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THE SHAREHOLDER IN FRANCE AND THE UNITED STATES: A COMPARATIVE ANALYSIS OF CORPORATE LEGAL PRIORITIES

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I. INTRODUCTION

The fundamental question in the law of business organizations – what is the purpose of the corporation? – contains a related question of constituencies and therefore priorities among them – whom does the corporation serve? If, for example, the purpose that justifies the existence of the corporation is the maximization of share price, then it follows that the corporation exists to serve the shareholders that are the beneficiaries of share price increases. The answers to such questions are encoded in the laws governing the decisions of a corporation's directors and managers and regulating the transactions that allocate the benefits and the burdens of a corporation's activity. Different societies have reached different conclusions and enshrined different priorities in their respective legal regimes. And while the modern global corporation does business – and may serve stakeholders – far beyond the borders of its jurisdiction of incorporation, these fundamental questions of purpose are generally still determined by the lawmakers in the corporation's place of incorporation.

1. The authors would also like to thank Kendall Maxwell, Olivia Coates and Théa Delhaye for their invaluable contributions to this article.

The corporate form in the United States[2] and in France[3] share important features, such as limited liability, that are fundamental to the globally recognized concept of a corporation. But, as this article will explore in greater depth, different corporate legal priorities developed in each jurisdiction over time, in certain cases resulting in the evolution of different rights and privileges for shareholders. At the same time, recent global governance trends, in particular, heightened awareness of environmental, sustainability, employee and other stakeholder issues, have begun to reshape what some consider "traditional" thinking about the purpose of the corporation. In some cases, the changes flowing from these new conceptions of governance have led to a convergence of priorities, while in other cases reactions to these developments have diverged. In this Article, Part II provides a comparative view of the development and purpose of the corporation in the United States and France, including recent re-evaluations of the corporation's purpose and whom it ought to serve; Part III explores the function of the board and the tensions between its duties to shareholders and to other stakeholders in each jurisdiction; Part IV considers the role of minority shareholders and activist investors; and Part V concludes with an assessment that governance regimes are converging more than they are diverging, with priorities becoming more alike than not.

II. THE PURPOSE OF THE CORPORATION: SHAREHOLDER PRIMACY VS. STAKEHOLDER PRIMACY

A. The Early Development of the Corporation

Legal scholars have observed that the essence of an American corporation is defined by five core attributes: legal personality, limited liability, transferability of shares, delegated management, and investor ownership[4]. The features of the modern American corporation evolved from those of the joint-stock companies formed in seventeenth century Europe. The capital-intensive, lengthy voyages pursued by joint-stock enterprises, such as the Dutch East India Company or the British East India Company, required organizations with long-term capital that could not be unilaterally withdrawn, in contrast to traditional partnerships that could be dissolved by a single investor[5]. As an incentive for passive investors to

2. A majority of corporations in the United States are governed by the Delaware General Corporation Law and, to the extent applicable, federal securities laws. As of 2019, 67.8% of Fortune 500 Companies and 89% of firms that made initial public offerings in 2019 were incorporated in Delaware. Del. Div. of Corps., *2019 Annual Report Statistics*, https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2019-Annual-Report.pdf.

3. The most common French structures for commercial firms, public limited companies (*sociétés anonymes* or "*SAs*"), private limited companies (*sociétés par actions simplifiées*) and limited liability companies (*sociétés à responsabilité limitée*) all derive their legal authority from the French Commercial Code.

4. *See* R. Kraakman et al., *The Anatomy of Corporate Law: A Comparative and Functional Approach 5* (3d ed. 2017).

5. *See* G. Dari-Mattiacci, O. Gelderblom, J. Jonker & E. C. Perotti, *The Emergence of the Corporate Form*, 33 J. L. Econ. & Org. 193, 195-96 (2017).

commit long-term capital to inevitably speculative undertakings, free transferability of shares developed as a means of providing investors with liquidity, and limited liability, while not a novel concept, was broadly adopted to facilitate the transferability of shares[6]. These nascent features became the foundation of the modern corporation[7].

But new modes of business organization were not without their pitfalls. Due to the size and scope of joint-stock companies, and the need to draw capital from numerous passive investors, the management of companies was separated from their ownership, giving rise to what economists call "agency costs". Individuals in positions of managerial power in joint-stock companies, including directors, ship captains, or other managers, often prioritized personal interests over those of the company, to the stockholders' detriment. Indeed, Adam Smith critiqued the joint-stock company for its vulnerability to agency costs[8]. This dynamic between a corporation's owners and its managers has influenced much of the subsequent development of American corporate law.

French commercial law is borne of a confrontation between historical international commercial practices, which were pragmatic and flexible (a *lex mercatoria* determined by custom and contract and applied by merchants among themselves to resolve their own disputes)[9], and the codified, more rigid, formal state law-making and decision-making apparatus[10]. The modern French corporation still exhibits the tensions of these two competing sources, as will become clear below in our discussion of the corporate interest and its evolution.

The first *grandes compagnies* appeared in France in the seventeenth century, inspired by Dutch and English practices[11]. However, for hundreds of years, any treatment of corporations in codified law remained cursory at best[12]. Although the use of the form already existed, the first modern French corporations, *sociétés anonymes* (or limited companies), were not officially treated in codified form until the Commercial Code of 1807 (which remained terse on the subject, leaving much to the shareholders to define in the articles of incorporation). For many years, other corporate forms were strongly preferred, and *sociétés anonymes* only emerged as a common form of business organization after the law on

6. *Ibid*. at 195-99, 203.
7. *Ibid*. at 198-99.
8. Ch. P. Kindleberger, *A Financial History of Western Europe* 203 (1984): "The directors of such companies, however, being the managers rather of other people's money than of their own, it cannot well be expected, that they should watch over it with the same anxious vigilance with which the partners in a private co-partnery frequently watch over their own... Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company", quoting A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 700 (E. Cannan ed., Modern Library 1937) (1776).
9. *See* N. Stolowy & M. Brochier, *France's Commercial Courts: Administration of Justice by Ordinary Citizens*, 1 J. Bus. Law 1 (2017).
10. *See* C. Jallamion, *La construction historique du droit commercial français, à l'épreuve de sa nationalisation*, Gaz. Pal. 30 août 2015, nº 234c1, p. 13.
11. P. Le Cannu & B. Dondero, *Les repères normatifs du droit français des sociétés*, Droit des sociétés, nov. 2019, Lextenso, 9782275069746.
12. *Ibid*.

commercial companies of July 1867, which modernized the existing legal regime and did away with the need to obtain the authorization of a governmental body (the *Conseil d'État*) to create a *société anonyme*[13]. This was an important step in the conception of the corporation as an "institution" independent from its shareholders.

B. The History of Shareholder Primacy in the United States

Alfred Chandler, in his work on managerial capitalism, points to the 1850s as a major transition in business organization: as new technologies, such as railroads and telegraphs, permitted efficient flows of goods and information across the United States, managerial hierarchies sprung into existence as essential features of the new business landscape, able to coordinate such processes[14]. The rise of professional management, coupled with increasingly dispersed shareholder ownership, mainstreamed the separation of ownership and control, a phenomenon described by Adolph Berle and Gardiner Means in 1932[15]. However, while Adam Smith theorized that managerial independence promised a misalignment of incentives, wherein management could direct the firm's activities for their own ends, Berle and Means recognized such independence afforded business the perspective to achieve a broader notion of community and stakeholder value[16]. Over the next 50 years, American business evolved much in the way Berle and Means predicted, with boards and managers acting as stewards of "social and economic institution[s]" for a dispersed and largely passive set of investors[17].

However, by the 1970s, academics began to revive criticism of managerial independence and concerns over agency costs. In 1976, Michael Jensen and William Meckling published *Theory of the Firm: Managerial Behavior Agency Costs and Ownership Structure*, which critiqued the modern corporation as a conflict between self-serving managers and passive shareholders, whose investments were posited to suffer from significant agency costs wrought by the separation of ownership and control[18]. In the wake of the *Theory of the Firm*, a theory of shareholder primacy grew in popularity among the law and economics faculty and the business community. Indeed, shareholder primacy provided the intellectual justification for the grievances of the corporate raiders of the 1980s, and later of the hedge fund activists of the twenty-first century, who sought to dismantle and remake corporations in the name of shareholder value maximization[19].

