Dialogues on Takeover Rules and Practices with European M&A Specialists

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Introduction:

This special article contains 7 transcripts of the dialogues with European M&A specialists (mainly French and Germany, this time), focused on the issues related to takeover rules and practices from the point of comparative law. I would like to express my deepest gratitude to all for their taking precious time to have meetings and willing consent to make these transcripts and their Japanese translations available to the public.

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Especially in the context of takeovers which various interest among the parties concerned conflict each other, it is very important to understand dynamic structures concerning the balance between rules and practices, including social norms because we often misunderstand the real picture when we only look at written rules.

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In these interviews, the modalities of takeovers in European countries as well as issues related to boards of directors etc. and labor issues were discussed in depth. Readers may find it surprising to read the contents describing aspects substantially different from what we had generally presupposed.

The discussions with the specialists may be quite thought-provoking with respect to discussion on the desirable takeover regulation in Japan. I hope that this work will provide useful insight for the academics and practitioners who are interested in takeover law and serve as a driving force for promoting international exchange in the field of takeover law on a full-fledged scale.
French Takeover Rules and Practices (1)
Interactions between Market Practices and Takeover Rules
(Interview with French M&A lawyers)

Hubert Segain*
Edouard Thomas**
Hiroyuki Watanabe***

[Introduction]

This is the transcript of an interview with French M&A lawyers regarding French takeover rules and practices, mainly on the issues about interactions between market practices and takeover rules. Maître Segain is a very knowledgeable lawyer with extensive experience in French takeover deals and have been involved with the discussions about recent amendment of French takeover rules. Maître Thomas is a lawyer also knowledgeable in the theory and practice of takeover deals and the co-author of “France” in Mergers & Acquisitions 2011 (ICGL, 2011). The interview was held on February 2011 at the conference room of Herbert Smith LLP, Paris office. /(Watanabe)

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1. Shareholding structures in French listed companies and their effect on takeover bids

WATANABE: Thank you very much for taking time to meet with me today, Maîtres Segain and Thomas. I have been involved in much research on rules and actual practices of takeovers in Europe both in an official capacity and as an individual; however, there are still many points that I would like to clarify. Also, I have a great interest in the characteristics of each jurisdiction’s takeover rules across Europe. As you are professional experts in M&A practices and takeover bids in France, I would like to ask you few questions in this respect.

SEGAIN: It is really my pleasure to meet with you here again. I hope we can provide you with answers to your questions. I asked my colleague Maître Edouard Thomas who also has expertise in Public M&A to join our interview today. Are you working on reforming the Japanese takeover law?

WATANABE: To reform our takeover law completely, we need to amend the securities law, and maybe also amend company law. As you know, takeovers are a very sensitive issue in every country and it will probably take some time to completely reform our takeover law.

SEGAIN: Is your idea to lean more towards what has taken place in the U.S., in continental Europe, or in the UK?

WATANABE: I suppose that the best solution for Japan would be a compromise between the takeover system used in the UK and in continental Europe.

WATANABE: First, I would like to ask you a general question about shareholding structures and their effect on takeover bids in French listed companies. Is it possible to have an overview of shareholding structure for CAC 40 listed companies?

THOMAS: We have reviewed the shareholding structures of the companies comprised in the CAC 40\(^1\) index, trying (i) to figure out what their shareholding structures are and (ii) to draw the major lines. According to this review, it seems that most of the share capital of those companies is held by the public, usually at least 60% of it.

WATANABE: Is ownership dispersed?

THOMAS: A general overview seems to confirm that the ownership is dispersed. First, the major part of the shareholding is composed of what is considered as “free float”, which includes individuals and institutional investors owning small stakes in companies (between 0% and 10%). Institutional investors category comprises banks, insurance companies or funds investing in listed companies. The free float usually accounts for approximately 10-20%, but can be higher reaching up to 60% of the share capital.

The second category is the majority shareholders. There is generally one large shareholder holding between 10% and 30% of the share capital, sometimes more (i.e. 40% stake of PPR held by Artemis). The majority shareholders can be another operational company but most of them are holding companies, whose purpose is to hold majority or minority interest in listed or non listed companies. In addition, several companies privatized still have the French State as majority shareholder, in accordance with the wish of the French State to remain a shareholder in strategic companies. The French State usually owns 10% up to 30% of the share capital of those privatized companies. However, it can be higher (i.e. 80% of EDF share capital, the partially privatized electricity producer, is still owned by the French State).
The third category of shareholders in CAC 40 companies is represented by the employees (from 2 % and up to 10 %), due to French regulations making mandatory to regularly propose to the shareholders the vote of share capital increases reserved to company employees. In addition, for privatized companies, the French Privatization Law forces companies to reserve a significant stake of their share capital to employees.

