

5-1993

French & SEC Securities Regulation: The Search for Transparency and Openness in Decisionmaking

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Keith D. Nunes, Louis Vogel, Chris X. Linn, and Peter C. Kostant, French & SEC Securities Regulation: The Search for Transparency and Openness in Decisionmaking, 26 *Vanderbilt Law Review* 217 (2021)
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Vanderbilt Journal of Transnational Law

VOLUME 26

MAY 1993

NUMBER 2

French & SEC Securities Regulation: The Search for Transparency and Openness in Decisionmaking

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ABSTRACT

In this Article, the authors retrace the history and development of France's securities markets. The authors find that the French markets have become dynamic and diverse in the wake of their modernization. In contrast to the passivity of the United States regulatory regime, the authors demonstrate that the role of French regulators is more aggressive and intrusive. The authors also note that, through directives seeking to coordinate the policies of member states, the European Economic Community serves as the world's leading securities regulator. The authors conclude that French securities laws have been successful in improving disclosure and market efficiency. But they recommend that France establish clearer lines of authority and control between its regulatory agencies and make them more accountable to free markets. Finally, the authors recom-

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mend greater cross-cultural understanding between states as a means of achieving the common worldwide interest in greater abundance and prosperity through free markets.

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I. INTRODUCTION

To the ordinary French person *La Bourse* once was a place of mystery, or even danger.¹ From Emile Zola's time² until two decades ago, such attitudes apparently were empirically verifiable. In France, securities dealing and brokerage operated as highly monopolized guilds, with trade knowledge passed from father to son for more than 180 years.³ In 1988, when French law renamed the *agents de change* (stock brokerage firms) the *sociétés de bourse*, there were only 61 such entities in France, of which 45 were located in Paris.⁴ The exclusive *Paris Bourse* closed its doors to women and did not permit visitors until 1972.

How things have changed! Compelled by the pressure of the 1992 integration of the European market⁵ and by the fierce foreign competition

1. See generally EMILE ZOLA, *L'ARGENT [MONEY]* (E.A. Vizetelly trans., 1894) (1891).

2. Emile Zola's open letter "*J'accuse*" protested the 12-year army cover-up of the young Jewish officer Alfred Dreyfus's mistaken conviction of treason for selling military secrets to the Germans in December 1894. It was published in the famous French democrat statesman Georges Clemenceau's newspaper *L'Aurore*, January 13, 1898, in his eight-year battle to win Dreyfus's innocence (1897-1905).

3. See INTERNATIONAL SECURITIES AND CAPITAL REGULATION 1-52 (Harold Bloomenthal ed., 1991) [hereinafter INT'L SECURITIES & CAPITAL REGULATION]. For criticism of the prereform French system, see Robert 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).

4. LE NOUVEL ECONOMISTE, July 24, 1990.

5. See the overviews of Anthony Morris et al., *Single European Market*, 3 Doing Bus. Eur. (CCH) ¶ 99, at 105,001, AUDREY WINTER ET AL., *EUROPE WITHOUT FRONTIERS: A LAWYER'S GUIDE* (1989), and the assessment of Karl M. Meessen, *Europe en Route to 1992: The Completion of the Internal Market and Its Impact on Non-Europeans*, 23 INT'L LAWYER 359 (1989). See generally PAOLO CECCHINI, *THE EUROPEAN CHALLENGE, 1992: THE BENEFITS OF A SINGLE MARKET* (1986); CHRISTOPHER TUGENDHAT, *MAKING SENSE OF EUROPE* (1988). The Single European Act, 1987 O.J. (L 169) 1, adopted in 1986 to radically transfer the EC from a European customs union to a single market, followed the European Commission's 1985 White Paper. Commission of the European Communities, *Completing the Internal Market: White Paper From the Commission to the European Council* (June 1985), com (85) (310) final. The Single European Act amended the Treaty of Rome, which in 1958 established the European

likely to result, the French government has transformed the Paris capital market in the past four years to such a degree that it is the most modernized and sophisticated in the world. Based on capitalization (4,333 billion FF in 1991), it now ranks fourth in the world, behind only Tokyo, New York, and London. Of all European countries, France has the largest number of individual shareholders.⁶

In 1991, *des Bourses de valeurs mobiliers*, the French stock market, achieved the best performance of all the stock exchanges in Europe, with an overall growth of twenty percent. However, while already representing more than thirty-one percent of France's nominal GNP, the French capital market, particularly its stock market, still has tremendous potential for growth. An increasing number of recently privatized enterprises (many of them giants in their industry, e.g., the investment bank *Paribus*) appear on the stock exchange each year, and many of these are undervalued compared to the relatively overvalued stocks on Wall Street. Part of the strength of the French securities market lies in its diversity, unmatched by any other European market. For all of these reasons, the *Paris Bourse* has become increasingly attractive to foreign investors, including those from the United States.⁷

A few years ago, a French observer described the goal of the financial markets reforms as "the creation of a unified capital market providing

Economic Community (EEC) to extend the association that began with the European Coal and Steel Community (ECSC). TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 1. The ECSC was established in 1952 and, unlike the EEC and the European Atomic Energy Community (Euratom), is subject to a 50-year period in duration. TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY [ECSC TREATY] art. 97. Euratom was established by a separate treaty on March 25, 1957, in Rome. TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY [EURATOM TREATY]. The ECSC later merged its governing council with those of the EEC and Euratom. TREATY ESTABLISHING A SINGLE COUNCIL AND A SINGLE COMMISSION OF THE EUROPEAN COMMUNITIES, Apr. 8, 1965, 4 I.L.M. 776. Merger of the three communities seems to be overdue. The three communities (EEC, Euratom, and ECSC) share the same decisionmaking structure of the Commission of the European Communities, Council of the European Communities, European Parliament, and European Court of Justice. The Maastricht Treaty, *infra* note 126, however, introduces a change by substituting the term European Community for the term EEC, art. G(A), throughout the Treaty of Rome. It now becomes the European Community. The ECSC, title III of the Maastricht Treaty, and Euratom, title IV, are retained as communities so that the three communities are retained with a name variation to accommodate the proposed changes. Since the three European communities have been managed by common decisionmaking, the singular reference of the European Community (EC) is increasingly used instead of the Common Market.

6. SELINA O'CONNOR, *WORLD EQUITY MARKET: 1991* (1991).

7. *LE NOUVEL ECONOMISTE*, Jan. 31, 1992.

investment opportunities from the very short-term to the very long-term for all segments of the economy."⁸ This goal largely has been achieved. The French capital markets now offer a wide variety of products, including debt and equity securities, futures, money market, and capital securitization. The Ministry of Economy and Finance recently authorized the issuance of negotiable debt instruments with terms of less than two years to spur the nation's shorter-term money markets by providing companies with alternative funding channels to their normal bank loans. Despite the reforms of the French financial securities markets in recent years, French corporations so far have made little use of the markets as a way of raising working capital.⁹

Beyond these domestic concerns, no discussion of French securities laws can be complete without reference to the regulatory framework of the European Community (EC) in the same area. One commentator has named the EC "the world's primary actor in accomplishing regulatory harmony in the field of securities regulation."¹⁰ This primary actor, which also serves as the world's primary securities regulator for the EC, is presently the most active and influential organization in the nascent field of international securities and financial services regulation. The most important contributions of EC lawmaking in the regulatory area since 1989 consist of the Prospectus Directive, the Insider Trading Directive, the Mutual Funds Directive, and the Second Banking Directive. Significantly, the Prospectus Directive will allow certain issuers from member states to make public offerings throughout the Community's markets using a common prospectus. The Banking Directive will allow a bank to provide a variety of banking services, including investment banking services, if authorized by its home state, throughout the Community on the basis of a single license.¹¹ Older EC proposals include the Take-

8. P. JAFFRE, *L'unification du marche des capitaux*, LA REVENUE BANQUE, Apr. 1986, at 332.

9. Decree 92-137 (Mar. 1992) reprinted in 2 THOMSON'S INT'L BANKING REGULATOR 4 (1992).

10. Manning Gilbert Warren III, *Global Harmonization of Securities Laws: The Achievements of the European Communities*, 31 HARV. INT'L L.J. 185, 193 (1990).

