Chapter 9
Worker participation rights under the EU Takeover Bids Directive: the case of France

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1. Introduction

Prior to the implementation of the 2004 EU Directive on takeover bids, some participation rights for workers had already been introduced in France as part of the Law on New Economic Regulations of 15 May 2001. The 2004 Directive was transposed in France by the Takeover Bid Law of 31 March 2006. This law stipulated that the offeror must give information not only to the offeree's works council, but also to its own works council.

Subsequent to implementation, considerable debate over takeovers has taken place in France. This was spurred in particular by the violation of employment and production location guarantees made by the steel producer ArcelorMittal in the wake of its formation through a hostile takeover of Arcelor by the Indian company Mittal. In 2012 ArcelorMittal, in violation of an agreement with the trade unions, announced that it would close two blast furnaces in Florange (Lorraine). The ensuing public outcry led the Socialist candidate for President, François Hollande, to promise to strengthen the rights of workers in takeover situations, should he be elected.

The ensuing legislation, which was passed almost two years after his election, was named the 'Florange Law' due to the public prominence of these closures. Worker participation rights were reinforced by the Florange Law, officially entitled the 'law to give a new impetus to the real economy'. It gave the offeree's works council a true consultation right on strategic plans of the offerer and their impact on employment and production sites. In addition it enhanced the rights of company boards to introduce defensive measures without the prior approval of shareholders and attempted to strengthen the role of long-term shareholders in corporate governance.

2. Key elements of the French takeover legislation

2.1 The control authority

Public takeovers are regulated by the Financial Markets Authority (*Autorité des Marchés Financiers*, or AMF), which is an independent public authority created in 2003 by the Financial Security Law through the merger of three pre-existing institutions. The AMF has regulatory powers to protect investments, to ensure investor information and to support the proper functioning of financial markets. The AMF's president is nominated by the President of the French Republic for a non-renewable term of five years. From 2008 to 2012 its president was Jean-Pierre Jouyet, a former State Secretary who was nominated by President Sarkozy and who is now general secretary of the President Hollande's office. Under his very political mandate, the AMF's financial resources and sanctioning powers were reinforced.

The president is assisted by a Board with 16 members. Half of them are nominated by the Ministry of Finance, the rest by the two chambers of Parliament, the Council of State, the Court of Cassation, the Court of Audit, the National Bank and the Economic and Social Council. They are professionals chosen for their financial and legal expertise and experience. There is also an Academic Advisory Board composed of scholars from universities, business schools and banks.

The AMF's main rules on takeovers are set out in Book II, Title III of the AMF General Regulation. It defines the rules and procedures for the acquisition of a listed company. Key principles are equal treatment, transparency and fairness in the bidding process. The AMF has the power to declare (or deny) the conformity of a bid with the legal and regulatory provisions.

2.2 Procedures for voluntary and mandatory bids

Public offers take the form of a cash tender offer (*offre publique d'achat*) or an exchange offer (*offre publique d'échange*). There are three procedures for public offers:

(i) the standard procedure, which applies where the offerer holds less than 50 per cent of the share capital or voting rights of the offeree;

(ii) the simplified procedure, which applies, with a shorter timetable, where the offerer already holds, directly or indirectly, 50 per cent or more of the offeree's share capital and voting rights, or where it wishes to acquire up to 10 per cent of the offeree's share capital and voting rights;

(iii) the public buyout offer and squeeze-out procedure.

The offer timetable is set in each case under the supervision of the AMF. The standard offer acceptance period generally lasts 25 trading days but it can be extended if competing bids are launched.

Offers are mandatory if individuals or legal entities that come to hold (alone or in concert, directly or indirectly) more than 30 per cent of a listed company's share capital or voting rights. In this case they must immediately inform the company and file a tender offer with the AMF. An offerer must extend its offer to any listed subsidiary if the offeree company holds more than 30 per cent of the capital or voting rights of the subsidiary and if the subsidiary constitutes an essential asset of the offeree company. Mandatory tender offers also apply to persons who own between 30 per cent and 50 per cent of a listed company's share of capital or voting rights and increase that holding by 1 per cent or more within in a period of less than twelve months. Before the Florange law, this acquisition 'speed limit' was fixed at 2 per cent. Under certain circumstances, the AMF can authorise exceptions for mandatory bids.