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13. P. Bézard, *La société anonyme*, L.G.D.J, 1re édition, 01/1987.
14. *See* A. D. Chandler, Jr., *The Emergence of Managerial Capitalism*, 58 Bus. Hist. R. 473, 474 (1984).
15. *See* L. A. Stout, *On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)*, 36 Seattle U. L. Rev. 1169, 1169-70 (2013).
16. *Ibid*. at 1170-71.
17. *Ibid*. at 1171.
18. *See generally* M. C. Jensen & W. H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. Fin. Econ. 305 (1976).
19. *See* L. A. Stout, *On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)*, *op. cit*. at 1174-75.

The essential assumption of shareholder primacy is that the purpose of the corporation is to maximize shareholder value[20]. In 1970, Nobel Prize-winning economist Milton Friedman argued that this goal was the "one and only one social responsibility of business"[21]. As shareholder primacy entered the mainstream in the 1970s, the costs were borne by other stakeholders – "employees, customers, suppliers, communities and society"[22]. Until recently, the objective of maximizing shareholder value in the United States "r[an] so deeply through the relevant statutory and case law that it [was] rarely questioned or even stated"[23].

C. The History of Stakeholder Primacy in France

Throughout the 20th century, France observed a similar trend toward professional management to that witnessed in the United States. In this context, the most important piece of legislation in contemporary French corporate law, the law on commercial companies of 24 July 1966, enshrined the corporation as a stand-alone "institution" independent from its shareholders (as opposed to a mere nexus of contracts). Such recognition afforded a significant level of autonomy to corporate managers, who were entrusted with the duty to act in the corporate interest of the company. This approach has not fundamentally changed in the decades since, although some subsequent reforms have sought to introduce greater management accountability and rights for shareholders (notably the law on new economic regulations of 15 May 2001, known as the "NRE" law).

More fundamentally, the corporate manager's autonomy is limited and grounded by the concept of the *intérêt social*, or corporate interest as the defining purpose of the corporation. The *intérêt social* is quite broad, and the prevailing view is that the interests of all corporate stakeholders (employees, customers, suppliers, shareholders, counterparties, environment, etc.) combine to form an independent interest attributable to the legal entity itself, which is the *intérêt social*[24]. However, it should be acknowledged that a minority view of the corporate interest is that it simply represents the interests of the shareholders (and just the shareholders) as a whole via the corporation[25].

Any resemblance of the *intérêt social* to U.S. "stakeholder statutes" is entirely superficial. U.S. stakeholder statutes typically authorize (but do not oblige) the members of a corporation's board of directors incorporated in that state to take into account interests of constituencies other than shareholders, such as employees, suppliers, customers and communities. While the impact of U.S. stakeholder

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20. *See ibid.* at 1174.
21. M. Friedman, *The Social Responsibility of Business Is to Increase its Profits*, N.Y. Times Mag. (Sept. 13, 1970), https://graphics8.nytimes.com/packages/pdf/business/miltonfriedman1970.pdf (quoting M. Friedman, *Capitalism and Freedom* (1962)).
22. M. Lipton, *Stakeholder Corporate Governance*, Wachtell, Lipton, Rosen & Katz 1 (Dec. 2, 2019), https://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.26645.19.pdf.
23. Allen, et al., *Commentaries and Cases on the Law of Business Organization 3* (5th ed. 2016).
24. M. Cozian, A. Viandier & F. Deboissy, *Droit des sociétés*, 229, §394 (2012); *Le conseil d'administration des sociétés cotées*, Rapport AFEP/CNPF, juill. 1995, p. 8.
25. *See* N. Rontchevsky, *L'utilisation de la notion de l'intérêt social en droit des sociétés, en droit pénal et en droit boursier*, Bull. Joly Bourse, 1er juill. 2010, no. 4, 355 §29.

statutes has been debated[26], the French *intérêt social* has unquestionable practical consequences.

The *intérêt social* provides solid legal grounds for managerial independence vis-à-vis the shareholders but also represents a limit to the powers of directors and officers. It arises in a number of contexts in French law[27], and as further detailed below, management's failure to respect the corporate interest can result in significant civil and criminal penalties. For example, the main prong of the criminal offense of "abuse of corporate assets" (*abus de bien social*) is management's failure to comply with the company's corporate interest[28]. Similarly, any defensive measures adopted by a target in the context of a hostile takeover must be consistent with its corporate interest[29].

The challenge is that despite the fundamental importance of the concept, debate continues about the contours of what precisely constitutes the "corporate interest"[30]. As a result, courts, commentators, legislators and agencies have at different times given greater or lesser credence to one or another of various perspectives.

For example, in the 1960s, *École de Rennes* academics articulated the corporate interest as the interest of the enterprise itself, a synthesis of the different categories of stakeholder interests[31]. The corporation was simply the legal structure of the business, a business whose interests transcended the parochial interests of its various stakeholders with its own general interest[32]. Decisions such as the Paris Court of Appeals 1965 *Fruehauf* decision were viewed as reinforcing this understanding[33].

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26. *See, e.g.*, A. N. Licht, *The Maximands of Corporate Governance*, 29 Del. J. Corp. L. 649, 703 (2004) ("[S]takeholder statutes have received only cursory attention from the courts,... have played a negligible part, if any, in litigation involving directors' decisions [and] are generally interpreted as having made hardly any change in American corporate law.").

27. *See generally* N. Rontchevsky, *L'utilisation de la notion de l'intérêt social en droit des sociétés, en droit pénal et en droit boursier*, *op. cit.* including abuse of majority, minority and equality, remuneration of directors, litigation of injunction orders in summary proceedings, dismissal for cause of corporate officers, assessment of the validity of voting agreements, validity of certain securities granted by a civil company and abuse of corporate assets.

28. The offense is defined as follows: "If the chairman, directors or managing directors of a public limited company use the company's property or credit, in bad faith, in a way which they know is contrary to the interests of the company[.]", Art. L. 242-6 3° of the French Commercial Code [informal translation].

29. Art. L. 233-32 of the French Commercial Code (any decision on defensive measures must be "within the limits of the corporate interest"). *See also* Art. 231-7 AMF Gen. Reg. ("*Pendant la période d'offre publique, l'initiateur et la société visée s'assurent que leurs actes, décisions et déclarations n'ont pas pour effet de compromettre l'intérêt social et l'égalité de traitement ou d'information des détenteurs de titres des sociétés concernées.*").

30. M. Cozian, A. Viandier & F. Deboissy, *Droit des sociétés*, *op. cit.* at p. 386, §2024; E. Cafritz & D. Caramalli, *La responsabilité des dirigeants de la société cible quant à leur prise de position sur l'offre envisagée*, Dalloz 2004.

31. A. Couret, *L'état du droit des sociétés, 50 ans après la loi du 24 juillet 1966*, BJS juill. 2016, n° 115e9, p. 433.

32. This conception may echo a national political discourse with roots in General de Gaulle's distinction between the general interest (*l'intérêt general*) and special interests (*les intérêts particuliers*), and his view that the former must prevail over, and could not simply be the sum of, the latter.

33. Paris, 22 mai 1965, JCP 1965. II, n° 14274 bis, concl. Nepveu; D. 1968. 147, note R. Contin: "*étant observé que pour nommer un administrateur provisoire le juge des référés doit s'inspirer des intérêts sociaux par préférence aux intérêts personnels de certains associés, fussent-ils majoritaires*".

Perhaps under the influence of the late-twentieth-century American trend towards shareholder primacy, as well as more generally Anglo-American conceptions of corporate governance, and in the context of the globalization and liberalization of financial markets from the 1980s forward, a more shareholder-centric view has had real influence in France in recent decades[34], although without overtaking the more traditional understanding of the corporate interest. In this respect, it must be emphasized that significant legislation of the last decade, such as the *Florange* law of 29 March 2014, abandoning the passivity rule, appears to espouse the more widely held view of the corporate interest as representing an independent purpose, distinct from but taking into account different stakeholder interests[35].

In short, although American corporate law's detour to a more shareholder-centric perspective over the last 50 years cannot be said to have been without influence in France, this imported vision of shareholder primacy never displaced the traditional French understanding of the corporate interest as representing a distinctly independent interest of the corporation, informed by different stakeholders' interests.

