The Political Economy of the Market for Corporate control in France and the Hamstrung Harmonisation of European (and French) Corporate Governance[1]

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ABSTRACT

This paper focuses on the EU Takeover Directive and the impact of its transposition into French law. Takeover regulation is employed as a test case in assessing the importance of the EU in inducing harmonisation within European varieties of capitalism. French outcomes diverge from EC aspirations for greater clarity and uniformity. Heightened uncertainty and differentiation exacerbate problems of asymmetric vulnerability of member states (and their firms) which hinders EU-level harmonisation of varieties of capitalism and corporate governance. In the French case, transposition involved departures from liberal norms (consistent with the Takeover Directive's ambitions) which had prevailed before. As a result of the directive, a more confused and varied European takeover picture has emerged. Instead of the desired greater clarity and uniformity regarding takeover regulations and processes, there is heightened uncertainty and differentiation.

Key Words: Takeover Regulation; Corporate Governance; EU harmonisation; Takeover Directive; Comparative Capitalisms; French Market for Corporate Control

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Introduction: The Market for Corporate Control

The market for corporate control is a key mechanism of change within corporate governance, often associated with restructuring along the lines of Anglo-Saxon capitalism. The potential for takeover, in particular hostile takeover, is a means by which market discipline is brought to bear on the behaviour and operations of management. Below par performance can be punished in the capital markets by takeover bids, rewarding shareholders with a higher price for their shares, and sanctioning poor management (often the first to go in subsequent restructuring). Thus a freer functioning market for corporate control results in increased emphasis on 'shareholder value', the core organising principle of 'Anglo-Saxon' liberal market capitalism. In fact, this disciplinary mechanism is blunted in the supposedly archetypal U.S. case by numerous anti-takeover devices (Monks & Minow 2004: 42, 110-120, 232-239). Conversely, in the UK case the threat of hostile takeover does have an important impact on firm and executive behaviour. Thus any increased prevalence of hostile takeover can be seen as a 'straw in the wind' of the transformation of French corporate governance, towards a new nexus of institutions more influenced by shareholder value norms and 'Anglo-Saxon' discipline.

One aim of this paper is to offer an *Etat des lieux* of French capital market and corporate governance context in relation to takeovers, and impediments to them. The paper also seeks to assess the relative import of EU-level institutions and initiatives as an impetus for change within French corporate governance. Analysis focuses on the European Takeover Directive, its long gestation process, and the impact of its transposition into French law on the French model of corporate governance. This is employed as a test case in assessing the relative import of the EU –regional level as a factor in the changes within French capitalism. The paper assesses coherence of EU level initiatives, and the impact of changes relative to the ambitions of reformers.

The paper establishes the context of takeovers within French corporate governance, identifying those elements of the French context which have impeded the market for corporate control. Contrary to the protectionist reputation of French capitalism and the French state, the takeover regime has since the late 1980s been open, even 'liberal'. Indeed, it has for nearly 20 years been fairly closely aligned with UK practice in many respects. France is by no means an extreme continental case of concentrated capital, 'locked-up' ownership and powerful obstacles to hostile takeovers. In fact France has long had a number of 'Anglo-Saxon' features in its legal and institutional corporate governance regime, including the modelling of the *Commission des Opérations de Bourse* (COB) on the US Securities and Exchange Commission (SEC) in 1967, to insider trading legislation, board neutrality rule and mandatory bid rules since 1989. These open, liberal elements, however, co-exist with a range of dissuasive measures and facets of the French corporate governance regime. These include concentrated ownership and the prevalence of dominant shareholder (Barca & Becht 2001) as well as blockholding practices, double voting rights, and voting ceilings.

Many of these dissuasive aspects within French companies have not changed as French capitalism has internationalised in recent decades. Some have even taken on greater significance. The synthesis is captured by the French double voting share, whose role and significance has increased in recent years (Goyer 2003; Clift 2007). This is not a different class, but a *prime de fidélité,* with the extra voting rights accruing only after 2 (or 3, or 4) years of holding the security. This departure from the one share one vote principle is justified as encouraging and rewarding stable, patient capital. The norm that defensive measures, and even some new 'poison pills'[2] are permitted, but only once shareholder approval has been secured, also illustrates the intermediate position between 'shareholder value' and 'protected capitalism'.

This analysis of French takeover reform and corporate governance suggests a rethinking of 'institutional complementarity', normally seen as the cement which ensures persistence of *Varieties of Capitalism* (Hall & Soskice 2001: 17-21). Here, the focus on mechanisms of change illustrates how institutional complementarity is more helpfully deployed in explaining the *differential* effects of *similar* kinds of changes within capitalisms. The impact of a single institution in a given framework is mediated by the presence of other institutions, thus the same institution will produce different consequences across different institutional frameworks. As Goergen *et al* note, despite some movement towards more Anglo-Saxon norms in takeover regimes across Europe, 'regulatory changes, which may at first sight

[2] Defence mechanisms in company statutes allowing target boards to attempt to derail bids. The classic poison pill involves 'rights or warrants issued to shareholders that are worthless unless triggered by a hostile acquisition attempt. If triggered, pills give shareholders the ability to purchase shares from, or sell shares back to, the target company (the "flip-in" pill) and/or the potential acquirer (the "flip-over" pill).' (Monks & Minow 2004: 236). Other defensive measures include augmentation of capital, share buybacks, selling valued assets or acquiring new ones, and shareholders' blocking rights using transfer restrictions.

appear similar across countries, may have totally different effects within their national system' (2005: 244). This is linked to the differential impact of the same EU takeover regime on dispersed as compared with concentrated ownership, as well as the differential consequences of the various 'weapons' in the takeover-facilitating 'arsenal' for the prevalence and likelihood, over time, of concentrated as opposed to dispersed ownership (Goergen *et al* 2005: 248-9). For example, the introduction of 'poison pills' requiring shareholder approval will have a different effect to their introduction in corporate governance contexts where shareholder approval is not required.

The French Corporate Governance Context and the Market for Corporate Control

In order to assess the potential impact of EU-level change on French corporate governance, it is necessary to establish the context of the market for corporate control in France, and the impediments to its operation. These relate both to specific legal and regulatory measures, as well as aspects of the structure of capital holdings in France, and practices within firms. One of the key impediments to a market for corporate control historically was the French state, with its extensive range of holdings in a number of large French firms, as well as a much wider set of informal links to elites throughout France's 'financial network economy' (Morin 1998; 2000). Through such links, by a variety of cajolery and moral suasion, the French state induced the emergence of a set of inter-linked relationships in major French firms cemented by cross-shareholdings and interlocking board memberships. These were known as the *noyaux durs* (Schmidt 1996).

This phase of 'protected capitalism' in France ended amid the privatisation programmes, and heightened merger and acquisition activity in the 1990s which was contemporaneous to a thorough internationalisation of French capitalism. In certain cases the French state sought to leave the traces of the prior 'protected capital' era. Thus, in the negotiating of some privatisations, the French government was careful to retain 'golden share' holdings vested with sufficient voting rights to fend off potential takeover (Knudsen 2005: 510). This means of protecting its 'national champions' eventually attracted the EC's disapproving attention, and in the ECJ Golden shares case of 4 June 2002,[3] the French State was forced to sell off its

[3] No C-483/99 Commission CE c/République Française (2002) 411 Bull 430-35 Joly Bourse; France case C-483/99 commission versus French government on Elf Aquitaine.

‘golden share’ in Elf-Aquitaine (Ipekel 2005: 345). Whilst *most* Golden shares have gone, some remain,[4] notably in industries of special strategic interest such as Thalès and Aérospatiale-Matra-EADS. Golden shares thus remain an element in the range of opaque defensive mechanisms impeding the development of a market for corporate control, though they are now much less significant in France than in Italy.