11. Financial services under the Second Banking Directive, which becomes effective on January 1, 1993, and the amended proposal for Investment Services Directive fall outside this Article's focus. See Second Council Directive 89/646 of 15 December 1989 on the Coordination of Laws, Regulations and Administrative Provisions Relating to the Taking Up and Pursuit of the Business of Credit Institutions and Amending [First Council] Directive 77/780 [the First Council Banking Directive of 12 December 1977, 1977 O.J. (L 322) 30], 1989 O.J. (L 386) 1; Amended Proposal for a Council Directive on Investment Services in the Securities Field, 1990 O.J. (C 42) 7; Amended Proposal for a Council Directive on Capital Adequacy of Investment Firms and Credit Institu-

over Directive¹² and the Investment Services Directive. The Directive on Investment Services, if adopted, "would provide for a home state license that would allow investment firms to provide in any member state the investment services that the home state authorizes. A deadlock over a proposed amendment to restrict off-exchange and off-market trading activities by investment firms has held up passage of this directive since 1991.¹³

It is important to note, however, that these directives are not self-executing and require national laws for implementation. Moreover, most of their provisions only set minimum requirements. The national authorities of member states still maintain broad control and autonomy in the securities and financial services areas.

II. THE FRENCH STOCK EXCHANGE SYSTEM

The French stock exchange system is comprised of three markets: 1) The official stock exchange (*marché officiel*), 2) the second market (*second marché*), and 3) the over-the-counter market (*marché hors côté*). The principal differences among these markets are the size and scope of the activities of the listed securities issuers and the preconditions that such issuers must satisfy in order to list their securities. Of the three French markets, the Official List Exchange is the largest and most prestigious.¹⁴

A. *The Official List Exchange*

The Official List Exchange consists of a cash trading sector and a forward trading sector. The cash trading sector is called *marché au comptant*, also translated as cash market. The forward trading sector known as the *marché à règlement mensuel*, also translated as the monthly settlement market, is where the most active stocks are traded.¹⁵

On the cash market, investors may place orders for any quantity of securities, starting with a single unit. "Title to securities traded on [this] market passes immediately upon the effectuation of such a trade, irre-

tions, 1992 O.J. (C 50) 5; Amended Proposal for a Council Directive Relating to the Supervision of Credit Institutions on a Consolidated Basis, 1992 O.J. (L 332) 6; Council Directive 89/299 of 17 April 1989 on Own Funds of Credit Institutions, 1989 O.J. (L 124) 16.

12. See SAMUEL WOLFF, *Securities Regulation in the European Community*, 20 DENV. J. INT'L. L. & POL'Y 99, 99-101 (1991).

13. *Id.* at 101.

14. *Banking-Financing*, 2 Doing Bus. France, Nov. 1990, (M.B.) § 15.04[2][c][ii].

15. *Id.*

spective" of the timing of certificate delivery.¹⁶ Thus both buyers and sellers must be prepared to settle their transactions immediately.

On the monthly settlement market, sellers and buyers agree to make full payments for securities traded or a fixed future date at the price quoted at the time of such agreement.¹⁷ While transactions once concluded are firm in both price and quantity, actual cash settlement and delivery of securities do not occur until the end of the trading month. All such trades must be made in lots of five, ten, twenty-five, fifty, or one hundred.

Trading on the listed market used to take place on the *Paris Bourse* and on six other regional stock exchanges. Since January 24, 1991, however, these exchanges have been merged into a single national market. Consequently, transactions and most supervision of the exchange are now centralized in Paris. "With this change, the regional bourses have lost their monopoly over regional stock trading. But, they are now entitled to trade in all national stocks, provided that [the regional bourses] meet the capital requirements of Parisian firms."¹⁸

B. *The Second Market*

The second market (*Le seconde marché*) 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.¹⁹ Launched in 1983, the second market is now the largest in Europe. At the end of 1990 the second market listed 295 firms with a total capitalization of FF 139 billion (\$27.2 billion). This was three times the size of the Unlisted Securities Market in London.²⁰ At present there are approximately eighty companies listed on the second market. After a probationary period, and subject to the approval of the *Commission des opérations de Bourse* (COB),²¹ the *Consul des Bourses des Valeurs* (CBV)²² must decide whether to maintain the shares on this market, strike them off, or admit them to the official list. Until recently, the CBV effectively decided at

16. *Id.*

17. *Id.*

18. *Regional Exchange Merge with Paris to Create Simple National Equities Market*, INT'L SEC. REG. REP., Jan. 28, 1991, at 1. The capital requirements were FF 25 million (\$5 million) at the beginning of 1991.

19. *Banking-Financing*, *supra* note 14, § 1504[2][c][ii][B].

20. *SBF Plans Second Market Reform*, INT'L SEC. REG. REP., Feb. 25, 1991, at 8.

21. See discussion *infra* part II.B.1.

22. *Id.*

least four years after the introduction of the company on the second market, based on the financial accounts for the third year of activity of the relevant company. The CBV now decides at the end of the third year.²³ Trading on the second market is on a cash basis only.

C. *The Over-the-Counter Market*

The over-the-counter market (*marché hors-côté*) does not create a permanent market for any security; rather, it functions merely as irregular market for the occasional sale of French or foreign securities. Under this market regime, the seller and purchaser of securities simultaneously exchange the securities for full payment. Any company or shareholder may list securities on the over-the-counter market by filing an application with the Stock Brokers Association (SBF)²⁴ and by publishing certain minimum financial information concerning the issuer. When a security is not traded for a period of one month, it is withdrawn from the market. Stockbrokers have no monopoly over this market because securities can be traded without formalities or conditions.²⁵

III. STATUTORY FRAMEWORK AND MAJOR REGULATORS

A. *Statutory Framework*

Although the French government first comprehensively addressed securities regulation in an ordinance issued in 1967, it is only in recent years that the government has created a truly effective regulatory scheme for securities. The 1967 ordinance introduced France to the concept of securities regulation as a separate area of law and established a specialized government agency, the COB, to regulate activities falling within the purview of the ordinance. As originally adopted, the ordinance contained only the most rudimentary rules and endowed the COB with very limited authority.²⁶ It was left to a law enacted by the Parliament in 1987 and signed by the President in early 1988, however, to lay the true foundation of the postreform French securities regulation.²⁷ While making investor protection the chief task of the COB, the 1988 law created a new agency, the CBV, to maintain discipline on the stock exchanges.

23. *Banking-Financing*, *supra* note 14, § 1504[2][c][ii][B].

24. *See* discussion *infra* part II.B.3.

25. CBV Règlement (Apr. 21, 1988).

26. Ordonnance No. 67-833 (Sept. 28, 1967). *See also* Georgeatte Miller, in INT'L SECURITIES & CAPITAL REGULATION, *supra* note 3, ch. 7.

27. Loi No. 88-70 (Jan. 22, 1988).

The CBV is responsible for making rules on the creation and duties of stockbrokers, the operation of the stock exchanges, and the listing requirements of the exchanges. This statute also gave the SBF, on the other hand, executive authority to examine the listing applications submitted to the CBV, decide on the suspension of listings, and register the price of listed securities. Nineteen eighty-eight additionally witnessed the enactment of a law setting forth the fundamental rules concerning the operation of open-end mutual funds in France.²⁸ In August 1989 the French legislature adopted a law reorganizing and increasing the power of the COB. This law further strengthened the independence of the COB by providing it with the authority to determine its own budget within legally authorized limits.²⁹ This statute also laid down the first comprehensive body of rules concerning takeovers through tender offers in France. Scattered in among these major legislative actions are many decrees issued by the Prime Minister, *arrêtes* issued by the Minister of the Economy and Finance, and *règlements* issued by the COB. While the decrees aim to fill in the gaps left by the major statutes, the *arrêtes* are issued to approve the COB and CBV regulations. The corpus of General Regulations (*Règlements Générale*) issued by the CBV, which has been modified since 1988, fills out this list of securities-related regulations.