D. Recent Movements Toward a More Holistic Approach

1. The Movement Toward The New Paradigm *in the United States*

Shareholder primacy, while dominant over the last 50 years, is historically radical, and its foundation has been shaken in recent years, as prominent investors, directors, executives, academics, and business advisors have assessed its results. The era of shareholder primacy has coincided with accelerating economic inequality and climate change, which impede long-term prosperity. Institutional actors, recognizing the exigency of the current environment, have called upon corporations to look beyond short-termism and take steps to restore balance to a system that had intellectually moved away from it[36].

One such project, *The New Paradigm: A Roadmap for an Implicit Corporate Governance Partnership Between Corporations and Investors to Achieve Sustainable Long-Term Investment and Growth*[37], produced for the World Economic Forum by Wachtell, Lipton, Rosen & Katz, with which certain of the authors of this article are affiliated,

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34. *Cf.*, G. Goffaux-Callebaut, *La définition de l'intérêt social*, RTD Com. 2004 p. 35.

35. *See, e.g.*, C. Valter, *Rapport au nom de la Commission des affaires économiques sur la proposition de loi visant à redonner des perspectives à l'économie réelle et à l'emploi industriel*, n° 1283, p. 22.

36. *See, e.g.*, L. Fink, *A Sense of Purpose* (BlackRock Annual Letter to CEOs), Harv. L. Sch. F. on Corp. Governance (Jan. 17, 2018), https://corpgov.law.harvard.edu/2018/01/17/a-sense-of-purpose/ ("[Companies without a sense of purpose] will succumb to short-term pressures..., and, in the process, sacrifice investments in employee development, innovation, and capital expenditures that are necessary for long-term growth."); C. Taraporevala, *2019 Proxy Letter—Aligning Corporate Culture with Long-Term Strategy* (Letter to State Street Global Advisors Board of Directors), Harv. L. Sch. F. on Corp. Governance (Jan. 15, 2019), https://corpgov.law.harvard.edu/2019/01/15/2019-proxy-letter-aligning-corporate-culture-with-long-term-strategy/ ("[A]t a time of unprecedented business disruptions,... a company's ability to promote the attitudes and behaviors needed to navigate a much more challenging business terrain will be increasingly important.").

37. M. Lipton, *The New Paradigm: A Roadmap for an Implicit Corporate Governance Partnership Between Corporations and Investors to Achieve Sustainable Long-Term Investment and Growth*, World

articulated a "set of principles designed to foster a balanced, symbiotic relationship between corporations and shareholders that focused not just on corporate behavior, but also on shareholder behavior"[38]. While *The New Paradigm* "recognizes a pivotal role for boards of directors in harmonizing the interests of shareholders and other stakeholders, it also assumes that shareholders and other stakeholders have more shared objectives than differences – namely, they have the same basic interest in facilitating sustainable, long-term value creation"[39]. Likewise, the members of the 2019 Business Roundtable, reacting to the "existential threat to society" created by shareholder primacy at the expense of other stakeholders, resolved to commit to delivering value to all stakeholders in recognition that the well-being of each constituency, not just one, is critical to the well-being of the corporate enterprise[40]. These recent developments may be seen as echoes of some already long-standing principles in French corporate law.

2. Intérêt Social *and Recent Developments under French Law*

As in the United States, in recent years, there have been an increasing number of calls to revise the French Civil Code to take into account the relationship between the corporation and greater social concerns. Ultimately, on April 11, 2019, France passed the so-called "*PACTE*" law, which amended Article 1833 of the French Civil Code to require that a corporation not only have a lawful purpose and be incorporated in the common interest of shareholders, but also that the corporation be "managed in its corporate interest, while taking into account the social and environmental issues related to its activity"[41]. The French Commercial Code was simultaneously modified to specifically require the governing bodies of the company to consider these issues in their decision-making[42]. In essence, this innovation goes further than the existing concept of the *intérêt social*, and may arm directors and management of French companies with stronger tools to promote long-term growth of the company for more expansive categories of interests, not just shareholders or even the company's own limited, individual, corporate interest.

Econ. F. (Sept. 2, 2016), https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.25960.16.pdf.

38. M. Lipton, S. A. Rosenblum, K. L. Cain & S. V. Niles, Wachtell, Lipton, Rosen & Katz Memorandum, *Corporate Purpose: Stakeholders and Long-Term Growth*, Harv. L. Sch. F. on Corp. Governance (May 29, 2019), https://corpgov.law.harvard.edu/2019/05/29/corporate-purpose-stakeholders-and-long-term-growth/.

39. M. Lipton, S. A. Rosenblum, K. L. Cain, S. V. Niles, A. S. Blackett & K. I. Tatum, Wachtell, Lipton, Rosen & Katz Memorandum, *Embracing the New Paradigm*, Harv. L. Sch. F. on Corp. Governance (Jan. 16, 2020), https://corpgov.law.harvard.edu/2020/01/16/embracing-the-new-paradigm/.

40. M. Lipton, *Business Roundtable Embraces Stakeholder Corporate Governance*, Wachtell, Lipton, Rosen & Katz 1 (Aug. 19, 2019), https://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.26511.19.pdf.

41. Art. 1833, French Civil Code, (amended May 2019): "*Every company must have a lawful purpose and be incorporated in the common interest of the shareholders. The company is managed in its corporate interest, while taking into account the social and environmental issues related to its activity.*"

42. Art. L. 225-35 of the French Commercial Code; art. L. 225-64, as amended.

In addition, Article 1835 of the French Civil Code was amended at the same time to permit a company to set out its *raison d'être* or corporate purpose in its articles of incorporation, consisting of the principles governing the company's conduct, including how the business allocates resources. It has been suggested that a company's *raison d'être* can be described as what is essential to fulfil its *intérêt social*[43]. The idea is that every business has a *raison d'être* that can be memorialized in the company's articles[44]. A well-drafted *raison d'être* may provide the board and management with an additional justification to resist activist initiatives (or hostile overtures in the context of a potential takeover) that are inconsistent with the *raison d'être*[45]. However, in the same way, a *raison d'être* will limit the board's and management's flexibility, as they will indeed be obliged to take the *raison d'être* into account in their decision-making[46], with potential implications both for their personal liability and changes to the *raison d'être* thereafter (noting the high threshold for modifying the articles of incorporation). In some cases, a similarly positive public image for the company can be achieved by adopting a precatory *raison d'être* (*i.e.*, without changing the *statuts*), but in this case it remains debated whether the communication should be clear that it is nonbinding.

The implications of these amendments are yet to be clarified by jurisprudence or indeed much experience in practice, but they demonstrate French law's ongoing adherence to a vision of the corporation and its purposes that goes beyond the circumscribed interests of shareholders.

III. THE FUNCTION AND DUTIES OF THE BOARD VIS-À-VIS THE SHAREHOLDERS AND OTHER STAKEHOLDERS

A. What Do the Corporate Laws Demand and Whom Do the Laws Protect?

1. General Duties and Responsibilities of the Board and Its Relationship to Shareholders

In American jurisdictions, in light of the corporate form's system of delegated management, the corporation's board of directors has ultimate responsibility for

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43. N. Notat and J.-D. Senard, *Rapport aux Ministres de la Transition écologique et solidaire, de la Justice, de l'Economie et des Finances, du Travail, L'entreprise, objet d'intérêt collectif*, 9 mars 2018.

44. On April 30, 2019, Atos was the first company of the CAC 40 to include a *raison d'être* in its bylaws. *See* Atos, Press Release, *Atos Annual General Meeting – April 2019* (Apr. 30, 2019). According to a recent report, while 55% of the CAC 40 companies have stated a *raison d'être*, only 9% of them have formally added the *raison d'être* to their articles of incorporation (Atos and Carrefour, noting that Orange and Engie have included such modifications for consideration by their 2020 annual general meetings (*see* Comfluence, *Les entreprises du CAC 40 à l'âge de la raison d'être* (2 mars 2020)).

45. *See, e.g.*, F. Alogna, *Intérêt social et « raison d'être » en défense d'OPA*, Les Échos (14 août 2018), https://business.lesechos.fr/directions-juridiques/droit-des-affaires/statuts-des-societes/0301936235752-interet-social-et-raison-d-etre-en-defense-d-opa-322735.php.