The Florange Law of 2014 introduced a mandatory minimum acceptance threshold. If the offerer does not reach at least 50 per cent of the capital or voting rights at the closing of the offer period, it lapses automatically. In this case the shares held by the offerer before filing the bid are deprived of voting rights for the portion exceeding 30 per cent if the mandatory bid was triggered by the crossing of the 30 per cent threshold. If the offerer exceeded the 1 per cent acquisition limit, their shares are deprived of voting rights for the portion exceeding the offeror's holding before launching the bid.

2.3 Information requirements

The investment bank acting as sponsor on behalf of the offerer must file the draft offer prospectus with the AMF. The sponsor must guarantee that the offeror's commitments are irrevocable; it must also set out the draft terms of the public offer in a letter to the AMF that defines the offeror’s objectives and gives information about the proposed price and conditions. In particular, it must state whether the offer was announced in advance of its filing and whether the consultation of the offeree's works council has already been initiated.

If a person's shareholding in a listed company crosses (either by exceeding or going below) the thresholds of 5, 10, 15, 20, 25, 30, 33.3, 50, 66.7, 90 or 95 per cent of that company's share capital or voting rights, the person must inform the company within four trading days of doing so, stating the total number of shares and voting rights it holds. If the company is listed on a regulated stock market, it must also inform the AMF within four trading days. The AMF then discloses this information to the public. If a person crosses the 10, 15, 20 or 25 per cent thresholds it must also inform the company and the AMF, within five trading days, of its objectives for the following six-month period, in particular regarding whether it acts alone or not, whether it intends to continue to purchase shares or not and what its planned strategy is with regard to the offeree.

2.4 Defensive action on the part of the board

The Takeover Act of 31 March 2006, which transposed the Takeover Directive, applied the board passivity rule of Article 9. This part was, however, reversed by the Florange Law of 29 March 2014, which removed the rule according to which delegations of powers granted to the board of directors by the shareholders' meeting were suspended during the offer period. The board of directors of the offeree company is now authorised to take defensive action without shareholder approval, provided that this action is not contrary to the corporate interest of the offeree. A shareholders’ meeting can decide otherwise, however.

In order to prevent a hostile takeover, a company can now increase the power of friendly shareholders, for example by limiting voting rights or concluding shareholders' agreements. It can also offer discounted shares to existing shareholders in order to dilute the offeror’s stake in the company. This measure, designed to make the offeree company unattractive to the offerer, was developed in the 1980s by US companies fighting takeovers and is referred to as a ‘poison pill’. The Florange law now also allows the distribution of free shares to its employees up to 30 per cent of its capital (previously limited to 10 per cent).

In order to reinforce the position of long-term shareholders, the Florange law gives double voting rights to shareholders who commit themselves to keep the share for a minimum of two years, on condition that this commitment is registered. Before, this was possible only if there was a formal vote approving this by the shareholder assembly and if this right was integrated into the company's statute.

2.5 Sanctions

Failure to make the required disclosures results in the shares exceeding the relevant threshold being deprived of voting rights. The Commercial Court may also decide that all or part of the shares be deprived of voting rights for a maximum of five years, following a motion from the AMF, the company's chair or any of its shareholders. This also exposes shareholders to administrative sanctions by the AMF, as well as a criminal fine of 18,000 euros.

Failure to fulfil the obligations to file a mandatory bid will result in the shares exceeding the relevant thresholds being deprived of voting rights. It could also lead to financial penalties.

3. Worker involvement

If the offeror has a French works council, its CEO must convene a meeting to inform it concerning the content of the offer and its potential impact on employment. This must happen within two trading days following the publication of the offer, or following the announcement of the offer in case the offerer has asked the offeree to start its works council consultation immediately.

After the offerer has filed the offer documents with the AMF, the offeree's CEO must immediately convene a meeting with its works council, indicating whether it is a friendly or a hostile bid. If the takeover bid is made public before its filing with the AMF, the offerer can request that the offeree convenes its works council within two business days of the announcement. The works council can decide to question the offerer at a subsequent works council meeting, which must take place within one week after the filing of the draft offer with the AMF and before the shareholder meeting is convened. At this hearing the works council has the right to be assisted by any person of its choice; the offerer must present its industrial and financial policy and strategic plans for the offeree company, as well as their impact on employment, business sites and the location of the decision-making centres. The works council can also decide to appoint an accountant as an expert at the expense of the offeree. Within three weeks after the filing of the offer, the expert must deliver a report that assesses the offeror's strategic plans and its impact. Within one month of the filing of the offer, the works council must meet to examine the expert's report and deliver its opinion on the bid. If the works council believes it has not received sufficient information, it can ask the president of the competent civil court, who must rule within eight days, to enjoin both the offerer and the offeree to provide the requested information. This procedure does not extend the one-month period for the works council to render its opinion.

