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## Guidelines for Mergers and Acquisitions in France

David J. Berger

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# Guidelines for Mergers and Acquisitions in France\*

David J. Berger\*\*

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## I. INTRODUCTION

Recent developments in France, including the opening of French markets and the privatization of many of the companies nationalized in the early 1980s, have made France one of the leading countries for investment by American companies seeking to enter Europe prior to the unified European market in 1992.<sup>1</sup> France's liberalization of foreign investment rules, as well as its lifting of foreign exchange controls, have further helped make French companies among the most attractive for both American and European investors.<sup>2</sup>

Reflecting the growing attractiveness of French companies, the

<sup>1</sup> The 1992 program requires the 12 European Community ("EC") states— Belgium, Denmark, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, the United Kingdom, and Germany—to create a single community for the free movement of goods, persons, services and capital by December 31, 1992. For an analysis of 1992 on the United States see U.S. Int'l Trade Commission, Pub. No. 2204, *The Effects of Greater Economic Integration Within the European Community on the United States* (1989). For a discussion of the historical bases for the 1992 program see Schildhaus, *1992 and the Single European Act*, 23 INT'L LAW. 549 (1989); see also Berger, *The European Markets Try to Coordinate, Unify Conflicting Merger Law*, Nat'l L.J., Nov. 6, 1989, at 14, col. 1 (discussing the effect of 1992 on cross-border takeovers); Berger, *EC To Lower Takeover Hurdles*, The Recorder, Apr. 10, 1990 (reviewing development of EC takeover market).

<sup>2</sup> France was the third most popular target nation for cross-border acquisitions within the EC in 1989. See Translink, EUROPEAN DEAL REV. (1990) [hereinafter EUROPEAN DEAL REVIEW]. Some experts have estimated that between 3000 and 5000 French companies will change hands each year over the next 10 years. See "France," in *International M & A*, INT'L FIN. L. REV. 41 (1991) [hereinafter France].

Paris stock market (the "Bourse") has grown substantially in recent years, while successive French governments have taken a number of important actions to modernize the French securities markets.<sup>3</sup> Paris has now become one of the leading stock exchanges on the European continent, and the privatization (and subsequent listing on the stock market) of more than sixty previously nationalized companies, with a value in excess of \$35 billion, has dramatically increased the Bourse's market capitalization. The Bourse is now second, behind the London stock market, as the most active European market in terms of companies listed. The Bourse's domestic market capitalization has grown from less than \$120 billion in 1987 to more than \$190 billion by the end of 1988.<sup>4</sup> This figure is likely to increase in the future as more recently privatized French companies seek additional capital.<sup>5</sup>

Merger and acquisition activity within France has also grown dramatically in recent years. While the bulk of this activity involved French companies as both buyer and seller, there were approximately 191 acquisitions of French companies by companies based outside of France in 1989, at a total disclosed value of more than \$6 billion.<sup>6</sup> French companies have also grown more acquisitive of foreign companies in recent years, with such well known American companies as Pennwalt Corporation, the European food businesses of RJR Nabisco, and Norton Company becoming targets for French companies.<sup>7</sup> The purchase by French companies of non-French assets has also increased demands by Americans and other foreigners for reciprocity when they attempt to acquire a French company, further pushing France to adopt even more favorable rules for foreign investment.

These developments have made France an important topic for American businesses interested in taking advantage of the single European market. However, American companies wishing to enter France are still troubled by the apparent complexity of French law, and the rela-

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<sup>3</sup> While there are seven stock exchanges in France, the main exchange in Paris handles over 95% of the transactions in the country.

<sup>4</sup> See 2 COOPERS & LYBRAND, *BARRIERS TO TAKEOVERS IN THE EUROPEAN COMMUNITY* 12 (1989) [hereinafter *TAKEOVERS IN THE EC*].

<sup>5</sup> *Id.* An additional reason for expecting the market's continued growth is the fact that historically many companies have been reluctant to use the equity markets to raise additional capital. Thus, France's market capitalization as a percentage of gross domestic product was approximately twenty percent in 1988, placing France ahead of only Germany, Italy, Spain and Greece among EC countries in this category. However, as issuing equity becomes more acceptable within France it can be expected that additional companies will seek to sell shares to the public.

<sup>6</sup> See *EUROPEAN DEAL REVIEW*, *supra* note 2; during the first six months of 1990 approximately 17% of the FFr 90.2bn takeover market represented foreign investment. France, *supra* note 2, at 41.

<sup>7</sup> See Graham, *Time to Take the War to the Enemy*, *Fin. Times*, Nov. 9, 1989, at 26.

tive lack of basic French legal texts and documents in English. This difficulty has been compounded by the substantial changes in French corporate law during the past several years, changes resulting from both EC regulations and internal economic conditions. These changes are likely to continue as the EC moves toward a unified market and as the French economy opens.

This article summarizes some of the French laws and regulations which are pertinent for an American company seeking to enter France or acquire a French company. The purpose of this summary is to provide a conceptual framework for those considering entry into the French market, while also providing a basic understanding for companies deciding how to structure an investment in France.

## II. THE FRENCH COMPANY — FORMS OF ORGANIZATION

French business organizations are principally governed by the Commercial and Civil Codes, particularly Law No. 66-537 of July 24, 1966<sup>8</sup> and Decree No. 67-236 of March 23, 1967.<sup>9</sup> France is also in the process of harmonizing its corporate law with various EC directives, a process which can be expected to continue.

There are two principle French business organizations: the Corporation (*Société Anonyme* or "SA"); and the Limited Liability Company (*Société à Responsabilité Limitée* or "SARL"). The relevant features of each of these types of business organizations will be discussed below. In addition, some alternative types of commercial enterprises will be reviewed. This section will conclude with an analysis of how different corporate group structures can act as a barrier to or facilitate the acquisition process.

### A. § 2.01. The French Corporation — SA

An SA is an organization created for a business purpose and has at least seven shareholders.<sup>10</sup> The SA is the French equivalent of the American corporation, and is the most common form for a business enterprise. An SA issues shares which represent equity participation in the organization, and shareholders generally are only liable for their capital contributions.

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<sup>8</sup> Law No. 66-537 of July 24, 1966, [1966] J.O. 26 Juillet at 6402 [hereinafter Law 66-537]. See also BERMANN, DEVRIES & GALSTON, FRENCH LAW — CONSTITUTION AND SELECTIVE LEGISLATION 24-40 (1989) (English translation in part).

<sup>9</sup> Decree No. 67-236 of Mar. 23, 1967, [1967] J.O. 24 Mars at 2843 [hereinafter Decree 67-236]. See also BERMANN, DEVRIES & GALSTON, *supra* note 8, at 41-42.

<sup>10</sup> Law 66-537, *supra* note 8, at art. 71.

### 1. Incorporation of an SA

While the incorporation of an SA is a rather straightforward procedure, the registration process can take between one and two months, particularly when the necessary clearance by the Treasury Department for a foreign investment is required.<sup>11</sup> An SA obtains legal status only upon registration in the Register of Commerce and Companies (*Registre du Commerce et des Sociétés*).<sup>12</sup> However, an SA is technically formed when all of the initial shareholders sign or approve the articles of incorporation.

#### a. Initial Articles of Incorporation

The articles of incorporation must include the form of the organization (*i.e.*, that shareholders elected to create an SA), duration (no more than ninety-nine years), name, purpose (simple reference to "any legal, commercial, financial or business activity" is not sufficient), registered capital, and a declaration of the number and classes of stock.<sup>13</sup> In addition, the articles must contain provisions relating to the management of the SA, including the appointment of the first members of the board of directors (*conseil d'administration*) or the supervisory board (*conseil de surveillance*),<sup>14</sup> the names of the senior officers, and the appointment of a statutory auditor (*commissaire aux comptes*).<sup>15</sup>

#### b. Initial Capital

The minimum legal capital for an SA at formation is FFfr 1.5 million if the SA is making a public offering and FFfr 250,000 if it is not making

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<sup>11</sup> See SIMÉON, MOQUET, BORDE & ASSOCIATES, *DOING BUSINESS IN FRANCE* § 5.02 (1989) [hereinafter *DOING BUSINESS IN FRANCE*]; PRICE WATERHOUSE, *DOING BUSINESS IN FRANCE* 69 (1989).

<sup>12</sup> Law 66-537, *supra* note 8, at art. 5. This is an official government publication. A registration number may be obtained from the Clerk of the Commercial Court of the department where the SA has its registered office (*siège social*).

<sup>13</sup> *Id.* at art. 2.

<sup>14</sup> For the differences between a board of directors and a supervisory board see *infra* notes 24-28 and 36-40 and accompanying text.

<sup>15</sup> Law 66-537, *supra* note 8, at arts. 88 and 98. The role of the statutory auditor in France is far more supervisory than that of the independent public accountant in the American company. For example, the statutory auditor's functions include verifying the accuracy of the company's financial statements, while also ensuring the proper functioning of the corporation and the equal treatment of shareholders. *Id.* at art. 228. See generally Tunc, *The French Commissaires aux Comptes*, 1984 J. BUS. L. 279 (1984); *DOING BUSINESS IN FRANCE*, *supra* note 11, at § 5.02. However, at least one recent authoritative voice has claimed that despite these auditors, "the statutory accounts of some [French] companies are frequently regarded as unreliable or misleading in terms of the UK concept of 'true and fair view,' even though the equivalent of that ("*image fidele*") is now a French legal requirement." TAKEOVERS IN THE EC, *supra* note 4, at 10.

such an offering.<sup>16</sup> Declaration of the number of shares and the par value per share is fixed by the articles of incorporation.<sup>17</sup> Similarly, where there are separate classes of stock issued by the SA, the rights and privileges of each class concerning, at a minimum, dividend, voting power, and liquidation preferences, must be stated in the articles.<sup>18</sup>

## 2. *Corporate Governance Issues*

French corporate law allows an SA to choose between either of the two fundamental alternative western methods of corporate governance: a one-tier system led by a board of directors (*conseil d'administration*) as is common in the United States<sup>19</sup> or the two-tiered system patterned after the German model.<sup>20</sup> The characteristics and distinctions of each method are discussed below.

### a. Single-Tier System

The traditional single-tier system provides for the SA to be administered by a board of directors composed of between three and fifteen members.<sup>21</sup> A director must also be a shareholder of the SA,<sup>22</sup> and directors may be removed (with or without cause) by a simple majority vote of the shareholders<sup>23</sup>.

#### i. *Role of the Board of Directors*

The board of directors has full power to direct the affairs of the SA.<sup>24</sup> Decisions are taken by a majority vote of the directors, and at least

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<sup>16</sup> Law 66-537, *supra* note 8, at art. 71. Generally, SAs do not make a public offering at the time of formation.

<sup>17</sup> *Id.* at art. 268.

<sup>18</sup> Decree 67-236, *supra* note 9, at art. 55.

<sup>19</sup> Prior to the adoption of Law 66-537, companies in France were governed by a board of directors. For a discussion of the effects of Law 66-537 on this tradition see Will, *Recent Modification in the French Law of Commercial Companies*, 18 INT'L & COMP. L.Q. 980 (1969).

<sup>20</sup> See Law 66-537, *supra* note 8, at arts. 89, 117-118. See Will, *supra* note 19, at 982-90.

<sup>21</sup> Law 66-537, *supra* note 8, at art. 89. However, an SA not listed on a stock exchange may not have more than twelve directors. *Id.* The articles may also provide that a number of directors (not to exceed one-third of the entire board) are to be elected by the employees. *Id.* at art. 97. These directors are in addition to, and are not counted for purposes of, determining the number of directors required by law. *Id.*

<sup>22</sup> *Id.* at art. 95. A director not owning shares at the time of his/her election must acquire shares within three months of the election or he/she is deemed to have automatically resigned his/her position. *Id.*

<sup>23</sup> *Id.* Removal of a director without cause will only subject a corporation to liability if the removal was done with an unlawful or harmful intent. See DOING BUSINESS IN FRANCE, *supra* note 11, at § 5.02.

