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B. STATUTORY ARM'S-LENGTH PROFITS OF DUTCH FINANCE COMPANIES

The Dutch Ministry of Finance has recently published new guidelines for the issuance of advance rulings concerning the Dutch tax treatment of finance companies (which are typically special-purpose affiliates of multinational enterprises designed to borrow and re-lend capital within the group).²⁰ Assuming the finance company bears no credit or currency risk, advance rulings will be issued for companies earning between 1/8th and 1/16th of 1 percent of the capital supplied by related parties and between 1/4th and 1/32nd of 1 percent of the capital supplied by third parties. In each case these percentages will decrease inversely to the amount of the finance company's capital.

France*

The enactment of Law 89-531¹ significantly changes the securities market in France. The purpose of this enactment is twofold. First, it renders the financial market safer by strengthening the powers of the Stock Exchange Commission (COB).² Second, it introduces a greater "transparency" into the market, principally with regard to public offers to purchase and to exchange. Further, the law strikes a balance of interests among different kinds of shareholders.

The new enactment still must be complemented by two regulations to be issued by the Securities Market Council (CBV)³ and by the COB. These two regulations will specify rules to be followed in public offers to purchase (OPA)⁴ and in voting agreements. Except for the rules relating to self-government, Law 89-531 is of immediate application, and will become effective on July 1, 1991. For certain measures concerning the COB only, Law 89-531 will become operative when that body is restructured in compliance with the new enactment.⁵

20. Ministry of Finance Letter dated June 8, 1989, *noted in* 1 TAX NOTES INT'L 520-21 (Nov. 1989).

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1. Enacted on August 2, 1989 and published two days later in the JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] Law 89-531 (Fr.), 28 RECUEIL DALLOZ SIREY-LEGISLATION [D.S.L.] Law 89-531 (Fr.).

2. The Stock Exchange Commission is the French equivalent to the Securities and Exchange Commission (SEC) in the United States. The original name is Commission des Opérations de Bourse and it is known by its initials as COB.

3. The initials are taken from the original French name, Conseil des Bourses de Valeurs.

4. The initials are taken from the original French name, Offre Publique d'Achat.

5. This date will be announced in a ministerial decree (*arrêté ministériel*), to be published in the JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE.

I. Activities of the COB

The statute not only restructures the COB and specifies the way of appointing board members, it also decisively strengthens the powers of this body. The COB can now impose fines of up to ten million francs on those who infringe COB regulations. In cases where profits have been made, the penalty can reach as high as ten times the amount of the profit. Fines of this kind, proportionate to the degree of infringement and to the profits made, can only be imposed after due process, which involves a hearing, consideration of pleadings, and the like.⁶ The COB can also order the publication of its decision in any magazine or newspaper, at the cost of the violating party.

In the course of investigating complaints of insider trading, malicious release of inaccurate information, or manipulation of exchange rates, COB inspectors may—paralleling the powers of tax, customs, and free trade authorities—search any premises, even private, and impound any documents. This kind of procedure requires the previous authorization of the Tribunal de Grande Instance⁷ and the presence of an officer of the Judicial Police.

At the COB's request, the president of the Tribunal de Grande Instance may: (a) order the impounding of funds, commercial papers, or rights belonging to parties under investigation, whether third parties are holding such assets or not; (b) issue a temporary injunction preventing any physical or legal person from participating in the securities market; and (c) in case of urgency, request a bond, discretionally established by the court, from any party under investigation. All of these sanctions are subject to criminal liability in case of infringement. The COB also may request corporations that solicit public funds to supply complementary reports or other kinds of verification.

Appeals against COB decisions—other than those that are merely regulatory or related to collective investments in securities—now lie with the judiciary and not with the administrative courts. In general, appeals of this kind do not prevent enforcement. The president of the Paris Court of Appeal may, however, stay an execution that is “likely to provoke consequences largely disproportionate to the nature of the case.”

II. Acquisition of Shares

A. NOTICE OF OWNERSHIP OF SHARES

Any physical or juridical person who attains ownership of over 5 percent, 10 percent, 20 percent, 33⅓ percent, or 50 percent of the outstanding shares of a corporation must notify that corporation within fifteen days of having surpassed any of these thresholds, and must inform the corporation of the exact number of

6. Known in French under the generic name of *procédure contradictoire*.

7. A court of original jurisdiction.

shares under control. In the case of a corporation listed on the stock exchange, the acquiring party must also notify the Société des Bourses Françaises⁸ within five working days after the threshold is exceeded.

In harmony with the European Directive of December 12, 1988, Law 89-531 includes several measures to improve the "transparency" of the stock market. The obligation to give notice does not apply to stock that is not publicly listed. A new threshold, in the amount of 66⅔ percent (two-thirds) of the outstanding shares, is added to the five thresholds mentioned above. This latest threshold conforms to European Economic Community (EEC) law and corresponds to the disappearance of any institutional "minority opposition"⁹ within the corporation.