B. Major Regulators

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

The principal French agency regulating securities transactions is the COB, which has the responsibility of regulating, developing and expanding the French securities market.³⁰ The 1989 statute strengthens the independence of the COB by providing this body with the authority to determine its own budget within legally authorized limits.³¹

The COB has three primary functions. First, it regulates and supervises the various French exchanges and French brokers by promulgating rules and regulations concerning the functioning of the exchanges and related activities, including the offering, buying, and selling of shares.³²

28. Loi No. 88-1202 (modified by *Arrete* (Feb. 7, 1992)).

29. Loi No. 89-531.

30. See Ordonnance No. 67-883, *supra* note 26, art. 1.

31. Loi No. 89-531.

32. *Id.* art. 4.

Second, it reviews and verifies information disclosed to the public by reporting companies. Finally, the COB polices the exchanges and ensures that companies listed on the exchanges disclose the requisite information. Pursuant to this responsibility, COB may, for instance, require a company to inform publicly its shareholders and the market of any previous disclosure violations, and if the company refuses, the COB may officially inform the public of the violation.³³

The active role of the COB in verifying information contrasts with the passive role played by the Securities and Exchange Commission in the United States. Securities and Exchange Commission Regulation S-K provides that the forepart of the registration statement and outside front cover of the prospectus state in large boldface type: "These Securities have not been approved or disapproved by the Securities and Exchange Commission nor has the Commission passed upon the accuracy or adequacy of this prospectus. Any representation to the contrary is a criminal offense."³⁴

In addition to its verification function, the COB has investigative and enforcement authority. It may, after obtaining a court order, require that all a company's assets be placed into an escrow account, and the COB may obtain the equivalent of a preliminary injunction (*interdiction temporaire d'activité professionnelle*), temporarily preventing a company from engaging in business or selling securities. The COB has investigatory power to conduct searches and to seize documents as well as broad authority to conduct discovery. It has authority to levy fines of up to the greater of ten million French Francs or ten times the profit realized from the illegal activities. Anyone not cooperating with a COB investigation may face criminal liability or disciplinary action.³⁵ After 1988, the CBV assumed the COB's role as watchdog over company listing and reporting. The COB, however, retains the exclusive right to conduct investigations.

In 1990 the COB issued a series of regulations covering subjects such as failure to disclose information to the public (*défaut d'information du public*), the tort of insider trading (*délits d'initiés*), manipulation of prices (*l'établissements des cours*), abuse of office (*l'utilisation abusive des pouvoirs ou des mandats*), portfolio management (*gestion de portefeuille*), and underwriting procedures (*procédure de rescrit*).³⁶

33. *Id.* art. 3.

34. Securities and Exchange Commission Regulation S-K, item 501, 17 C.F.R. part 229.501 (1992).

35. Ordinance No. 67-883, *supra* note 26, arts. 37, 2, 5, 6, 10.

36. See LE NOUVEL ECONOMISTE, SPECIAL PLACEMENTS, Mar. 1991.

The COB has also been active in the area of international cooperation. It has signed a mutual assistance agreement with the SEC and the Chicago Commodity Trading Commission and with the British Securities and Investment Board (SIB).³⁷ The mutual assistance agreement between the COB and the United States SEC, which came into effect on January 31, 1991, obliges the two agencies to investigate securities law violations on each other's behalf and to alert each other as to suspected irregularities. The COB has also signed information exchange accords with its counterparts in Japan and Switzerland to ensure parallel regulations and reciprocity between France and other states.³⁸

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

The CBV possesses general legislative and judicial decisionmaking authority over the stock exchanges. This body develops the rules and regulations necessary for the orderly function of the exchange and ensures the compliance with these rules. It must also approve the listing or removal of a company's securities from a stock exchange.³⁹ Finally, it has the responsibility of analyzing and approving the price offered in any tender offer within five days of bidders' applications.⁴⁰

The CBV consists of twelve members. Ten are elected by stock brokers, one is appointed by the employees of stock brokers (*Sociétés de Bourse*) and the Stock Brokers Association (*Société des Bourses Françaises*, or SBF), and one is appointed by the Minister of the Economy and Finance.⁴¹

3. The French Stockbrokers Association (*La Société des Bourses Françaises* or SBF)

Formerly called *La Compagnie Nationale des Agents de Change*, the SBF is a self-regulating organization whose membership includes all securities brokers in France. This body has the executive authority to examine the listing applications submitted to the CBV, to decide on the suspension of listings, and to register the price of listed securities.⁴²

37. *Id.*

38. *COB Negotiating Information Pacts with Japanese, Swiss Regulators*, INT'L SEC. REG. REP., June 17, 1991, at 7.

39. Decree No. 88-254 (Mar. 17, 1988).

40. *Règlement Général du Conseil des Bourses de Valeurs*, approved by *Arrete*, Apr. 21, 1988, arts. 182-86.

41. *Loi No. 88-70*.

42. David J. Berger, *Guidelines for Mergers and Acquisitions in France*, 11 Nw. J.

IV. LISTING ON THE EXCHANGE

A. *Listing Qualifications*

1. Domestic Corporations

To be listed on the official 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.⁴³ For those companies trading on the Official List market at least 25 percent of their equity and 80,000 of their shares must be available for sale to the public, although this requirement may be waived in cases in which a company has put on the market on the day of listing sufficient capitalization and number of shares to assure an orderly market (no less than 600,000 shares with a share capital equal to no less than 30 million FF). The company must have published or have filed its annual financial statements for the three fiscal years preceding the request for listing and must have the financial statements for the last two fiscal years certified by the company's Statutory Auditors.⁴⁴

Lastly, an *établissement crédit*⁴⁵ or other qualified intermediary designated by the company to oversee the listing process must file the application for listing on behalf of the company with the Stock Exchange Council.⁴⁶

INT'L L. & Bus. 484, 510 (1991).

43. See Règlement Général du Conseil des Bourses de Valeurs, approved by *Arrete*, Apr. 21, 1988, tit. III.

44. See COB Règlement No. 88-04 (setting forth disclosure requirements for public issuers; shares held by the company's employees are counted for the purposes of this twenty-five percent requirement). The CBV may also take into account shares that may be issued in exchange for certain convertible securities previously subscribed to by the public. See CBV General Decision No. 88-2 Relating to the Listing on the Official Exchange, art. 6.

45. *Établissement crédit* are legal entities that carry out banking operations on a regular basis and are subject to the rules and regulations governing the banking profession in France, including banks, finance companies (*sociétés financières*), specialized financial institutions (*institutions financières spécialisées*), mutual or cooperative banks (*banques mutualiste ou coopérative*), savings associations (*caisses d'épargne et de prévoyance*), and municipal credit banks (*caisses de crédit municipal*).

46. Règlement Général, art. 3.1.1. See General Decision No. 88-2, arts. 4-5, for a detailed list of the documents and information to be submitted at the time of the filing of the application for listing.

2. Foreign Corporations

To list its securities on the official stock exchange, a foreign corporation must obtain the prior authorization of the Ministry of Economy and Finance unless it is a resident of the EEC or of a member state of the Organization for Economic Cooperation and Development (OECD).⁴⁷ Once a company has received the necessary authorization, a credit establishment or other qualified intermediary acting on behalf of the foreign company must file the application for listing. Unless the CBV makes an exception, the foreign company must have published or filed its financial statements for the last three fiscal years, the last two of which must be certified by its Statutory Auditors. The company must translate into French all financial statements and notes annexed thereto. It must also submit a prospectus (*note d'information*) setting forth certain information relating to the foreign company's organization, financial situation, and activities to the COB for approval prior to the listing.⁴⁸ The CBV makes its decision on the listing and notifies the credit establishment that submitted the application for the foreign company within six months of the receipt of such an application, or, if the CBV requires supplementary information, within six months of the receipt of this additional information.⁴⁹

3. Second Market Listing

A listing on the second market is valid for three years. At the end of this period the issuer may, with recommendation by the SBF and approval of the CBV, list its securities on the Official Exchange if the company has developed accounting procedures that satisfy the rules and regulations governing the official stock exchange. The issuer must publish the same accounting information as companies listed on the official stock exchange, notably the consolidated financial statements and semi-annual reports, including a table of activities and profits or losses.⁵⁰

B. *Disclosure Requirement*

Before engaging in an initial public offering of securities (*appel public à l'épargne*), a company must prepare a prospectus (*note d'information*) disclosing specific information required by the COB. It must issue a prospectus in any transaction that would constitute an offer of, or for, secur-