Nevertheless, hostile takeovers are a much less common feature of French capitalism compared to the UK case. This is because a whole variety of obstacles are put in the path of the free play of market forces in relation to takeovers. Much has changed in the French financial market context in the last 25 years, but the legacy of protected capitalism remains in the capital structure of many firms. Concentrated ownership remains the prevalent in French capitalism, in contrast to the dispersed ownership patterns in the UK and US (O’Sullivan 2003). Concentrated ownership operates through controlling shareholder exercising ‘control without owning a large fraction of the cash flow rights by using pyramid ownership, shareholder agreements and dual class of shares’ (Enriques & Volpin 2007: 117; La Porta *et al* 1999). This is less pervasive than it once was in France, but of France’s 20 largest companies, 8 still have a controlling shareholder. Three are subject to ‘pyramid control … an ownership structure in which the controlling shareholder exercises control of one company through ownership of at least one other listed company’ (Enriques & Volpin 2007: 117).

Whilst the *noyaux durs* of the ‘protected capitalism’ period are less prevalent than in the 1980s, they have not disappeared. Within the financial network economy, the very substantial financial assets of the *Caisse des dépôts et consignation* CDC have often been deployed strategically by the state, investing to buy up stakes in large French firms deemed in the national interest. Although not as central in the wake of privatisation, the French state’s shareholder role in a number of large French firms is still a feature of French capitalism. The erosion of the *noyaux durs* is considerable but not complete.[5] Loriaux notes that ‘the hard core now represents less than 30 per cent of the capital for half of France’s blue chip, CAC 40 enterprises, less than 20 per cent for fifteen of the forty, and less than 10 per cent for five

[4] see Commission Of The European Communities Brussels, 22.7.2005 Commission Staff Working Document Special rights in privatised companies in the enlarged Union, pp. 14 & 22.

[5] In 2002, networks of influence constructed around three big banks – BNP, Société Générale and Crédit Lyonnais remained in place, and thirty directors enjoyed between them 160 seats on the boards of major French firms (Orange 2002).

of the forty' (2003: 116; see also Morin 2000: 39). Family ownership remains a prevalent phenomenon within France capitalism (Philippon 2007: 14, 51-70; Tibi 2004), and is another variant of concentrated ownership. These concentrated configurations of capital holding changes the dynamics of possible takeover activity, giving greater control to dominant shareholders (Fanto 1998: 67).

Other obstacles to takeovers vary in nature and degree across sectors. Firstly, there are certain sectors subject to a high degree of regulation, such as banking and defence, where public authorities will have a final say over the acceptability of a takeover bid. It is no accident that such 'golden shares' as do remain are in the defence sector, where the French state continues to protect its industrial patrimony jealously. There are also areas where the state is major a contractor (e.g. the health sector and pharmaceuticals). In these areas, deterioration of the quality of relations with the French state could potentially have a long term adverse effect up returns. The French State's public discourse on hostile takeovers also plays a role, but not that often attributed to it. With a few specific exceptions, the French state lacks the policy mechanisms to back up its rhetorical hostility to takeover. Nevertheless, its vociferous critique can act as a dissuasive measure. The perception of the interventionist French state which 'economic patriotic' discourse reinforces does not entirely marry with the reality (as in the case of Arcelor), as shall be seen in the empirical sections below, but it may suffice to ward of less determined and less well-informed foreign bidders (as in the case of Pepsico & Danone in 2005).

The last major category of intentional institutional engineering to impede takeovers is a range of statutory instruments and mechanisms within firms' constitutions. One oft-cited example is the *société en commandite*, a particular mode of organisation of the company which separates control from management, making them very difficult to buy. The two main examples amongst large French firms are Michelin and Lagardère. Besides this, a whole range of measures contained within particular company statutes can bolster the position of the incumbent management or dominant shareholders. These can sure up control and make hostile takeover more difficult. Provisions include voting ceilings, differential voting rights, and clauses limiting the right to designate board members. Another favourite is making voting rights proportionate to turn out for Annual General Meetings (AGMs) (therefore if there is only 50% attendance, a block of 10% of the company' capital is only 'worth' 5% of the votes). In addition to the patterns of shareholding noted above, shareholder pacts are a widely used tool in corporate control in France. This is another departure from dispersed ownership, and such action in concert can present a further hurdle in the path of potential bidders, in particular restricting the transfer of securities.

Sometimes, the corporate institutional engineering is more elaborate still. Pyramidal structures, although unusual, are not unknown in France (Enriques & Volpin 2007: 118-22), with some large and significant examples such as Louis Vuitton Moet Hennessy (LVMH). Within the pyramidal ownership of LVMH by Bernard Arnault, 'the firm is controlled by a pyramidal group that includes several nonlisted and one listed company … as a consequence of this control structure [Arnault] controls 47 per cent of the voting rights in LVMH with a direct and indirect ownership of 34 percent of the cash flow rights.' (Enriques & Volpin 2007: 117-8).

Part of the 'viscosity' within the French system is related not to strategic design by feather-bedding management or dominant shareholders, but is a by-product of the historical development of French capitalism. France has lacked a culture which invested in financial savings instruments such pension funds or mutual funds. Companies have not traditionally looked to financial markets for investment. Thus, from the 'supply' and 'demand' sides, financial markets as a source of capital for enterprises remained underdeveloped. The historic reliance on institutionally allocated credit (orchestrated through the state) rationed industrial investment. This led the French economy to be caricatured as 'capitalism without capital' (Stoffaes, 1989: 122). Such a configuration helps explain why there are a number of very large French corporations, and many smaller firms, but a comparative lack of medium-sized firms. Non-recourse to financial markets probably hindered the growth of French firms. This industrial profile also has an impact on the takeover markets, reducing the number of targets for anyone but the richest bidders.

More indirectly, another factor which may have a dissuasive effect on certain takeovers is the difficulties of industrial restructuring in the French labour law, *acquis sociaux*, and industrial relations context. The fruits of future restructuring are often the source o returns on the investment that a takeover requires. The relative difficulty of achieving such restructuring in the French case may encourage bidders to look elsewhere for target firms.

The EU Level as site for corporate governance reform

The scale of EC corporate law interventionism is impressive, with nearly 50 directives or regulations since 1968. its impact is much more debateable. Studies point to ‘under-enforcement’, ‘sporadic enforcement’, and ‘parochial interpretation’, such that ‘one can doubt whether anything really worth calling EC corporate law exists “off the books”’, not least because ‘the Commission has traditionally lacked the resources to monitor Member States’ compliance with corporate law directives’ (Enriques 2006: 12). The format and process of reform has evolved in the face of modest earlier achievements; ‘most important measures have failed after decades of efforts at harmonisation. Overall, the more they tried to harmonise ‘corporate governance’ the less successful they were’ (Lannoo & Khachaturyan 2003: 5). Enriques and Gatti describe earlier EC company law legislative initiatives as a ‘petrified forest’, which ‘dates back mainly from the sixties and seventies’ and is perceived as ‘too cumbersome’ and ‘in great need of a thorough review’ (2006: 5).

In the face of the demonstrable inefficacy of EC as a convergence inducing corporate governance actor through ‘hard’ law, the strategy shifted from trying to ‘hard wire’ European corporate governance reform to a soft law ‘open method of co-ordination’ (OMC) style. This took account of the formidable obstacles to coercive harmonisation towards a single European Corporate governance legal and regulation framework. The first high level corporate governance working group (of 2001-2) began thinking through the shape of reform. Recognition of the softer approach is contained in the opening statement of the 2003 corporate governance Action Plan, The plan recognised the need for national actors to ‘reconcile’ the reform process to their ‘domestic circumstances’ (EC 2003: 1). Situated in the context of Enron, its priorities for modernising company law and enhancing corporate governance were transparency, bolstering shareholders’ voting and other rights, and more generally to ‘improve economic competition in Europe’ (EC April 2006).

The OMC in corporate governance continued in 2005-6 with a second working group, the *European corporate governance forum*, and public consultation. Placed in the context of the Lisbon agenda, this second phase of the May 2003 action plan, emphasised the rights and responsibilities of shareholders, the modernisation and simplification of European company law, the responsibility of directors and internal control, and the mobility and restructuring of firms (EC April 2006: 14). As with the takeover directive, this ‘harmonisation’ of European corporate governance aimed at facilitating the emergence of more integrated capital markets in Europe, with the underlying assumption that resultant reallocation of resources and corporate restructuring would lead to a more efficient corporate Europe.