**WATANABE:** Can a French company hold its own shares?

**THOMAS:** A French company can hold its own shares up to 10 % of its share capital.

**WATANABE:** Thank you for your answers. And what about the percentage of block shareholders who own over 30 % of the target?

**THOMAS:** In the largest French listed companies it seems that only a few of them have shareholders holding more than 20-30 % of the share capital. Usually for those companies, the capital ownership seems quite dispersed. On the contrary, smaller listed companies, seem to be mainly owned by either another group, or by families or by investors with a majority stake.

**SEGAIN:** Several studies relating to the share capital of French listed companies seem to show the importance of family ownership (usually founder’s family). Usually those family majority shareholders hold their stake through a non-listed family holding company.

### 2. Irrevocable undertakings to tender shares to the offer

**WATANABE:** According to my research on French takeovers, I come to the results that many bidders acquire more than half the target shares as a first step, and then, have launch an offer on the remaining shares. To my understanding, this is a typical feature of French takeover practice for listed companies in France. Is my understanding correct?

**SEGAIN:** Your understanding is correct. A bidder would see whether or not blocks are available and if it can buy them from shareholders willing to sell. Typically a bidder will buy one or several blocks representing a significant percentage of the share capital of the target company (between 30 % and 50 %). Once a bidder has acquired 30 % or more of the share capital or voting rights of a French listed company, it is mandatory to file an offer on the remaining shares. Otherwise a bidder will generally try to obtain before launching the offer irrevocable undertakings from the main shareholders to tender their shares to the offer.

**THOMAS:** Contrary to UK irrevocable undertakings, French undertakings are not completely binding. This is a consequence of the principle of free interplay of offers and counter-offers under French regulations. Any third party shall be able to make a counter-offer before the end of the acceptance period of a first tender offer and no agreement shall prevent the success of a counter-offer made by any third party. That is why undertakings to tender shares have to be revocable if a competing offer is launched.

**WATANABE:** As you say, it really should not be called “irrevocable”.

**THOMAS:** The situation might be simplified as follows: the undertaking can be 99 % irrevocable but if a competing offer comes along with better terms, the undertaking to tender has to fall. However, a shareholder who agrees to tender its shares has no exit right unless another offer comes along. To be valid, such undertakings shall become void if there is a better competing offer and shall be disclosed to the public.

**WATANABE:** Subject to these conditions, are the so-called “irrevocable undertakings” admitted in prac-
tice?

SEGAIN: The so-called irrevocable undertakings are admitted in practice. It has been confirmed by case law. There are cases from the Court of Appeals that confirm its validity.

3. Defensive measures (1)(double voting rights, identifiable bearer securities, change of control-clauses, etc.)

WATANABE: Next, I would like to move on to the questions regarding defensive measures.

SEGAIN: In a Herbert Smith e-bulletin dated December 2010, we gave a summary of all the takeover defensive measures that had been put in place by all CAC 40 companies. The e-bulletin is composed of a four-page executive summary of all the available defenses, and in an appendix, we provide the reader with a precise analysis of the defense put in place by each CAC 40 company.

WATANABE: You mentioned double voting rights in your paper. To my understanding, this is an exception to the EU breakthrough rule.

SEGAIN: It is an exception to the “one share, one vote” rule but it does not breach the EU directive on takeovers. The EU wants to harmonize corporate governance principles in Europe and to develop the “one share, one vote” principle across Europe. The European Commission decided to launch a study in this respect in 2007. Even if some countries have implemented in their corporate law multiple voting rights (i.e. the Netherlands), many EU countries decided to banish voting privilege, such as Belgium, Germany, or Italy.

Double voting right in France is not attached to the shares but to the shareholder itself. As double voting rights depend on the length of share possession, it creates inequality between short-term and long-term shareholders that might discourage takeover bids. As a consequence, this principle has to face many critics.

WATANABE: As a result of resisting the directive?