46. Art. L. 225-35 of the French Commercial Code. *Cf.*, Opinion of the *Conseil d'État* on the draft *PACTE* law, 14 juin 2018, p. 39, n°105; Dalloz éditions législatives, Droit des affaires, *Une gestion des sociétés encadrée par l'intérêt social et la "raison d'être"* », 24 mai 2019; *De nouveaux enjeux pour la gestion des sociétés – intérêt et raison d'être des sociétés*, BRDA 10-19; C. Blondel, *Intérêt social élargi, raison d'être et société à mission dans la loi Pacte : la grande illusion?*, RICEA n° 4, août 2019, comm. 12.

the corporation's business affairs[47]. For whose benefit the board discharges those responsibilities defines the corporation's priorities. In Delaware, and in most if not all other American jurisdictions, the board's actions are regulated by its fiduciary duties, principally the duty of care and the duty of loyalty. These duties are broad-textured, and generally the board's decisions must reflect due care in deliberation and serve the best interests of the corporation. Moreover, the decisions of directors, if made on "an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company," are afforded the safe harbor of the business judgment rule if challenged in the courts[48]. Indeed, Delaware's popularity as the legal domicile of the majority of U.S. public companies is in part due to the flexibility of the fiduciary duty framework, which allows corporations to address evolving business challenges[49]. Thus, while the acolytes of shareholder primacy argue that the sole purpose of the corporation is to maximize its value to shareholders, advocates of stakeholder governance reason that such narrow focus misconstrues the law's more expansive view that the board's paramount fiduciary duty is to "promote the long-term value of the corporation"[50].

As a legal matter, it can be said that corporations are independent legal persons, and that shareholders do not own the corporations themselves, only instruments that afford them limited rights[51]. Although shareholders are charged with the selection of directors, the location of the corporate franchise does not limit the scope of a director's duties to shareholder interests only[52] – a director is not required to act "other than to promote the corporation's long-term business success and increase in value"[53]. A board may determine that a corporation's long-term value is best served by considering more inclusive notions of stewardship. Indeed, a key advantage of delegated management, central to the evolution of the corporate form, is to empower boards to serve as arbiters of the diverse interests of various stakeholders[54]. It is a fundamental necessity that for the board to

47. *See* Del. Code Ann. tit. 8, § 141(a) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors").
48. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).
49. *See* M. Lipton, S. A. Rosenblum, K. L. Cain & K. I. Tatum, *Some Thoughts for Boards of Directors in 2020*, Wachtell, Lipton, Rosen & Katz 4 (Dec. 9, 2019), https://www.wlrk.com/files/2019/SomeThoughtsforBoardsofDirectorsin2020.pdf.
50. *Ibid*. at 1.
51. *See* L. A. Stout, *On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)*, *op. cit*. at 1169 n.2.
52. *See* M. Lipton & W. Savitt, *Stakeholder Governance—Issues and Answers*, Wachtell, Lipton, Rosen & Katz 2 (Oct. 24, 2019), https://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.26567.19.pdf.
53. M. Lipton, S. A. Rosenblum, W. Savitt, K. L. Cain & S. V. Niles, Wachtell, Lipton, Rosen & Katz Memorandum, *Stakeholder Governance—Some Legal Points*, Harv. L. Sch. F. on Corp. Governance (Sept. 20, 2019), https://corpgov.law.harvard.edu/2019/09/20/stakeholder-governance-some-legal-points/; *see also* M. Lipton & W. Savitt, *Stakeholder Governance—Issues and Answers*, *op. cit*. at 2 ("[N]ot even the most aggressive reading of precedent identifies share-price maximization as the polestar of director decision-making.").
54. *See* M. Lipton, K. L. Cain & K. C. Iannone, Wachtell, Lipton, Rosen & Katz Memorandum, *Stakeholder Governance and the Fiduciary Duties of Directors*, Harv. L. Sch. F. on Corp. Governance

discharge its duty to develop strategy and manage risk in service to value creation[55], it must consider non-shareholder interests that may impact the corporation's "longer-term strategy, sustainability, and risk profile"[56].

As discussed above, in France, corporate officers and directors have a general duty to act in the interests of the company – not limited to the interests of its shareholders. They may generally be held civilly liable for breach of their fiduciary duties vis-à-vis the company or protected third parties (such as the shareholders) when they do not comply with laws or regulations applicable to *sociétés anonymes*, infringe the by-laws of the company or negligently mismanage the company ("*fautes de gestion*"), in addition to other specific civil or criminal sanctions[57]. In the 1990s, French courts began to impose on executives a duty of loyalty to the company's shareholders, as well as to the company itself[58]. In an unexpected parallel with the common law development of fiduciary duties, the imposition of this duty in France was notably not a statute-based innovation, but a court-based innovation, and may have developed as a result of a gap in the civil code system in this area[59].

While the board of directors also has ultimate responsibility for the corporation's business affairs, perhaps one of the most striking differences between the approaches of the French and U.S. systems to the responsibilities and duties of management relates to business judgments. In evaluating whether a management decision constitutes mismanagement or a breach in fiduciary duties, courts often verify that the company's *intérêt social* has been complied with, also taking into account practical consequences for the company. In this respect, shareholders holding 5% or more, the workers' council, the French Financial Market Authority (known as "*AMF*"), and the public prosecutor can also demand an inquiry into the company's management decisions ("*expertise de gestion*")[60].

French courts usually only second-guess business decisions and hold managers liable for mismanagement in the context of fraudulent behavior and other extreme situations, such as bankruptcy. Specifically, the managers of a company that goes into bankruptcy can be held personally liable for all or part of the company's debts

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(Aug. 24, 2019), https://corpgov.law.harvard.edu/2019/08/24/stakeholder-governance-and-the-fiduciary-duties-of-directors/.

55. By way of example, the Delaware Supreme Court recently addressed matters of risk management in *Marchand* v. *Barnhill*, 212 A.3d 805 (Del. Ch. 2019), the "*Blue Bell*" case, in which a multistate outbreak of listeria linked to the company's facilities killed three people and resulted in a suspension of operations and product recalls. *See ibid*. at 807. In *Blue Bell*, the court suggested that a corporation's directors failed to meet their fiduciary duties by not making a good faith board-level effort to monitor and address food safety issues that could put customers at risk. *See ibid*. at 822. The board's failure to address this "mission critical" risk to customers of course threatened the corporation's long-term value. *Ibid*. at 824.

56. M. Lipton, K. L. Cain & K. C. Iannone, Wachtell, Lipton, Rosen & Katz Memorandum, *Stakeholder Governance and the Fiduciary Duties of Directors*, *op. cit*.

57. Art. L. 225-251 of the French Commercial Code.

58. D. Martin, B. Kanovitch & F. Alogna, *Convergence, real and apparent, of rules and standards applicable to public companies: a French perspective*, RTD Financier., n° 2, 2006, pp. 10-26.

59. B. Daille-Duclos, Le devoir de loyauté du dirigeant, 39 JCPE 1486, 1490 (24 sept. 1998).

60. Art. L. 225-231 to the French Code of Commerce.

when the court determines that the company has been "mismanaged" and the mismanagement resulted in the company having insufficient assets to pay its liabilities[61]. This approach is in contrast to Delaware's business judgment rule, a fundamental principle of American corporate law, and represents a limit to the notion of delegated management.

2. The Integration of ESG into Corporate Behavior and Legal Principles

In recognition of the fact that society charges corporations, as the principle engines of economic activity, with creating prosperity, an increasing number of institutional investors have called upon their portfolio companies to address long-term stakeholder concerns, particularly environmental, social and governance ("*ESG*") considerations[62]. A number of disclosure standards that measure more than just near-term profitability have proliferated, such as the Global Reporting Initiative, the Sustainability Accounting Standards Board and the Task Force on Climate-Related Financial Disclosures. Although the market is still coalescing around uniform standards, corporations are increasingly compelled by market forces to disclose quantifiable ESG performance metrics by which investors and other stakeholders can decide which companies are protecting and generating value[63]. The impact of this increasing focus on ESG may extend broadly. For example, mergers and acquisitions advisors expect ESG to figure prominently in dealmaking, including with respect to the selection of acquisition targets, due diligence of business risks, voting decisions of major asset managers and lenders' determinations of long-term creditworthiness[64].

Over the last 20 years, the trend to enshrine ESG principles into law has taken a more dramatic turn in France, at least in appearance. Beginning in 2001, certain listed companies were required to include qualitative and quantitative information on the social, societal and environmental consequences of their activity in the management report[65]. This reporting obligation has progressively been reinforced and expanded to cover non-listed companies (exceeding certain thresholds) and to require data verification by an independent third-party organization[66].