The Commission consistently recognised the need for ‘flexibility’ in putting the programme into practice, but insisted nevertheless on its ‘rigour’. (EC April 2006: 11). The EC encouraged convergence upon best practice through the European Corporate Governance Forum High levels of transparency, targeted high-quality information for shareholders, and rights for shareholders to ask questions and hold the board to account in the light of the information received. Consistent with the ‘conform or explain’ principle in relation to corporate governance, the Commission also advocated an annual declaration of corporate governance practice specifically in relation to accounting norms, company law, and regulatory authorities, in which companies would account for any deviations from the agreed code of good practice (EC April 2006: 11-13).

As with social policy, there is considerable scepticism as to the efficacy of this non-coercive approach. Many point to lack the lack ‘teeth’, and change-inducing mechanisms within the OMC (Annesley 2007; Wincott 2003) and dissonance between the weakness of the Lisbon method, and the very ambitious Lisbon agenda (Sapir 2006: 386; Daly 2006: 478). There is considerable scepticism about the significance of the EU role in European corporate governance change. Within OMC, Europeanization takes on a ‘voluntary form’ (Wincott 2003: 297), with national policy elites choosing to ‘learn’ those policy elements which aligned closest with their existing practice.

In the realms of corporate governance, this has given rise to the ‘Triviality thesis’, which argues that EC corporate law rules are ‘under enforced’, and subject to ‘sporadic’ judicial interpretation by the ECJ. Furthermore, where the EC has introduced new rules ‘it has done so with respect to issues on which Member States would have probably legislated even in the absence of an EC mandate.’ Finally, ‘most EC rules can be categorized as optional, market-mimicking, unimportant, or avoidable’ (Enriques 2006: 1-2, 6-11). There is also a ‘constructivist’ dimension to the triviality thesis. EC corporate law ‘tends to be implemented and construed differently in each Member State, according to local legal culture and consistently with prior corporate law provisions’ (Enriques 2006: 1-2). These ‘nationalistic tendencies in the interpretation of EC corporate law’ mean that ‘the prevailing interpretation of any given directive in each jurisdiction is, wherever possible, an interpretation compatible with the existing legal culture' (Enriques 2006: 17-9). Halbhuber concurs, identifying how national ideational and institutional structures 'filter European legal materials', rendering it unlikely that EC corporate law 'means the same for lawyers in different Member States' (2001: 1385). Legal norms in Europe also help explain the relative disempowerment of EC compared to SEC (Enriques & Volpin 2007: 126-7). The SEC has more extensive disclosure requirements, but most importantly the EU lacks 'an aggressive set of enforcement institutions, such as the securities plaintiff bar (lawyers who bring class action suits on behalf of large numbers of investors), the securities and Exchange Commission (SEC), and the U.S. Department of justice'. In the EU, by contrast, 'private enforcement of directors' duties is almost unheard of' (Enriques & Volpin 2007: 127).

There are some qualifications to the thesis. The 'sporadic' ECJ activism has given some rules meaningful impact, such as ECJ rulings on *Centros* and freedom of establishment with implications for regulatory arbitrage (see Hoepner & Schafer 2006, 2007). The 'Golden shares' ruling (see below) is another case in point. It is significant, given the focus of this paper, that in the area of takeover regulation, that the caveats to the triviality thesis are strongest. Thus even those pre-disposed to think of the EU as marginal to corporate governance in the national context consider that, in relation to takeovers, EU corporate governance hard and soft law can have an important impact (Enriques 2006). Overall, there is substantial empirical support for the Triviality thesis. Enriques argues that 'major instances of implementing rules that are clearly at odds with the text of the directives' that 'can be found throughout the EU' (2006: 13). Even in the area of takeovers, poison pills are outlawed by EU corporate law in relation to pre-emptive rights and barriers to discriminatory share issues, but Italian experience suggests otherwise (Enriques 2006: 52-3), as does French case (see below).

Discerning the degree to which corporate governance reform is 'European' in origin is a useful analytical exercise, but it has to contend with a co-existence of national and European processes of company law and takeover reform. This creates difficulties in discerning truly 'European' origin of reforms. This is compounded by the fact that the 'European' reform agenda is informed by national policy elites. For example, the high level corporate governance working group (of 2001-2) which played a key role in shaping reform, and also the European Corporate Governance Forum which came later, were site of two-directional of travel of ideas rooted in experience of corporate governance practitioners of the various member states. Furthermore, it would be an over-simplification to talk of *a* 'European' corporate governance policy agenda. As shall become clear later, a wide range of views, rooted in different models of political economy, generate ongoing normative conflict about appropriate corporate governance reform in Europe.

The waters are further muddied by 'hindsight bias', where EC corporate law regulation merely restates already existing regulation at national level (Cheffins 1997). In France, for example, much of the ground covered by the takeover directive was already subjected to comparable national level regulation. To illustrate the point about multiple sources, European and National, of takeover regime reform, in the mid to late 1990s from CNPF (now MEDEF) called for reforms to make hostile takeover harder called for both the ability to seek alternative bidders (or 'White Knights'), and also the increasing the number of declaration of intention thresholds, adding a lower one of 10% to that already in place at 20 % (Fanto 1998: 79-80). These have both become part of both the EU-level Takeover directive, and the new legal situation in France. This indicates reservations about takeovers amongst French business organisations, and also suggests their ability to influence the re-regulation of French (and indeed European) corporate governance.

Pre-existing Takeover Regime in France

In addition to the long list of factors outlined earlier, the financial market regulation context must also be taken into account when assessing the functioning or otherwise of the market for corporate control in France. Tender offers are not unknown in France by any means, indicating that the obstacles in the way of the market for corporate control are not insurmountable (Fanto 1998: 79). Takeovers of listed companies are subject to jurisdiction of the *Autorité des Marché Financiers* (AMF) *reglement générale* (previously the COB & CMF). The body of law and regulation covering takeovers in France is well-established. One important element is the 1989 law (Law 89/531 of 2 August 1989) 'prohibits secret understandings and covert changes of control' (Economist Intelligence Unit 2007: 16-18). This legislation includes a mandatory bid rule (a requirement to bid for 100% of the company), with a trigger threshold of 33% of capital. This is higher than the UK threshold of 25 %, but compared to many European countries France has a much longer-established and open regime for takeovers. The mandatory bid rule makes takeovers more costly for bidders

(Fanto 1998: 76), and therefore constitutes a dissuasive influence on bids. To this extent, it could be seen as a bolster to the already substantial range of insulatory measures for managers. However, its aim is an equitable and clear takeover market which does not punish individual shareholders. In this sense, it approaches the 'liberal market economy' (LME) ideal-type.

Board passivity (or neutrality) is also a long established norm, preventing the incumbent board from taking frustrating action to derail bids. The management, faced with a bid, is subject to a potential conflict of interest since a bid that might be good for the 'intérêt social' of the company may entail them losing their jobs. Attempts to ensure a bid fails, such as issuing new securities, buying back capital, or introducing new statutory protecting incumbents within the firm's constitution, have long been outlawed in France (unlike in many European countries). A key issue is delegation of powers from shareholders annual general meetings (AGM) to the board. Before March 2006, prior delegations (in the previous 18 months) could be used by board in offer period where issuing new shares was concerned. However, this was subject to strict conditions. It had to be 'normal' business in the social interest of the company, and the issuance had to be *not* liable to make the bid fail.[6] French law thus already sought to outlaw measures which 'locked up' the capital of firms in the case of a takeover bid, and ensures equitable treatment of all offers. The principles of sufficient information for shareholders to decide upon the merits of an offer, and that shareholders have the opportunity to decide upon the merits of a bid, were written into both the AMF, and before that COB regulations, and French financial Law.

Another established feature of the French regulatory context is extensive disclosure obligations on shareholders, acting alone or in concert, when they pass (in either direction) a considerable number of thresholds of holdings *either* voting rights *or* capital. In the 1990s, these thresholds were set at 5, 10, 20, 33, 50, 66 (Fanto 1998: 73), with a requirement to inform the securities regulator, who published the information. In addition to this, the COB (pre-cursor to the AMF) required, on reaching a 20% threshold, a declaration of intentions, whether plan to continue to acquire holdings, launch a takeover, or seek to acquire a seat on the board in 12 next months. The rationale behind these measures is to dissuade (if not prevent) takeover by 'creeping control'. The regulation increases the transaction costs for

[6] Art. L. 225-129 C, see ANSA 2006: 2-3)

investors (moving in both directions). Whilst the transparency of market operations is improved, increased 'sunshine' and disclosure can have a dissuasive effect on takeover activity.