<sup>24</sup> Law 66-537, *supra* note 8, at art. 89.



half of the board must be physically present for a quorum.<sup>25</sup> While the board has the general authority to take any action not prohibited by the SA's articles,<sup>26</sup> certain matters are within the exclusive authority of the board<sup>27</sup>. These matters include the calling of shareholder meetings, the preparation and review of financial statements, the preparation of an annual report of the SA's activities, and the appointment of the senior officers.<sup>28</sup>

## ii. Officers

The principal officer of an SA is the president (*président du conseil d'administration* or P.D.G.). The president must be a member of the board of directors, and the president's term of office runs concurrently with the president's term as a director.<sup>29</sup> The president is responsible for the daily management of the SA.<sup>30</sup> In addition, the president may be dismissed without cause,<sup>31</sup> and may request the board's appointment of a general manager (*directeur général*) to assist the president<sup>32</sup>.

## b. Two-Tier System

The alternative method for governing an SA is a two-tier system patterned after the German model of corporate governance.<sup>33</sup> The purpose of the two-tier system is to separate the management of the SA from the supervision of management.<sup>34</sup> In the two-tier system, the SA is man-

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<sup>25</sup> *Id.* at art. 100. Directors not present are deemed to have voted *against* any proposed resolution. *Id.* While a director may grant a proxy to another director for a specific vote, the granting of the proxy does not satisfy the physically present requirement. Decree 67-236, *supra* note 9, at art. 83.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at arts. 110, 158. See generally *DOING BUSINESS IN FRANCE*, *supra* note 11, at § 5.02.

<sup>29</sup> Law 66-537, *supra* note 8, at art. 110.

<sup>30</sup> *Id.* at art. 113.

<sup>31</sup> *Id.* at art. 110. Any provision, either in the articles or in an employment contract, which limits a board's right to dismiss the president is deemed unenforceable. *Id.*

<sup>32</sup> *Id.* at art. 115. An SA is limited to one general manager if its capital is less than FFfr 500,000; two general managers if its capital is between FFfr 500,000 and FFfr 10 million; and five general managers if it has capital in excess of FFfr 10 million, provided that three of the five general managers are administrators.

<sup>33</sup> *Id.* at arts. 118-150. For a review contrasting the French and German systems see Grossfield, *Management and Control of Marketable Share Companies*, 13 INT'L ENCYCLOPEDIA OF COMP. L. 6-28 (1972). The alternative system was adopted, at least in part, to assist in the unification of EC corporate law. See Andres, *Legal Aspects of Marketing Computer Software in France*, 3 SOFTWARE L.J. 21, 58-59 (1989); Will, *supra* note 19, at 985-90.

<sup>34</sup> The two-tier system is becoming increasingly popular among French companies, particularly those considering a restructuring of management. For example, Cie Financiere de Paribas, the French banking giant, adopted a two-tier system in response to its failed bid to acquire Cie de Navigation Mixte and the accompanying criticism of the company's management. See Browning &

aged by a directorate (*le directoire*), which exercises all corporate powers and is under the supervision (*contrôle*) of a supervisory board (*le conseil de surveillance*).<sup>35</sup>

*i. The Supervisory Board*

The principal task of the supervisory board is to oversee the actions of the directorate.<sup>36</sup> In order to accomplish this task, the board must receive regular reports from the directorate on the SA's operations,<sup>37</sup> receive and review an annual report and supporting documents from the directorate, and present annually to the shareholders its observations on the SA's operations and the directorate's functioning<sup>38</sup>. The supervisory board has plenary authority to conduct such verifications and audits as it deems necessary to conduct its oversight functions.<sup>39</sup> The supervisory board names the members of the directorate, and appoints the directorate's president.<sup>40</sup>

*ii. The Directorate*

The members of the directorate oversee the daily operations of the SA.<sup>41</sup> The directorate's power is limited only by provisions in the articles and the SA's corporate purpose.<sup>42</sup> The directorate is limited to seven members,<sup>43</sup> and a person can be a member of no more than two directorates<sup>44</sup>. A director's term of office may be between two and six years, and

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Echikson, *Paribas, Stung by Failed Takeover Bid is Preparing a Management Shake-up*, Wall Street Journal, March 27, 1990, at A17.

<sup>35</sup> Law 66-537, *supra* note 8, at art. 119. An SA must inform the public that it is governed by a two-tier system by having the following announcement on all publications: *Société anonyme régie par les articles 118 à 150 de la loi sur les sociétés commerciales* (corporation governed by articles 118-150 of the law on commercial corporations). See Decree 67-236, *supra* note 9, at art. 56.

<sup>36</sup> Law 66-537, *supra* note 8, at art. 128. The supervisory board appoints one of its members as president. *Id.* at art. 138.

<sup>37</sup> *Id.* The directorate must make reports, at a minimum, on a quarterly basis. *Id.*

<sup>38</sup> *Id.* at art. 128.

<sup>39</sup> *Id.* at art. 128. A member of the supervisory board must also be a shareholder, and cannot be a member of the directorate. *Id.* at arts. 130, 133.

<sup>40</sup> *Id.* at art. 120. The supervisory board also approves the issuance of guarantees for the SA, and must approve a total or partial transfer of the SA's shares or real estate. *Id.* at art. 128.

<sup>41</sup> *Id.* at art. 124.

<sup>42</sup> *Id.* Any limitations imposed upon the directorate by the articles are enforceable only by shareholders or the supervisory board, and not by third parties. *Id.*

<sup>43</sup> If the SA is not a public company, the directorate can contain no more than five members, while if the SA has capital of less than FFfr 1 million, then a single director (*Directeur Général Unique*) may be appointed. *Id.* at arts. 119-120.

<sup>44</sup> A director must receive the authorization of his/her supervisory board before accepting an appointment to a second directorate. *Id.* at art. 127.

where not specified in the articles, is four years.<sup>45</sup> A director may be removed with or without cause only by the shareholders upon the recommendation of the supervisory board.<sup>46</sup> While the directorate takes decisions only upon majority vote, the president has exclusive authority to deal with third parties.<sup>47</sup>

### 3. *Liability of Officers and Directors*

In France, director liability is based primarily on the concept of negligence or mismanagement.<sup>48</sup> Article 244 of Law 66-537 subjects directors and officers of an SA to civil liability if there is a violation of law or an act taken which is contrary to the SA's articles, or for faults committed during their management.<sup>49</sup> Officers and directors are jointly and severally liable (*solidairement*) to the corporation and/or third parties for any damages or losses resulting from such actions.<sup>50</sup> A shareholder may bring an action either individually or derivatively on behalf of the corporation,<sup>51</sup> and a shareholder vote attempting to limit or remove director liability is presumptively invalid.<sup>52</sup> While the liability of a member of the supervisory board may be more limited because of the member's limited role in directing the SA's affairs,<sup>53</sup> the general manager of an SA may be subject to the same liability as a director, and is personally liable for any acts of mismanagement for which the general manager was personally responsible.<sup>54</sup>

Article 244 has been strongly criticized because of its chilling effect on managerial risk-taking.<sup>55</sup> As one commentator stated, "[i]t is hard to imagine a situation where a direct loss resulting from the violation of an applicable text would not be covered by [Article 244]."<sup>56</sup>

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<sup>45</sup> *Id.* at art. 122.

<sup>46</sup> *Id.* at art. 121.

<sup>47</sup> *Id.* at art. 126. However, the articles may permit the supervisory board to appoint general managers to also represent the SA in its dealings with third parties. *Id.*

<sup>48</sup> See Berger, *Exporting the Twin Towers: The Development of a Transnational Business Judgment Rule*, 4 ST. LOUIS U. PUB. L. REV. 169 (1990); *Paris Colloquium on Corporate Governance*, reprinted in 6 J. COMP. BUS. & CAP. MKTS. L. 199 (1984) [hereinafter *Paris Colloquium*].

<sup>49</sup> Law 66-537, *supra* note 8, at art. 244.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at art. 245; see also Decree 67-236, *supra* note 9, at art. 200. The statute of limitations for a shareholder action is three years. Law 66-537, *supra* note 8, at art. 247.

<sup>52</sup> *Id.* at art. 246.

<sup>53</sup> *Id.* at art. 250. Thus, the liability of a supervisory board is limited to its failure to properly supervise management or to disclose to shareholders any personal knowledge it may have of crimes or serious mismanagement. *Id.*

<sup>54</sup> *Id.* at art. 244.

<sup>55</sup> Berger, *supra* note 48, at 175-76; *Paris Colloquium*, *supra* note 48, at 257-80.

<sup>56</sup> MILLER, *France*, in INTERNATIONAL CAPITAL MARKETS AND SECURITIES REGULATION 7-33, 34 (H. Bloomenthal ed. 1989).

French corporate law can also subject officers and directors to criminal liability. Corporate actions which can result in criminal liability include the declaration of an improper or unauthorized dividend, the creation of fraudulent financial statements, or the failure to prepare (or cause to be prepared) proper financial statements for the annual report.<sup>57</sup>

#### 4. *Mandatory Disclosures*

The disclosures required from an SA vary both with the SA's size and whether or not the SA is a public company.

##### a. *Information Available to Shareholders*

Certain information concerning the SA's financial and operating results must be made available to shareholders, regardless of the SA's size. This information includes the SA's balance sheets, income statements, salaries of its highest paid employees, and any reports of management or the SA's statutory auditors.<sup>58</sup> All of this information must cover the past three fiscal years.<sup>59</sup>

Shareholders holding at least ten percent of an SA's registered capital have a right to additional information in two different ways.<sup>60</sup> First, twice a year these shareholders may submit written questions to the president concerning any matter involving the continued operation of the SA.<sup>61</sup> The president must respond in writing to these questions within one month of receipt.<sup>62</sup>

Second, ten percent of the shareholders may obtain an order from the Commercial Court appointing an expert to prepare a report on one or more aspects of the SA's operation.<sup>63</sup> The report can be on any issue which concerns the corporation, and the court can order that the SA pay for the report.<sup>64</sup> Upon completion, the report must be sent to, among

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<sup>57</sup> See, e.g., Law 66-537, *supra* note 8, at arts. 437-39. Violation of these provisions may result in up to five years imprisonment. *Id.*

<sup>58</sup> *Id.* at art. 170; see also *DOING BUSINESS IN FRANCE*, *supra* note 11, at § 5.02.

<sup>59</sup> Law 66-537, *supra* note 8, at art. 170. Shareholders may also obtain lists of the board of directors or supervisory board during this period, the attendance sheets and minutes of any shareholders meeting, and a certified copy of the articles. *Id.* at arts. 153, 168 and 170.

<sup>60</sup> For a more general discussion of the role of a substantial minority shareholder under French Law see Tunc, *The Minority Expert in French Company Law*, 1984 J. Bus. L. 83 (1984).

<sup>61</sup> Law 66-537, *supra* note 8, at art. 226.

<sup>62</sup> *Id.* A holder of less than ten percent of stock may, pursuant to the rules of civil procedure, obtain a judicial order allowing for limited discovery on an issue before the initiation of litigation, or in a summary proceeding (*sur requête ou en référé*) to determine if litigation is warranted. C. Pr. Civ., at art. 145.

<sup>63</sup> Law 66-537, *supra* note 8, at art. 226.