61. Art. L. 651-2 to the French Code of Commerce.
62. *See* L. Fink, *A Sense of Purpose* (BlackRock Annual Letter to CEOs), *op. cit.*; C. Taraporevala, *2019 Proxy Letter—Aligning Corporate Culture with Long-Term Strategy* (Letter to State Street Global Advisors Board of Directors), *op. cit.*
63. *See* A. R. Brownstein, S. A. Rosenblum, D. M. Silk, M. F. Veblen, S. V. Niles & C. X. W. Lu, Wachtell, Lipton, Rosen & Katz Memorandum, *The Coming Impact of ESG on M&A*, Harv. L. Sch. F. on Corp. Governance (Feb. 20, 2020), https://corpgov.law.harvard.edu/2020/02/20/the-coming-impact-of-esg-on-ma/.
64. *See ibid.*
65. Art. 116, NRE Law of 15 May 2001.
66. Art. 225 of the Grenelle 2 Act adopted in 2010 and implementing decree published in 2012.

At a European level, the Non-Financial Reporting Directive[67] imposed requirements for the disclosure by large companies of non-financial and diversity information. This directive was transposed into French law in 2017[68].

Looking forward, in its December 11, 2019 Communication on the European Green Deal, the European Commission noted that "companies and financial institutions will need to increase their disclosure on climate and environmental data so that investors are fully informed about the sustainability of their investments." The Commission is currently reviewing the Non-Financial Reporting Directive to that end.

The need for boards of directors to consider not only the shareholders' short-term interests but also long-term social and stakeholder concerns, such as gender diversity and employee welfare, has also been energetically addressed by the French legislator through board representation rules.

First, listed companies and, since the 2019 *PACTE* law, other companies meeting certain thresholds in terms of number of employees[69], have an obligation to include employee representatives in the management bodies, following the example of other continental European jurisdictions. There must be at least two employee representatives when the board of directors has at least eight other members and at least one otherwise, subject to certain exemptions for holding companies. In the case of a designation of two members, one man and one woman must be chosen. In the same vein, if the employee shareholding represents more than 3% of the share capital, listed companies and those having a certain minimum number of employees[70] also have an obligation to elect employee shareholders to the board or, as the case may be, members of the supervisory boards of mutual funds holding shares in the company reserved for employees (*fonds communs de placement d'entreprise*).

Second, regarding gender diversity, for companies whose shares are admitted to trading on a regulated market or which meet certain financial metrics and employment conditions, the proportion of directors of each gender must be at least 40%[71]. In the case of a board with no more than eight members, the difference between the number of women and men on the board may not exceed two. Companies that fail to comply with this obligation are subject to sanctions recently reinforced by the 2019 *PACTE* law, including the nullification of appointments and decisions made by boards that are not in compliance with the parity requirement and the suspension of payment of directors' fees[72].

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67. Directive 2014/95/EU of 22 October 2014.
68. Ordinance of 19 July 2017 *relative à la publication d'informations non financières par certaines grandes entreprises et certains groupes d'entreprises* and its implementation decree of 9 August 2017.
69. Art. L. 225-71 of the French Commercial Code.
70. Art. L. 225-23 and L. 225-71 of the French Commercial Code.
71. Art. L. 225-18-1 of the French Commercial Code.
72. Art. L. 225-18-1, L 225-24, L. 225-45, L. 225-69-1, L. 225-78 and L. 225-83 of the French Commercial Code.

B. How are these priorities expressed in the law governing the takeover process?

1. Revlon Principles in a Sale of Control

Since its issuance in 1986, the Delaware Supreme Court's decision in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[73], which requires the board to "sell [the corporation] to the highest bidder" when it decides to sell control of a company in certain scenarios[74], is cited by proponents of shareholder primacy as supporting the notion that the corporation's value is synonymous with the near-term price of shares of common stock. However, such a view overlooks the legal reality that the *Revlon* doctrine is limited to the context of mergers and acquisitions, and even then only to certain sale-of-control transactions where the board itself has decided to sell the corporation. Observers have noted that "the *Revlon* doctrine has played an outsized role in fiduciary duty jurisprudence not because it articulates the ultimate nature and objective of the board's fiduciary duty, but rather because most fiduciary duty litigation arises in the context of mergers or other extraordinary transactions where heightened standards of judicial review are applicable"[75]. Two Delaware Supreme Court cases decided the year before *Revlon – Unocal Corp. v. Mesa Petroleum Co*[76]. and *Moran v. Household International, Inc.*[77] – confirmed that the board may consider the interests of not only shareholders, but also other stakeholders when adopting a poison pill in a takeover defense, making clear that *Revlon* applied only to sale-of-control situations[78].

Therefore, for most American corporations, the decision to pursue a sale of the company is ultimately within a board's business judgment, and it is not until a board decides to sell that directors have a *Revlon* duty to achieve "the highest value reasonably available" for shareholders[79]. Consequently, outside of the context of a sale-of-control, a well-informed board acting in good faith and without conflict will not be second-guessed by courts when making decisions to maximize the long-term value of the corporation for all stakeholders[80].

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73. 506 A.2d 173 (Del. 1986).
74. *Ibid*. at 182.
75. M. Lipton, K. L. Cain & K. C. Iannone, Wachtell, Lipton, Rosen & Katz Memorandum, *Stakeholder Governance and the Fiduciary Duties of Directors*, *op. cit*.; *But see* L. E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 Wake Forest L. Rev. 761, 768 (2015): "[D]irectors must make stockholder welfare their sole end, and... other interests may be taken into consideration only as a means of promoting stockholder welfare".
76. 493 A.2d 946 (Del. 1985).
77. 500 A.2d 1346 (Del. 1985).
78. *See Unocal*, 493 A.2d at 955 ; *Moran*, 500 A.2d at 1357 ; M. Lipton, K. L. Cain & K. C. Iannone, Wachtell, Lipton, Rosen & Katz Memorandum, *Stakeholder Governance and the Fiduciary Duties of Directors*, *op. cit*.
79. Wachtell, Lipton, Rosen & Katz, *Mergers and Acquisitions—2020*, The CLS Blue Sky Blog (Jan. 23, 2020), https://clsbluesky.law.columbia.edu/2020/01/23/wachtell-lipton-discusses-mergers-and-acquisitions-2020/.
80. *See ibid*.

2. *The Role of the Board and Stakeholders in Tender Offers under French Law and AMF regulations*

As an introductory matter, it should be emphasized that the mediating function of the board of directors in France is not the same as in the United States. While in France an acquiror often negotiates its offer directly with key shareholders (if there are shareholders with a substantial block of shares), in the United States negotiated acquisitions are typically the product of an agreement with the board (though a hostile acquiror may nonetheless make a tender offer directly to shareholders without the board's recommendation).

However, since 2014, French legal reforms have empowered the board of French companies with greater flexibility to adopt defensive measures and influence the fate of a takeover offer. In 2006, France originally opted into Article 9 of the EU Takeover Directive[81]. This is the Takeover Directive's version of the English "passivity rule", prohibiting a target's board and management from adopting any defensive measure against an offer during the offer period without having first obtained shareholder approval[82]. Thus, until 2014, during the offer period, the management bodies of a French target had to obtain the prior consent of shareholders before taking any action which might frustrate an offer (other than seeking alternative offers or exercising their appointment rights, if any).

France's original decision to opt into the passivity rule was in part based on the widely held view that the ability of the board and management to adopt defensive measures without shareholder approval was largely "theoretical" under existing French law[83]. Like most other countries in Europe, for purposes of the passivity rule, France opted for the Takeover Directive regime that was viewed as most similar to its existing law[84].

In 2014, France reversed the 2006 opt-in, thereby effectively opting out of the passivity rule[85]. A number of reasons were given for this change of position, including that it would permit managers to pursue a superior stand-alone or alternative strategy, help prevent foreigners from acquiring control of strategic industries, permit the board to negotiate price increases more effectively, and, more generally, defend the interests of long-term shareholders[86].

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81. Law no. 2006-387, 31 Mar. 2006 pursuant to Article 9 of Directive 2004/25/EC of the European Parliament and of the Council of 21 Apr. 2004 on takeover bids.