SEGAIN: In negotiations over the drafting of the directive, France resisted the “one share, one vote” principle.

Double voting right is very useful and flexible, especially in companies with a strong family ownership and encourages shareholder’s loyalty. We understand that the UK is currently considering a similar system to protect its crown jewels.

WATANABE: You also mentioned “identifiable bearer securities” in your paper. Could you provide more information about it?

THOMAS: It refers to the provision in the bylaws of most French listed companies enabling the company to identify the real holders of bearer shares. Since an amendment of the French commercial code in 2001, if the company thinks that the identity of the beneficiaries provided to the company is not the real one, the company can ask for further inquiries in order to identify the real beneficiaries.

WATANABE: And how is this power implemented? How does Euronext or the company do it?

THOMAS: The process is described by Article L. 228-2 of the French commercial Code. To my understanding the inquiry is usually done through Euroclear France (as central custodian). Euroclear France then provides the requesting company with the list of beneficial owners. It provides the target company with a good knowledge of its shareholders basis and allows it to analyze its potential vulnerability in the
context of hostile tender offer.

**WATANABE:** It is very informative. You also mentioned change-of-control clauses. The average percentage among CAC 40 companies was 37.9% according to the 2008 version of your paper. It is a much lower rate than I expected. Is there any specific reason for this?

**SEGAIN:** In our 2011 version, the ratio of CAC 40 companies which had introduced change-of-control clauses had increased to 77.5%. Our interpretation is that this is a disclosure issue. The mandatory disclosure of change-of-control clauses and all the takeover-bid defenses in the annual reports is a consequence of a 2006 Law. Lawyers and companies took some time, but now realize that they have to comply with such regulation and as a consequence, the information is now included in the annual reports, as required by French law.

**WATANABE:** In your paper, you also mentioned that the minutes of the general shareholders meeting were published and available for public.

**SEGAIN:** Minutes or extracts of the minutes can be ordered from the Trade and companies register. The AMF also advises listed companies to make such minutes available on their website.

**WATANABE:** Thank you. In addition you wrote that “the AMF releases information on the shareholding structures of French listed companies.” Does it mean global information?

**SEGAIN:** The information provided to the market by the AMF is multiple and quite diversified. The AMF issues information in respect of public M&A deals. It will issue decisions, comments, or public releases for each company involved in such transaction, any time a particular situation arises.

### 4. Defensive measures(2) [the French-style poison pill or “bons Breton”]

**WATANABE:** Next, I have questions about the French-style poison pill (the “bons Breton”). To my understanding, this involves share subscription warrants (BSA, *Bons de souscription d’actions*) issued by the target company to all of its existing shareholders before the end of the offer period. I have heard that it is slightly different from US poison pills, which have a condition that only the hostile bidder cannot exercise the right and that the conditions of the warrants must be linked to the conditions of the offer made by the bidder. I heard that one of the practical uses of the Breton warrants is that if the offer price is low, the target shareholders can receive shares for a low price upon exercise of the Breton warrants and that the bidder’s ownership is thereby diluted.

My question is whether it is possible for the bidder to acquire shares with a Breton warrant?

**SEGAIN:** No Breton warrants were ever allocated in practice to its shareholders by a target company. We believe that in the event of allocation of Breton warrants to shareholders, the situation can be summarized as follows:

- allocation of the Breton warrants during the offer period;
- publication of the results of the offer;
- issue of shares upon exercise of the Breton warrants after the publication of the results of the offer;
- reopening of the offer.

In our view, the Breton warrants cannot be included in the initial offer and purchased by the bidder.
In addition, shares issued upon exercise of the Breton warrants can only be acquired by the bidder during the reopening of the offer as those shares did not exist at the time of the initial offer and cannot as a consequence be included in the initial offer.