<sup>64</sup> *Id.*

others, the petitioning shareholder, the SA's statutory auditor, and (if appropriate) the public prosecutor.<sup>65</sup> The report must also be attached to and published with the annual report or notice to shareholders of the next annual meeting.<sup>66</sup>

b. Additional Disclosures Required of Certain Companies

Additional periodic filing requirements are mandated for companies having a net turnover (*i.e.*, sales minus taxes and rebates) of more than FFfr 120 million or more than 300 employees.<sup>67</sup> These disclosures must be reviewed and approved by the board of directors or supervisory board.<sup>68</sup> It is expected that these disclosure provisions will be applied to an increasing number of corporations, particularly in light of disclosure requirements presently being considered by the European Economic Community.<sup>69</sup>

c. Additional Disclosures for Public Companies

All public corporations must publish their annual financial statements (including profit statements, loss statements, and consolidated financial statements) and portfolio holdings within four months after the end of the company's fiscal year.<sup>70</sup> A public company must also provide quarterly disclosures of its net turnover during the proceeding quarter, and biannual profit and loss statements for the previous six month period.<sup>71</sup>

B. § 2.02. The Limited Liability Company— SARL

An SARL is an organization created for a business purpose which must have at least two and not more than fifty shareholders.<sup>72</sup> Shareholders of an SARL are liable only to the extent of their capital contributions. An SARL is commonly used by small or newly formed companies because it offers limited liability for shareholders while also allowing for

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Decree 67-236, *supra* note 9, at art. 244.

<sup>68</sup> *Id.* If the statements appear unreasonable, the statutory auditor must, within one month of receipt, prepare a report for the board. This report must be provided to shareholders at the next annual meeting. *Id.*

<sup>69</sup> See DOING BUSINESS IN FRANCE, *supra* note 11, at § 5.02.

<sup>70</sup> See Decree 67-236, *supra* note 9, at arts. 294-97. Companies must also state whether or not the accounts have been verified by the statutory auditor. *Id.*

<sup>71</sup> *Id.* This information may be obtained from the Companies and Commercial Registry.

<sup>72</sup> Law 66-537, *supra* note 8, at art. 36. A special type of SARL, an *Entreprise Unipersonnelle à Responsabilité Limitée* ("EURL") can be created with only one shareholder. See *infra* notes 109-114 and accompanying text.

a streamlined corporate governance structure.<sup>73</sup>

### 1. *Creation and Purpose of an SARL*

The incorporation of an SARL is similar in process (and time) to an SA.<sup>74</sup> Thus, an SARL is technically formed when the initial shareholders sign the articles of incorporation, but does not obtain legal recognition until it is registered in the Register of Commerce and Companies.<sup>75</sup>

#### a. Initial Articles of Incorporation

The initial articles may include any provisions pertaining to corporate governance as the shareholders choose, including methods for selecting a managing director, shareholder voting, and limiting the sale or transfer of shares.<sup>76</sup> The initial articles must contain,<sup>77</sup> at a minimum, the name, purpose,<sup>78</sup> duration,<sup>79</sup> registered office, and registered capital<sup>80</sup> of the SARL.

#### b. Initial Capital

The minimum legal capital for an SARL at formation is FFfr 50,000.<sup>81</sup> The capital of an SARL is divided into shares with a minimum par value of FFfr 100.<sup>82</sup> An SARL cannot make a public offering of its shares, and is prohibited from issuing negotiable securities.<sup>83</sup>

### 2. *Corporate Governance Issues*

An SARL is governed by two principal bodies: a managing director (*gérant*) and the shareholders. The duties and responsibilities of each group are summarized below.

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<sup>73</sup> The SARL was introduced into France in 1925, and was based upon the German *Gesellschaft mit beschränkter Haftung* [GmbH]. As of 1985 there were approximately 430,000 SARLs versus approximately 270,000 SAs in France. Andres, *supra* note 33, at 54-55.

<sup>74</sup> See *supra* notes 11-18 and accompanying text.

<sup>75</sup> Law 66-537, *supra* note 8, at art. 5.

<sup>76</sup> *Id.* at arts. 49-51 and 59.

<sup>77</sup> See generally *id.* at arts. 2, 38; DOING BUSINESS IN FRANCE, *supra* note 11, at § 5.03.

<sup>78</sup> As with an SA, reference to "any legal, commercial, financial or business activity" is not sufficient. In addition, there are certain businesses which an SARL may not conduct. See Law 66-537, *supra* note 8, at art. 490.

<sup>79</sup> The maximum duration of an SARL is ninety-nine years. *Id.* at art. 2.

<sup>80</sup> See *infra* text accompanying notes 81-83.

<sup>81</sup> Law 66-537, *supra* note 8, at art. 35.

<sup>82</sup> Decree 67-236, *supra* note 9, at art. 21.

<sup>83</sup> Law 66-537, *supra* note 8, at arts. 42-43.

a. Managing Director

The managing director oversees the daily operations of the SARL.<sup>84</sup> Full authority is given to the managing director<sup>85</sup> to bind the SARL in its dealings with third parties,<sup>86</sup> even though the managing director does not have to be a shareholder of the SARL<sup>87</sup>. The managing director is appointed either in the articles or by simple majority vote of the shareholders,<sup>88</sup> and may be removed at any time, with or without cause, by majority vote<sup>89</sup>. However, managing directors removed without cause may bring a suit for wrongful termination against the SARL.<sup>90</sup> Finally, it is important to include in the articles a provision limiting the time period a managing director is appointed for; absent such a provision, a managing director is appointed for the life of the SARL.<sup>91</sup>

b. Shareholders

Shareholders have ultimate power over the SARL because, unlike the SA<sup>92</sup> (or the American corporation), there is no intermediary body between the manager(s) and shareholders. A shareholder meeting must be held within six months of the close of the fiscal year, at which time shareholders will receive the general manager's report on the SARL's operations and financial statements (including balance sheets, assets and liabilities, and income statements) for the previous year.<sup>93</sup> Decisions can be made by shareholders representing more than one-half the SARL's capital, and if a majority is not obtained then a second meeting is held at which decisions are adopted by a simple majority of the votes cast, regardless of the number of shares present or represented.<sup>94</sup>

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<sup>84</sup> *Id.* at arts. 13-14 and 49.

<sup>85</sup> A managing director must be a natural person and cannot be a legal entity (*i.e.*, another SARL). *Id.* at art. 49.

<sup>86</sup> The articles may limit this authority by, for example, requiring certain types of decisions to be voted upon by shareholders. *Id.* However, third parties may hold the SARL liable for agreements entered into with the managing director, even if the articles limited the managing director's power to take such action, unless it is shown that the third party knew of this limitation. *Id.*

<sup>87</sup> *Id.* In contrast, the President of an SA must be a shareholder. *See supra* notes 21-22 and 29 and accompanying text.

<sup>88</sup> Law 66-537, *supra* note 8, at art. 49. This majority requirement may be increased in the articles. *Id.* at art. 55.

<sup>89</sup> *Id.* This majority vote requirement may also be increased.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at art. 49. *See generally* Rawlings, *French Company Law: Choice of Corporate Form Available to the Foreign Investor*, 30 BUS. LAW. 1251 (1975).

<sup>92</sup> For a discussion of the SA see *supra* notes 10-18 and accompanying text.

<sup>93</sup> Law 66-537, *supra* note 8, at art. 56.

<sup>94</sup> *Id.* at art. 59. However, the shareholders may amend the articles to prevent decisions from being taken without a quorum present.

*i. Shareholder Action by Written Consent*

The SARL's articles may provide that any shareholder action (except for the approval of the general manager's statement of operations and financial statements provided at the annual meeting) may be taken by written consent (*consultation écrite*).<sup>95</sup> Resolutions considered by this method are approved on the same basis as if they were presented to shareholders at an annual meeting.<sup>96</sup>

*ii. Extraordinary Shareholder Meetings*

Extraordinary shareholder meetings are held when necessary to amend the SARL's articles.<sup>97</sup> Decisions taken at an extraordinary general meeting require the affirmative vote of three-fourths of the SARL's capital.<sup>98</sup>

*3. Liability of Officers*

As with the officers and directors of an SA,<sup>99</sup> the managing director of the SARL may be subject to significant liability for certain acts of mismanagement or for violations of the law or the SARL's articles<sup>100</sup>. A managing director may also be held criminally liable for declaring dividends when the SARL has insufficient profits or for providing fraudulent or inaccurate financial statements to shareholders.<sup>101</sup>

*4. Comparison Between an SA and an SARL*

An SARL is typically chosen as the investment vehicle for smaller businesses, start-up ventures or family-owned businesses. Some particular advantages of an SARL over an SA include simpler management structure (*i.e.*, management of an SARL may be entrusted to a single managing director, and shareholder action may be taken by written consent), a lower minimum amount of registered capital for incorporation (FFr 50,000 for an SARL versus FFr 250,000 for a private SA), and an

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<sup>95</sup> *Id.* at art. 59.

<sup>96</sup> *Id.* at arts. 59-60. The articles may also impose "super-majority" requirements on such action. For the technical requirements necessary for any such solicitation see Decree 67-236, *supra* note 9, at arts. 40-42.

<sup>97</sup> Law 66-537, *supra* note 8, at art. 60.

<sup>98</sup> *Id.* A provision in the articles requiring a higher percentage of approval is void. *Id.* Certain actions taken at extraordinary meetings, including the sale of stock to third parties or an increase in shareholder liability, may require additional majority or even unanimous approval of the shareholders. See, e.g., *id.* at arts. 45, 60. See generally *DOING BUSINESS IN FRANCE*, *supra* note 11, at § 5.03.

<sup>99</sup> See *supra* notes 48-57 and accompanying text.

<sup>100</sup> Law 66-537, *supra* note 8, at art. 52. For example, liability may be imposed for certain self-dealing transactions, waste of assets or corporate funds, and failure to pay required dividends.

<sup>101</sup> See *id.* at arts. 423-31.



SARL may be incorporated with only one shareholder, while an SA requires at least seven. In addition, an SARL does not have to appoint a statutory auditor unless it meets certain size requirements, while an SA must appoint a statutory auditor at the time of incorporation and must have two such auditors if it is a public company required to publish consolidated financial statements.<sup>102</sup>

In contrast, an SA is commonly used by larger organizations, and has more status within France. The advantages of an SA are primarily the result of the fact that SAs are created for large organizations. Some advantages of the SA over the SARL include the ease with which shares of an SA may be transferred or purchased,<sup>103</sup> the SA's ability to issue negotiable securities or debentures which may not be issued by an SARL,<sup>104</sup> and the ease with which changes in management may be made.<sup>105</sup>

### 5. *Converting the SARL into an SA*

Transforming an SARL into an SA is a relatively simple process. Assuming the prerequisites for the formation of an SA are satisfied<sup>106</sup> and that the SARL has had its financial statements properly reviewed and approved for the prior two fiscal years, an SARL may be converted into an SA if approved by shareholders controlling three-fourths of the SARL's capital<sup>107</sup>. The newly converted SA would then have the authority to exchange the non-negotiable shares of the old SARL for negotiable securities.<sup>108</sup>

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<sup>102</sup> SARLs must appoint statutory auditors if two of the following three tests are satisfied: they have assets of more than FFfr 10 million; pre-tax turnover of more than FFfr 20 million; or more than fifty employees. See Law 66-537, *supra* note 8, at art. 64; Decree 67-236, *supra* note 9, at arts. 12, 43.

<sup>103</sup> For example, shares of an SARL normally may not be sold or transferred to third parties without the prior approval of shareholders holding at least three-fourths of the SARL's capital. See Law 66-537, *supra* note 8, at art. 45. SAs are not subject to this prohibition unless it is specifically stated in their articles. In addition, an SARL may entirely prohibit the sale or transfer of shares, a right the SA does not have. See *id.* at art. 47. Finally, the sale of shares of an SARL is subject to a 4.8% registration tax, while the sale of an SA's shares are generally not subject to this tax.

<sup>104</sup> See *id.* at arts. 42-43.

<sup>105</sup> For example, the general manager of the SARL may maintain an action for damages if his/her dismissal was for other than good issue, while an SA's officers have no such right.

<sup>106</sup> The three most important are a minimum of seven shareholders, capital of at least FFfr 250,000, and shares with a par value of FFfr 100.

<sup>107</sup> Only a simple majority of the SARL's capital is required if the SARL has a net asset value in excess of FFfr 5 million. See *id.* at arts. 60, 69.