82. In France, the offer period (*période d'offre*) runs from the moment the AMF first publishes the key terms and conditions of the offer until the AMF publishes the offer results, or, as the case may be, the results of a subsequent offering period (*réouverture de l'offre*). AMF Gen. Reg. art. 231-2 (6°).

83. J.-F. Lepetit, *Rapport du groupe de travail* : *Sur la transposition de la directive concernant les offres publiques d'acquisition*, 14 (27 juin 2005).

84. Commission of the European Communities, Commission Staff Working Document, *Report on the implementation of the Directive on Takeover Bids*, at 6-7, § 2.1.3 SEC (2007) 268 (Feb 21, 2007) ; Ch. Clerc, F. Demarigny, D. Valiante & M. de Manuel Aramendía, *A Legal and Economic Assessment of European Takeover Regulation*, 15-16, tbl. 3 (2012).

85. Law no. 2014-384, 29 mars 2014.

86. *See, e.g.*, C. Valter, *Rapport au nom de la Commission des affaires économiques sur la proposition de loi visant à redonner des perspectives à l'économie réelle et à l'emploi industriel*, p. 136 (17 juill. 2013) ;

The new approach represents a significant departure from previous French law and raised various questions going forward, many of which remain without definitive answers. Notably, in a departure from the pre-2006 regime, the current law explicitly authorizes the board to make a decision whose implementation may cause an offer to fail: "During the period of an offer for a public issuer, the board of directors, or the management board authorized by the supervisory board of the target company, may make any decision whose implementation may cause the offer to fail, subject to the powers expressly reserved to the shareholders and within the limits of corporate interest"[87]. The clear legislative intent behind the law was that management should be in a position to unilaterally, and without consulting shareholders (except to the extent relevant defensive measures would require shareholder approval under applicable law[88], such as amending the articles of association), fend off a hostile takeover bid. Indeed, as the AMF has noted, "the law is unequivocal on the right of a target to implement defensive measures"[89]. This provision, however, must be placed in the context of other provisions in existing law which are substantially similar to provisions in the pre-2006 regime.

In this respect, the decision of the target's board must be consistent with the target's corporate interest. Although there are a significant number of court decisions treating the subject of the corporate interest, very few of these decisions confront this question in the specific context of defensive measures taken during the offer period.

The evaluation of the target's corporate interest will be pivotal in determining the board's effective powers in the context of a bid. At this stage, it is difficult to predict courts' interpretation of the concept of the corporate interest in this specific context. Moreover, it should be noted that the EU Takeover Directive specifically mentions shareholders as being a crucial constituency in takeover decision-making[90].

In light of the *Florange* law, the AMF General Regulation was amended in June 2014 to provide that, during the offer period, the offeror and the target must ensure that their acts, decisions and declarations do not jeopardize the corporate interest (*intérêt social*) and the principle of equal treatment of and equal information to the companies' different shareholders[91]. In addition, the governing body of the relevant companies must inform the AMF should they decide to implement a

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Lettre du président de la commission des affaires économiques de l'assemblée nationale et du rapporteur de la proposition (18 sept. 2013), at p. 4 quoted in A. Viandier, *OPA OPE et autres offres publiques*, 389-90 (2014).

87. Art. L. 233-32 of the French Commercial Code. This is the default regime.

88. Art. L. 233-32 I of the French Commercial Code (duplicative of Art. L. 225-35). In contrast to the prior regime, delegations granted by a shareholders' meeting to the board before the takeover bid (*e.g.*, to increase the share capital) whose implementation could hinder the bid are not suspended during the takeover bid period.

89. AMF, *Synthèse des réponses à la consultation publique sur les modifications du livre II du règlement général concernant les offres publiques d'acquisition*, 17 (13 Oct. 2014).

90. The board of the target must "*act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid*" (*See* EU Takeover Directive, article 3.1(c)).

91. AMF Gen. Reg. art. 231-7 §1.

measure which may impede the offer[92]. Although the general principles set out by the General Regulation[93] (*e.g.*, free competition between offers and competing offers) – which could potentially constitute a further limitation to the powers of the board of directors – have not been modified in the wake of the *Florange* law, the AMF has indicated that the application of those principles will take into account the specific authority of the target's board of directors to take defensive measures during the offer period[94].

In addition, the *Florange* law repealed the provisions regarding the suspension of delegations given by the shareholders to the board during the offer period. This permits management bodies to implement defensive measures without convening the shareholders' meeting, including share capital increases, should the target's shareholders have granted the board a delegation to such effect.

Shareholders can always elect to voluntarily set aside the default regime, and reinstate the board passivity rule, by amending the articles of association[95]. Several proxy advisors (Proxinvest, ISS, and Glass Lewis & Co.) have recommended that companies propose, and their shareholders vote in favor of, such an amendment.

In the same spirit, the law implementing the EU Takeover Directive introduced the possibility for a target to issue warrants as a defensive measure (similar to shareholder rights plans in the United States). The shareholders of a French target may, in an extraordinary general meeting[96], approve the issue and free allocation, to all shareholders registered before the expiration of the offer period, of warrants giving the right to subscribe on preferential terms for shares of the target. As in other jurisdictions, defensive warrants may primarily be used as a threat to force the offeror to the negotiating table.

IV. MINORITY SHAREHOLDERS AND SHAREHOLDER ACTIVISM

A. Minority Shareholders' Rights and Protections

Generally, protective measures for minority shareholders, while extant, are not as ingrained in American law as they are in other countries and jurisdictions[97]. Nevertheless, minority shareholders of Delaware corporations are beneficiaries of meaningful protections in the context of mergers and acquisitions, both in the rights afforded to minority shareholders and the heightened scrutiny applied to board decisions made in many related-party transactional scenarios.

In the late 1980s, in response to a wave of hostile takeovers, the Delaware legislature adopted Section 203 of the General Corporation Law, which restricts

92. AMF Gen. Reg. art. 231-7 §2.
93. AMF Gen. Reg. art. 231-3.
94. AMF Consultation Paper, May 13, 2014, p. 6.
95. Art. L. 233-33 I and II of the French Commercial Code.
96. But in accordance with the majority and quorum required in an ordinary general meeting (*See* Article L. 233-32 II of the French Commercial Code).
97. *See* S. V. Niles, *USA*, *in* The Int'l Compar. Legal Guide to Corp. Governance 2019, at 264, 267 (12th ed. 2019).

the ability of interested stockholders (defined as holders of 15% or more of a corporation's voting stock) to engage in a business combination with the corporation for a period of three years, unless, *inter alia*, the board approves the transaction prior to the shareholder becoming an interested stockholder or the transaction is approved by the board and holders of two-thirds of the corporation's outstanding voting shares not owned by the interested stockholder[98]. The effect of Section 203 is to empower the board and minority stockholders and force a powerful stockholder to negotiate, thereby allowing the corporation to realize its long-run value, even if the would-be takeover bidder offers a near-term premium to the corporation's then-current share price.

Moreover, the Delaware board's process and decisions in transactions involving a controlling shareholder are subject to greater judicial scrutiny under an "entire fairness standard"[99]. This onerous standard of review, often triggered in conflict transactions, requires directors to demonstrate their "utmost good faith and the most scrupulous inherent fairness" of the transaction under review[100]. But Delaware courts, following *Kahn v. M&F Worldwide Corp.*[101], have ruled that so long as boards implement certain procedural protections, their decisions in such transactions should be afforded business judgment deference[102]. Transactions conditioned on the approval of an independent, empowered special committee of the board and an "uncoerced, informed vote of a majority of the minority stockholders"[103], have the "characteristics of third-party, arm's-length mergers," and directors' decisions are reviewed in the safe harbor of the business judgment rule[104].

French law is similarly solicitous of minority shareholder rights, but in a much more codified and specific way. In particular, the AMF General Regulation provides that the target's board must obtain the fairness opinion of an independent valuation expert with respect to the offer price or exchange ratio if the transaction is likely to (i) create conflicts of interest among the target's board members such as to compromise the objectivity of the opinion that the board is required to include in its response document, or (ii) call into question the equal treatment of security holders[105]. In addition, the AMF General Regulation specifically requires the AMF to review the financial terms ("*conditions financières*") of a voluntary offer, where the potential for conflicts of interest among the target board triggers the requirement for a mandatory fairness opinion from an independent expert.