The corporation must also, in its annual report, notify shareholders when the new threshold is exceeded. In particular, the report must state: (a) the identity of those holding a significant proportion of stock; and (b) the number of shares belonging to other corporations bought by the corporation.

Two amendments have been made to the method for determining stock thresholds:

(1) *Scope of voting rights.* When the number of votes does not correspond with the number of shares (e.g., in case of shares with multiple votes, or shares with no voting rights), the shares are not calculated by their number but by the number of votes they allow. To allow shareholders to determine whether a given threshold has been exceeded, the corporation must inform shareholders within fifteen days following the annual meeting of the total number of votes then available. If, before the next annual meeting, this number changes beyond a certain proportion (to be established in the implementing regulation), the corporation must promptly inform its shareholders. If the stocks are publicly listed, the corporation must also notify the CBV. The articles or bylaws can add other thresholds to those created by the law.

(2) *Determination of the shareholder.* To decide whether a given threshold has been exceeded, one must consider not only the total number of votes held by one person, either physical or juridical, but also: (a) the voting shares held in that person's name; (b) the voting shares held by corporations controlled by that person; (c) the voting shares held by someone having an informal or private voting agreement with that person, and (d) the voting shares that the person is entitled to buy as a matter of law, as in the case of preemptive rights or options to purchase.

The new law also focuses on informal or private voting agreements,¹⁰ that is to say, concealed maneuvers to acquire control or stronger voting positions. Innovations in this area include the following:

8. A government office, similar to the U.S. Securities Exchange Commission, that controls the public offerings of securities.

9. In French, *minorité de blockage*.

10. In French, *action de concert*.

(a) an informal agreement is implied whenever “two or more parties have transacted to acquire or to convey voting rights in order to implement a common corporate policy”;¹¹

(b) an informal agreement is deemed present in transactions among the following parties:

- a corporation and its directors or officers;
- corporations controlled by the same person or persons (horizontal control); and
- a corporation and other organizations controlled by it (vertical control); and

(c) informal voting agreements are considered, not only to verify whether a given threshold has been surpassed, but also to determine who has the duty to inform and to refine proceedings for OPA or for a public offer to exchange (OPE).¹²

The notice required for any case in which a threshold is exceeded must state not only the total number of shares that the party in question owns, but also the total number of votes available to him. Delays in complying with the notice requirement are penalized by withholding voting rights over the shares that exceed a given threshold. Depending on the seriousness of the case, the suspension of voting rights can be imposed from three months to two years. At the request of the corporation, a shareholder, or the COB, the Commercial Court may impose a more severe penalty. For instance, the noncomplying party can be deprived of all voting rights (not just those attached to the exceeding shares) for a maximum of five years.

In principle, these rules are effective immediately. Nevertheless, the determination of whether any threshold has been exceeded can only be made by shareholders after the corporation informs them of the total number of voting shares. This determination will probably take place at the annual meeting. Until then thresholds will be assessed as before, except that some amendments will be immediately applicable: the new threshold of two-thirds, the rules on informal voting agreements, and the new content requirements for notices to the corporation.

B. CORPORATE SELF-GOVERNMENT

Self-government is a device through which a corporation assures independent control of itself by the intermediary of several other corporations, controlled by the first one. To curb the power of self-government, and particularly to prevent blocking mechanisms in favor of the board that are to the detriment of the shareholders, the voting rights attached to self-government shares are now limited to 10 percent of the voting shares present at the shareholders' meeting.

11. The quoted language is originally provided by a July 24, 1966, law, J.O. Law 356-1-3, ¶ 1.

12. See *infra* section III.
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As of July 1, 1991, self-government shares will have no voting rights. Only the voting power will be lost, however. No obligations follow to dismantle corporate self-government structures or to sell the shares in question.

C. DISCLOSURE OF SHAREHOLDERS' DEALS

The CBV must be notified of any agreement entered into by shareholders of a publicly listed corporation that concerns preferential conditions of transfer or purchase of shares. The CBV will enter a public record of such transaction. The noncompliance of this duty to disclose does not, in the absence of a specific rule, make the transaction voidable.¹³ As the law presently stands, failure to disclose only gives rise to damages in favor of those injured by the lack of disclosure. In our opinion, the duty to disclose applies not only to new transactions, but also to previous ones for which enforcement is presently being sought.

III. Public Offers to Purchase

The new law ensures that the CBV and the COB take important steps to achieve the "transparency" of market transactions during an OPA and assure that minority shareholders are respected. The exact nature of steps to be taken will not be known until the implementing regulations for the CBV and the COB, presently under consideration, become public. Nevertheless, following the parliamentary debates on the new law, the Ministry of Economy and Finance has released certain information about the projected changes. According to this source, the minimum capital fraction of the targeted company (presently 10 percent of the capital or 10 million French francs) over which the OPA is required will be replaced by two-thirds of the voting shares. Furthermore, any party holding one-third of the capital or voting shares of a publicly listed corporation will be required to comply with OPA and OPE regulations.¹⁴

A right of withdrawal will be instituted in the following cases: (1) when the majority shareholders reach a particular degree of control (probably 95 percent) of voting rights in an annual meeting, and (2) when the corporation is transformed into another type of business organization. Just as in the case of giving notice when certain thresholds are exceeded, the rules of public offerings are applicable not only to the immediate party making them, but also to those who operate jointly with that party.