<sup>108</sup> *Id.* at art. 449.

C. § 2.03. Alternative Commercial Structures<sup>109</sup>

While the SA and the SARL are the two most common forms of business enterprise, there are a number of other alternative forms of French business organizations which may be useful for the foreign investor. The three most significant are the Single Shareholder Limited Liability Company (*Entreprise Unipersonnelle à Responsabilité Limitée* or "EURL"), the General Partnership (*Société en Nom Collectif* or "SNC"<sup>110</sup>), and the Economic Interest Group (*Groupement d'Intérêt Economique* or "GIE"). The salient features of each of these forms of organization are outlined below.<sup>111</sup>

1. EURL

An EURL is considered to be a special type of SARL because it has only one shareholder.<sup>112</sup> An EURL is subject to all of the regulations applicable to an SARL unless the regulation explicitly provides otherwise.<sup>113</sup> The primary differences between an SARL and an EURL is that the sole shareholder controlling the EURL may not grant proxies or delegate power, and all decisions made by the sole shareholder must be recorded pursuant to statutory requirements.<sup>114</sup>

2. SNC

An SNC is the French equivalent of the American partnership. Partners of the SNC are jointly and severally liable for the SNC's debts, the SNC is not subject to corporate income tax, and the SNC does not have to publicly release its financial results.<sup>115</sup> An SNC is typically used

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<sup>109</sup> In addition to commercial organizations, it is important to note that certain profit-seeking activities are considered "civil" in nature, and thus may be operated through a civil company (*Société Civile* or "SC"). Such activities include law firms, some types of real estate syndications, and other non-commercial activities. See generally *DOING BUSINESS IN FRANCE*, *supra* note 11, at § 5.01 (discussing differences between civil and commercial activities).

<sup>110</sup> Limited partnerships (*Sociétés en commandite par actions* or "SCA") have also gained in popularity in recent years, largely as a result of their virtual immunity from takeover bids. Thus, such well-known companies as Hermes, EuroDisneyland and Yves Saint-Laurent have recently selected the SCA form of organization. However, an existing company which wishes to modify its articles to become an SCA must give existing shareholders the right to "opt-out," thereby creating significant difficulties for the company. See Law No. 89-531 of August 2, 1989, at art. 15, [1989] J.O. 4 Aout at 9822 [hereinafter Law 89-531].

<sup>111</sup> For a more exhaustive discussion in English of these and other French corporate structures see *DOING BUSINESS IN FRANCE*, *supra* note 11, at ch. 5.

<sup>112</sup> Single-member private companies were permitted in France only in 1985, under Law No. 85-697 of July 11, 1985, [1985] J.O. 12 Juillet at 7862.

<sup>113</sup> Ministerial Response [1988] J.O. Deb. A.N. 1043.

<sup>114</sup> See Law 66-537, *supra* note 8, at art. 60.

<sup>115</sup> *Id.* at art. 10.

either for joint ventures or by investors who wish to remain anonymous.

An SNC is operated by one or more managing directors (*gérants*).<sup>116</sup> All partners are automatically managing directors and, in addition, the managing directors may appoint other managing directors who are not partners.<sup>117</sup> Removal of a managing director/ partner appointed in the articles<sup>118</sup> requires a unanimous vote of all of the partners, and results in automatic dissolution of the SNC unless the articles otherwise provide or the remaining partners unanimously vote to continue the SNC<sup>119</sup>. Removal of a non-partner managing director may be accomplished by a simple majority vote.<sup>120</sup> Managing directors have all of the authority necessary to run the SNC and, while the articles may limit this authority, any such limitation is ineffective against third parties unless the third party has knowledge.<sup>121</sup> As with an SA or an SARL, managing directors may be liable for negligent mismanagement, and a non-partner managing director may be liable for the debts of a bankrupt SNC. An SNC must hold a partnership meeting at least annually to review and approve the SNC's financial statements,<sup>122</sup> and must also have additional meetings if presented with a proper demand from a partner<sup>123</sup>. However, the articles may allow the SNC to take action by written consent.<sup>124</sup>

### 3. *GIE*<sup>125</sup>

The GIE is similar to a partnership in that it allows two or more individuals<sup>126</sup> to join their resources to expand or increase their individual activities. The activities of a GIE are considered to be an economic extension of its members; thus, the GIE is not a profit-seeking enterprise, but rather attempts to allow each member to profit individually from the

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<sup>116</sup> *Id.* at art. 12.

<sup>117</sup> *Id.* However, the SNC's articles may limit the right of partners to be managing directors or to name non-partners as managing directors. *Id.* A corporation can be a managing partner.

<sup>118</sup> Although an SNC acts like a partnership, it is a corporate entity and as such is governed by its articles of incorporation (*statuts*), as are the SA and SARL. *Id.* at art. 2.

<sup>119</sup> *Id.* at art. 18. If the partner/managing director is not named in the articles, removal still requires a unanimous vote by the other partners but does not result in dissolution. *Id.*

<sup>120</sup> *Id.* Removal of a managing director without cause may give rise to a cause of action for damages. *Id.*

<sup>121</sup> *Id.* at arts. 13-14.

<sup>122</sup> *Id.* at art. 16.

<sup>123</sup> *Id.* at art. 15.

<sup>124</sup> *Id.* Unless otherwise set forth in the articles, all resolutions require unanimous consent of the partners for approval. Certain decisions, including the removal or appointment of new managing directors and the transfer of partnership shares, may only be determined by a majority which the bylaws establish. *Id.*

<sup>125</sup> The GIE was created by Ordinance 67-821 of September 23, 1967 [hereinafter Ordinance 67-821], and has rapidly gained acceptance in France and in the EEC.

<sup>126</sup> Legal entities (*i.e.*, SAs, SARLs) may form a GIE.

efforts of the GIE.<sup>127</sup> Typical activities for which a GIE is used include research and development, and joint commercialization projects, such as the Airbus Industrie consortium created by French, English and German airline manufacturers.

A GIE is created by a contract between its members.<sup>128</sup> It is operated by one or more managers (*administrateurs*),<sup>129</sup> who are given authority to run the GIE<sup>130</sup>. However, members of the GIE have plenary powers to meet and make any or all decisions relating to the GIE.<sup>131</sup> The ability of members to withdraw and new members to join is determined by the original contract or subsequent agreement among the members.<sup>132</sup> A GIE may not issue negotiable shares, but it may issue debentures provided that all of its members are companies which may themselves issue debentures.<sup>133</sup>

#### D. § 2.04. Corporate Group Structures as a Barrier to the Acquisition Process

As a practical matter, certain types of corporate group structures can often impede or prevent the acquisition process. For example, cross-ownership of shares in friendly hands can often prevent an unwanted bidder from succeeding.<sup>134</sup> This section briefly outlines some structural impediments to acquisitions in France.

##### 1. *Hardcore Shareholdings*

In an attempt to protect a number of the newly privatized companies from being the targets of unwanted takeover bids, the government

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<sup>127</sup> Ordinance 67-821, *supra* note 125, at art. 2. Accordingly, any profits made by the GIE accrue directly to the members. The members of the GIE are also jointly and severally liable for the debts of the GIE. *Id.* at art. 4.

<sup>128</sup> *Id.* at art. 6.

<sup>129</sup> *Id.* at art. 9. Managers do not have to be members of the GIE. *Id.*

<sup>130</sup> This authority may be limited by the contract which created the GIE, or by subsequent decisions of the members. *Id.*

<sup>131</sup> Unless so specified in the GIE's contract, decisions of the members require a unanimous vote.

<sup>132</sup> *Id.* at art. 7.

<sup>133</sup> *Id.* at art. 5.

<sup>134</sup> In America, this type of cross-holding where a target (or potential target) places a block of stock in the hands of an investor friendly to management is termed a "white squire" arrangement. See generally D. BLOCK, N. BARTON & S. RADIN, *THE BUSINESS JUDGMENT RULE* 140-44 (2d ed. 1988). Some recent examples of white squire arrangements include Corporate Partners' purchase of \$300 million of voting preferred stock from Polaroid during the pendency of a hostile tender offer by Shamrock Holdings, see *Shamrock Holdings v. Polaroid Corp.*, 559 A.2d 278 (Del. Ch. 1989) and General Cinema's purchase of Carter Hawley Hale's preferred stock to defeat a takeover attempt by The Limited, see *Carter Hawley Hale Stores, Inc. v. The Limited, Inc.*, 587 F. Supp. 246 (C.D. Cal. 1984).

sold a significant block of stock to "hardcore friendly shareholders" (*noyau dur*). The *noyau dur* were put in place to give these privatized companies some stability after a seven year period in which they had been both nationalized and privatized.<sup>135</sup> As a result of this policy, it is estimated that as much as twenty to thirty percent of the equity of the larger French public companies is owned by various *noyau dur*.<sup>136</sup> The *noyau dur* had an obligation to retain these holdings, for at least two years, and can only sell them to other similarly situated shareholders.<sup>137</sup> In return for their agreement to be long-term friendly investors, the *noyau dur* obtain, in effect, a blocking control position for only a small premium above the (low) initial offering price.<sup>138</sup>

The use of *noyau dur* has been successful. As one knowledgeable source commented, "a lot of companies have got to the point where 30%, 40%, 50% of the company is in friendly hands."<sup>139</sup> However, the policy is also coming under increasing criticism, particularly as Europeans attempt to enter the French market through acquisitions. In addition, as the time period that companies were privatized increases, the less the justification for *noyau dur* exists.<sup>140</sup>

Finally, it is worth noting that *noyau dur* could potentially result in a substantial block of stock being in unfriendly hands. The French government has previously considered attempting to break down the *noyau dur*, and while the government considered allowing the shares to be transferred as a block to new "friendly" shareholders, such friendly shareholders have been known to turn hostile.<sup>141</sup>

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<sup>135</sup> See *supra* notes 1-7 and accompanying text.

<sup>136</sup> See TAKEOVERS IN THE EC, *supra* note 4, at 15. Some companies which have *noyau dur* shareholders include Paribas, which has a stable group of seventeen shareholders, and the French television channel, TFI, which has eighteen. For a recent listing of nine large French companies and their *noyau dur* see Jacquillat, *Nationalization and Privatization in Contemporary France*, *Gov't Union Rev.* 21, 46 (1987).

<sup>137</sup> TAKEOVERS IN THE EC, *supra* note 4, at 15.

<sup>138</sup> Jacquillat, *supra* note 136, at 41-5. The average initial returns on French privatized companies were substantially higher (with a smaller risk given the operating history of these companies) than ordinary initial public offerings. See generally *id.*

<sup>139</sup> Evans, *France's M&A Quandary*, *EUROMONEY*, March 3, 1989, at 21 (quoting William Lee, Managing Partner in the Paris office of the law firm Shearman & Sterling).

<sup>140</sup> See, e.g., Jonquière, *The Break With the French Tradition*, *Fin. Times*, Jan. 17, 1990, § 1, at 24.