Similarly, when the AMF considers that the rights of the minority shareholders are affected by any of the same fundamental changes (such as the sale of all or the

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98. *See* Del. Code Ann. tit. 8, § 203 ; *see also* S. Marcus, *The Strange Case of Section 203*, The Deal 12 (Mar. 14, 2011).
99. *See* I. Kirman, *Takeover Law and Practice*, *in* Doing Deals 2016 : The Art of M&A Transactional Practice, Practicing Law Institute Course Handbook B-2232, at 1, 42 (2016).
100. *Ibid.* at 42 (citing *Encite LLC v. Soni*, 2011 WL 5920896, at ⋆20 (Del. Ch. Nov. 28, 2011)).
101. 88 A.3d 635 (Del. 2014).
102. *See* I. Kirman, *Takeover Law and Practice*, *op. cit.* at 44.
103. *Ibid.* at 46 (quoting *Kahn*, 88 A.3d at 642).
104. *See Kahn*, 88 A.3d at 644-46.
105. AMF Gen. Reg. art. 261-1 ; AMF Instruction n° 2006-08 of Sept. 28, 2006, as updated, last revised on Feb. 10, 2020.

principal assets of the company, significant changes to the company's articles or dividend policy, among other fundamental changes) contemplated by controlling shareholders, the AMF is likely to require the controlling shareholders to launch an exit offer ("*offres publiques de retrait*" or "*OPR*")[106].

An OPR relating to the shares of a company (or respectively to investment certificates or to voting right certificates) may equally be initiated by shareholders holding, in concert, at least 90% of the share capital or voting rights of a listed company either spontaneously or at the request of the AMF upon application by a minority shareholder[107]. An OPR follows the same procedure as the simplified offer and cannot be subject to an acceptance condition[108].

The acquisition of the principal assets of the target could be contemplated in the context of a friendly transaction supported by the target's management. Most notably as regards minority shareholders' rights, it could be argued that such a transaction has to be approved by the extraordinary shareholders' meeting of the target with a two-thirds majority if it constitutes a change in the corporate object ("*objet social*"). In addition, under the AMF's guidelines, a company should consult with the general meeting of shareholders for disposals of the majority of assets according to certain criteria[109]. Lastly, when the target is controlled by the offeror, or is under common control with the offeror, the AMF may require the target's controlling shareholder to initiate an exit offer[110].

B. Are There Protections Against Abuse By Activists?

1. Activism in the United States

In the United States, the key protection against opportunists who might aim to distort corporate strategy to generate a short-term share price increase is the business judgment rule – the deference to the board's good faith and informed judgment in stewarding the long-term value of the corporation, an objective that is purposely flexible and broadly conceived. That protection has not eliminated activist attacks from being employed, often in a serial way. As corporate raiders have evolved into shareholder activists, however, assaults on corporate strategy are now more often launched in the media and only later and occasionally advance to the proxy card and the courtroom where the corporation's long-term interests have protections.

The intense pressure to focus on short-term outlook, driven by shareholder activism as well as equity incentive compensation practices and the quarterly earnings routine, has led to calls for reform[111]. In 2019, the U.S. Securities and

106. AMF Gen. Reg. art. 236-6.
107. AMF Gen. Reg. art. 236-1 and 2.
108. AMF Gen. Reg. art. 236-5 and 6.
109. AMF, position-recommendation (DOC-2015-05).
110. AMF Gen. Reg. art. 236-6 2°.
111. *See* D. A. Katz & L. A. McIntosh, Wachtell, Lipton, Rosen & Katz Memorandum, *Corporate Governance Update : The Long Term, The Short Term, and The Strategic Term*, Harv. L. Sch. F. on Corp. Governance (Sept. 27, 2019), https://corpgov.law.harvard.edu/2019/09/27/the-long-term-the-short-term-and-the-strategic-term/.

Exchange Commission (the "SEC") held a conference to discuss short-termism and its relationship to the periodic reporting regime in the United States[112]. SEC Chairman Jay Clayton encouraged a review of the U.S. disclosure framework and other regulations to "determine whether they efficiently allow companies to focus on the long-term performance"[113]. It remains to be seen, however, whether these aspirations will be reflected in the law.

2. Activism in France

France has a long-standing and vigorous tradition of activism, and French and European laws and regulations furnish both the activist and the target company's board and management with a variety of tools[114].

French minority shareholders enjoy significant rights, such as the right for holders of as little as 0.5% of a company's shares to include proposed resolutions in the "proxy" materials circulated by the company to shareholders. For the defending company, investor disclosure obligations are more developed in France than in the United States, which helps to provide French companies with earlier notice of a potential campaign than is typical under U.S. federal securities laws. Strict regulations in this area have created significant issues in major shareholders' interventions over the last decade, such as for Wendel and its former chairman in connection with Wendel's investment in Saint Gobain, LVMH in connection with its investment in Hermès, as well as Elliott's investment in Norbert Dentressangle following the takeover by XPO[115]. In addition, the threshold for French squeeze-outs in France was recently lowered from 95% to 90%, which should reduce opportunities for activist investors to engage in squeeze-out "blackmail".

Popular consciousness of activism in France has developed considerably in recent years, with directors and senior management becoming increasingly focused on the topic[116]. Over the past few years, France has witnessed an unprecedented academic and public debate regarding shareholder activism and its long-term economic and social effects. Several public reports have been issued making various recommendations regarding possible modifications to the French

112. *See ibid.*

113. U.S. Securities and Exchange Commission, *Short- and Long-Term Management of Public Companies Examined at the SEC* (Aug. 21, 2019), https://www.sec.gov/page/short-and-long-term-management-public-companies-examined-sec (last visited Sept. 3, 2020).

114. *See* J-M. Darrois, B. Cardi & F. Alogna, *France*, *in* The Shareholder Rights and Activism Review (F. J. Aquilla ed., 4th ed. 2019).

115. In the Norbert Dentressangle case, in 2020, Elliott Capital was fined €20 million by the AMF for failing to adequately disclose its interest during the takeover and for obstructing a subsequent AMF investigation.

116. A survey conducted in 2019 on 195 European issuers found that "Shareholder activism has become a highly sensitive issue for managements (....) The survey shows that shareholder activism has become a prominent, and likely permanent feature of the corporate landscape as the majority of the issuers consider their chairman or CEO to be highly sensitive to the activism risk. Some issuers even consider activism to be part of normal listed company life," Michel Prada, Report of the ad hoc committee of Le club des juristes, *Shareholder Activism* (7 nov. 2019).

legislative and regulatory framework[117], as well as various statements by prominent French political and regulatory authorities[118].

As in the United States, different perspectives have been articulated. Some commentators have insisted on the positive role of activists in the creation of shareholder value (arguing that activism can have a globally positive impact on the stock price, the proper functioning of the governance bodies and the defense of minority shareholder rights)[119]. Other commentators around the world maintain that activist victories may be a zero-sum game involving a simple wealth transfer from other corporate stakeholders to short-term shareholders[120], with no real long-term value creation and even value destruction for the businesses they invest in, notably because of activists' short-term focus[121]. These commentators argue that activist strategies that push businesses towards overleveraging and underinvesting will leave them vulnerable to economic crises and foreign competition[122].

Following the discussion and debate over the last few years in France regarding activism's role, the AMF very recently made a number of proposals (many of which would require implementing action of the French legislator or European action) generally aimed at ensuring that issuers are better equipped when dealing with activists[123]. In particular, the AMF recommended lowering the mandatory reporting

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117. *See, e.g.*, "Co-rapporteurs" Eric Woerth and Benjamin Dirx, Report of the working group of the Finance Committee of the French Parliament, *shareholder activism* (2 oct. 2019); Michel Prada, Report of the *ad hoc* committee of Le club des juristes, *Shareholder Activism* (7 nov. 2019) ; AFEP, Report on *Shareholder Activism* (Dec. 10, 2019); Europlace working group, *Shareholder Governance and Market Practices* and *Responsible Shareholders* (Jan. 9, 2020); AMF, *Communication de l'AMF sur l'activisme actionnarial* (28 avril 2020).

118. Bruno Lemaire, French Minister of Economy and Finance, announced in April 2019 that he was preparing "new national instruments that will enable us to better resist these activist funds" (L'Agefi Quotidien, Bruno Lemaire promet un dispositive anti-activistes (5 avril 2019)); Chairman of the AMF, Press Release, Contribution de Robert Ophèle aux réflexions sur l'activisme en bourse (11 juill. 2019).