WATANABE: Is this regarded as a new offer?
SEGAIN: No as it is a reopening of the initial offer.
WATANABE: And is it possible for the bidder to lower the offer price per shares if the target issues Breton warrants?
SEGAIN: It might be. It can be considered that the target issuing Breton warrants, “is changing its substance” allowing the bidder to withdraw its bid (subject to the AMF approval). The bidder can then put a bid back on the table with a lower price per shares.
THOMAS: In accordance with one of the main takeover rules in France, offers are irrevocable, except when special circumstances arise that make the offer irrelevant. If a bidder offers 10 for each shares of a company that is worth 10 but due to the issuance of Breton warrants, the valuation of the shares becomes different, a bidder can make the argument to the AMF (on the basis that the value of the shares has changed because of stock dilution due to the exercise of Breton warrants), that the offer should be withdraw.
WATANABE: I suppose when the substance of the company changes it is possible to withdraw the offer.
THOMAS: If the circumstances of the target company changed or its substance dramatically changed, so that the offer became irrelevant, and the terms of the offer became inapplicable, the offer can be withdraw.
SEGAIN: But is it a circumstance allowing the bidder to lower the offer price?
THOMAS: The terms of the offer are also irrevocable. Once the offer is filed, the terms of the offer are frozen, except if the bidder wants to improve the price offered or the conditions of the offer. On the contrary, the bidder cannot decrease the price offered or reduced the terms of the offer.
WATANABE: And is this regarded as a kind of withdrawal or as a new offer?
THOMAS: A bidder cannot withdraw an offer subject to very few exceptions and limited conditions listed by the AMF General Regulations:
- antitrust or regulatory approvals;
- success threshold meaning that if the bidder does not get to a certain threshold, which is usually 50 % of company shares (at least), at the end of the offer, the bidder can withdraw the offer;
- if a bidder offers shares as part of the offer, a bidder might need an authorization from its shareholders at a shareholders’ meeting, and can put this as a condition; or
- substance change as referred to above.
In addition, it shall be kept in mind that banks filing the offer on behalf of the company guarantee the irrevocability of the offer.
WATANABE: Is the requirement for withdrawing an offer closely related to condition for admissibility?
SEGAIN: Absolutely. The two are completely linked.
5. Acquisition of shares during a takeover bid and issue raised by the use of equity derivatives

WATANABE: Next, I would like to ask you the questions concerning the acquisition of shares during the offer period.

SEGAIN: It is a very complicated system recently amended.

THOMAS: The complexity is that pursuant to French public takeover regulations an offer has several stages, and for each stage specific rules exists regarding the purchase of shares by the bidder. During certain periods it is forbidden, and during others it is allowed within defined limits. The situation can be briefly summarized as follows:

- during the pre-offer period (i.e. after the deal announcement and prior to the publication of the draft offer document), the bidder is not allowed to acquire shares. This is to avoid disturbing the market and the price of the shares;
- between the publication of the draft offer document and prior to the opening of the acceptance period of the offer, the bidder can acquire shares of the target up to 30% of outstanding capital or voting rights and shall not pay less than the offer price;
- during the offer period (i.e. the acceptance period), the bidder of a cash offer that is not subject to any conditions, can acquire shares of the target. If the bidder is paying more than the offer price, the price of the offer shall be automatically increased to the price paid or at least increased by 2%. The bidder of a non all cash offer cannot acquire shares on the market;
- between the end of the acceptance period and the announcement of the results of the offer, the bidder can acquire shares of the target provided that the bidder is not paying more than the offer price.

WATANABE: Next, I would like to ask you a concrete question about equity derivatives and hidden ownership. I would like to know the concrete exemptions from the requirement of notification to the AMF about equity derivatives.

SEGAIN: The way it works is that there is no need to notify when the derivatives are purely cash-settled unless the holder of the cash-settled shares owns more than 5% of the shares as a normal holding. This is different in the UK where notification is compulsory. Non cash-settled derivatives shall be notified.

Recent examples showed that those regulations were not working well enabling a bidder, through several financial institutions, to build cash-settled derivatives without having to disclose anything.

Cash-settled derivatives were used in the recent LVMH-Hermes case. The Wendel-Saint-Gobain case was also commented in this respect. Wendel concluded with four different financial institutions Total Return Swaps contracts to acquire about 17.6% of Saint-Gobain share capital without any notification to the AMF. Amendments of French law regarding notification of cash-settled derivatives are currently contemplated, to be closer to the UK system, which fit better with the economic interest. A proposal has been made in this respect on 29 June 2011 by senate member Philippe Marini and should probably be discussed and adopted by the parliament before the year end.

WATANABE: To my understanding, recently in France a comprehensive notion of “financial instrument” has been introduced.

SEGAIN: This is correct. You follow things a lot more closely than a lot of our lawyers do. It was recently
changed.