<sup>141</sup> While Law No. 89-465 of July 10, 1989, J.O. July 11, 1989 at 8671, empowers the Ministry of Economy to block the acquisition by an investor seeking to acquire more than 10% of a privatized company if warranted by the protection of "national interests," the authority will lapse as of January 1, 1993. In America, a most notable example of a friendly shareholder turning unfriendly occurred when Warner, in response to a threatened takeover by Rupert Murdoch, sold a 19 percent equity interest to Chris-Craft. See *News International Plc v. Warner Communications, Inc.*, No. 7420 (Jan. 12, 1984) (LEXIS, Del. library, Delch file). Chris-Craft's President, Herb Siegel, eventually became

## 2. Cross-Holdings

Many SAs are generally thought to be controlled by a relatively small number of shareholders. One estimate suggests that up to fifty-seven percent of the 200 largest public and private French industrial and commercial companies are controlled by family groups, with this percentage being even higher for small companies.<sup>142</sup> It is not uncommon for French companies to attempt to sell a large block of stock to a friendly investor, such as a company's key supplier or the company's bank. These alliances can include significant cross-shareholdings, or the issuance of stock warrants or options to allies which can be converted to common (or even super-voting) stock in the event that a takeover offer for the issuer company is announced.<sup>143</sup>

A variation of this cross-holding technique is a company's use of a subsidiary as a holding company to hold up to ten percent of the parent company's stock. The practice, termed "*auto-contrôle*," is widely used in France by such well-known companies as Pernot-Ricard, Paribas and CGE, the French telecommunications and electronic company. *Auto-contrôle* has been described as "capitalism without capital," and has been widely criticized within France.<sup>144</sup>

## 3. Use of Super-Voting Stock

Another way that French companies may seek to maintain control in friendly hands is to separate voting rights from shareholdings. For example, French law allows the articles of an SA to increase the voting

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a major critic of Warner Chairman Steven Ross, a fact which influenced Warner's decision to merge with Time. In France, a similar situation can be found in the battle for control over Moët Hennessy Louis Vuitton (LVMH), where Bernard Arnault was originally invited onto the LVMH Board and became a large shareholder at the request of LVMH's former Chairman, Henry Racamier, only to turn against Racamier and seek control of LVMH. See, e.g., Graham, *Champagne War Bubbles Over*, Fin. Times, November 14, 1989, § 1, at 29. Arnault eventually was successful in this battle. See Greenhouse, *Vuitton's Chief Quits, Ending a Bitter Feud*, N. Y. Times, April 27, 1990, at D1, col 4.

<sup>142</sup> TAKEOVERS IN THE EC, *supra* note 4, at 15.

<sup>143</sup> *Id.* at 16. For example, the large French food company BSN recently issued bonds with warrants convertible into common stock in the event of an unfriendly offer in an attempt to dilute the holding of any unfriendly party. Similarly, Société Générale used an alliance of shareholders to prevent an unwanted acquisition. See Evans, *supra* note 139, at 20-21.

<sup>144</sup> *Id.*, see generally Law 66-537, *supra* note 8, at art. 359. Paribas' subsidiary, Bancaire, owns 6 percent of its parent, while Pernod-Ricard's subsidiary controls 10 percent. However, under recently adopted legislation, after July 1, 1991 a target may not vote shares owned by companies that are directly or indirectly controlled by the target. See *infra* notes 228-46 and accompanying text. Thus, it is anticipated that the "*auto-contrôle*" practice will largely disappear as a result of this legislation.

rights of long-term shareholders.<sup>145</sup> This ensures that long-term shareholders, generally friendly to management, have increased control over the company.<sup>146</sup>

SAs may also issue up to twenty-five percent of their capital as either non-voting preferred stock (*actions à dividende prioritaire sans droit de vote*) or investment certificates (*certificat d'investissement*) where the voting rights associated with these certificates are issued separately to existing shareholders and are subject to significant transfer restrictions.<sup>147</sup> Non-voting preferred stock must have preference in terms of receiving dividends and liquidation rights over the common stock.<sup>148</sup>

Finally, it is possible, though officially discouraged, for a company to put an absolute limit on the amount of voting power of any one shareholder. For example, Pernod-Ricard limits a shareholder from controlling more than thirty percent of the voting rights of the company, regardless of the number of shares held.<sup>149</sup>

#### 4. Conclusion

One authority has claimed that, as a result of the use of various structures to place control in friendly hands, "relatively few listed companies are in fact susceptible to a takeover without the agreement of management or a restricted group of dominant shareholders."<sup>150</sup> In addition, where an acquisition is proposed by a foreign-owned entity, particularly when controlled by non-EC investors, the French target may persuade the government to delay the necessary approval of the transaction to allow the target to find a "French solution."<sup>151</sup> Yet these structures are changing, and the French market is becoming increasingly

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<sup>145</sup> Law 66-537, *supra* note 8, at art. 175. For example, shareholders may resolve in an extraordinary general meeting (requiring a two-thirds majority of the votes of shareholders present or represented) to provide for double voting rights of shares held for at least two years by the same shareholder. *Id.*

<sup>146</sup> Major public companies, such as Piper-Heidseck, Peugeot and LVMH have this type of provision in their articles.

<sup>147</sup> The regulations concerning the issuance of non-voting preferred stock are at *id.* at art. 269. The issuing of investment certificates is covered at *id.* at art. 283. The transfer restrictions prevent the voting certificate from being transferred except to a holder of another investment certificate. *Id.*

<sup>148</sup> *Id.* at art. 269. If dividends are not paid over three years, then non-voting preferred shareholders gain the right to vote without losing the right to preferred dividends. *Id.*

<sup>149</sup> See generally *Takeovers in the EC*, *supra* note 4; see also, *France*, in TAKEOVERS AND MERGERS IN EUROPE (1988) (monograph published by the law firm Clifford Chance) [hereinafter, TAKEOVERS AND MERGERS].

<sup>150</sup> See TAKEOVERS IN THE EC, *supra* note 4, at 17.

<sup>151</sup> In most instances, the French target seeks a white squire willing to top the offer, as in the case of the counter-offer by Martini & Rossi for Benedictine. See generally Kiernan, Bedos, & d'Ornano, *The Regulations Governing Mergers and Acquisitions Across the European Community: France*, 1989 INT'L FIN. L. REV. 26 (March 1989).

open. This openness is likely to continue, particularly as some of the larger nationalized French companies are privatized, and in response to the demands by other EEC companies and American investors for reciprocal openness as French companies make purchases abroad.<sup>152</sup>

### III. THE FRENCH SECURITIES MARKET

Since the mid-1980s, successive French governments have taken significant steps in an effort to modernize the French securities market and in an attempt to make Paris the leading stock exchange on the European continent. As a result of these steps and the selling of formerly nationalized companies to investors at a highly favorable price, the Paris stock exchange (the Bourse) is now second (behind the London Exchange) as the most active European market in terms of companies listed.<sup>153</sup> The French stock market has reached record levels, increasing more than twenty percent over its high prior to the October 1987 market decline. It is expected that the French securities market will continue to grow, and the government will strongly support this growth.

#### A. § 3.01. Regulatory Authorities in France

##### 1. *The Stock Exchange Commission (Commission des Opérations de Bourse or "COB")*

The COB is the principal organization regulating securities transactions in France. The COB was established in 1967,<sup>154</sup> modeled largely upon the United States' Securities and Exchange Commission ("SEC")<sup>155</sup>. One significant difference between the COB and the SEC, however, is that in addition to its regulatory duties, the COB was given the responsibility for developing and expanding the French securities market.<sup>156</sup>

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<sup>152</sup> An example of the criticism against French barriers is the report in TAKEOVERS IN THE EC, *supra* note 4, at § 4.

<sup>153</sup> See *id.* at 12; Hawawini, *Financial Innovation and Recent Developments in the French Capital Markets*, 9 U. PA. J. INT'L L. 145 (1987).

<sup>154</sup> Ordinance 67-833 of September 28, 1967, [1967] J.O. 29 Septembre at 9589. [hereinafter Ordinance 67-833].

<sup>155</sup> The COB's establishment and development is reviewed in Bordeaux-Groult, *Problems of Enforcement and Cooperation In the Multinational Securities Market: A French Perspective*, 9 U. PA. J. INT'L BUS. L. 453 (1987).

<sup>156</sup> See Ordinance 67-833, *supra* note 154, at art. 1. The COB was given this responsibility because French authorities believed that enhanced investor confidence would encourage desired growth and broaden the investor base. Previously, the French Securities markets had been subject to serious abuses. See generally Bordeaux-Groult, *supra* note 155, at 453.



a. Recent Legislation

In August, 1989, the French legislature adopted a law reorganizing and increasing the power of the COB.<sup>157</sup> The law strengthens the independence of the COB by providing it with the authority to determine its own budget within legally authorized limits.<sup>158</sup> The COB is also no longer subject to financial supervision by the Ministry of Economics and Finance.<sup>159</sup>

The legislation also expanded the COB's governing body (*Collège de la COB*) to include eight instead of five members; a president, appointed by the government for a non-renewable term of six years; a member appointed by the governor of the Bank of France; three members, one each appointed by the Presidents of the Council of State, Supreme Court, and the Audit Office ("*Cour des Comptes*"); and three industry regulatory representatives.<sup>160</sup>

The COB is organized into five principal divisions: (i) inspection, responsible for market surveillance of trading, (including insider trading investigations) and contacts with the stock exchanges; (ii) accounting, which reviews financial statements of reporting companies and handles contacts with auditors; (iii) legal, which receives complaints concerning operations on the exchanges, and investigates possible violations of law resulting from these complaints; (iv) investment, regulating the activities of mutual funds and real estate companies; and (v) information, which approves prospectuses and handles the listing and de-listing of securities.<sup>161</sup>

b. Investigative and Enforcement Authority

The COB has investigative and enforcement authority. It may, after

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<sup>157</sup> Law 89-531, *supra* note 110, at 9822. Law 89-531 also modified the laws governing tender offers (*offres publiques d'achat*), particularly the disclosure requirements for bidders. *See infra* notes 217-224 and accompanying text.

<sup>158</sup> Law 89-531, *supra* note 110, at art. 12.

<sup>159</sup> *Id.*; *see also* France: Securities Bill Becomes Law, 2 *Doing Business In Europe* (CCH) ¶98,315 (Nov. 1989) (providing English summary of the regulations) [hereinafter *France: Securities Bill*]; *See generally* Lee, *French Rules On Tender Offers*, *Fin. Times*, Nov. 9, 1989, § 1 (*Business Law*), at 45.

<sup>160</sup> Law 89-531, *supra* note 110, at art. 1. These members serve four-year terms which can be renewed once. *See generally* Lee, *supra* note 159, at 45. Law 89-531 has eliminated the presence of a specific governmental representative (Commissaire du Gouvernement) in an effort to cut the "umbilical cord" with the Minister of Economy.

<sup>161</sup> *See generally* Bordeaux-Groult, *supra* note 155, at 453-60. The COB's disciplinary powers have been expanded to cover managers of mutual funds. Law 89-531, *supra* note 110, at art. 37. In addition, this legislation provides for the creation of a new disciplinary council for managers of mutual funds. *Id.*

obtaining an appropriate court order, require that all of a company's assets be placed into an escrow account and obtain the equivalent of a preliminary injunction (*interdiction temporaire d'activité professionnelle*), temporarily preventing a company from engaging in business.<sup>162</sup> It has investigatory power to conduct searches and seize documents, and broad authority to conduct discovery.<sup>163</sup>

The COB has authority to levy fines of up to FFr ten million or ten times the profit realized from the illegal activities, whichever is greater.<sup>164</sup> The COB also may issue orders to cease an activity in violation of its rules.<sup>165</sup>

### c. Duties and Responsibilities

The COB has three primary functions. First, it regulates and supervises the various French exchanges and French brokers.<sup>166</sup> In this capacity, it promulgates rules and regulations concerning the functioning of the exchanges and related activities, including the buying and selling of shares.<sup>167</sup> Second, it reviews and verifies information disclosed to the public by reporting companies.<sup>168</sup> Finally, the COB is responsible for policing the exchanges and ensuring that companies listed on the exchanges disclose the requisite information.<sup>169</sup>

## 2. *The Stock Exchange Council (Conseil des Bourses de Valeurs or "CBV")*

The CBV, while more limited in authority than the COB, has general legislative and judicial decision-making authority over the stock exchanges. The CBV must also approve the listing or removal of a

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<sup>162</sup> *Id.* at art. 5. This authority was significantly expanded by the new legislation.

<sup>163</sup> *Id.* at art. 2. Anyone not cooperating with a COB investigation may face criminal liability. *Id.* at art. 6. In addition, persons who otherwise might be able to claim immunity from the requirement to disclose certain information because of the French law on secrecy have no right to such a privilege against the COB. See generally Bordeaux-Groult, *supra* note 155, at 456-57.