47. Décret No. 89-938, Dec. 29, 1989, art. 10.

48. COB Règlement 88-04, arts. 2-5, 14-16.

49. Règlement Général, art. 3.1.7.

50. CBV Règlement Général, Apr. 21, 1988, art. 3.

ities, including a tender offer.⁵¹ The COB mandates disclosure regarding 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 the officers, directors, senior management, and controlling shareholders, and any relationship thereto; the reasons for the issuance and planned use of proceeds; and the financial institutions advising the issuer and guaranteeing placement of the securities.⁵²

When a formal prospectus is too technical for a nonprofessional to understand readily, "the COB in certain instances requires that issuers prepare and disseminate to the public a prospectus summary (*abrégé de la note d'information*). This summary may not exceed six pages, must refer to the formal prospectus and must contain a coupon enabling the reader to order a copy of the formal prospectus, free of charge."⁵³

The COB must approve a prospectus before the prospectus can be issued to the public. The COB may require an issuer to change the prospectus, or may conduct an investigation to determine the accuracy of the disclosures by sending its agents to the issuer's offices or by requesting representatives of the issuer to appear before it. Frustrating the COB's factfinding activities or refusing to produce documents or appear before the COB subjects the issuer to penal sanctions.⁵⁴

Once the COB has approved a prospectus, the issuer must make the prospectus available to the public at its registered office, at all establishments where subscriptions for the securities, and, if the securities are listed on a stock exchange, at the Stock Brokers Association.⁵⁵

C. *The Second Market*

The requirements that a company must satisfy to list its securities on the second market are simpler and significantly less burdensome than those necessary for listing on the official stock exchange. The application process is more streamlined, and the required minimum percentage of the company's shares offered to the public is only ten percent.⁵⁶ Listing

51. Ordonnance 67-833, art. 6.

52. Annex I to the Instruction of February 2, 1982 of the Commission des Opérations de Bourse Relating to Prospectus Distributed by Companies Making Public Offerings.

53. See *Banking-Financing*, *supra* note 14, § 15.04[3][b][i].

54. *Id.*

55. *Id.*

56. *Id.* § 15.04[2][c][ii][B].

on the second market also requires less information to be disclosed to the public. A prospectus for listing on the second market, known as a *note de présentation*, must set forth information concerning the company's organization, financial situation, and activities recommended by the COB. This prospectus must be filed with the COB no later than three months prior to the date on which the securities are to be listed. Unlike the prospectus filed with respect to a listing on the official stock exchange, the prospectus filed in connection with a listing on the second market need not be formally approved by the COB. The company files the final text of the prospectus with the COB, which then makes the text available to the public.⁵⁷

D. *The Listing Directives and the Prospectus Directive of the European Economic Community*

Prior to the adoption of the Prospectus Directive in April 1989, two EEC directives governed the offering and listing of securities in the common market. The EEC Listing Conditions Directive of 1979⁵⁸ and the Stock Exchange Admission Directive sets forth the minimum conditions for securities to be listed on a stock exchange located in the EEC and requires member states to ensure that securities may not be admitted to listing in their state unless they satisfy these conditions. These listing conditions involve matters such as the size of the issuer, its period of existence, and the distribution of its shares in the market. The Directive also imposes numerous reporting obligations on issuers of listed securities. Non-EEC issuers listing in an EEC state must meet the minimum conditions and obligations of the Directive as enacted into national law in the appropriate state.⁵⁹ The EEC Listing Particulars Directive of 1980⁶⁰ and the Stock Exchange Prospectus Directive aim to coordinate the differences in member state disclosure requirements for stock exchange listings. This directive requires a member state to ensure that the listing of securities upon a stock exchange in its territory is contingent upon the publication of a disclosure document referred to as a "listing particular." While requiring the listing particular to contain all information necessary for an investor to make an "informed assessment" of the

57. *Id.*

58. Council Directive 79/279 of 5 March 1979 Coordinating the Conditions for the Admission of Securities to Official Stock Exchange Listing, 1979 O.J. (L 66) 21.

59. *Id.* pmb. ¶ 6.

60. Council Directive 80/390 of 17 March 1980 Coordinating the Requirements for the Drawing Up, Scrutiny and Distribution of the Listing Particulars to Be Published for the Admission of Securities to Official Stock Exchange Listing, 1980 O.J. (L 100) 1.

financial position and prospects of the issuer, the Directive allows a member state to create numerous exemptions, such as exemptions for securities that have been publicly issued or issued in connection with a takeover bid in which, within the preceding year, the issuer published an equivalent disclosure document in that state. States may not publish listing particulars until they have approved them. Once approved, the state must publish them. A state can make the publication either by inserting the listing particular in one or more newspapers circulated throughout the member state or by a brochure made available to the public.⁶¹

Furthermore, the Prospectus Directive seeks to coordinate the requirements for the drawing-up, scrutiny, and distribution of a prospectus to be used when securities are "offered to the public for the first time" within a member state. Thus, the Directive does not apply to securities that are already listed in member states.⁶² If a company makes a public offer of transferable securities in a member state, and at the same time the securities are the subject of a listing application in the same state, the Listing Particulars Directive governs the prospectus requirements.⁶³ Article 11 of the Prospectus Directive sets forth the minimum prospectus disclosure requirements for publicly offered securities that are not the subject to the listing application.⁶⁴ Member states, however, have the freedom to provide the manner of publication of such a prospectus⁶⁵ and may require the offeror to prepare the prospectus in accordance with the Listing Particulars Directive, even though the securities in question are not the subject of a listing application.⁶⁶ In this manner, the Prospectus Directive paves the way for uniform regulations of disclosure for both listing and nonlisting public offerings.⁶⁷

Another feature of the Prospectus Directive is a provision that when public offerings are made within short intervals of each other in two or more member states, all member states must recognize and accept a prospectus prepared and approved in accordance with the Prospectus Direc-

61. *Id.* arts. 2, 3, 4, 5, 6, 18 and 20.

62. Council Directive 89/298 of 17 April 1989 Coordinating the Requirements for the Drawing-up, Scrutiny and Distribution of the Prospectus to Be Published When Transferable Securities are Offered to the Public, 1989 O.J. (L 124) 8, art. 1, sec. 1.

63. *Id.* art. 7.

64. *Id.* art. 11.

65. *Id.* art. 15.

66. *Id.* art. 12(1).

67. The 1989 prospectus directive and a separate mutual recognition directive adopted in 1990 continue to integrate the listing and public offering process in the Community by allowing a company to use listing particulars and prospectuses almost interchangeably. See WOLFF, *supra* note 12, at 101.

tive and the Listing Particulars Directive.⁶⁸

In France, the regulations adopted in 1988 govern listing on the stock exchange, delisting, and disclosure requirement for public offerings.⁶⁹

In 1990 the COB adopted new rules designed to comply with the EEC Integration Directive of June 22, 1987 governing mutual recognition of listing particulars. Thus, EEC issuers listing in one member state can use the same listing particulars in France.⁷⁰

V. REGULATION OF STOCKBROKERS AND INTERMEDIARIES

A. Brokerage Firms

Stockbrokers have enjoyed a monopoly on the negotiation of securities on the stock exchanges.⁷¹ The role of intermediaries such as portfolio managers, banks, and other credit establishments is restricted to transmitting orders received from clients to stockbrokers. Certain direct and indirect sales (*cession directe ou indirecte*), however, such as those between two individual persons, and those between two companies, one of which holds at least twenty percent of the stock of the other company, do not take place via a stockbroker.

Stockbrokers may also purchase and sell securities on their own account (*se porter contrepartie*), manage portfolios, and negotiate securities, futures, and options. Stockbrokers are responsible to their clients (*donneurs d'ordres*) for the delivery and payment of the securities they buy and sell on the market.⁷²

The CBV must approve all stockbrokers, and all stockbrokers must present sufficient guarantees concerning their composition and amount of their registered capital, their financial and technical means, as well as the experience of their directors.⁷³ An applicant denied approval may appeal the CBV's decision to the Court of Appeals within one month of

68. *Supra* note 62, art. 21(1).

69. *France: Amendments to Stock Exchange General Regulations Approved*, Doing Bus. Eur. (CCH), *supra* note 5, ¶¶ 120-604.

