

The Member States added a protocol in the 1997 Treaty of Amsterdam to help determine when Community-wide legislation is needed on a certain issue, or whether the Member States should be allowed to enact their own laws.128 The protocol is called the Protocol on the Application of the Principles of Subsidiarity129 and Proportionality.130 Generally, the view in the EU has been that the Community has the power to make law only when it is clearly necessary.131 However, this principle is only applicable to areas where the Community and the Member States share concurrent powers.132 The Commission has listed areas of law which are

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128. TREVOR C. HARTLEY, CONSTITUTIONAL PROBLEMS OF THE EUROPEAN UNION 51 (1999) [hereinafter HARTLEY, CONSTITUTIONAL PROBLEMS]. The Treaty of Amsterdam was enacted in 1997, and went into effect in 1998. *Id.* The treaty was enacted to further the movement of the EU toward one union. HARTLEY, *supra* note 13, at 8. For example, it has set the stage for the eventual abolition of all entry controls for people traveling between Member States. *Id.*

129. HARTLEY, CONSTITUTIONAL PROBLEMS, *supra* note 128, at 84-85. The Principle of Subsidiarity is that the Member States should retain power, and Community action should be treated as an exception that is used only when necessary. *Id.* at 84. This principle was introduced to the Community in Article 3b(5) of the Treaty of Maastricht, which reads in part:

[i]n areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

*Id.* at 85. The reasoning is that the EU covers a large area that includes differences in language, politics, geography, religion, language, and culture, and so the individual Member States are better able to provide for their own citizens than would a mass Community-wide rule. *Id.*

130. *Id.* at 86-87.

131. *Id.* at 84-86. Under the Treaty of Amsterdam, Community-wide action is justified when 1) the issue has transnational aspects that the Member States alone could not satisfactorily regulate, 2) lack of Community action would either fail to satisfy requirements of the Treaty, or would cause significant damage to Member States' interests, or 3) Community action would benefit both the EU and the Member States more than individual Member State's actions. *Id.* at 87.

132. *Id.* at 86. The Treaty does not specify what areas of law are concurrent between the Member States and the Community, but the Commission declares
within the exclusive mandate of the Community. Included in this list is competition law. Therefore, the Commission has the power to enact new legislation in this area, and its legislation will overrule any conflicting national legislation that the Member States may enact.

The EU seeks to create a common economic market through harmonious and uniform policies in order to promote its basic purpose, which is to create a unity among the Member States. For matters that eminently affect this single market, uniformity of law is especially important. The EU has always viewed a strong and uniform competition policy as an important means of accomplishing its goals. This is illustrated by the EU's enactment of Articles 85 and 86, and its subsequent enactment of the Merger Regulation. As the market changes, EU competition laws must respond and change in order to ensure that vital uniformity remains.

This Comment proposes that due to recent changes in the European market, the EU should: 1) extend the Merger Regulation so that the national courts must apply it; and 2) create a takeover regulation that governs what practices are acceptable during mergers, especially when a hostile takeover is involved.

what areas of law are exclusively within the competence of the Community. Id.

133. HARTLEY, CONSTITUTIONAL PROBLEMS, supra note 128, at 86. Areas include "the removal of barriers to the free movement of goods, persons, services, and capital; [and] the common commercial policy; the general rules on competition . . . ." Id. at n.8. The Commission has said that, as new areas emerge within the EU which require exclusive competence of the Community as opposed to the individual Member States having power, it will add those areas to the list. Id. at 86.

134. Id. at n.8.

135. Id. at 84-86. See also CARSWELL & DE SARRAU, supra note 24, at 14-8 (discussing that where conflict exists between the EU competition laws and the national competition laws, the national laws must give way to the EU competition laws).

136. TREATY CONSOLIDATED, supra note 22, at 588.

137. HARTLEY, CONSTITUTIONAL PROBLEMS, supra note 128, at 92. Competition is key to the single EU market, as is uniformity of the competition laws among the Member States. Id. at 86, 92. If some countries have more lax laws than others, it will encourage forum shopping in that corporations would rather register themselves in those countries. Id. at 93. This may result in hostility and contention between the Member States, and eventually an increase in trade barriers. Id.

138. TREATY CONSOLIDATED, supra note 22, at 587.

139. Waller, supra note 38, at 55. The underlying reason for EU competition law is to promote the goals of the EU in breaking down the national boundaries of Member States, in turn creating a unified common market. Id.