**WATANABE:** What is the definition of this?

**SEGAIN:** The main thing is that it is broader than it was before.

**THOMAS:** It is the result of an old French debate. In the past different categories were labeled “Financial Instruments” or “Valeur Mobilière”. These categories were a bit mixed up, as some rules referred to securities in general, some to “valeur mobilière”, and others to “financial instruments”. For each rule, it was unclear whether the rule was really covering all type of securities or only certain types of securities.

In order to simplify the system, we have now harmonized the categories so they all fall under the category of “financial instruments”.

**WATANABE:** It looks very simple.

**THOMAS:** It is much simpler. The new category regroups old categories, in a way. The old categories still exist, but they are put under this general umbrella term.

### 6. Function of financial institutions in the process of takeover bids

**WATANABE:** Thank you. By the way, some time ago you mentioned the “guaranteeing bank” with respect to “cash confirmation and double guarantees.” I have heard there is a “double guarantee” system in French takeover bids.

**THOMAS:** First, the entity that files the offer cannot be the bidder. The offer has to be filed through a financial intermediary.

**WATANABE:** Is this the presenting bank?

**THOMAS:** Exactly. The AMF provides that the bidder has to appoint a bank as a “presenting bank” in connection with the offer. The presenting bank is the bank filing the offer on behalf of the company and guaranteeing the irrevocable nature of the offer. This bank has to guarantee the terms of the offer, including the payment of the shares tendered to the offer.

If the bidder ultimately is not able to pay the tendered shares, it will be the responsibility of the bank to pay. This is the first guarantee. The presenting bank asks for a counter-guarantee (a backup) from the bidder. So on day 1, when the bank files and guarantees the offer, it also requests a parallel guarantee from the bidder corresponding to the amount of the offer, in order to secure its own commitment for the offer.

**WATANABE:** It looks very safe but very costly.

**THOMAS:** It is more costly but it is not so costly and the banks limit their risks with the counter-guarantee and the fact that bank will only accept to file offer from serious bidders. No financial intermediary in France would in any event file an offer without having a counter-guarantee at the same time from the bidder.

**SEGAIN:** The way the French system is structured is to protect the shareholders and the public. As you said, it is an incredible safety feature of our system and it replaces the UK cash confirmation system that does not exist in France.

**WATANABE:** It is a trade-off between safety and cost.

**SEGAIN:** That is right. As Edouard was mentioning previously, the costs are limited, because the presenting bank secures its commitment through a counter-guarantee. In addition, the guarantee is given for
a short period of time (corresponding to the offer period as from the “visa” of the AMF on the offer documents).

WATANABE: I understood. Thank you.

THOMAS: It shall also be noted that the offer is also irrevocable for the banks. The guarantee becomes effective as of the day of the filing of the offer. This means that if the bidder goes away or fails to comply with its payment duties, the banks will have to pay for the offer and purchase all securities, and that the guaranteeing banks have no exit.

7. Descriptions in the offer document

WATANABE: Thank you. Next, I would like to move on to the question about the descriptions of employees or working conditions in the offer document.

THOMAS: A bidder has a lot of information to give, of course, in the offer documents, relating to the offer, the strategy, the synergies and also a presentation of legal, financial and accounting characteristics of both the bidder and the target. Among this information, the bidder has to describe what will be its future policy regarding the employees and the employees’ situation after completion of the offer. If the bidder intends to lay off some employees, it has to disclose its intentions and the synergies that will be created. From experience, such paragraph is tough to write for several reasons.

First of all, it is difficult for a bidder to disclose a precise social policy during the acquisition process, due to the absence of certainty in bidder’s management view at this stage.

Secondly, it is difficult to disclose the future social policy during such a sensitive period. In countries such as France where labor Law raises significant issues, bidders have to be careful about employees.

WATANABE: I heard that in Germany it has been customary to write in the offer documents that the bidder will do nothing about employees. In addition, I heard that this type of rough statement has not been considered a misstatement.

SEGAIN: In France, those statements are very carefully drafted so as not to provoke liability for the bidder. The statements remain very wide. In hostile-bid situations, the bidder does not exactly know what he will do with in this respect, due to the lack of information available to him. As a consequence, in such situation we have very general statements (3 to 5 lines long).

THOMAS: A bidder might not really want to disclose that he is going to lay off employees in the future. However, the information that a bidder has to disclose in the offer documents is really precise in accordance with the AMF General Regulations and the AMF instructions. The AMF reviews carefully such section.