Re-regulation of takeover activity 2001-2006

Heightened merger and acquisition activity in the late 1990s and early 2000s, in which French companies were more often acquirers than targets, provided the context for reform of both the regulatory environment and the French law governing takeovers. This has been an incremental process, with significant changes at the national level at the same time as earlier attempts at the European level were floundering. Thus the decree of April 2001[7] sets out rules for such takeovers, including reporting requirements for existing shareholders during the period between launch and completion. Any transactions involving purchase of more than 2% of the target must be made public. Consistent with MEDEF preferences, in addition to the 20% declaration of intentions threshold, another was added at 10% (Economist Intelligence Unit 2007: 49).

Shortly afterwards, the 2001 *nouvelles regulations Economiques* (NRE) introduced further financial transparency requirements upon potential takeover bidders (Journal Officiel 2001: 7776-7), stipulating that 'preferential or pre-emptive rights involving a shareholding of more than 0.5% … such as part of voting pacts' are nullified for the duration of the takeover bid if not previously reported to the authorities. Takeover bidders are required to communicate with employees regarding their industrial strategy. There are also requirements for enhanced communication with the public, and other companies. Most significantly, the NRE does not eradicate any of the long standing impediments to takeovers noted above, therefore the NRE does not facilitate hostile takeovers.

The Breton Law of July 2005 created an obstacle to certain hostile takeovers in requiring a bidder for a target 'parent company' to also bid for overseas subsidiaries (in which the target holds more than a one-third stake). This was in effect designed to render a takeover of Renault much more difficult, since a bidder would also be required to bid for Nissan (whose stock market capitalisation is twice that of Renault) at the same time. This kind of targeted,

[7] implementing Law 2001/420 (JO April 27th 2001)

specific protection remains a feature of French takeover regulation. The state was, meanwhile, relinquishing some of its grasp over takeovers in France. In August 2005, the government abolished the requirement that any investment exceeding 1.5M Euros had to be notified to Ministry if it took foreign company's stake to over 33.33% of capital or voting rights.[8]

The Breton Law also transposed the EU transparency directive into French law, and thus contained new disclosure requirements. The new thresholds for reporting major shareholdings of 15, 25, 90, and 95 were introduced in the 2005 Breton law (AMF 2005: 87-89). The 90% threshold was a French initiative in addition to those required by the transparency directive in order to warn of imminent 'squeeze out' (compulsory purchase of minority holdings) (at 95%).[9]

A recurrent theme to the legislation and regulation in France has been the desire to carve out scope for *volontariste* interventionism in relation to 'strategic' sectors. In addition to the Golden shares noted above, there were laws in 1996 and 2003[10] specifying that French state approval is required for takeover or investment in 'strategic sectors' such as national defence, public health or public order, including casinos. This theme was revisited between September and December 2005 when the De Villepin government introduced more takeover legislation giving itself the right to intervene in any takeovers in strategic sectors.[11] The revision to French monetary code required governmental authority for takeovers in 11 'sensitive' sectors (see Menucq 2006: 230). The EC took issue with the French government over this directive,[12] on grounds of impeding the free movement of capital. In particular, the EC objected to the interpretation of casinos as strategic sectors given the fight against money laundering. Attempts by the hotel chain *Accor* to gain protection were not welcomed by Brussels, but the sensitive sectors law still prevails in other areas.

[8] on August 2 2005 by decree 2005/1007

[9] These facilitate a bidder in acquiring control of the target company, and protect minority shareholders interests in a takeover. Member States can choose between 90 and 95 % as the threshold at which any remaining shares of minority shareholders can be compulsorily purchased (squeeze out), and at which the bidder can be compelled to buy remaining minority shares (sell out).

[10] 96/109) and Decree in 2003 7 March accompanying ordinance

[11] Decree 2005/1739

[12] European commission IP/06/438, 'Free movement of capital: Commission scrutinises French law establishing authorisation procedure for foreign investments in certain sectors'. 4/04/2006

The Long Road to Takeover Regulation

Originally proposed in 1989 as part of the 'Bangemann proposals', the EC has long aspired to a European harmonization of the field of takeovers, seeing it as 'a *sine qua non* for the attainment of its broader objective, namely the creation of an integrated capital market by 2010' (Ipekel 2005: 341). The idea is to ensure an unimpeded market or corporate control in Europe, based on an assumption (for which there is at best equivocal support in the economic literature) that takeovers are necessarily efficiency enhancing sources of industrial and corporate restructuring. The EC sought to dismantle defences that insiders may use to derail takeovers, because such activity would hinder the economic restructuring process assumed to be beneficial.

The first attempt at the Takeover Directive travelled a long arduous road, including a rejection (just!) of one version of the Takeover directive by the European Parliament on July 4 2001 in a dead-heat vote 273-273. This exercise was subjected to some criticism as an excessively 'Anglo-Saxon' view of takeover as necessary a discipline against inefficient management which ignored the discordance of such a position with valued European corporate governance traditions. Pre-bid defences, such as multiple and double voting shares, and concentrated ownership were recurrent issues in the disagreements between EC and member states, as well as between member states themselves. The substantive issues related to, firstly, board neutrality or passivity, and the limitations placed on the use of defensive measures and frustrating actions (Article 9) in the case of hostile takeover attempts. These were only possible with shareholder approval. Secondly, there were concerns about insufficient protection of workers in target firm. Furthermore, because multiple voting rights were not abolished by the directive, it failed to create a level playing field (Knudsen 2005: 511). The underlying reasons for the 2001 rejection is dealt with at length and ably elsewhere (Hopner & O'Callaghan 2005). Suffice to say the 'clash of capitalisms' issue noted above was an undercurrent, as was some not too subtle (and failed) attempts at 'divide and conquer' by the Commission seeking to isolate Germany.

As Wincott points out, much Europeanisation literature is 'too ready to identify the EU - ontological – level as ordered, coherent, and consistent, providing a clear basis from which to develop claims about "Europeanisation"' (2003: 300). An assumed coherence and rationality of ontological EU level in relation to takeover reform seems misplaced. Goergen *et al* identify the emergence of a ‘hybrid model’ of European corporate governance. They characterise the EC’s approach advocating national-level selection of those norms most appropriate to national context as resulting in ‘just the right mix of market discipline, corporate regulation, and power of corporate stakeholders’ (Goergen *et al* 2005: 245). This optimistic view neglects consistencies, and arguably a degree of incoherence, within the stuttering Europeanisation of corporate governance.

As the first takeover directive demonstrated, there is no accepted, agreed ‘European’ approach to corporate governance reform. Rather, diverse elements endure within the process of European integration, generating ongoing political struggles between, at root, contending models of political economy. Thus many liberal market-oriented elements akin to the UK model are implicit of explicit within EC attempts to reform corporate governance. However, these co-exist with enduring attachment to aspects of regulated, co-ordinated continental European capitalism. Normative contestation surrounds the relative importance of these elements. The differential outcome of this ‘clash of capitalisms’ (Hoepner and Callaghan 2005) in different areas of corporate governance regulation is all part of the variable geometry of Europeanisation.

The Takeover Directive – Slight Return

In the wake of this setback, the Commission convened a ‘high level’ working group of corporate governance and European company law experts to suggest the next steps in furthering the progress towards ‘good’ corporate governance within the EU. More specifically, they were charged with coming up with proposals for a new draft takeover directive. The group, headed by Jaap Winter, produced its final report and recommendations in January 2002. The Winter group emphasised shareholder decision making, and their new concept of proportionality between risk bearing capital and control. Takeovers were deemed positive by the group, building on potential ‘synergies’ between companies, giving shareholders the opportunity to sell at a premium on market price, and, through the market for corporate control, exerting a disciplinary effect on management (Clarke 2006: 357).