A. INCREASE OF CAPITAL DURING A PUBLIC OFFER

It has become standard practice, especially for publicly listed corporations, for the shareholders' meeting to authorize the board to increase the capital one or

13. Concerning this issue, the Senate's proposal to void nondisclosed transactions, Deb. Senat 9 June 1989, J.O. at 1306, has been set aside by the Assemblée Nationale, Deb. AN 23 June 1989, J.O. at 2398.

14. The CBV, however, can waive OPA and OPE requirements in certain cases such as majority control in a corporation by a holding company, reissue of stock, and lack of important purchases right before the threshold was exceeded, etc.

more times within a maximum period, which varies according to whether preemptive rights have been suppressed or not. Once a corporation has been made the target of an OPA or an OPE, the authorization mentioned in the preceding paragraph can be used as a means of defense, because the concentration of capital renders the operation more expensive and less certain for the offeror. In practice, however, such a maneuver can rarely be used because of COB reluctance to allow impediments to the free use of OPAs and OPEs.

Currently, the rule is that authorizations for the board to increase capital are suspended during an OPA or an OPE period. There is an express exception, however: an increase of capital is allowed if it is authorized by the shareholders' meeting during an OPA or an OPE, and such authorization, valid only for one year, has been given before the public offer. Furthermore, the issuance of shares must not be restricted to one or several parties, but must be open to all shareholders and to the general public.

The Business Associations Law, section 180, paragraph 3, authorizes the shareholders' meeting to delegate to the board the power to decree an increase of capital. This rule has been complemented by another rule that specifies: "In case of an OPE such delegation is given in derogation of section 193."¹⁵ The sense of this amendment, adopted with practically no discussion, is not immediately clear. It would seem that the legislature had in mind (as practitioners lobbied for) a simplification of OPE procedures not for the targeted company but for the offering corporation.

Presently, in the case of an OPE, two cumulative procedures must be followed: stock exchange regulations and the law concerning contributions in kind. The result is a procedure of such complexity and excessive duration that it constitutes a daunting obstacle to control bids by foreign corporations, especially Anglo-Saxon ones. But the present wording of section 180, paragraph 3, does not allow the desired simplification since the authorization it institutes relates to the targeted corporation, not to the one who initiated the offer.

B. NOTICE TO THE BOARD

Under previous legislation, notices to the board about the modification of the economic or juridical structure proved to be insufficient in cases of OPAs and OPEs. According to the new law, the president of the corporation must inform the board as soon as an OPA or an OPE has been initiated. The board may, with the president's consent, invite the offerors to explain the terms of such offer to the corporation.

When the OPA or the OPE targets the controlling corporation of a group, notice must be given to that group's committee, which may invite the authors of

15. Section 193 concerns contributions in kind.

the offer to explain the project in detail. The board or the group committee only has the right to receive notice. No right to intervene and to try to block the offer follows.

C. RIGHT TO CALL A SHAREHOLDERS' MEETING

After an OPA or an OPE, or the transfer of a controlling block of shares, the majority shareholders of capital or voting rights may call a shareholders' meeting. The purpose of this rule is to allow any new majority to fire unwanted corporate officials who cling to their posts by refusing to call a meeting that could unseat them.

IV. Other Rules

A. INVESTMENT SOCIETY OF VARIABLE CAPITAL (SICAV) AND COMMON INVESTMENT FUND (FCP)—THEIR CAPITALIZATION¹⁶

Since October 1, 1989, SICAVs and FCPs are not forced to distribute their revenue from fixed investments on an annual basis. This important amendment will allow the establishment in France of capitalized SICAVs and FCPs like those that exist already in numerous countries. This new concept allows parties to be taxed only when they choose to sell their stock and only for the profit made at that moment. Tax is exempted if the total profit made in one year does not exceed a limit established annually (F 288,400 in 1988). Anything beyond this level is subject to a 16 percent tax.

B. COMMUNICATION OF PRIVILEGED INFORMATION

According to insider trading rules, those who use privileged information, or who allow others to use it, in the stock exchange before it becomes public knowledge, expose themselves to penal sanctions. Law 89-531 creates a new type of liability for "all those who, due to professional reasons, hold privileged information concerning possibilities of investment in the stock exchange and communicate such information to third parties outside their normal scope of work." In this way, the duty of secrecy concerning third parties is added to the duty of refraining from using privileged information oneself.

C. DECRIMINALIZATION OF CERTAIN INFRACTIONS

Criminal sanctions against those who promote the subscription of shares issued by parties not allowed to sell to the public have been abolished. Also

16. The respective names in French are: *Société d'investissement à capital variable*, and *Fond commun de placement*.