70. *COB Rules Harmonized with EEC*, INT'L SEC. REG. REP., Mar. 12, 1990, at 2. The French Ministry of Economy and Finance has recently approved COB Règlement 92-02, which implements the EEC Prospectus Directive.

71. No new *sociétés de bourse* may be authorized prior to December 31, 1991. See Loi No. 88-70, art. 24(2). In theory, 1992 should have seen a fresh opening of competition in this industry, but that has not happened so far.

72. Loi No. 88-70, art. 3.

73. See *id.* art. 4; CBV Règlement Général, art. 2.1.1.

receiving notification of the CBV's decision.⁷⁴

The reforms in the past five years have enabled domestic and foreign banks to buy stakes in stockbrokers' capital, while at the same time have allowed brokers access to the money markets.⁷⁵ The French stockbrokers thus have gradually lost their monopoly on stock trading.

In conjunction with the United Kingdom's Securities and Investments Board (SIB), the COB has adopted a set of common ethical principles regarding relationships between the financial intermediaries and their customers. Among these principles: 1) A firm should be able to deploy the necessary resources for the proper performance of its activities. It should put in place adequate internal organization and procedures, including appropriate staff dealing rules. It should properly supervise staff activities. It should have procedures to facilitate compliance with the regulatory system. 2) A firm should make itself aware of the situation and objectives of its customers and should inform them when necessary about risks, deals undertaken on their behalf, and any other relevant facts. 3) In the interests of fairness and diligence, a firm should not abuse its position to the detriment of its client. It should act with due skill, care, and diligence on its client's behalf. It should take reasonable steps to obtain the best execution of customer orders. 4) A firm should be vigilant to prevent potential conflicts of interest, and when it cannot avoid conflicts, a firm should take all reasonable steps to ensure fair treatment to all its customers.

B. *Mutual Funds in France*

The mutual fund industry requires special and separate consideration. This industrial is a major component of the French financial sector, the largest in Europe, and third in the world, representing some FF 2,000 billion (\$339 billion) of investments.⁷⁶ There are two kinds of mutual funds, the SICAVs and the *Fonds Communs de Placement*, both of which are open-end funds. The industry's trade organization is the French Mutual Fund Association (*L'Association des Sociétés et Fonds Français d'Investissement*) (ASFFI).

A law enacted in 1988 governs the operation of SICAVs and the *Fonds Communs de Placement*.⁷⁷ This law, while designed to clarify

74. Décret No. 88-603, art.3.

75. LE NOUVEL ECONOMISTE, July 13, 1990.

76. INT'L SEC. REG. REP., January 27, 1992.

77. See Loi No. 88-1201, Dec. 23, 1988, and the *arretes* and *decrees* issued pursuant thereto. The law of 1988 brought France into line with EEC rules on mutual funds. There are now more than 5000 mutual funds registered in France. By the end of May

mutual fund regulation, is not free of defects. It imposes Chinese walls between management and depositories of the mutual funds. Nevertheless, in about ninety-five percent of securities firms, the addresses of these two supposedly separate entities are the same. Moreover, an agreement between the COB and the Paris Auditors Association delegates routine control of only a handful of funds to the association. One way to further the separation of mutual fund management and depositories mandated by the 1988 law would be for the securities clearing house, SICAVAM, to break down its accounts by fund, rather than by operator, so that regulators could more easily discover duplication. The depository is responsible for all the activities of the managers, and if any abuses or false declarations in this area are not rectified, auditors may refer the case to the COB or to the courts. "The COB can order a judicial inquiry, and in the case of an ethical problem, auditors are empowered to call in the mutual fund disciplinary council."⁷⁸ The problem of bottleneck of administrative approval also exists given the increasing volume in mutual funds transactions. In response to complaints from the industry, the COB has streamlined procedures for approving new mutual funds (within one month) and for approving changes to existing funds (eight days).

In May 1991 the COB approved a code of practice for mutual fund managers drawn up by the ASFFI. "Although not all fund management firms in France are members of the ASFFI, all firms must nevertheless abide by this code, since they must pledge to honor the code as a condition of COB new fund authorization. If firms violate the new rules, the COB (will) report the case to the mutual fund disciplinary council, which was set up (in 1990) and consisting of securities market regulators and professionals."⁷⁹

C. *The Mutual Funds Directive of the European Economic Community*

The Mutual Funds Directive coordinates the laws relating to investment undertakings under the umbrella of "Undertakings for Collective Investment in Transferable Securities" (UCITS).⁸⁰ As defined in article

1990, the COB approved 54 European mutual funds for marketing in France under the European Community UCITS directive of October 1, 1989.

78. *Auditors Group Assails Rule Bending on Fund Separation*, INT'L SEC. REG. REP., Feb. 26, 1990, at 1-2.

79. *COB OKs Code of Practice for Mutual Fund Managers*, INT'L SEC. REG. REP., May 20, 1991, at 2.

80. Council Directive 85/611 of 20 December 1985 on the Coordination of Laws,

1.2 of the Directive, such undertakings represent collective investments in transferable securities of capital raised from the public, whose units are, at the request of holders, repurchased or redeemed, directly or indirectly, out of those undertakings' assets. These are in effect open-end, redeemable mutual funds. The investors can recover the net asset value of an investment by redeeming their units or selling them to the managers.

The main feature of the Directive is "home country" authorization: A UCITS established in a member state may be promoted throughout the EEC if it conforms with the Directive's minimum requirements, subject to local marketing and advertising rules. Each UCITS must produce a detailed prospectus containing certain information as set forth in the Directive, such as financial reports and prices of units. When investors market units in a member state other than the fund's home state, the "competent Authorities"⁸¹ of both states must be informed, and those of the Home State must provide those of the Host Member State with a certification indicating that the fund fulfills Directive condition.

In 1988 France enacted legislation designed to harmonize French mutual funds law with the EEC UCITS directive. The government adopted additional regulations applicable to EEC-based funds in late 1989. By early 1990, about thirty investment funds from other EEC countries had obtained authorization to offer securities in France.⁸²

VI. INSIDER TRADING

A. *Insider Trading Under French Law*

Insider trading represented the most common violation of securities laws in France in 1990. Nearly one-third of inquiries and nine of fifteen

Regulations and Administrative Provisions Relating to Undertakings for Collective Investment in Transferable Securities, 1985 O.J. (L 375) 3, *as amended* by Council Directive 88/220 of 22 March 1988 Amending, as Regards the Investment Policies of Certain UCITS, Directive 85/611, 1988 O.J. (L 100) 31 [hereinafter Council Directive]. *See also* Council Recommendation 85/612 of 20 December 1985 Concerning the Second Subparagraph of Article 25(2) of Directive 25/611, 1988 O.J. (L 375) 19. For a feasible proposal for United States reform of the Investment Company Act of 1940, by transplanting the UCITS model to section 7(d) to attain similar regulatory standards for parallel, reciprocal cross-border investment opportunities, Patrick J. Paul, Note, *The European Community's UCITS Directive: One Model for United States Regulatory Change in a Globalized Securities Market*, 25 VAND. J. TRANSNAT'L L. 61 (1992).

81. Council Directive, *supra* note 86.

82. *France: Bill Submitted on Mutual Funds*, Doing Bus. Eur. (CCH) 98-195, at ¶ 97,201.

cases referred for public prosecution involved insider trading.

In 1990 the COB drew up and the Finance Minister approved new sets of rules addressed to curb this pattern of abuse.⁸³ The new COB rules clearly delineate four categories of insiders who possess privileged information: 1) chairperson of the board, managing director, members of the directorate, directors, and members of the supervisory board of a company, as well as their spouses; 2) dealers and other personnel involved in the preparation and execution of an order; 3) people receiving privileged information through their work; and 4) anyone receiving such information from people in the other three categories. The first category of persons must prove that the profits they realized on transactions in the securities of a company with which they are affiliated do not result from inside information, but the government bears the burden of proving that such persons had access to and used inside information.⁸⁴ If the court finds that a legal entity has engaged in insider trading, it holds the entity criminally liable.⁸⁵

The rules also require the information provided to the public by listed companies to be precise and sincere. The information disclosed in France must be at least as complete as information published abroad.⁸⁶

Securities of an issuer must disclose to the public, "at the earliest opportunity,"⁸⁷ the terms of the proposed transaction. The disclosure must contain all material facts that, if known, would significantly affect the price of the security in question. Any person planning to engage in, for his or her own account, any financial transaction likely to significantly affect the price of the securities of an issuer, must disclose to the public at the earliest opportunity.