The offeree must wait until the end of the consultation period with the works council to file its draft response prospectus with the AMF, which must include the report of the expert appointed by the works council and the opinion of the works council. These documents are released on the AMF's and the offeree's websites. Afterwards, the AMF makes its decision of compliance, which is published together with the response prospectus on its website.

The offerer must send the approved offer prospectus to the offeree's works council no later than three calendar days following its publication. If the bid is successful, the offeror must thrice (after six, twelve and 24 months) report to the works council on the fulfilment of its commitments and on the impact of its strategy on employment, location of business sites and decision-making centres.

4. The Florange Law 2014

The 'Florange affair' was the historical background for the so-called 'Florange Law', which was drafted in April 2013 and finally voted on in February 2014. The name is a reference to the closure of two blast furnaces in Florange (Lorraine) in 2012 by the ArcelorMittal steel group, as a result of a hostile takeover of Arcelor by the Indian steel company Mittal in 2006. Arcelor, headquartered in Luxembourg, was itself the result of a merger between Sacilor, a former nationalised French company, the Spanish Arceleria and the Luxemburgish Arbed. Together with the management of Arcelor, the trade unions and governments of the three countries were opposed to the takeover bid by Mittal, although it finally succeeded.

With the goal of renewing cooperation with the unions, ArcelorMittal had signed a European framework agreement with the European Metalworkers Federation in November 2009. In this agreement it promised to preserve all the temporarily suspended plants and to 'use all possible means to maintain the workforce'. Despite these promises, because of a severe drop in steel demand, Arcelor again suspended the operation of several plants in 2011, including the two blast furnaces in Florange.

The Florange case raised much political debate about the closure of a site that was profit-making. During his presidential electoral campaign, candidate François Hollande visited Florange in February 2012 in order to support the mobilisation of the ArcelorMittal workers against the planned closure. During a speech to the striking workers from the top of a trade union van, he promised that, once elected, he would pass a law which would prohibit the closure of competitive plants. This promise was afterwards transformed into proposal number 35 of his electoral programme; here he announced that, in order to 'dissuade shareholder motivated dismissals', he would make dismissals more costly for companies that pay dividends to their shareholders and give workers the possibility to appeal to the courts for this purpose.

After Hollande's election in May 2012, his proposal was transformed into law, but with such a delay that it came too late to change the fate of Florange. In October 2012 ArcelorMittal announced the definite closures of the two blast furnaces, together with 629 job cuts out of a total workforce of 2,500 employees in Florange. The Socialist Minister of Industry, Arnaud Montebourg, tried to find investors to buy the Florange plant, but did not succeed within the two months that the company gave him for that search. His alternative plan for a temporary nationalisation of the Florange plant was opposed by the Prime Minister, who preferred to negotiate an agreement with ArcelorMittal; this was signed on 30 November 2012. Through this agreement the government accepted the closure of the blast furnaces, but ArcelorMittal committed itself to keeping the rest of the Florange site open and to invest 180 million euros for its modernisation. There would be no compulsory dismissals; 621 jobs would be cut on a voluntary basis (namely through early retirement and internal mobility) within the framework of a collective agreement negotiated with the trade unions. The majority union CFDT and the CGC-CFE agreed on this despite the opposition of two minority unions CGT and FO.

The main goal of the Florange law is to oblige companies that plan to close a plant to find a new investor in order to maintain the activity and employment of the site. But it also has two secondary aims: to reinforce the position of stable long-term shareholders in order to prevent hostile takeovers, and to protect companies against 'creeping' takeovers. These aims were also part of the recommendations of the Gallois Report, presented to the French Prime Minister in November 2012 by the former CEO of the French-German company EADS (now Airbus), Louis Gallois. This report suggested a national 'pact for the competitiveness of French industry' in order to reinforce the profitability of big French industrial companies and to ensure their long-term sustainability by protecting them from short-term financial constraints.