The working group’s recommendations included an adherence to the norm of one share, one vote as an element of good corporate governance practice, and included recommending abolishing multiple voting rights (Knudsen 2005: 519). The group were thus advocates of a particular model of political economy, taking an ideological position on one side of the 'clash of capitalisms' divide. Its recommendations were, in fact, *more* radical than the earlier defeated measures. It argued strongly in favour of its particular conception of a 'level playing field'. The idea was to ensure equivalent safeguards for shareholders in all European public listed companies. Furthermore, arbitrary differences in governance structures across the EU should not distort the corporate restructuring process (Clarke 2006: 355-6). Yet the proposed solution did not remove the problem of asymmetrical vulnerability of particular firms or nations. Rather, some argued, the new proposals 'would hit dominant shareholders and incumbent managers around the EU unevenly, prohibiting some structural defences while leaving others untouched' (Enriques 2006: 63).

The bold assumption of the Winter Group and the EC was that shareholder democracy, disclosure and transparency would lead to 'good' corporate governance. Decades of corporate governance scholarship and research since Berle and Means seminal book in 1932 give very considerable grounds for doubt that these are, in and of themselves, a sufficient condition of good corporate governance. The assumption that shareholder democracy is a sufficient condition of 'good' corporate governance is as questionable today as it was in 1932 (Hirte 2004; Ferrarini 2006). Literature reviews of the economic evidence offers less than a ringing endorsement to the Winter group's assertion of the beneficial and economic efficiency gains from takeovers, with many studies denying that an empirical case can be made for efficiency gains (O'Sullivan 2003; Clarke 2006: 361). There are also doubts about the efficiency improving qualities of the market for corporate control. For example, *extreme* bad management tends not to be worth a bidder's risk, therefore falls outside the discipline of the market for corporate control (Coffee quoted in Clarke 2006). The point is not that an emphasis on shareholder democracy and the market for corporate control is 'wrong' or 'misguided', but rather than the assumptions underlying the EC approach to advance towards its goal of better corporate governance are somewhat naïve. This is significant because of the normative contestation over the 'best' model of corporate governance (or indeed capitalism). The Ec was not necessarily in a position to win the arguments surrounding the re-regulation of takeover activity at the national and European level.

The Winter Group's recommendations fed into another proposal presented by the Commission in October 2002. The new proposals of October 2 2002 still contained the controversial Article 9 (board neutrality). It also included increased provision for employee protection in the case of takeovers was introduced. In a bid to facilitate the operation of the market for corporate control, and overcome defensive institutional engineering designed to impede hostile takeover, the revised proposal in autumn 2003 included a 'Break Through' rule designed by the Winter group (Article 11) which established a threshold of 75% of the target's shares; 'once a bidder successfully reaches a threshold of shares in accordance with national company law, the new majority can annul the structural defensive devices' (Knudsen 2005: 519; Menucq 2006: 229)

In forging a new directive, the EC was alive to the political realties and the realms of the possible in terms of 'hard law' corporate governance reform across the EU. Nevertheless, the new proposed directive proved unacceptable to Member States, and agreement could not be reached in the European Council meeting on 19 May 2003. The 'one share, one vote' principle was a major stumbling block (Ipekel 2005: 342-3). The global level playing field issue was contentious, with French and German negotiators pointing out that US boards retained a range of defensive measures including 'poison pills' – giving them the right to issue new shares making targets much more expensive. The proposed takeover directive, in depriving European firms of defence mechanisms, would in fact skew the playing field against European firms.[13] Because one share one vote and a lack of takeover defences was *not* the norm everywhere, Germany argued, the 'level playing field' would be unfair. Germany wanted to prevent hostile takeover of its national champions, and felt particularly vulnerable having abolished multiple voting shares in the 1998 Schroeder's KontraG Law (see e.g. Cioffi 2002) As Clarke notes, 'the ghost of the hard-fought hostile takeover of Mannesmann in Germany may have haunted the negotiating table' (2006: 374). Concerns about protecting Volkswagen also generated resistance to tackling pre-bid defences through Rule 11 'Break-through rule' in Germany.

The 'Breakthrough rule' would have the effect of neutralising pre-bid defences (such as voting ceilings and multiple voting rights), and thus the proposal went to the very core of the European concentrated ownership, and rewarding of patient capital ethos. In circumventing the articles of association of firms, the breakthrough rule also violates the principle of shareholder decision-making (see Goergen *et al* 2005: 253-4). The aim is to circumvent obstacles presented by restrictions on voting rights, multiple (but not double) voting rights,

[13] P. Betts, 'Directive to fall at last hurdle. Few will mourn the passing of the code for pan-European takeovers', (2003) 28 April, *Financial Times*, p. 6.

and share transfer restrictions, thus preventing a case where a bidder has a majority of the risk-bearing capital but cannot gain control of the firm due to minority blockholders with multiple voting rights or benefiting from statutory prerogatives. Hostility to the Breakthrough rule was particularly intense in parts of Scandinavia, especially Sweden. There, the A & B dual stock tradition (with A stock carrying up to 1,000 times more voting rights than B stock) was seen by Swedish MEPs as integral to the Swedish model of capitalism (Knudsen 2005: 519). Furthermore, the Swedes pointed out, the new proposals were not likely to improve progress towards a level playing field since the proposals exempted France's double share tradition.

In Autumn 2003, a revised draft was proposed by the Commission. On December 16 2003, the European Parliament adopted a watered down Takeover Directive 321-219. The watered-down directive does not outlaw double or multiple shares. Crucially, it makes the key articles 9 (on preventing defensive measures) and 11 ('breakthrough') *optional* for Member States. It introduced, in article 12, the notion of reciprocity as the means to address the absence of a genuine 'level playing field'. On 30 March 2004, the Council approved the new takeover directive. It came into force in April 2004, with transposition into national law required within two years.

The Directive had a number of guiding principals, firstly that shareholders get equal treatment, are given sufficient information and time to reach an informed decision, and that the target board acts in the interests of the company. The aim of the information requirements placed on the bidder is to ensure that holders of the targeted shares can make an informed decision. The dissemination of information to employees of the target firm was also required. There was a relatively non-contentious tidying up of some European takeover procedures, simplifying 'Squeeze out' and 'sell out' procedures. Thus Member States can choose between 90 and 95 % as the threshold at which any remaining shares of minority shareholders can be compulsorily purchased (squeeze out), and at which the bidder can be compelled to buy remaining minority shares (sell out). Provisions for when a mandatory bid is required (i.e. when a controlling right is acquired), with the threshold being defined at the national level (in France this remained unchanged at 33.33%).

The new directive sought to ensure board neutrality by preventing frustrating action, such as augmentation of capital, share buybacks, shareholders' blocking rights using transfer restrictions, limitations on share ownership and weighted voting rights, during the bid period. Article 9 (3) has been interpreted as ‘a clumsy, but honest, attempt to prevent directors engaging in pre bid activities which might jeopardise the market for corporate control’ (Clarke 2006: 365).

The Breakthrough rule sought to allow successful takeover market in Europe despite differential capital and control structures across European countries and firms. The rule thus overrides these restrictions, and applies one share one vote even to multiple voting shares in the shareholder AGM or EGM which decides on defensive measures (as per Article 9), as well as in the first post successful bid AGM which decides upon the new structures and constitution of the company (Clarke 2006: 367). In practice, studies estimate that the rule is only likely to lead to loss of control in 3-5% of cases of firms with dual class shares. Thus not only is it potentially problematic given that it violates the hallowed principle of shareholder democracy, it is also not a very efficient means of addressing the obstacles to the market for corporate control. Its practicability is also open to question, notably in relation to the question of how those who have their rights removed as a result of paragraphs 2,3,4 of article 11 will be compensated. This is deemed a matter for member states, but no guidance is offered on who pays, how much, how and when. It is very difficult to determine true cost of compensation in advance, and therefore the true cost of the bid, and further complications surround whether the member state imposes the Breakthrough rule, or the company opts into it voluntarily (Clarke 2006: 370). The article ‘is likely to give rise to more problems than it solves’ (Clarke 2006: 374).