The rules also set forth conditions governing the independence and responsibilities of fund managers and of companies trading in their own shares. Parties that repurchase their own shares must report each transaction in advance to the COB, undertake the transaction against the market price trend, and limit their transactions to twenty-five percent of daily trading volumes during the previous five opening days for monthly settlement trades and thirty days for cash trades.⁸⁸

83. COB Règlement No. 90-08, art. 2.

84. *Banking-Financing*, *supra* note 14, § 15.04[5] (citing COB Règlement 90-08-78 (Matthew Bender 1991)).

85. *Id.*

86. *France: Securities Regulations Approved on Public Disclosure, Pricing, Ruling Requests, Insider Information*, DOING BUS. EUR. (CCH) 98-604, at ¶ 97,518.

87. COB Règlement No. 90-08, art. 2.

88. COB Règlement 90-02. These rules are criticized as being too harsh and exceeding the authority of the COB because they expand the scope of the term "insider infor-

B. *The Insider Trading Directive of the European Economic Community*

In addition to French domestic law, EC law also provides regulations to discourage insider trading in the French securities market. The Council adopted the Insider Trading Directive⁸⁹ in 1989. This Directive instructs member states to prohibit anyone who, in the exercise of employment, profession, or duties, acquires inside information from taking advantage of that information to buy or sell listed securities in his territory.⁹⁰ Member states are obligated to establish and apply penalties sufficient to promote compliance with the measures taken pursuant to the Directive. Unlike United States law, this EC directive only applies to securities admitted to trading on a market that is regulated by "public bodies," that "operates regularly and is accessible directly or indirectly to the public."⁹¹ The Directive specifically permits member states to exclude transactions effected without a professional intermediary outside a regulated market.⁹² France incorporated the Directive when the government approved COB regulation 92-02 in March 1992 prior to the final date of June 1, 1992 for incorporation into the internal law of EC member states.

VII. TENDER OFFERS IN HOSTILE TAKEOVERS

A. *Statutory and Regulatory Framework*

A "hostile takeover" occurs when a firm acquires a publicly held company over the opposition of that company's management. To achieve this goal, hostile bidders often use "tender offers" in which they "offer to stockholders of a publicly owned corporation to exchange their shares for cash or securities at a price above the quoted market price."⁹³

Prior to 1989, United States style takeovers were not common in France. With the battles for control of such large companies as Téléme-

mation" as defined under existing legislations. "[I]t means that only people who know absolutely nothing will be able to trade." *COB Draws Up Tougher Insider Trading Rules*, INT'L SEC. REG. REP., May 21, 1990, at 2-3.

89. Council Directive 89/592 of 13 November 1989 Coordinating Regulations on Insider Dealing, 1989 O.J. (L 334) 30.

90. *Id.* arts. 1-2.

91. *Id.* art. 1.

92. *Id.* art. 2.

93. LEWIS D. SOLOMON ET AL., CORPORATIONS: LAW AND POLICY 1052 (2d ed. 1988).

canique, Bénédictine, Moët-Hennessy Louis Vuitton (LVMH),⁹⁴ Le Printemps and Perrier,⁹⁵ however, hostile takeovers have become almost routine, largely due to the regularization of takeover rules in France since the adoption of the 1989 law⁹⁶ and regulations promulgated by the COB and CBV. These rules demand significant disclosure by bidders and make it very difficult to remove incumbent management. A factor conditioning business decisions was that France's acquisitions abroad in the past several years exceeded greatly French assets sold to foreigners during the same period.

With no single law governing the subject matter, such as the Williams Act in the United States, a number of official or quasi-governmental groups undertake the French regulation of takeovers. Thus, the CBV 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 d'échange*). The COB examines and approves the prospectuses and other public statements disseminated to shareholders during a tender offer. The Ministry of Economy and Finance coordinates the creation of regulations governing takeovers and has control over agencies governing foreign investments (in the directorate called *Direction du Trésor*) and antitrust (in the department called *Direction Générale de la Concurrence*).⁹⁷

Representatives of these three organizations sit on the Supervisory Board of Takeovers (*Comité de Surveillance des offres publiques d'achat*), which coordinates, rather than supervises, the three above-mentioned agencies.⁹⁸ The COB and the CBV have made major decisions, but rarely has the Supervisory Board played a significant role in the government's approval of a major takeover.

The 1989 law and subsequently adopted implementing measures outline in detail how a tender offer should be conducted, what defensive measures can be taken, and what disclosure should be made.

94. See WOLFF, *supra* note 12.

95. The legal battle between the Swiss food giant Nestlé and the Italian Agnelli family over the control of Perrier, the largest mineral water maker in France, lasted about four months and was intensively reported by the international press.

96. Loi No. 89-531 (Aug. 2, 1989) (relating to the Security and Transparency of the Financial Markets).

97. *Id.* See also *Arrête* (Sept. 28, 1989), at File V of the General Regulation of the CBV and subsequent changes made thereof; COB Règlement 89-03.

98. See Alexander Marquardt, *Tender Offers in France: The New Rules*, INT'L FIN. L. REV., Jan. 1990, at 35-37.

B. *Conduct of a Tender Offer*

A tender offer must remain open for at least twenty days from the date of the *avis d'ouverture*. Shareholders may withdraw their tenders at any time during the offer. Competing bids must be submitted ten calendar days prior to the closing date of the original offer. If a competitor bids, the CBV will then extend the duration of the original offer so that both offers will close on the same date. Bidders must set competing cash offers at a price of at least 102 percent of the prior offer, but that increase is not required if the original bidder did not offer to buy all the target's outstanding shares and the competing bidder does so.⁹⁹

A bidder offering to buy all shares for cash may purchase the target's shares on the open market during the duration of the offer, the offer price being automatically increased to the greater of either 102 percent of the offer price or the price paid on the market. If the offer is not all cash for all shares, however, or includes some securities as consideration, the bidder may not purchase any shares during the offering period. Once the bid closes, and prior to the CBV's official announcement of the result, the offeror may not sell any of the target's securities and may only purchase additional securities on the open market at the offering price.¹⁰⁰

A distinctive feature of French takeover law under Law No. 89-531 is the concept of mandatory tender offers. The CBV amended Law No. 89-531 in March 1992 so that shareholders who own more than one-third of a company's common stock must launch bids for the other two-thirds, bringing the holding to one hundred percent.¹⁰¹ Because regulation, rather than law, fixes this new threshold, future changes are possible if the negative consequences exceed expected benefits.¹⁰²

This regulatory scheme contrasts sharply with the United States regulations under the Williams Act, for these regulations do not empower the regulator to rule on purely substantive terms, such as the price and the minimum number of shares to be bought. Instead, the Williams Act seeks to use "traffic rules" to guarantee equal treatment for all stockholders and to prevent stockholders from being rushed or unfairly pressured to sell securities.¹⁰³ For example, under the Securities Exchange Act of

99. *Id.* at 38.

100. *Id.*

101. *Id.* Under the original provisions of Loi No. 89-531, ownership of 33.3% of the voting rights of the target corporation would trigger automatically only the bidder's obligation to offer for another one-third.

102. *CBV Changes Standards for Making Takeover Bids*, INT'L SEC. REG. REP., Mar. 24, 1992, at 2, 3.

103. See ROBERT CHARLES CLARK, CORPORATE LAW 551 (1986).

1934,¹⁰⁴ if the bidder offers to buy only a portion of the outstanding shares of the target, and holders tender more than the number the bidder has offered to buy, the bidder must buy in the same proportion from each shareholder. This is called the "pro-rata rule."¹⁰⁵

The CBV may approve a number of exemptions to the mandatory tender offer provision if the exceeding of the 33 percent stock ownership level resulted from a decrease in the number of outstanding shares, the target is already under the control of a third party, or the bidder owns less than 37 percent of the outstanding shares and promises to reduce his or her ownership level to 33 percent within 18 months.