140. Id. at 55-58.
A. Extension of the Merger Regulation

As currently written, the Merger Regulation is only applied at the Community level to concentrations that satisfy the requirements of the regulation. The transactions that fail to satisfy the requirements are sent to the Member States, and the national courts analyze the transactions under their own laws. The reason for this is that the provisions of the Merger Regulation are only deemed to apply to a certain level of concentrations that will affect Community-wide competition. Smaller concentrations are deemed not to affect the Community, so national laws are applied to determine whether competition in one or more Member States is affected. In fact, in 1998 the threshold requirements for falling under the Merger Regulation were raised in order to decrease the workload of the Commission by causing more cases to fall into national jurisdictions. However, most national courts do not have specific laws designed to prevent small-scale concentrations that may affect competition. As discussed in Parts I and II of this Comment, the reason that the Merger Regulation was enacted was because of the deficiencies in Articles 85 and 86 with regard to governing transactions, such as mergers, that affect competition.

For this reason, the Commission should extend the Merger Regulation so that the same standards for determining whether a transaction will constitute a concentration that affects competition will also apply in the national courts, regardless of the scale of the concentration. In this way, transactions that do not constitute a Community concentration could still be found to constitute a concentration within one or more Member States that affects competition. The national courts could, as the Commission can on a Community level, "block any concentration that creates or strengthens a dominant position within the [Member State(s)]."

With the law written this way, the Commission would still be

141. See supra notes 68 and 69 for a list of the requirements needed for a concentration to fall under the Merger Regulation.
142. CARSWELL & DE SARRAU, supra note 24, at 14-95, 14-8.
143. GOYDER, supra note 29, at 389.
144. CARSWELL & DE SARRAU, supra note 24, at 14-95.
145. GOYDER, supra note 29, at 389.
146. See id. at 424 (discussing how national competition laws are based on and are very similar to Articles 85 and 86); CARSWELL & DE SARRAU, supra note 24, at 14-71 (discussing the problems in applying Articles 85 and 86 to concentrations). However, each Member State could adopt laws that are similar to the Merger Regulation. Id. at 14-8. For example, on January 1, 1998, the Dutch Competition Act took effect in the Netherlands, which included a merger control provision based on the EU Merger Control. Lisa Brownlee, Netherlands, 33 INT'L LAW. 705, 705-06 (1999).
147. CARSWELL & DE SARRAU, supra note 24, at 14-71.
148. Waller, supra note 38, at 74.
notified first and would have thirty days to make its initial decision. If the Commission decided that the transaction did not constitute a concentration, or that it did, but was harmless to Community-wide competition, the process would shift to the national courts of Member States. The national courts would then have the option of determining if the transaction constitutes a concentration on a smaller scale that would effect competition within a Member State or between any Member States. If a national court found that competition would be affected, then the court could block the transaction from proceeding and order the breakup of the concentration. This would eliminate the loopholes that exist in Articles 85 and 86 with regard to mergers and acquisitions.

In 1998, the Netherlands enacted the Dutch Competition Act. The Dutch Competition Act replaced the earlier act of 1956 and modeled its competition laws after those of the EU. As was to be expected, the Articles that deal with antitrust and abuse of dominant positions are almost exact replicas of Articles 85 and 86 of the EU. However, the Dutch Competition Act also contains a provision for merger control, which states that the Act:

applies to all legal and/or economic concentrations that do not have a community dimension within the meaning of the EC competition law. Not only must these concentrations possess a combined aggregate revenue of NLG 250 million, but two of the undertakings concerned must also have a revenue that exceeds NLG 30 million in the Netherlands. Because these threshold criteria apply to aggregate world-wide revenue and [are not limited to] revenue realized in the Netherlands, the merger control provisions of the Competition Act are not limited to combinations or mergers that take place in the Netherlands.

The Dutch Competition Act, therefore, is an example of what this Comment proposes. The Netherlands based its merger control provisions on the Merger Regulation, but on a smaller scale. The Dutch Competition Act provides for smaller amounts of aggregate world-wide revenue, and a stipulated nation-wide aggregate revenue amount. The Commission of the European Union must issue a directive instructing all of the Member States to enact such merger control provisions. However, the Member States

149. Brownlee, supra note 146, at 705.
150. Id.
151. Id.
152. Id. at 705-06.
153. A directive is one of the five kinds of acts that may be adopted by the four governing bodies of the EU. HARTLEY, supra note 13, at 99. Directives are issued to Member States, and are binding only "as to the result to be achieved[,]" but leave "the choice of form and methods" to the national governments. Id. (citations omitted). Directives have supremacy over inconsistent national legislation. Id. at 219.
should each have the autonomy to decide what amounts to set for the necessary aggregate revenue.

B. Creation of a Takeover Regulation

The existing competition laws of the EU are silent as to what behavior and tactics are allowed during mergers and takeover attempts.\textsuperscript{154} Because the Commission has not spoken on this issue, the Member States are free to enact their own legislation.\textsuperscript{155} However, allowing Member States to enact their own laws decreases uniformity of competition laws throughout the Community.\textsuperscript{156} This encourages forum-shopping by corporations that are seeking to find Member States with either the least restrictive or most restrictive allowances concerning takeover tactics.\textsuperscript{157} In effect, individual legislation negatively affects competition because it encourages forum-shopping and it leads to a more barbaric common market.