<sup>164</sup> Law 89-531, *supra* note 110, at art. 5. This figure is reduced by any fines levied in a judicial proceeding.

<sup>165</sup> Traditionally, the COB only had the right to recommend to the public prosecutor that an action be brought. See, e.g., Bordeaux-Groult, *supra* note 155, at 455-60. However, Law 89-531 has given the COB additional enforcement powers by granting it a specific but extended injunction power. See Law 89-531, *supra* note 110, at art. 5.

<sup>166</sup> Ordinance 67-833, *supra* note 154, at art. 4.

<sup>167</sup> *Id.* at art. 4. The COB also has responsibility for developing guidelines applicable to companies making public offerings, and those assisting in such offerings. *Id.*

<sup>168</sup> *Id.* at art. 3.

<sup>169</sup> *Id.* The COB may require a company to publicly inform its shareholders and/or the market of any previous disclosure violations, and if the company refuses to so act the COB may officially inform the public as to the violation in any appropriate manner. *Id.*

company's securities from a stock exchange.<sup>170</sup> The CBV consists of twelve members, ten of whom are elected by stock brokers; one who is an appointed representative for publicly listed companies; and a member appointed by the employees of stock brokers (*Sociétés de Bourse*) and of the Stock Brokers Association (*Société des Bourses Françaises* or SBF), a specialized financial institution charged with overseeing the market's day-to-day operations and which has executive authority over the exchanges.<sup>171</sup> The CBV also includes a government representative appointed by the Minister of the Economy.<sup>172</sup>

The primary function of the CBV is to develop the rules and regulations necessary for the orderly function of the exchange, and ensure the compliance with the rules of the exchanges and the SBF.

All decisions of the CBV concerning disciplinary or regulatory issues may be appealed to an administrative judge.<sup>173</sup> As more fully discussed below, the CBV also has primary responsibility for analyzing the price offered in any tender offer.<sup>174</sup> The CBV must determine, within five days of a bidder's application, that the consideration provided in an offer is acceptable and within the public interest.<sup>175</sup>

## B. § 3.02. The French Stock Exchanges

### 1. Public Markets

There are three different stock markets in France: the official stock exchange (*Marché Officiel*), the second market (*Second Marché*) and the over-the-counter market (*Marché Hors Cote*). As in the United States, the principal differences among these markets are the size and scope of the issuers. The CBV decides on which of the seven French stock exchanges an issuer's securities are to be listed, depending upon the value

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<sup>170</sup> Decree No. 88-254 of March 17, 1988, [1988] J.O. 18 Mars at 3663. The COB must notify the CBV of any objection to the listing within five days from the date it learns of the CBV's decision. *Id.* at art. 12.

<sup>171</sup> The SBF has been delegated its authority from the CBV, and has responsibility for determining when a quotation should be interrupted or stopped. Law No. 88-70 of January 22, 1988, [1988] J.O. 23 Janvier at 1111 [hereinafter Law 88-70].

<sup>172</sup> Law 88-70, *supra* note 171, at art. 12. The CBV replaced the former Stock Brokers Committee (*Chambre Syndicale des Agents de Change*).

<sup>173</sup> *Id.* at art. 5. All other decisions by the CBV can only be appealed to the judicial court before the court of appeals in Paris. *Id.*; see also Decree No. 88-603 of May 7, 1988 at art. 2, [1988] J.O. 8 mai at 6606. The operating procedures of the CBV are set forth in Law 88-70, *supra* note 171, at arts. 5-7. See also DOING BUSINESS IN FRANCE, *supra* note 11, at § 15.04 (translation and summary of procedures).

<sup>174</sup> See *infra* notes 217-220 and accompanying text.

<sup>175</sup> Règlement General du Conseil des Bourses de Valeurs, approved by the Arrêté of April 21, 1988, [1988] J.O. 23 Avril at 5394, at arts. 182-186. See generally *infra* note 220 and accompanying text.

of the securities to be listed, the location of the issuer's principal place of business, and the recommendation of the Association Française des Sociétés de Bourse ("A.F.S.B."), an organization representing both brokers and the SBF.<sup>176</sup> The basic requirements and characteristics of each market are summarized below.

a. The Official Stock Exchange

The Official Stock Exchange is the largest and most prestigious in France. In order to be listed on this exchange, a company must have a market capitalization of at least one million European currency units ("ecu") and have published its annual financial statements for the three previous years.<sup>177</sup> As a general rule, at least twenty-five percent of a company's shares must be available for sale to the public, although this requirement may be waived where the company has sufficient capitalization and number of shares to assure an orderly market. While the number of domestic companies listed on the official market decreased slightly from 1987 to 1988, market capitalization during this period increased substantially.<sup>178</sup>

b. The Second Market

The second market provides a market for the shares of companies not large enough to be traded on the official market. Companies listed on the second market frequently switch over to the official market after a three- to five-year period. In 1988 there were fourteen companies listed on the second market.

The procedures for listing on the second market are significantly less burdensome than for a listing on the official market. In addition, only ten percent of the company's shares must be sold to the public.<sup>179</sup> At the time of listing a company must issue a prospectus,<sup>180</sup> and develop accounting procedures which satisfy the rules governing issuers on the official market<sup>181</sup>. A listing on the second market is good for three years, at the end of which the issuer may, with the approval of the CBV and fol-

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<sup>176</sup> The seven stock exchanges in France are located in Paris, Bordeaux, Lille, Lyon, Marseille, Nancy and Nantes. *DOING BUSINESS IN FRANCE*, *supra* note 11, at § 15.04[2][c].

<sup>177</sup> Listing on the French stock exchanges is now within the exclusive jurisdiction of the CBV. See *Règlement Général* of April 21, 1988 of the Commission des Bourses de Valeurs, at title III [hereinafter CBV Regulation of April 21]. See also COB *Règlement* No. 88-04 (setting forth disclosure requirements for public issuers).

<sup>178</sup> TAKEOVERS IN THE EC, *supra* note 4, at 40.

<sup>179</sup> CBV Regulation of April 21, *supra* note 177, at art. 3.

<sup>180</sup> The information required to be included in a prospectus is discussed *infra* at notes 186-187 and accompanying text.

<sup>181</sup> CBV Regulation of April 21, *supra* note 177, at art. 3.

lowing recommendation by the SBF, be listed on the Official Exchange.<sup>182</sup>

c. The Over-The-Counter Market

The Over-The-Counter market is an irregular market established for the purpose of creating a market for the occasional sale of French or foreign securities.<sup>183</sup> The Over-The-Counter market does not create a permanent market for any security. Rather, the seller and purchaser of securities simply simultaneously exchange the securities for full payment. Any company or shareholder may cause securities to be listed on the Over-The-Counter market by filing an application with the SBF and publishing certain minimum financial information concerning the issuer.<sup>184</sup>

2. *Listing of Securities*

a. Initial Public Offerings

Before engaging in an initial public offering of securities (*appel public à l'épargne*), a company must prepare a prospectus (*note d'information*) disclosing certain specific information required by the COB.<sup>185</sup> The COB mandates disclosure concerning the following issues: all relevant facts concerning the securities and the issuer; a description of the issuer's principal activities, including its business(es), employees, and subsidiaries; recent financial information, including balance sheets and profit and loss statements; the names of officers, directors, senior management and controlling shareholders, and any relationships thereto; the reasons for the issuance and planned use of proceeds; and the financial institution advising the issuer and guaranteeing placement of the securities.<sup>186</sup> A summary of the prospectus may also be required.<sup>187</sup>

A prospectus must be approved by the COB before it can be issued to the public. The COB may require an issuer to change the prospectus, or it may conduct an investigation to determine the accuracy of the disclosures.

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<sup>182</sup> *Id.*

<sup>183</sup> See *DOING BUSINESS IN FRANCE*, *supra* note 11, at § 15.04[2][c].

<sup>184</sup> CBV Regulation of April 21, *supra* note 177, at arts. 3-4.

<sup>185</sup> A prospectus must be issued in any transaction which would constitute an offer of or for securities, including a tender offer. See Ordinance 67-833, *supra* note 154, at art. 6.

<sup>186</sup> The full requirements are set forth in Annex I to the Instruction of February 2, 1982 of the Commission des Operations de Bourse Relating to Prospectuses Distributed by Companies Making Public Offerings (Pub. COB: 1982).

<sup>187</sup> *Id.* at ch. 2.

b. Listing of Foreign Securities

Foreign securities of a non-EEC issuer may be listed after approval by the Minister of Economy.<sup>188</sup> The request for listing must include certain economic, financial and legal information,<sup>189</sup> and be sent simultaneously to both the COB and the CBV<sup>190</sup>. The COB has the right to seek any additional documents concerning or prepared by the issuer during the prior three years so that the information offered to the French public is equivalent to that supplied by local (or EC) issuers, and the COB must give its recommendation to the Ministry within two months from receipt of the application.<sup>191</sup>

IV. THE MERGERS AND ACQUISITION PROCESS IN FRANCE

United States-style takeovers have been arriving in France since at least 1988. The battles for control of such large, well-known French companies as Télémécanique, a major manufacturer of mechanical and electrical equipment, the liqueur company Bénédictine, and the luxury-goods, champagne and cognac house Moët-Hennessy Louis Vuitton ("LVMH") demonstrated that even hostile bids can succeed in France. However, such bids have also spurred an outcry by many in France, including President Mitterand who has bitterly attacked "financial speculators" living off of the "easy money" made through such bids.

The political backlash against takeovers has had its effect, both legal and practical. France has recently adopted regulations requiring greater disclosure by bidders and making it more difficult to remove incumbent management.<sup>192</sup> On a more practical level, France's more than \$11 billion of acquisitions abroad in 1988 were almost triple the nearly \$4 billion in French assets sold to foreigners during the same period.<sup>193</sup>

A. § 4.01. The Regulatory Framework

France does not have one law which regulates tender offers or dis-

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<sup>188</sup> See Regulation No. 88-04 of the Commission des Operations de Bourse Relating to the Listing of Securities, approved by Arrêté of July 6, 1988, [1988] J.O. 8 Juillet at 2410 [hereinafter Regulation 88-04]. Regulatory requirements for the listing of foreign securities are contained in arts. 14-18, 27-28, 36-37 and 42.

<sup>189</sup> Documents which must accompany the application include the issuer's last three annual reports; a memorandum describing the issuer's business activities, prospects and capital structure; and the market(s) for its shares. *Id.*

<sup>190</sup> The application must be filed by a financial institution or stock broker authorized to do business in France. *Id.* at art. 57.

<sup>191</sup> *Id.* at art. 14.

<sup>192</sup> See *infra* notes 217-224 and accompanying text.

<sup>193</sup> See EUROPEAN DEAL REVIEW, *supra* note 2.

closure obligations such as the Williams Act in the United States.<sup>194</sup> Rather, takeovers may be regulated by a number of official or quasi-governmental groups, including the CBV, which is responsible for the analysis and approval of the price of a cash tender offer (*offres publiques d'achat*) and the terms and conditions of a share exchange offer (*offres publiques déchange*); the COB, which must approve any prospectus and other public statements disseminated to shareholders during a tender offer; and the Ministry of Economy and Finance, which coordinates the creation of regulations governing takeovers and has control over agencies governing foreign investments ("*Direction du Trésor*") and antitrust ("*Direction Générale de la Concurrence*").<sup>195</sup>

Representatives of these three organizations sit on the Supervisory Board of Takeovers ("*Comité de Sureveillance des offres publiques d'achat*"), which serves more as a coordinator for the three agencies than a supervisory body. In practice, the divisions between the various bodies are sometimes difficult to discern.<sup>196</sup>

The takeover rules in France are contained principally in the recently adopted Law No. 89-531 of August 2, 1989 relating to the Security and Transparency of the Financial Markets ("*Law 89-531*")<sup>197</sup>, and regulations promulgated by the COB and CBV. However, France's takeover legislation cannot be considered exhaustive or thorough, and the practice has been to issue new regulations in response to a specific perceived abuse, rather than general prospective rule-making.<sup>198</sup> Takeover rules in France have changed significantly over the last five years, and it

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<sup>194</sup> A tender offer occurs when a party, whether individually or in concert with others, invites or solicits shareholders of a company (the "target") to sell their shares at some specific consideration, consisting of cash, securities or a combination of the two. The value of the consideration offered usually exceeds the target's stock by a substantial premium. Target shareholders wishing to accept the offer "tender" their shares by forwarding them to a depository bank that acts as agent for the offeror. See Pitt, *Tender Offers: Offensive and Defensive Tactics and the Business Judgment Rule*, in HOSTILE BATTLES FOR CORPORATE CONTROL 498 (1990).