119. *See, e.g.*, M. Nussenbaum, *L'impact de l'action des fonds activistes sur la valeur actionnariale*, JCP E n° 36, 208, 1438; C. Neuville, présidente de l'ADAM, *Fonds activistes: opportunité ou menace pour l'économie?*, JCP E n° 36, sept. 2018, 1439; L. A. Bebchuk et. al., *The Long-Term Effects of Hedge Fund Activism*, 115 Colum. L. Rev. 1085, 1155 (2015); L. A. Bebchuk, *The Myth that Insulating Boards Serves Long-Term Value*, 113 Colum. L. Rev. 1637 (2013).

120. *See, e.g.*, M. R. DesJardine & R. Durand, *Disentangling the Effects of Hedge Fund Activism on Firm Financial and Social Performance*, Strat. Mgmt. J. (2020); J. C. Coffee, Jr. & D. Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. Corp. L. 545, 588-89 (2016) ; IGM Forum, *Stakeholder Capitalism* (Oct. 11, 2019) http://www.igmchicago.org/surveys/stakeholder-capitalism.

121. *See, e.g.*, Ed. deHaan, D. F. Larcker & Ch. McClure, *Long-Term Economic Consequences of Hedge Fund Activist Interventions*, ECGI Finance Working Paper No. 577/2018 (Dec. 2018); J. L. Bower & L. S. Paine, *The Error at the Heart of Corporate Leadership*, Harv. Bus. Rev. 8 (May-June 2017); J. C. Coffee, Jr. & D. Palia, *The Wolf at the Door : The Impact of Hedge Fund Activism on Corporate Governance*, *op. cit.*; Moody's, *Short-Term Shareholder Activists Degrade Creditworthiness of Rated Companies* (June 2007) ; K. J. Martijn Cremers et al., *Hedge Fund Activism and Long-Term Firm Value*, at 28 (Dec. 13, 2018), https://ssrn.com/abstract=2693231.

122. *See, e.g.*, Editorial, *How to Build a More Responsible Corporate Capitalism*, Fin. Times (Oct. 13, 2019) https://www.ft.com/content/8b282346-eaa3-11e9-85f4-d00e5018f061 ("It was clear already after the financial crisis that crude maximisation of the share price was a management goal that jeopardised sustained corporate growth.").

123. AMF, *Communication de l'AMF sur l'Activisme Actionnarial* (28 avril 2020).

threshold for investors to publicly disclose their ownership from 5% to 3% of the issuer's share capital or voting rights[124] (as is already the case in a number of other European jurisdictions) and requiring the publication of disclosures made by shareholders when crossing the thresholds provided for in the issuer's articles of incorporation (under current rules, such disclosures are only reported to the company and the AMF). In addition, the AMF contemplates requiring the disclosure of complementary information, including the investor's holdings of options contracts[125] and announced that it would be modifying its guidance on "quiet periods" to clarify that issuers may provide any information necessary to respond to public statements about them by activist investors, and that it would be supporting proposals to expand the required disclosures on short-selling to include information on activist investors' exposure to debt instruments. The AMF also requested legislation to give it additional capabilities to provide rapid responses in the activist campaign context – specifically, the AMF proposed that its ability to require additional disclosures if errors or omissions have been found in public statements be expanded from issuers to also capture investors, and that the obligations imposed on bidders and targets in takeover bid situations, including due diligence obligations for public statements, also be applied to their shareholders. Finally, the AMF acknowledged that some activist campaigns have raised the question of whether public statements made by activist investors fall within the European regime concerning investment recommendations[126] and stated that it will approach ESMA and the European Commission to request interpretative clarifications on the scope of this regulation.

Finally, France, and Europe more broadly, have witnessed a recent increase in ESG activism, or "active" shareholders increasingly focused on ESG issues[127]. For example, in April 2020, the oil and gas group Total was the target of an environmental campaign led by eleven shareholders (representing around 1.37% of the share capital), including a number of traditional institutional investors[128].

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124. Medium- and small-sized companies could be excluded, or the thresholds could be adapted for them, as is the case in Italy for example (as well as other variations).

125. Although such an expansion would be a helpful development, it should be noted that various other financial instruments may also be used by activists.

126. As discussed in further detail below, this regime applies to sell-side analysts, for example, and notably requires the disclosure of conflicts of interest, among other things.

127. *See, e.g.,* "Co-rapporteurs" Eric Woerth and Benjamin Dirx, Report of the working group of the Finance Committee of the French Parliament, *shareholder activism,* ("The ESG approach (environmental, social and governance), as well as the broader consideration of all "stakeholders", is increasingly emerging as new determinants of value, and as performance factors for a listed company. [...] It is very likely [...] that the next angle of approach for activists will be the weakness of some companies in these areas.") (2 oct. 2019) [authors' translation]; Lazard Shareholder Advisory Group, *2019 Review of Shareholder Activism* (Jan. 2020), https://www.lazard.com/media/451141/lazards-2019-review-of-shareholder-activism-vf.pdf ("ESG focus continues to grow... over the past two years").

128. Those investors submitted the first climate change resolution to Total's 2020 annual general meeting, which would modify the company's articles of incorporation to require that the company's annual management report set forth the board's strategy for aligning the company's activities with the objectives of the Paris climate accords, as well as defining the company's carbon emissions based on the activities of the company's clients (and not only the company's own activities). Although Total's board of directors does not agree with the resolution, it was included in the agenda for the

V. CONCLUSION: CONVERGING ON A RENEWAL OF TRADITIONAL UNDERSTANDINGS OF THE CORPORATION'S PURPOSE IN FRANCE AND THE UNITED STATES

Despite differences in the evolution of the roles and duties of the board vis à vis shareholders, one of the most important areas of convergence relating to corporate legal priorities has been the return, in the United States, to a more stakeholder-centric, rather than shareholder-centric, vision of the corporate purpose in recent years. The rise in attention to ESG considerations in the American boardroom is one such example of increasing alignment of corporate governance priorities. Almost a century after Berle and Means, the corporation is again being recognized as an institution with broad social and economic functions.

France has long emphasized precisely such a vision, in which the company's *intérêt social* takes priority over the interest of any single stakeholder. At the same time, it is paradoxical that, under the influence of activist and institutional shareholders[129], some in France should develop such sympathy for outmoded American theories of shareholder primacy at the very point in history that this approach has been increasingly called into question in the United States. We remain hopeful that the vocal movement in favor of a stakeholder-centric vision in the United States will continue to gain traction and also give further confidence to French courts, media, commentators and regulators to continue to uphold the traditional understanding of the *intérêt social*.

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company's shareholders' meeting scheduled for May 29, 2020. *See* N. Wakim, *Climat: le pétrolier Total sous pression d'un groupe d'investisseurs*, Le Monde, 16 avril 2020; Reuters, *Investors Plan to Push Total to Do More on Climate Change* (Apr. 15, 2020). Similarly, BNP's management was questioned during the 2017 general shareholders meeting by an activist NGO on the involvement of the company in the financing of an oil pipeline project. *See* D. Cuny, "*Le climat s'invite aux assemblées générales d'actionnaires de BNP et Société Générale*" La Tribune, 24 mai 2017.
Similarly, in 2020, JPMorgan faced activists' pressure in the context of its annual meeting with the filing by a non-profit group of a resolution to impose climate risk reporting. The proposal was narrowly rejected. *See* G. Tett et al., *JPM Barely Wins Climate Vote; Coal by Any Other Name; UK Retrofitting; Citi Launches ESG Group; Spain's Green Recovery*, Fin. Times (May 20, 2020), https://www.ft.com/content/0ab28990-8667-495f-8034-ac8b7dfbdd9f.

129. *Cf.* M. Lipton, *Reconsidering Activism in France*, Wachtell, Lipton, Rosen & Katz 1 (May 5, 2020), https://www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.26943.20.pdf (citing AMF report which, among other things, suggested that there is relative consensus on the usefulness of shareholder activism in improving corporate governance and defending the interests of minority shareholders). For another view on the same topic, *see* A. Pietrancosta and A. Marraud des Grottes, *Response to US Critics of the French Securities Regulator Position on Activism*, Harvard Law School Forum on Corporate Governance, June 26, 2020.