The law's long gestation can be explained by a series of political difficulties. The bill was presented by the Socialist group of the National Assembly and not by the government in order to circumvent the obligation of consultation with the social partners. Since the 2007 law on the 'modernisation of social dialogue', the government has the obligation, before any legislative initiative in the field of labour law, to consult the social partners and to give them the opportunity to negotiate a collective agreement on the proposed subject that will ultimately serve as a basis for legislation. As the employers' organisations were firmly opposed to any legislation to prevent plant closures, the government saw no need to use this procedure and encouraged a parliamentary initiative. Surprisingly, however, it was the CFDT union that formally opposed such an initiative – in October 2012 – and threatened to leave the opening negotiations with the employers on a 'pact on competitiveness', which the government had previously initiated. The CFDT announced its intention to include this subject in the negotiations. Therefore the government asked the Socialist Party to suspend its initiative until the end of the negations between the social partners. These ended on 11 January 2013 in an agreement on employment security which was signed by three of the five nationally representative unions and which was ultimately, according to a promise by President Hollande, transformed into law on 14 June 2013. Both the agreement and the law contained an article on the obligation of the employer, in case of a plant closure, to inform the works council about his efforts to find a new investor; in case of success, the employer must provide information on the conditions offered to the candidates, which the works council can examine with the help of its legal accountancy expert (Article 14 of the agreement, Article 12 of the law). There are, however, no sanctions in case of non-compliance with this obligation. This result did not satisfy the Socialist Party, which therefore presented its own draft on the subject on 30 April 2013.

From the beginning both the right wing and the extreme left parties were opposed to the draft, the former because it went too far, the latter because it did not go far enough. The draft was only supported by the Socialist, the Green and the Left-Radical parties, which were then part of the coalition government. These parties had a large majority in the National Assembly, but not in the Senate, where the Left Front (Communists and Left Party) blocked adoption by voting together with the right-wing opposition. According to the Constitution, in such a stalemate situation the National Assembly and the Senate must find a negotiated compromise through a joint commission. But this compromise also failed, so that the law could only be adopted through a final vote by the National Assembly, which took place on 24 February 2014.

The law contains a series of measures to ensure the long-term sustainability of the company. It reinforces the position of long-term shareholders and abolishes the neutrality principle for the board in case of a takeover bid, which had been introduced into French legislation in 2006. In order to prevent creeping takeovers, the initial draft lowered the threshold of shares above which an investor must make a compulsory takeover bid from 30 per cent to 25 per cent. This threshold had already been lowered from 33 per cent to 30 per cent in 2010. In its final version, the law kept the threshold at 30 per cent.

In case of a takeover bid, the offeree's works council must now be consulted before the offeree board gives its opinion about the bid. The works council has the right to formulate an opinion, which must be published together with the opinion of the offeree board and the report of the works council expert. The final law dropped the possibility for the works council to call for a mediator who would be appointed by the government and would make a public report on the strategic and employment impact of the bid.

The Constitutional Court declared several articles of the law unconstitutional on the grounds that they infringed upon the freedom of entrepreneurship and the fundament right to private property.

Consequently, it cancelled several essential articles of the law, namely those that established penalties in case of non-compliance with the procedure of seeking an investor. The articles concerning the information rights of the works council in case of a takeover bid, whose constitutionality was also challenged by the right-wing parties, were not struck down, however.

5. Conclusions

France has one of the more stakeholder-friendly takeover regimes in Europe. This was already the case before the passage of the Florange Law in 2014, as the offeror was obligated to meet with both its own works council (if it had one) and the works council of the target company (if requested). French works councils thus had rights above and beyond what was required in the EU Takeover Bids Directive. The passage of the Florange Law further enhanced this by considerably strengthening the rights both of the works councils and of the board to oppose hostile takeovers.

The background of the Florange Law was the closure of two blast furnaces by the steelmaking giant ArcelorMittal. Three facts in particular influenced the public debate surrounding this law. One was the fact that ArcelorMittal was formed by a hostile takeover of European steel companies by the Indian company Mittal, despite the opposition of employees, management and governments. A second fact was that the blast furnaces were closed even though they were profitable. This fed into the third fact, which was the perception by the general public that companies were increasingly being influenced by short-term financial considerations, in part due to pressures from institutional investors.

Although the primary goal of the Florange Law is to require companies to seek a new owner before closing down a plant, it contains a number of provisions directly relevant to takeovers. Specifically, it grants double voting rights to long-term shareholders and allows the board of a target company to implement defensive measures against takeovers without the approval of shareholders. It makes strategic alliances between management and employees possible in order to ensure the long-term sustainability of a company against purely financially motivated strategies. Finally, it strengthens the position of the works council of the target company by laying down a consultation right vis-à-vis its own board; the board must hear the works council before publishing its opinion on the bid. As this is a new development, however, it remains to be seen to what degree the relevant actors will make use of these new legal instruments.

Reference

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