<sup>195</sup> See *infra* notes 197-200 and accompanying text.

<sup>196</sup> See generally Marquardt, *Tender Offers in France: The New Rules*, 1990 INT. FIN. L. REV. 35 (Jan. 1990).

<sup>197</sup> Law 89-531, *supra* note 110, at 9322. The principal implementing measures, set forth in the Arrêtés of September 28, 1989, [1989] J.O. 30 Septembre at 12,301 and 12,307 [hereinafter the September 28 Regulations] include Title V of the General Regulation of the CBV, and COB Regulation No. 89-03 [hereinafter Regulation 89-03]. See generally Marquardt, *supra* note 196. See also France: Securities Bill, *supra* note 159, at ¶98,315. The law was, in general, upheld by the Constitutional Council in its ruling prior to the promulgation of Law 89-531. See Decision No. 89-260DC of the Constitutional Council of July 28, 1989, [1989] J.O. 1 Aout at 9676.

<sup>198</sup> For example, in response to Chargeurs attempt to gain control of Prouvost through a creeping accumulation of shares, the government established disclosure regulations upon the bidder's accumulation of shares. See TAKEOVERS IN THE EC, *supra* note 4, at 197.

is anticipated that these rules will continue changing, particularly in response to changes in EEC law.

B. § 4.02. Disclosure Obligations for Shareholders and in Tender Offers

Law 89-531 is the first takeover law in France's history,<sup>199</sup> and, when considered in combination with the implementing measures adopted on September 28, 1989, has substantially modified both the disclosure and substantive requirements for bidders and targets in a tender offer<sup>200</sup>. While the rules are expected to have only a negligible impact upon overall takeover activity, they will have a substantial effect on how takeovers, and in particular tender offers, are conducted. The legislation also has a number of features in common with the EEC's Draft Directive Thirteen on Takeover Bids,<sup>201</sup> and it is likely that French legislation will continue to develop in tandem with EEC legislation<sup>202</sup>.

There are two general types of tender offers in France: an all cash offer (*offre publique d'achat* or "OPA") or an offer which includes securities (*offre publique échange* or "OPE"). The disclosure requirements for both the bidder and the target in a tender offer will be discussed after the following more general review of the disclosure obligations for large shareholders.

1. General Disclosure Obligations for Large Shareholders

Pre-tender offer disclosure obligations in France vary according to a company's charter, the amount of shares owned, and the purpose of the ownership. Thus, disclosure of share ownership may be required by a company's charter, which can mandate that transfers of capital or voting control of, at a minimum, one-half of one percent be reported to the company.<sup>203</sup> The time within which disclosure must be made and to whom may also be determined by the charter.

Law 89-531 requires the public disclosure of anyone owning the fol-

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<sup>199</sup> Prior to 1989, regulations concerning takeovers were of lesser authority.

<sup>200</sup> See Marquardt, *supra* note 196, at 36-37.

<sup>201</sup> Proposal for a Thirteenth Council Directive on Company Law Concerning Takeover and Other General Bids, 64 O.J. Eur. Comm. (No. C 138) 7 (1989), reprinted in [current] Comm. Mrkt. L. Rep. (CCH) ¶60,200 at 10,401.

<sup>202</sup> See generally Berger 1 "The Second Common Market: Development of A United Standard for Reviewing The Actions Of Target Directors in the United States and European Community," 9 *Int. Tax & Bus. Law* \_\_\_ (1991) (forthcoming) (detailed review of Draft Directive Thirteen and Comparative Analysis with U.S. legislation). [hereinafter "Second Common Market"]; Berger, "Buying Up Europe In New Buyout Regime," *Legal Times*, Feb 4, 1991 at 26.

<sup>203</sup> Law No. 66-537, *supra* note 8, at art. 356. See also Marquardt, *supra* note 196, at 36.



lowing amounts of the capital or voting rights of a French company with listed shares: five percent; ten percent; twenty percent; thirty-three and one-third percent; fifty percent; and sixty-six and one-sixth percent.<sup>204</sup> Disclosure to the company must be made within fifteen days, and, if the shares are traded on the Official Market, then there must be disclosure to the CBV within five market days.<sup>205</sup> Law 89-531 also requires disclosure by any group of purchasers "acting in concert" whose holdings counted together meet one of the above thresholds.<sup>206</sup> The "acting in concert" standard, new to French corporate law, is defined as an agreement to purchase or sell voting rights or to follow a common purpose with respect to the securities.<sup>207</sup> There is a rebuttable presumption that a company is acting in concert with its officers, directors and companies under its control or with which the company shares common ownership.<sup>208</sup>

There are substantial penalties for failing to comply with the disclosure requirements. The law provides that shareholders who fail to make the required disclosures may lose for up to two years the voting rights of the shares in excess of the disclosure thresholds.<sup>209</sup> In addition, voting rights may be suspended for up to five years by the commercial court if, upon the request of the company, its shareholders or the COB, the circumstances are shown to have warranted such a penalty.<sup>210</sup>

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<sup>204</sup> Law 89-531, *supra* note 110, at art. 17. This includes the ownership of securities, such as warrants or convertible debentures, which may lead to the ownership of shares and voting rights.

<sup>205</sup> *Id.* at art. 18. The new rule changes prior law by requiring that voting rights, not just capital ownership, be taken into account when determining the statutory thresholds. This substantially broadens the scope of the law because under French corporate law companies can, and frequently do, split voting rights from other attributes of share ownership. See *supra* notes 45-49 and accompanying text.

<sup>206</sup> Law 89-531, *supra* note 110, at art. 18. Cf. Section 13(d) of the Williams Act, 15 U.S.C. § 78m(d) (19—) (requiring any person who acquires more than five percent of any equity securities registered under the Securities Act of 1933 (the "Act") to file with the Securities and Exchange Commission a Schedule 13D within ten days of the acquisition, setting forth specified information about the purchaser and the acquisition). See also *Second Common Market*, *supra* note 202 (analyzing comparable EC and US legislation).

<sup>207</sup> Law 89-531, *supra* note 110, at art. 17. Cf. Block, Hoff & Berger, *Considerations in Stock Accumulation Programs*, in *HOSTILE BATTLES FOR CORPORATE CONTROL: THE NEW MARKET ENVIRONMENT* (1988) (discussing how comparable legislation applies in the United States); *Second Common Market*, *supra* note 202 (discussing analogous provision in Draft Directive Thirteen).

<sup>208</sup> Whether a written agreement will be required before the "acting in concert" standard is satisfied is still under debate. In the attempt by Paribas to acquire Compagnie de Navigation Mixte ("Mixte"), Paribas complained about the parallel action taken by certain stockholders friendly to Mixte. In their replies to the CBV, these stockholders denied that they had an obligation to file because they had no written agreement between them or with Mixte. See Marquardt, *supra* note 196, at 36-37. Persons acting in concert are jointly and severally liable for the disclosure obligations.

<sup>209</sup> Law 89-531, *supra* note 110, at art. 20. The two year period does not begin until the required disclosure has been made. The previous maximum suspension period was three months.

<sup>210</sup> *Id.* The suspension period may include the right to vote shares below the disclosure thresholds.

a. Disclosure Upon Acquiring Ten Percent Ownership of a  
Company's Shares

Disclosure must be made by anyone acquiring ten percent or more of the capital or voting rights of a privatized company.<sup>211</sup> This disclosure must include the cost and the number of shares purchased, and must be made to the Minister in charge of the economy.<sup>212</sup> Within ten days the minister may oppose such acquisitions for the protection of national interests through a decision setting forth the grounds for the opposition. This provision exists only until December 31, 1992.<sup>213</sup>

b. Disclosure Upon Acquiring Twenty Percent Ownership of a  
Company's Outstanding Shares

COB Regulation No. 88-02 of April 12, 1988 requires any person or entity who acquires more than twenty percent of the capital or voting rights of a company listed on either the Official Exchange or the Second Market to declare the objectives it intends to pursue during the next twelve months.<sup>214</sup> The disclosure must include whether the acquiror intends to continue to purchase more shares, acquire control of the company, request appointment as a director, and whether the acquiror is acting alone or in concert with others.<sup>215</sup> In addition to the target company and the CBV, disclosure must be published on the securities listing, announced in nationally distributed financial newspapers and sent to the press agencies.<sup>216</sup>

2. *Disclosure Obligations of the Bidder*

a. Disclosure to the CBV

Before commencing an offer, the offeror must file an application<sup>217</sup> with the CBV through the banking institution(s) guaranteeing the financing arrangements for the offer. The required disclosure includes information concerning the bidder's intentions in making the bid, any plans the

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<sup>211</sup> The list of companies privatized by the government are listed as annex to Law No. 86-793 of July 2, 1986, [1986] J.O. 3 Juillet at 8240(4).

<sup>212</sup> Law No. 89-465 of July 10, 1989, [1989] J.O. 11 Juillet at 8671.

<sup>213</sup> *Id.*

<sup>214</sup> COB Regulation No. 88-02, approved by Arrêté of April 21, 1988, [1988] J.O. 23 Avril at 5395 [hereinafter Regulation 88-02].

<sup>215</sup> *Id.* at art. 3. The disclosure is similar to that required in a Schedule 13D, required under the Williams Act in the United States. See *supra* note 206, at n.8-9.

<sup>216</sup> Regulation 88-02, *supra* note 214, at art. 3.

<sup>217</sup> September 28 Regulations, *supra* note 197, at art. 5; see also Regulation No. 88-01, approved by Arrêté of April 21, 1988, [1988] J.O. 23 Avril at 5394. Securities firms as well as banks have the authority to file such an application.

bidder may have if the offer is successful, the minimum number of securities which the offeror is willing to accept, the form of payment (including the basis for a valuation of any securities which are included in the offer), and the means for payment.<sup>218</sup>

The CBV then notifies the SBF which automatically suspends trading in the securities of the target company upon receipt of the application, and also notifies the government and the COB of the application.<sup>219</sup> The CBV then has five days to approve the application and, in particular, to determine whether the consideration provided in the offer is reasonable and within the public interest.<sup>220</sup> If approval is granted, the CBV publishes a notice of approval and trading may resume within two market days.<sup>221</sup> Until such notice is published, the offeror must obtain the CBV's approval prior to making any public disclosure concerning the offer.

The CBV publishes a third notice upon being notified of the COB's approval of the offeror's prospectus and any other regulatory requirements.

#### b. Disclosure to the COB

Within twenty-four hours of the offeror's filing with the CBV, the offeror must file a draft prospectus (*note d'information*) with the COB.<sup>222</sup> The prospectus, while generally less detailed than that required in the United States, must include information concerning the purpose for the offer, the future plans of the offeror (including any agreements or contracts entered into by the offeror), the financing for the offer, the number of shares being offered, and the timetable for the offer.<sup>223</sup> The COB has five trading days following the filing of the draft prospectus to approve or seek amendment to the disclosures contained therein. As soon as the prospectus is approved, it must be sent to the target company and made

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<sup>218</sup> September 28 Regulations, *supra* note 197, at art. 5. If applicable, the file is also to contain a copy of the necessary authorization request required for regulated foreign investments. *Id.* The general disclosures are similar to the tender offer disclosures required by the Williams Act in the United States. See Sections 14(d), 14(e) and 14(f) of the Exchange Act, 15 U.S.C. §§ 78n(d), 78n(e), 78n(f); *Second Common Market*, *supra* note 202. (analyzing U.S. and EC tender offer regulations).