C. *Defensive Measures*

Once a bidder has made a tender offer, the incumbent management can take only a limited number of defensive actions under French law. A COB regulation, for instance, provides that management must notify the COB of all actions beyond the ordinary course of business. The incumbent management must exercise particular prudence in redeploying assets or taking other extraordinary corporate actions, because the COB generally prohibits measures taken primarily to defeat the offer. For instance, the board of the target company is prohibited from voting any shares held by a subsidiary company during the offering period.¹⁰⁶ These rules have also made it difficult for the incumbents to seek effective help from a "white knight," a competing bidder who enters the game solely to rescue the target's management. This is illustrated in Framatone's failed attempt to rescue Télémécanique, in Schneider's 1988 hostile takeover and in a white knight's failure to rescue Perrier from acquisition by Nestlé in the Spring of 1992.¹⁰⁷

104. 15 U.S.C. §§ 78a-78lll (1988).

105. 15 U.S.C. § 78(n)(d)(6) (1988).

106. COB Règlement 89-03.

107. For the case of *Télémécanique*, see *supra* Berger, note 42, at 521 n.241. The takeover war over Perrier was triggered by Nestlé and its ally Banque Indosuez's attempt to control Perrier. The majority holder of Perrier, Exor (controlling 49.3% of Perrier's voting shares), feared that Nestlé would break up the company and sought help from the Italian family Agnelli, owner of the carmaker Fiat. The latter then offered a competing bid, through its investment subsidiary IFINT, for Perrier's shares at exactly the same price. The Nestlé camp countered by asking its ally the French food company, BSN, to bid for the control of Exor. In response, the Agnelli camp extended a competing but friendly bid for Exor. Eventually, what tipped the balance in favor of Nestlé was the CBV's decision that Exor, whose "acting-in-concert" with its allies Saint-Louis and Société Générale made its holding of Perrier exceed the one-third threshold, was required by law to extend an unconditional bid for all shares of Perrier. The Agnelli camp's

A rule more favorable to the target company's management holds that a target company can increase its share capital throughout the duration of an offer and can issue new 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*).¹⁰⁸

Under the 1989 law, shareholders controlling the majority of the voting or equity stock upon completion of a tender offer may call a shareholders' meeting if the target board does not do so, thus allowing the successful offeror to elect a new board quickly.

D. Disclosure Requirement Triggered by Significant Ownership

Apart from the disclosure requirements for public offers and listings of securities discussed earlier, any person who owns or acquires listed securities is also required under French law to disclose when his or her holdings reach a certain level, whether through a tender offer or otherwise. In contrast to the singular five percent disclosure threshold mandated under the Williams Act in the United States,¹⁰⁹ French law sets up six ownership thresholds, the crossing of each of which triggers a different disclosure requirement. These triggering levels are five percent, ten percent, twenty percent, thirty-three and one-third percent, fifty percent, and sixty-six and two-thirds percent. A securities owner must make a disclosure to the company in all cases within fifteen days and to the CBV within five market days if the shares are traded on the Official Market. It is worth noting that regulators must take into account voting rights, as well as ownership, when determining the statutory thresholds. Moreover, any group of purchasers "acting in concert" must also make a disclosure if their holdings added together meet one of the thresholds.¹¹⁰ Failure to disclose in violation of the law deprives the shareholder of his or her rights to vote on the shares in excess of the thresholds for two years, or up to five years if a commercial court finds that circumstances warrant such a penalty.¹¹¹

attempt to have the French court overturn the CBV's decision was unsuccessful and the Agnelli group had to give up the battle for Perrier in April 1992.

108. Loi No. 89-531, art. 14.

109. Securities Exchange Act of 1934, 15 U.S.C. § 78m(d) (1988).

110. Loi No. 89-531, arts. 17-18.

111. Loi No. 89-531, art. 20.

E. *Disclosure Required of a Bidder in Tender Offers*

Before commencing an offer, the offeror must file an application with the CBV through the banking institution guaranting the financing arrangements for the offer.¹¹² This application must disclose the bidder's intention in making the bid, any plans the bidder may have if the offer is unsuccessful, the minimum number of securities which the offeror is willing to accept, and the form and means of payment.¹¹³ Within twenty-four hours of such a filing, the offeror must also file a draft prospectus (*note d'information*) with the COB, disclosing information such as the purpose for the offer, the future plans of the offeror, the financing for the offer, the number of shares being offered, and the timetable for the offer. The COB must either approve or disapprove the draft prospectus within five trading days and, upon approval, must forward this document to the target company and make it available to the target's shareholders either through publication in appropriate newspapers or otherwise.¹¹⁴

Upon CBV's notification, the SBF automatically suspends trading in the securities of the target company and the COB then has five days to approve the application for the bid based on considerations such as whether the price (cash or stock swap) is reasonable and whether the takeover is in the public interest.¹¹⁵ If approval is granted, the CBV publishes a notice of approval and trading resumes within two market days.¹¹⁶

F. *Proposed Takeover Directive of the European Economic Community*

In September 1990 the Commission of the European Communities adopted an amended proposal for a directive on takeover bids known as the Proposed Takeover Directive.¹¹⁷ This proposal aims to establish a uniform code for takeovers in the EEC, especially with respect to minimum disclosure requirements and to permissible defensive measures.¹¹⁸

112. COB Règlement 88-01, September 28 Regulation, art. 5.

113. *Id.*

114. COB Règlement 89-03, art. 8.

115. *Id.*

116. *Id.*

117. Amended (Commission) Proposal for a Thirteenth Council Directive on Company Law, Concerning Takeover and Other General Bids, 1990 O.J. (C 240) 7.

118. Article 4 would establish that shareholders who are in the same position would be treated equally and that any bidder who could end up holding one-third of the shares carrying voting rights would have to make a full bid for the company. With respect to

To date, passage of the directive has been delayed by various controversies.

VIII. CONCLUSIONS AND RECOMMENDATIONS

As the acquisitions of Perrier and Le Printemps illustrate, the division of responsibility among the decisional securities agencies in France is far from clear. To function most effectively, markets managers need clear allocations of authority and control as well as accountability to the free market. Such clear divisions of authority and competency are lacking in the realm of French securities regulation.¹¹⁹

If these regulatory institutions and practices are to realize accurate and honest decisionmaking in the accumulation of wealth via the securities market, it must be recognized that functional realities and not formal competencies will maximize such efficiencies. More critical than the unity of the market is the need to focus upon the securities institutions

"disclosure" requirements, articles 7 and 10 of the proposal oblige the offeror to make public its intention to make a bid as soon as it has resolved to do so and to prepare a prospectus containing detailed information on the bid (e.g., future plans as to the target company, particularly those concerning the continuation of the business and as to the use of corporate assets and the composition of the board). The proposal also includes restrictions on the use of defense mechanisms by requiring that the management of the target company be authorized by a general meeting of the shareholders before taking any defensive measure against the takeover bid. Article 22 of the amended proposal would require member states to adopt implementing provisions by January 1, 1992, to become effective no later than January 1, 1993. *Id.* arts. 4, 7, 8, 10, 22.

119. Indeed, the French newspaper *Le Monde* has pointed out:

But who does what? One day, the parties plead their cases before the Council on Competition. The next day, the CBV decides that a tender offer is acceptable. Then later on, the COB gives its green light for the transaction while the Ministry of Finance, through the Directorate of the Treasury, approves the bid

In France, unlike in foreign systems, there exists no hierarchy that defines the powers of the agencies (COB and CBV) responsible for regulating the financial markets. The structure resembles an unstable molecule characterized by repellant elements unwilling to subordinate their proper interest and bond together. Alone the COB pursues its mission of protecting investors while, for its part, the CBV works at maintaining order within the markets. From time to time, their jurisdictions (*champs de compétence*) overlap.

When the opinions of the two agencies as to a tender offer run counter to one another, a most awkward conflict arises. In the confusion, the parties to the case contest the interpretations before the courts. Ultimately the power of the judiciary over the subject matter grows at the expense of the regulatory agencies' authority. Isn't a multitude of regulatory bodies without hierarchy disastrous for the harmony of the marketplace?

LE MONDE, Feb. 25, 1992 (translation by authors).