The Winter report assumed that both 9 and 11 would be required in tandem to create a level playing field, and either on its own would not deliver that objective. The optional nature of these elements in the final Directive therefore represents a recognition that the ‘level playing field’ remains unattained. The provisions of the directive enable individual firms to opt back in, even if ‘their’ member state opts out. This generates uncertainty for bidders as to which restrictions will apply in particular cases. ‘Reciprocity’ is the clumsy concept (also of questionable practicability) designed to address this issue. This new concept in EU company law is set out in Article 12(3). It specifies that ‘if member states elect to allow reciprocity, and either or both of the Articles apply, companies can disapply the relevant article if they become the target of a bid by a company that does not apply the same Articles’ (Goodall *et al* 2006: 26-9). Consistent with the emphasis on decision making in the hands of the shareholders, the reciprocity clause requires, in 12(5), shareholder AGM approval no more than 18 months prior to the bid to enact any measures.

In part, the logic of this measure is that they should ‘opt in’ to a more liberal regime voluntarily in order to facilitate takeovers where they are bidders. Reciprocity also potentially addresses the lack of a level playing field between the EU and the US. However, although one aims was that European companies should not be weakened vis-à-vis American firms protected by a range of ‘nuclear option’ style poison pills and defences, in fact the Directive is unclear whether reciprocity applies in relation to non-EU bidders (Menucq 2006: 233; Clarke 2006: 373). It falls to national securities regulators to adjudicate as the equivalence of measures, and very little guidance is offers, adding to the lack of clarity about how reciprocity will be interpreted by member states.

Less discussed but also significant is the increased transparency introduced with regard to anti-takeover measures. In Article 10 of the directive, companies are required ‘to give full detail in their annual reports on a set of aspects affecting their contestability in the market for corporate control, such as the presence of takeover defences or devices that can be used as takeover defences’ (Enriques and Gatti 2006: 18-19).

The final takeover directive was a case of drafting by committee, with the optionality and *à la carte* nature of the directive stripping it of its desired effect. Whilst it did clarify some issues in relation to takeovers, such as ‘squeeze out’ and ‘sell out’, it fell far short of the Winter group’s ambitions. EU Commissioner Fritz Bolkestein recorded his hostility to the final version, regarding it as a testament to national protectionism which he deemed not worth the paper it was written on (Bolkestein 2004).

French Transposition of the Directive in March 2006

Transposition took place in a charged political context, with talk of ‘economic patriotism’ in spate as it gushed from the mouths of Prime Minister De Villepin and Finance minister Breton. The (ultimately successful) hostile talked by Mittal of Arcelor, begun two months earlier, had been greeted with thinly veiled hostility by the French government. This case was governed by Luxembourgish, and not French law, and therefore would not be affected any way by the bill. Nevertheless, this economic patriotism raised the stakes of what might otherwise have been a technical debate.

In France's implementation of the directive, there were some changes in relation to France's regime on defence against hostile takeovers. The principles underpinning the changes are that shareholder approval must be sought for any action attempting to make the bid fail. The March 2006 law allows the board to seek other offers (so-called 'white knights') without shareholder approval.[14] The board's liberty to seek other offers, whilst not outlawed previously, is now explicitly recognised in French law. This is consistent with the general direction of travel of reform, encouraging the free market of bids.

This requirement of prior shareholder approval *during the bid period* is a new element in French law. Previously, prior shareholder delegation of powers to the board (provided it met certain exigent conditions, including that the action would not make the bid fail) could be used in a bid period by a target board. Measures taken before the bid, which might impact upon it (and do not come under 'normal' operations of the company) must also be approved. Board neutrality extends to preventing the board from pursuing measures during a bid period likely to impede a takeover *even if* they had been agreed by shareholders previously. Thus the law presumes the possibility of a shareholder meeting to decide upon action (or not) during the bid period. This heightened emphasis on shareholder approval is a significant shift, and departure for French corporate culture. It is an exigent requirement given the difficulties of hastily convening shareholder general meetings. There are changes to the rules governing shareholder meetings to facilitate convening them at short notice.[15]

In not opting out of Article 9, France retained a long-established restriction on frustrating action during an offer period without shareholder approval. Board passivity has long been the rule in France, with all defences such as Pac Man,[16] new issues, divestitures, buybacks and acquisitions not permitted during the bid period (Belze 2005). French law prevents defensive measures being undertaken by the board without shareholder approval during a hostile bid,

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[14] Loi 2006-387, Article 22, http://www.journal-officiel.gouv.fr/frameset.html, http://www.journal-officiel.gouv.fr/publication/2006/0401/joe_20060401_0078_sx00.html?verifBaseDir=/verifier&verifMod=load.php&ficBaseDir=../publication/2006/0401#test1

[15] Provisions are made for shorter delays before meetings can be held (15 days in offer period, compared to 35 normally). Resolutions can be submitted closer to the meeting date (5 not 25 days).

[16] With the one exception of Elf Aquitaine – permitted by COB in 1999.

and had prevented the delegation of authority to managers on decisions over measures designed to impede hostile bids (Bonneau 2006). This of course does not necessarily outlaw frustrating action if the shareholders endorse it. Dominant shareholders may well be able to prevail and secure approval for frustrating action, although shareholder meetings '*à chaud'* convened hastily in the middle of a bid period are unusual in France.

Frustrating action, hitherto outlawed in France, becomes possible under certain conditions due to French endorsement of the reciprocity principle. Due to the reciprocity exception, the passivity rule does not apply if the bidder's national laws do not contain similar board passivity provisions. French law employed a broad interpretation of reciprocity – to enable companies to dispense with Article 9 if the bidder was not subject to it. Furthermore, if the bid is a case of concerted action, if *one* of the bidders does not apply the relevant article, boards are not constrained by passivity/neutrality restrictions.[17] The Directive text is unclear whether this was the intention (ASAP 2006: 6-7). Measures undertaken in the context of reciprocity must have been approved within the last 18 months by a shareholder meeting. (art. 12-5). In effect, the somewhat clumsy attempt at 'levelling' the playing field, which resulted from the compromises made to gain agreement for the takeover directive opens up a move away from passivity norms of board behaviour during takeover offers.

Where the French legislator did exercise the optionality within the EU takeover directive was in relation to parts of article 11 of the directive, relating to the 'breakthrough rule'. Provided the bidder holds 75% of the shares, overrides restrictions on transfers of shares and introduces a one share one vote principle into a meeting called to authorise defensive measures (Enriques 2006: 24-6; Menucq 2006: 231). In fact, a similar provision already existed within the COB (precursor to AMF) code. The Lepetit Report (an influential body convened to explore transposition options, chaired by the former head of the COB) favoured French opting into Article11(4), thus accepting that part of article 11 relating to the first AGM after a successful bid. In the directive, once a bidder has obtained 75% of the capital with voting rights, all the statutory voting restrictions are suspended for the first agm after a successful bid. In France the COB had long enforced a similar rule once a threshold of 66% of *either* capital *or* voting rights was reached (Marini 2005: 100-101), thus this part of the

[17] L. 233- 32-3

new EU regime presented no difficulties. This again attests to the open nature of the pre-existing French regime in relation to takeovers.

The part of the Takeover Directive's Article 11 which *was* introduced related to the suspension of voting ceilings in the first agm following a successful takeover bid. This conforms to the principle that once a bidder owns a majority of the capital, they should be able to exercise effective control of the firm (Novelli 2005: 12-3). However, other provisions of Article 11 presented different problems given the prevalence within French corporate governance of statutory and contractual mechanisms such as voting ceilings, restrictions on transfers of securities. In particular, 11 (2) and (3) challenged the central role of shareholder pacts and contracts between shareholders. The French 'balance' has been to permit such 'flexible financing and control' structures, but to ensure transparency surrounding them (Novelli 2005: 12-3). These kinds of 'contractual agreements' (such as shareholder pacts) are a significant feature of the French approach, often defined as enabling founders of medium sized companies to retrain control of the company when listing (Menucq 2006: 231).

The pre-existing AMF code suspended statutory restrictions on the transfer of securities during an offer period. This enters into French law in the transposition of the directive (Marini 2005: 101-2). The suspension of other statutory restrictions on voting rights is left optional. The suspension of 'contractual' restrictions (shareholder pacts) in relation to both transfers of securities and on voting rights is also left optional. In order to preserve pre-existing aspects of French corporate governance. France has, as the European Directive permits, opted out of parts of Article 11's 'breakthrough rule', which neutralises some statutory and contractual restrictions, but allows firms to opt back in on a voluntary basis.