<sup>219</sup> September 28 Regulations, *supra* note 197, at art. 5.

<sup>220</sup> *Id.* See also *DOING BUSINESS IN FRANCE*, *supra* note 11, at § 15.04 (reviewing factors considered by CBV).

<sup>221</sup> *Id.* Approval is made only on the terms of the offer; the CBV does not have jurisdiction or responsibility for antitrust or other issues unrelated to the offer's terms. Trading may (and in practice frequently is) suspended for more than the five day minimum period.

<sup>222</sup> See COB Regulation 89-03, *supra* note 197, at art. 8.

<sup>223</sup> *Id.* For a discussion of the minimum and maximum amount of time an offer can remain open see *infra* notes 228-34 and accompanying text.

available to the target company's shareholders; in addition, the essential terms of the offer must be published in appropriate newspapers and financial journals no later than four days after the COB's approval.<sup>224</sup>

### 3. *Target Disclosure Obligations*

The target company must file an information circular for approval of the COB within six trading days of the receipt of the bidder's approved prospectus.<sup>225</sup> The circular (also less detailed than that required under the Williams Act in the United States) must include the Board's opinion on whether shareholders should accept or reject the offer and the reason(s) therefore, any risks associated with the offer, the number of shares owned by officers and directors and their ownership levels from one year prior to the offer, and whether the Board's opinion was unanimous or simply a majority.<sup>226</sup> The COB has three trading days to approve the circular after which the approved circular must then be provided to shareholders, and published in appropriate publications within four trading days from the COB's decision.<sup>227</sup>

## C. § 4.03. The Substantive Law of Tender Offers

### 1. *Timing of the Offer and Competing Bids*

A tender offer must remain open for at least twenty days from the date of the *avis d'ouverture*. Tenders made by shareholders may be withdrawn at any time during the offer.<sup>228</sup> Any agreement entered into after a tender offer is made by a shareholder to tender shares is unenforceable.<sup>229</sup>

Competing bids may be submitted until ten calendar (not market) days before the closing date of the original offer.<sup>230</sup> The CBV will then

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<sup>224</sup> Regulation 89-03, *supra* note 197, at art. 12.

<sup>225</sup> *Id.* at art. 11. In friendly deals the target and the bidder may make a joint filing.

<sup>226</sup> *Id.* at art. 12.

<sup>227</sup> *Id.* The target may be required to file with the COB a copy of the financial journal in which the circular was published. Management is also required to give notice to the company's workers committee (*comité d'entreprise*) of the takeover bid. The workers committee may request a meeting with the offeror in a further effort to provide employees with early and full information. Law 89-531, *supra* note 110, at art. 40.

<sup>228</sup> September 28 Regulations, *supra* note 197, at art. 5. Prior to this regulation, tenders became irrevocable ten days prior to the expiration of the offer. The new regulation is similar to Rule 14d-7 under the Williams Act in the United States, which allows shareholders to withdraw their shares during the entire period which the offer is open. See 17 C.F.R. § 240.14d-3 (1988).

<sup>229</sup> Kiernan, Bedos & d'Ornano, *supra* note 151, at 30.

<sup>230</sup> September 28 Regulations, *supra* note 197, at art. 5. Under the prior legislation, competing bids had to be submitted no more than twenty days before the original offer closed, while offers were required to remain open for thirty days.

extend the duration of the original offer so that both offers will close on the same date. Competing cash offers must be at a price of at least 102 percent of the prior offer, but no increase is required where the original offer was a partial offer, *i.e.* for less than all of the target's outstanding shares and the competing offer is for all shares.<sup>231</sup> No minimum increase is required if the offeror raises the price of the original bid.<sup>232</sup> After ten weeks, the CBV may set a deadline for the submission of final bids.

If the offer is all-cash for all shares, the bidder may purchase shares of the target on the open market during the pendency of the offer, but the offer price is then automatically increased to the greater of either 102 percent of the offer price or the price paid on the market.<sup>233</sup> If the offer is for less than all shares, or includes some securities as consideration, the bidder may not purchase any shares during the pendency of the bid. Once the bid closes, and prior to the time the results are officially announced by the CBV, the offeror (and any members of his/her group) may not sell any of the target's securities, and may only purchase additional securities on the open market at the offering price.<sup>234</sup>

## 2. *Mandatory Tender Offers*

Law 89-531 established the concept of mandatory tender offers in France.<sup>235</sup> Under the previous law, a purchaser who obtained a "control bloc" (*acquisition de bloc de contrôle*) had to extend an equivalent offer to minority shareholders, either through a tender offer or a standing buy order (*maintien de cours*) over a fifteen trading-day period on the stock exchange. This system came under much criticism, both because of the lack of regulatory definition of "control bloc" and the *maintien de cours* system.<sup>236</sup> Under the new regulation, an offeror must bid for at least two-thirds of the target's outstanding voting stock upon obtaining 33-1/3 percent of the target's capital shares.<sup>237</sup> A tender offer is also required if

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<sup>231</sup> *Id.* Previously, competing offers had to be at 105% of the prior offers.

<sup>232</sup> Regulation 89-03, *supra* note 197, at art. 13. Like a competing bidder, previous increases by the bidder had to be an increase of at least five percent over the value of the previous offer. *See generally* Marquadt, *supra* note 196.

<sup>233</sup> September 28 Regulations, *supra* note 197, at art. 5. Under the previous rules, the offering price was increased to 105 percent of the offer price.

<sup>234</sup> For the definition of a "group" see *supra* note 215 and accompanying text. Non-group members who may be sympathetic to the bidder are not bound by this restriction, as was seen in the recent tender offer for Compagnie de Navigation Mixte.

<sup>235</sup> Law 89-531, *supra* note 110, at art. 15 (establishing the principal of a mandatory offer). *See also* September 28 Regulations, *supra* note 197, at art. 5 (implementing legislation); *Second Common Market*, *supra* note 202 (discussing principle of mandatory tender offer in Draft Directive Thirteen).

<sup>236</sup> *See generally* Kiernan, Bedos & d'Ornano, *supra* note 151, at 29.

<sup>237</sup> September 28 Regulations, *supra* note 197, at art. 3. This provision may also be triggered if the 33 1/3 percent level is crossed indirectly through, for example, the acquisition of another com-

a person holding between one-third and one-half of a company's equity securities or voting rights increases their holdings by more than two percent over one year, or increases their ownership to more than fifty percent of the target's securities as a result of their purchases.

There are a number of exceptions to the mandatory tender offer provision, including if the crossing of the thirty-three percent level was the result of a decrease in the number of outstanding shares, if the target is already under the control of a third party, or if the bidder owns less than thirty-seven percent of the outstanding shares and promises to reduce his ownership level to thirty-three percent within eighteen months.<sup>238</sup> An exemption must be approved by the CBV, and it is not yet clear how willing the CBV will be to grant such an exemption.

A tender offer may also be required by the CBV to allow minority shareholders an opportunity to "cash out" their shares under certain limited circumstances. For example, if the bidder holds ninety-five percent of the voting shares of the target, or controls the target and seeks to either transform an SA into another corporate form or change the company's articles or by-laws in a material way, the CBV may order an offer to be made.

### 3. *Defensive Maneuvers*

Once a tender offer has been made, a board is severely limited in the actions it may take to defeat the offer. The COB requires that the interests of the shareholders remain the dominant concern, and the target must exercise "particular prudence" in redeploying assets or taking other extraordinary corporate actions.<sup>239</sup> The COB must be notified of all actions beyond the ordinary course of business, and measures taken primarily to defeat the offer are, as a general matter, prohibited.<sup>240</sup> These rules act as a significant deterrent to a board considering the adoption of some of the defensive measures available to a board in the United States after a hostile offer is made.

Partly, in response to these limitations, many supporters of tender offer reform sought to strengthen the position of incumbent management

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pany, if the shares owned by that company constitute an "essential part" of the third company's assets. See Marquardt, *supra* note 196, at 38.

<sup>238</sup> Additional exceptions include if the threshold level is passed as a result of a merger approved by shareholders, or the company is already controlled by the bidder and the acquisition is only a transfer from one entity to another, without changing the group which already controls the bidder. See generally Lee, *supra* note 159.

<sup>239</sup> Regulation 89-03, *supra* note 197, at art. 3. See generally Berger, *supra* note 48.

<sup>240</sup> Regulation 89-03, *supra* note 197, at art. 3; see also Kiernan, Bedos & d'Ornano, *supra* note 151, at 30.

to defeat hostile bids. However, while the recently enacted legislation increased management's options in some areas, it also reduced the ability of a target to defeat an unwanted proposal in other ways, and generally should not have a significant impact on whether or not an offer is successful.<sup>241</sup>

The target's ability to defeat an offer was increased because the new legislation allows a target company to increase its share capital during the pendency of an offer.<sup>242</sup> Traditionally, French law requires shareholder approval for the issuance of any capital, and this approval was, as a practical matter, nearly impossible to obtain during the offer period.<sup>243</sup> Under the new legislation, the target board would retain the right to issue stock during an offer provided that the increase had been approved at a shareholders meeting prior to the offer (*autorisation préalable de l'assemblée générale*). This authorization must be given prior to the offer being made, is limited to no more than one year from the meeting, and sharply limits the board's ability to waive the preemptive rights of shareholders.<sup>244</sup> The requirement that preemptive rights be maintained may limit the usefulness of this defensive tactic.

The new law also limits the rights of a target board to refuse to call a shareholder's meeting after the offer is completed, or to vote shares held by a subsidiary company during the offer. Specifically, the new legislation provides that shareholders controlling the majority of the voting or equity stock upon completion of a tender offer may call a shareholder's meeting if the target board does not do so, thereby allowing the successful offeror the ability to quickly elect a new board.<sup>245</sup> The law also eliminates the right of a board to vote "auto-control" shares after July 1, 1991.<sup>246</sup>

## V. CONCLUSION

The French law of corporations is continuing to evolve as the French market opens, and in response to international developments.

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<sup>241</sup> These principles frustrated Télémécanique's attempt to be acquired by a white squire upon the hostile offer by Schneider in 1988. Upon the announcement of Schneider's offers, Télémécanique transferred ten percent of its capital to its white squire, Framatone, which shortly thereafter launched a competing bid. The court subsequently held that this transfer violated the principles of "good faith, prudence and equality among shareholders" as required by the COB.

<sup>242</sup> Law 89-531, *supra* note 110, at art. 14.

<sup>243</sup> See generally Marquandt, *supra* note 196.

<sup>244</sup> Law 89-531, *supra* note 110, at art. 14.

<sup>245</sup> *Id.* at art. 16.

<sup>246</sup> *Id.* at art. 21. "Auto-control" refers to the practice of a company's use of a subsidiary to hold up to ten percent of the parent company's stock as a defensive measure against a hostile offeror. See *supra* note 144 and accompanying text.

These changes will have a significant impact upon a foreign company wishing to establish or purchase a business in France. At the same time, however, these changes will make French regulations more familiar to American businesses and attorneys, as many of the French rules are derived, at least in part, from similar statutes in the United States or countries with which American attorneys may be more familiar (*i.e.*, the United Kingdom). Further, France has made substantial efforts to bring its markets and corporate law into agreement with applicable EC directives, and the continuation of this process will make French regulations more comprehensible to American companies.

In sum, France is fast becoming a favorite spot for American companies looking to enter Europe. France's industry and technology have made it a leader in a number of European industries, while its governments have successfully created an economic environment favorable to foreign investment. Given this framework, a familiarity with French corporate law is an important step for companies (and their advisors) looking to take advantage of the unified European market.