(COB, CBV, SBF, departments of State) and their decisional practices in terms of how successful these bodies are in providing for efficient delivery of services that maximize the wealth-amassing process. Their competencies need to be determined according to how candidly these agencies translate the amorphous investor and public confidence in the widest possible traditional and nontraditional means of capital formation into broad and concrete investor markets enabling businesses to grow and to make more money to be made available for investment. These institutions need to monitor each other and thereby create a system of checks and balances. The relevant questions remain how investors will decide whether and what equity securities to buy. The manager-regulators can help to promote market growth by accommodating and efficiently fostering the common interest in securities and other markets, so vital to the process of wealth generation in industrial and mercantile capitalist societies worldwide.

Another problem with the French regulatory regime derives from the French tradition of statism. One example of this statist tendency occurs when French agencies demand more information from companies than the regulations justify. The private sector also complains that these agencies often fail to consider the need for confidentiality in the corporate context.¹²⁰

The conduct of *res publica* (public affairs beyond the presentation of minimum public order)¹²¹ needs to transcend the single-minded focus of bureaucrats upon merely the goals of rational management. Such a focus leads only to the leviathan of a jurisprudence of bureaucracy.¹²² The government should implement alternate forms of state regulation functions that go beyond mere rationality and institutional self-aggrandizement. State agencies should refrain from self-maintenance functions so as to avoid the problem of placing agency interests before the interests of the community. The principle that regulatory agencies not also regulate themselves better promotes the furtherance of common interest and not just agency interest. Promoting the principles of the common interest should also govern the allocation of authority; the people's expectations about decisionmakers and the decision process should inform both verti-

120. See INT'L SEC. REG. REP. (March 25, 1991).

121. For a general explanation of this guiding principle of law, see Myres S. McDougal & Siegfried Wiessner, *Law and Peace in A Changing World*, 22 CUMB. L. REV. 681, 683 (1992); MYRES S. MCDUGAL & FLORINTINO FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 121-23 (1961).

122. For this school of jurisprudence, including the influence of Professor Hans Kelsen, see W. MICHAEL REISMAN & AARON M. SCHREIBER, *JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW*, ch. 9 (1987).

cal authority within France and the EEC and horizontal authority between France and other states. Official decisions continuously shape and recast the aggregate common interests of the investor participants in the securities market in France, the EEC, and other states. All feel these effects. Therefore, securities regulations must protect the common interest, and not just market participants.¹²³ The process of protecting this larger common interest in free markets and the ownership of securities should encompass three levels of decisionmaking: first, decisions minimizing unauthorized coercion that establish public order; second, decisions that constitute and maintain structures of authority and effective control; and third, decisions responding to intense individual demands for the constructing and sharing of values, specifically the preserving of equal opportunity for investment and the amassing of wealth, and values that establish civic order.¹²⁴

Viewed narrowly as a comprehensive commercial practice, however, France's efforts to increase the candor of disclosure and the efficiency of its stock markets have achieved success. This evolutionary process offers many lessons for the emerging securities markets throughout the world.

A second recommendation is for continuing cross-inquiry into French legal culture to aid Anglo-Americans in viewing their shared free market goals from a different perspective and in continuing to reinvent their economic cultures.¹²⁵ France's contribution to efficient market governance and to democratic practices deserves more research and comment in the federal system of the United States. Because the United States has no uniform corporate law, federal securities regulation fulfills the goals of free market candor and efficiency for multiple state business organization laws. European integration may benefit from comprehensive consideration of the unity-in-diversity dilemma that characterizes the demands

123. For clarification of the principle of common interest, see MYRES S. McDOUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 408-15 (1980).

124. For this integrative view of decisions, see Harold D. Lasswell & Myres S. McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362, 385-87 (1971).

125. As Professor Philip Curtin explains:

Trade and exchange across cultural lines have played a crucial role in human history, being perhaps the most important external stimuli to change, leaving aside the unmeasurable and less-benign influence of military conquest. *External stimulation*, in turn, *has been the most important single source of change and development in art, science, and technology*. Perhaps this goes without saying, since *no human group could invent by itself more than a small part of its cultural and technical heritage*.

PHILIP D. CURTIN, *CROSS-CULTURAL TRADE IN WORLD HISTORY* 1 (1984) (emphasis added).

within the European Community for decentralized decisionmaking. The principle of "subsidiarity" recently adopted to prevent member states from rejecting the Maastrich Treaty¹²⁶ may be seriously at odds with the notion of creating a true "European Company," a *Societas Europaea* to parallel to the "federal" nature corporations of the United States.¹²⁷ A second look across the Atlantic may be as desirable for the new Europe, as the reverse remains true for the United States with its *leitmotiv* of *E pluribus unum*.¹²⁸

International trade and communication in the Atlantic world stand to benefit from cross-cultural understanding. The ultimate goal of such open access is greater abundance and prosperity for all human beings while at the same time balancing important environmental constraints. The greater perspective of international trade and cross-understanding needs to foster a domestic to global focus by providing a systematic framework of inquiry. "The basic challenge," Professors McDougal, Lasswell and Chen explain, "is to make *continual reference of the part to the whole* in a contextual consideration of every particular question in

126. Decisions must be made at the lowest effective level close to the citizens who will be affected. TREATY ON EUROPEAN UNION, Feb. 7, 1992, 31 I.L.M. 247 (1992), art G (5) inserting art. 3(b) into the Treaty of Rome (EEC Treaty):

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

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

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

Cf. MARC WILKE, *SUBSIDIARITY: APPROACHES TO POWER-SHARING IN THE EUROPEAN COMMUNITY* (1990); ANDREW ADONIS, *SUBSIDIARITY AND THE COMMUNITY'S CONSTITUTIONAL FUTURE* (1991). The subsidiarity principle was developed by the Catholic philosopher Jacques Maritain (1882-1973) of Princeton University. Government should, Maritain said, "leave to the multifarious organs of the social body the autonomous initiative and management of all the activities which by nature pertain to them." JACQUES MARITAIN, *MAN AND THE STATE* 23 (1957).

127. See Proposal for a Council Regulation on the Statute for a European [Stock Corporation], 1988-89 EUR. PARL. DOC. (COM No. 268 FINAL) SYN (1989); Proposal for a Council Directive Complementing the Statute for a European Company with Regard to the Involvement of Employees in the European Company, 1988-89 EUR. PARL. DOC. (COM No. 268 FINAL) SYN-219 (1989).

128. See David Charny, *Competition Among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the "Race to the Bottom" in the European Communities*, 32 HARV. INT'L L.J. 423 (1991).

the light of overriding goals and characteristics of the larger community."¹²⁹

Specific problems of securities regulation should be considered in the light of the aggregate situations in which securities decisions develop to increasingly deepen and strengthen an emerging global securities market. This highly specialized arena with its institutionalized decision structures to both promote and function in the world of changing transnational market economies must continuously balance the interests of national and international markets and those of stock owners and the public interest. Private and public international law, to this world process of authoritative decisionmaking, are indispensable and complementary components which in pluralistic and decentralized fashion respond to claims of the free markets across multistate lines. The global process of change we are experiencing includes more democratically responsive governments, open forms of economic policy, national boundaries blurred by communications and global commerce, technological advances that alter peoples expectation of life, and communications that unite people in aspiration, awareness, and solidarity against injustices—all over the globe.¹³⁰ Yet, there is a caveat: "Commerce, communications and environmental matters transcend administrative borders," remarked United Nations Secretary General Boutros Boutros-Ghali on the rapidly changing nation-state contexts, "but inside those borders is where individuals carry out the first order of their economic, political and social lives."¹³¹ Global trade as well as cross-cultural understanding stand to benefit as systematic injury makes the institutional arrangements reveal the operations of individuals taking control of their destinies as they demand more wealth, property, and financial influence over their lives.¹³²

129. MCDUGAL ET AL., *supra* note 123, at 415.

130. See *Report of the Secretary-General on An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping* 3, 5, U.N. Doc. A/47/277, S/24111, at 3, 5 (1992).

131. *Id.* at 5.

132. This Article focuses on the specific sector of society producing and distributing the value of wealth. For an overview of the continuing demands among peoples for all the things they want as human beings, including wealth, power, enlightenment, skill, well-being, affection, respect, and rectitude, see generally MCDUGAL ET AL., *supra* note 123, at 367-448.