Article 10 of the European takeover directive requires detailed greater transparency about the defensive and structural mechanisms in place within a company (Menucq 2006: 226). Yet already, in France, all restrictions on voting rights, and shareholder pacts, had to be disclosed to AMF, which publishes them (AMSA 2006: 7-8). The March 2006 law includes stipulations for the information to be disclosed in company annual reports for all companies admitted to trading on regulated markets notably, in Article 6, details of the structure of the company's capital, statutory restrictions on voting, and on transfers of share, any shareholder pacts the company is aware of, as well as any pay off arrangements in the event of board members of employees losing their positions as a result of a hostile takeover (Bonneau 2006).

Article 4 brings new precision to what constitutes a shareholder pact or ‘concerted action’, anyone having reached an agreement with the bidder aimed at securing control of the firm, as well as all those agreements reached within the target firm which aim to make the takeover bid fail. French law thus requires the publishing of such contractual arrangements (see the AMF website), and a bidder is provided in this way with sufficient information to determine the real cost of the bid.

One aim of the Breakthrough Rule was to tackle multiple voting rights, and different classes of share which are one of the major obstacles to hostile takeover in some contexts, such as the U.S.. This could potentially challenge another valued particularity of French corporate governance, the double voting right. However, ‘the Directive does not apply to French double vote securities because the multiple vote securities mean securities included in a distinct and separate class’ (Menucq 2006: 231). The French Government reportedly defended its double shares and ensured their exclusion from the Directive. French double voting shares are a reward for loyalty, awarded to all without discrimination who have held shares for 2 (or up to 4) years, and that they lose their double status on sale. Thus they are not a particular class of share. Their place within French corporate governance is defended by the government and many actors within the corporate governance milieu. This entrenched attachment to this departure from one share one vote was successfully defended in the context of the takeover directive’s transposition.

There was, however, one area where the French government *did* draw inspiration from U.S. takeover regime. At first glance this might appear grist to the mill of those asserting an Anglo-Saxon convergence within French capitalism. However, this would assume that U.S. capitalism faithfully reflecting the ideal type supposedly modelled upon it. In fact, the U.S. has one of the best developed arsenals of anti-takeover weapons on the planet. The American market for corporate control is nothing like the free and open play of bids disciplining management to prioritise shareholder value that the textbooks (or casual ‘varieties of capitalism’ analysis) describes. In this case, the French government engaged in ‘policy transfer’ of a US-style ‘poison pills’ or anti-takeover devices.

The new French legislation included the possibility for target boards, with shareholder approval, to issue both in the pre- and post- bid periods new securities, known as ‘bons de subscription’. These ‘bons Breton’, named after the initiator of the law, are modelled on a fairly mild version of the American ‘poison pill’. This is the first time anything of the sort exists in French law. Under reciprocity, if the bidder does not apply article 9, these and other defensive measures can be issued or pursued by the board at its discretion *provided* that authorisation has been gained from a shareholder agm within the previous 18 months. Their effect is to dilute the effect of any holdings the acquirer already has in the firm, and to raise (perhaps dramatically) the price of the bid. By making control considerably harder to achieve, and raising the price, the aim is not so much to warn off the bidder as to raise the price of the offer and to facilitate negotiation on terms more favourable to the target firm. Its likely effect, recognised by Breton, was to increase the price, rather than to make the bid fail outright (Marini 2006: 11-12).

The issue of shareholder approval for such ‘poison pills’ was a source of debate during the parliamentary road the bill travelled, with the Senate favouring a simple majority, whilst the assemblée favoured a 2/3 majority. This was justified by the Bill’s *rapporteur* Hervé Novelli in terms of ‘better protecting the interests of small shareholders’ (Agence France Press 2006a: 1). However, the final version of the bill required a simple majority, thus making the poison pill easier to deploy.

The Socialist Arnaud Montebourg proposed an amendment which would enable the government ‘to oppose the completion of a merger which it deemed would be harmful to the industrial policy and the national economic and social development’ (Agence France Press 2006a: 1), but this was rejected. For his part, the then PS National Secretary for the economy and taxation Eric Besson endorsed the *bon de souscription* (poison pill) as a useful instrument to protect firms from hostile takeover (Agence France Press 2006a: 1). Besson argued for no shareholder approval, evoking the international context of US, German, Polish and Dutch firms all able to deploy such measures at will (Lamy 2006: 6).

Nevertheless, the introduction of the *bons* Breton in the same law which transposes the directive in theory facilitating takeovers, points at the delicate balance of the French takeover regime. Breton’s overall assessment was that the Law ‘enabled French firms to ‘jouer a armes égales’, and prevent French firms from being penalised but introduced clearer ‘règles de droit pour leur développement a l’étranger’ (Agence France Press 2006b: 1). In the shareholder agm season immediately following the new law, there was a spate of moves to introduce the ‘Breton’ poison pills into the firms statutes. For example, several companies, including

Bouygues, Eurazeo, Saint-Gobain and Suez have obtained shareholder approval to implement BSAs Breton. (Martin 2006: 7). In total 19 large French firms voted currently have ‘bon bretons’ onto their statutes by shareholder agms in 2006, and a further 15 are proposed for this 2007 AGM season. Any firm subject to a bid could, of course, follow suit *à chaud* given shareholder approval.

This, combined with the new reciprocity provisions, in practice expands options for management defensive measures. The March 2006 Law introduces reciprocity, seeking to ensure that bidder and target are equipped with the same arsenal. Its effect is to create a very variegated picture in terms of anti-takeover defence measures. The AMF has to make the judgement as to what constitutes the level playing field – what measures it can permit for the target, given the conditions under which the bidder operates. It also gives latitude to the AMF in determining the equivalence of provisions in foreign company law and what would be permissible for French firms targeted by such overseas investors. (Lamy 2006: 6).

The March 2006 law also tided up and simplified its process for squeezing out minority shareholders. New and quicker squeeze out procedures for a bidder holding at least 95% of capital and voting rights of the target within 3 months of the end of the offer period (this will not require the bidder to first launch a buy-out offer). There are also ‘sell-out’ provisions, requiring the bidder to buy up remaining shares at a new minimum price requirement – the highest price paid for the same securities by the bidder in the previous 12 months. That this is a minimum price requirement suggests that the AMF has discretion to demand a higher price, something not envisaged in the European directive. The trigger for mandatory bids remains unchanged at 33% of capital or voting rights.

The transparency requirements attached to the bid process stipulated in the March 2006 law are significant and extensive. Firstly, there is the introduction of provisions for informing employees about takeover bids, pushing further in a direction begun with the 2001 NRE. Disclosure requirements for employees, contained in article 7, now extend to all forms of takeover, hostile or otherwise. The information for works councils must now be disseminated to both the target and the bidder works councils, and in the absence of such a body, the information is given directly to the employees. The works council meeting to consider the information must precede the shareholder meeting which considers anti-takeover defences. The recipients of the information are threefold, the shareholders, the employees, and (via the

AMF), the public. Failure to comply with disclosure obligations nullifies the voting rights attached to the shares already held.

Another of its significant elements in terms of disclosure is the ‘Danone amendment’ requiring a potential bidder to declare their intentions to the AMF. Inspired by the UK "put up or shut up" rule under the City Takeover Code, the Danone Amendment is so-called after the mooted takeover plans of Pepsico for Danone in summer 2005 became a hot topic of conversation, including amongst government ministers seeking to dissuade the potential bidder. If, in the opinion of the AMF, it can reasonably be deduced from ‘significant movements’ in share buying activity that a company is preparing a hostile takeover, the AMF can require them to declare their intentions to the AMF, which would then make this public. If the bidder responds that it will not make an offer, it will be prevented from making any bid on the target company for a six month period. Both here and in earlier reforms, increased transparency and disclosure is a double edged sword. On the one hand, it offers ‘outsiders’ a clearer picture of the true investment picture. However, this must be balanced against the fact that ‘harsh disclosure duties on significant holdings have chilling effects on takeover activity’ because ‘all else equal, strict disclosure duties limit expected returns for prospective bidders, thus reducing their incentives to bid’ (Enriques and Gatti 2006: 20).