The EU must enact a new regulation that clearly defines the types of practices that are permissible and prohibited with regard to mergers and acquisitions of interest in corporations. It is important that this be a uniform regulation. The EU should not leave discretion to the Member States since lack of uniformity would defeat the purpose of the regulation. Because the EU law is supreme in the area of competition law, this regulation would prevail over any conflicting legislation of the Member States.\textsuperscript{158} In this way, two important policy interests would be satisfied: 1) there would be increased uniformity of competition laws throughout the EU; and 2) the regulation would mark the "implementation of a common policy . . . to promote throughout the Community a harmonious and balanced development of economic activities . . . ."\textsuperscript{159}

For example, the creeping takeover tactic that LVMH used on

\begin{itemize}
\item \textsuperscript{154} TREATY CONSOLIDATED, \textit{supra} note 22, at 588; Waller, \textit{supra} note 38, at 58-76.
\item \textsuperscript{155} CARSWELL & DE SARRAU, \textit{supra} note 24, at 14-9.
\item \textsuperscript{156} HARTLEY, \textit{CONSTITUTIONAL PROBLEMS, supra} note 128, at 92-93.
\item \textsuperscript{157} \textit{Id.} With less uniformity of competition laws, Member States may also be less willing to drop all trade barriers. \textit{Id.} Also, when there are loopholes in the laws of one Member State, corporations may flock there to take advantage of the gaps in the law, which may create animosity between Member States. \textit{Id.}
\item \textsuperscript{158} CARSWELL & DE SARRAU, \textit{supra} note 24, at 14-8. In a conflict between national competition laws and EU competition laws, EU law is supreme to prevent "prejudic[ing] the uniform application throughout the common market of the Community rules . . . ." \textit{Id.} (citations omitted).
\item \textsuperscript{159} TREATY CONSOLIDATED, \textit{supra} note 22, at 588 (quoting Article 2 of the Treaty of Maastricht, which sets out the goals of establishing the European Community); see HARTLEY, \textit{CONSTITUTIONAL PROBLEMS, supra} note 128, at 92-93 (discussing the importance and desire to have uniformity in matters that affect the common market).
\end{itemize}
Gucci would have been illegal in France, as well as in all other Member States with more restrictive takeover laws. The corporate world generally regards this tactic as underhanded and somewhat dishonest, as compared to when a corporation makes a bid after it has acquired a certain percentage of a target corporation’s stock. The EU may decide to set a threshold percentage of stock which, when passed, would require a corporation to launch a bid. However, this threshold must be uniform throughout the EU. Allowing the individual Member States to adopt their own threshold percentages of stock would not sufficiently guarantee uniformity.

The essence of this proposal is that uniformity must exist among all the Member States with regard to takeover rules. The EU sees a need for competition laws, and yet it allows the Member States to enact their own laws in this regard. With the new face of European business emerging under the single currency, the EU must enact uniform controls to regulate the recent takeover trend.

**CONCLUSION**

There are currently many changes occurring in the EU’s market atmosphere with the introduction of the euro and the resulting creation of a single market. Along with these changes, hostile takeovers are becoming a trend in the market, and hostile corporations are adopting a new “anything goes” mentality in order to win their battles against target corporations. Because these changes are so recent, the current EU competition laws are inefficient to control both the spread of takeovers and the tactics that corporations are using. This is apparent from the facts surrounding LVMH’s recent takeover attempt of Gucci. Neither corporation appeared to know what tactics and defenses were legal, and as a result, the two corporations went to court a number of times to fight over the legality of various takeover strategies and defenses.

Most Member States are still acting under Articles 85 and 86 with regard to all national competition matters. Yet these Articles were not designed to detect mergers and acquisitions that may affect competition. For this reason, the EU must issue a directive instructing the Member States to enact merger controls based on

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161. *Id.*
162. This proposal is for uniformity, and the creation of a new regulation governing takeovers. However, it is beyond the scope of this Comment to determine the regulation, and which tactics and defenses will be legal. For further reading on individual takeover strategies and defenses, see generally GAUGHAN, *supra* note 6 and STANLEY FOSTER REED & ALEXANDRA REED LAJOUX, THE ART OF M&A: A MERGER ACQUISITION BUYOUT GUIDE (2d ed. 1995).
the EU Merger Regulation. In this way, the EU or the national
governments can detect and break up concentrations that are not
large enough or strong enough to affect competition on a
Community-wide level, but which still may affect competition on a
national level, or between two Member States.

The EU must also create a standardized takeover regulation
that addresses the takeover tactics and defenses that the EU
would allow during hostile takeovers. This would increase
uniformity in the EU and would decrease the forum-shopping that
occurs due to inconsistencies among Member States’ national laws.
This uniformity of reformation would also allow for a smoother-
running common market that would be more in line with the
purposes set forth in the creation of the EU.