The French corporate governance and takeover context, in the wake of transposition, is more ambiguous that it had been previously. Transposition of the EU Directive into French law paradoxically *expanded* the range of anti-takeover defences available to target boards. This was consistent with a broader pattern recognised by the EC in their assessment of the Takeover directive’s introduction. The result was not a level playing field or harmonisation. With the optionality of key clauses, (9 & 11), and the reciprocity rule (12), the battleground for European takeovers remained every bit as uneven a surface as it had been prior to the Directive. Indeed, in anything, the result was *increased* differentiation. Furthermore, far from dismantling institution and structural impediments to the market for corporate control, in fact new forms of protection ended were introduced (EC 2007).[18]

[18] http://ec.europa.eu/internal_market/company/docs/takeoverbids/2007-02-report_en.pdf

The Market for Corporate Control in France

It is significant that, historically, 'French tender offers generally occur as consensual, rather than hostile, transactions' (Fanto 1998: 75). The notion of 'hostile' takeovers has a slightly different meaning in France. In the UK the notion of 'hostility' is to shareholders. The 'hostility' in France is to the board. Thus, once a bidder can win over the board, the bid ceases to be hostile. This perhaps explains the relative rarity of hostile takeovers, with bids mounted in a 'non-hostile' way in order to keep the incumbent board 'on board'. This has implications for the operation of takeover as a device disciplining management in the classic sense. Indeed, it arguably blunts the disciplinary element of takeovers.

Some cite the BNP Paribas takeover in 2000 as evidence that a market for corporate control has emerged as a result (Cioffi 2000). If true, this marks a fundamental shift in French capitalism. Yet hostile takeovers remain comparatively rare in France. Only 3 hostile takeovers involving large firms where the deal was worth $100 million or more took place in France between 2000 and 2004 (Culpepper 2005, 193), and only 19 hostile takeovers took place between 1991 and 2000 (Montagne, Pernot & Sauviat, 2002), illustrating that the French market for corporate control remains underdeveloped. The Arcelor case is unusual in the French context, in that Mittal's team went round winning over shareholders one by one, winning them over, and the board remained opposed, almost until the bitter end. The success of the Mittal hostile takeover could, like the BNP Paribas case, be interpreted as a turning point in French capitalism. However, this is a time consuming and very costly approach. To succeed, it required someone with Mittal's resources on the one hand, and a series of clumsy responses from the Arcelor CEO (notably approaching a Russian oligarch as a potential 'white knight') to effectively drive its shareholders into the Mittal camp.

Arcelor-Mittal notwithstanding, the long list of long-standing impediments noted at the beginning of this paper remain a part of the French corporate governance climate. As well as double votes, and a range of voting ceilings limit the voting rights of certain investors, there is also a prevalence of shareholder pacts, notably those restricting transfer of securities. All these allow management to 'create a friendly shareholder group' with the effect of 'seriously obstructing a change of control' (Fanto 1998: 74). Both unequal voting rights and voting ceilings are much more prevalent in France than in any other major economy (Goyer 2003a: 3). Such practices are *increasingly* prevalent, suggesting their use as new instruments to fend off takeovers, replacing the *noyaux durs* (Magnier 2002: 73-4; Goyer 2003b 197 & Table 6.5). Thus, large French firms are using these mechanisms to dissuade takeovers. None by itself represents a particularly powerful ‘poison pill’. In theory, the bottom line is that all of the dissuasive measures are public knowledge, and therefore get factored into the price offered by the bidder, or bidders. However, their collective impact is to insert a good deal of ‘viscosity’ into the system.

The increased prevalence of voting ceilings and double votes, along with the introduction of ‘bons Breton’, indicate the potential for more defensive institutional engineering to put new obstacles in the way of takeovers. Indeed, one reason for the only partial transposition of the ‘breakthrough rule’ neutralisation of defensive mechanisms was that full transposition could encourage recourse to ‘more opaque control structures, such as pyramids’, inducing ‘the creation of even more complex pyramids and cross-holdings (Groegen *et al* 2005: 254; Bebchuk & Hart 2002). These are difficult for regulation to track, let alone prevent. An increase in these kinds of takeover defences is deemed a ‘worse’ case than transparency plus the (milder) forms of takeover dissuasion noted above

One reason for the limited nature of change is the problematic policy transfer of financial and securities regulation from a U.S. context (where many of the initiative originate). These are sometimes designed to resolve different problems than those arising within European corporate governance. For example, they are often geared towards combating management opportunism, rather than controlling shareholder expropriation. The result, according to Enriques and Volpin, is that ‘when European policymakers adopt U.S.-style solutions designed to tackle managerial agency problems, they can appear to be doing something to reform European corporate governance while actually leaving the rents of Europe’s dominant shareholders perfectly intact’ (Enriques & Volpin 2007: 138). The authors clearly have Italy in mind here, and the degree of assumed continuity is probably not true of France. Nevertheless, the notion of problematic policy transfer having different impacts in different context is an important one for understanding the contemporary evolution of French takeovers and corporate governance.

Conclusion

One of the counter intuitive findings of this paper is a rejoinder to the 'triviality thesis'. In the light of the Takeover Directive, it seems that, contrary to strong versions of that thesis, the EC as a corporate governance actor *does* have a demonstrable impact. However, this influence has *not* had the effect of pushing the European takeover regimes in the desired, harmonising direction. Rather, as a result of the directive, a more confused, varied European takeover has emerged. Rather than the desired greater clarity and *lisibilité* of takeover regulations and processes, there is heightened uncertainty and opacity. As a result of no-one (and that includes the AMF whose job it is to implement it in the French context) really knows how (or indeed if) 'reciprocity' will work.

The 'asymmetric vulnerability' (Knudsen 2005: 524) of firms, and national corporate governance regimes to EU-level regulatory change, is a major obstacle facing supra-national reform of corporate governance. The notion of a level playing field, which underpins EC activism in this field, remains illusory. Given the permitted national derogations, the fact that it directive only lays down minimum standards, the crucial opt-outs (Articles 9 and 11), and the reciprocity rule, the result of the attempted harmonisation of European corporate governance is a *more* complex and *more* nationally variegated European takeover regime after implementation. Future attempts at the EU-level reform corporate governance will continue to be hamstrung by this (increasing) variety and complexity of institutional and legal environments of corporate governance in Europe, as well as the multitude of defensive measures at European firms disposal. As the takeover directive demonstrated, EC exhortation to endorse supra-national corporate governance harmonisation is insufficient to overcome entrenched corporate and political opposition

This is part because the assumed superiority of the EC model of political economy, rooted in institutions such as shareholder value, one share one vote, is not accepted. One reason for this is a lack of compelling evidence that takeovers necessarily bring in their wake efficiency gains and a virtuous restructuring of French industries or firms. Underlying this lack of consensus is an ongoing contestation surrounding European models of capitalism and their relative merits. This divergence over models of political economy ultimately explains why the Takeover directive was emasculated through the optionality of pre- and post-bid defensive measures, and why the EC failed in its bid to develop an EU Takeover directive with teeth.

In some respects, French capitalism was already aligned with a UK-style open regulatory regime in relation to takeovers. Anglo-American Institutional Investors (pension funds, mutual funds, and hedge funds) who today hold roughly 50 % of the capital of French public listed companies are often credit with transforming French corporate governance, seen as the 'Trojan horses' of the liberal market economy model in France. In relation to takeover regulation, this account fails to convince, since the liberal and open regime was established by the end of the 1980s, and thus *before* the internationalisation of French capitalism (which heralded the foreign funds' arrival) had taken off. Thus liberal open takeover regime was not 'caused by' foreign institutional investors.

The French context remains relatively open to takeover bids firms compared to many other European countries. None of the numerous obstacles and dissuasive measures discussed above represents a particularly powerful 'poison pill'. Nevertheless, their collective impact is to insert a good deal of 'viscosity' into the system. Furthermore, recent re-regulation within the French corporate governance regime has not been all towards 'Anglo-Saxon' or shareholder value norms. Paradoxically, the most significant shift *away* from an open, liberal takeover regime was introduced as a direct result of the EU Takeover directive. Its transposition into French law included policy transfer of U.S. poison pills, the 'bons Breton'. This ironically *expanded* the range of anti-takeover defences available to target boards.

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