WATANABE: Thank you. I have questions concerning the disclosure of substantial beneficiaries in the offer documents.

To my understanding, disclosure of substantial beneficiaries differs from unlimited disclosure of investors in the UK. For example, the disclosure of the names of investors depends on the type of fund. In particular, for funds subject to the fund manager’s discretion, it is only required to disclose the funds, whereas those not subject to the fund manager’s discretion require disclosure of the names of the investors. And a similar practice has been in operation in Germany. What about in France?
SEGAIN: I do not think there are specific rules in France in a bid context. There are specific rules when a management company has to disclose its ownership in a French listed company in accordance with transparency rules. And then specific rules exist on the aggregation of shares with all the shares held by the funds that the management company owns (whether they have discretion or not). In IPO situations certain countries require funds to disclose the full substantial beneficiaries of all their funds (example, in the Netherlands and in Germany).

But that is specifically for IPO situations and I have not heard of similar requirement of the AMF other than of “fair disclosure.”

WATANABE: I suppose the UK and Germany follow the transparency directive.

SEGAIN: You are right, but transparency goes back to my first point, which is disclosure of the ownership, which does not have to be fully detailed in the offer document. These are two separate rules in France. For the offer documents, there are no specific rules, only the “fairness” principle.

If you are talking about disclosure rules for ownership, it is the same thing in France as in Germany and in the UK.

You have to disclose all ownership, unless you do not have discretion over the investment, in which case you segregate.

8. Difference between France and the UK in the operation of the mandatory offer rule

WATANABE: Thank you. I would like to ask you a question about the conditions for a mandatory offer. European takeover rules basically require the bidder to solicit all shareholders irrespective of whether the offer is mandatory or voluntary. It is also common for the offer to lapse when the bidder fails to acquire the minimum percentage of shares initially set during the offer period (generally 50 % or two-thirds). Under these conditions, theoretically the issue of coerciveness would not arise.

And this is the only condition for a takeover made through a mandatory offer in the UK, whereas France and Germany do not allow acquiring a minimum percentage of shares to be a condition for mandatory offers.

Of course, this condition is allowed in the case of a voluntary offer. I suppose that the difference in France is a result of different shareholding structures between the UK and countries of continental Europe.

SEGAIN: Why do you think it is different? In France, a bidder cannot place any conditions on a mandatory bid.

WATANABE: I suppose it is because in the UK there are few block shareholdings. So it is reasonable to accept this type of condition in a mandatory offer in the UK and it is not reasonable / practicable in France due to the shareholding structure.

SEGAIN: I am not sure it has something to do with economics or with the structure of the market. I believe that it depends on regulators and parliament way of reasoning. This seems to me that in France and in Germany the focus might be more on protecting the shareholders, whereas in the UK the focus might be more on protecting banks and issuers. Therefore it has to do with the category of actor the regulator and the parliament want to protect.
The way the mandatory bid might be seen in France is as a penalty. You mentioned the coerciveness and you are right. It is a type of sanction. The idea in France is, when someone crosses a threshold, such person is penalized and has to offer the same exit conditions to any other shareholders.

**THOMAS:** The philosophy has to do with changes of majority. If a bidder wants to take control of a listed company, it may. But it should not be at the detriment of minority shareholders and the minority shareholders do not have to be prisoners from their shares. If a bidder does it by acquiring shares and crossing the mandatory-offer threshold, the bidder is obliged to offer the option of exiting from the company to all the other shareholders. The bidder cannot place any conditions on it, because the protection principle includes the fact that such offer is mandatory and as a consequence cannot be conditional.

The economic philosophy also is that when control of the company is changing, the investors who made their investment in the beginning did it on the basis of a certain type of management. If control is changing, the company's management and strategy may change. That is why they should have the option of exiting. This is a key principle and there should not be conditions on that. Finally, it also requires from any bidder that wants to take the control of a target to pay the price of the control on the basis of the entire share capital of the target not on the basis of a percentage of the share capital of the target.

**WATANABE:** I suppose the functions of takeover rules are a bit different between the UK and France. Should it be seen as a kind of right to exit after the change of control in France?

**THOMAS:** The philosophy is clearly to protect the minority shareholders who invested on the basis of certain circumstances. If the circumstances are changing, such minority shareholder should be able to exit and to sell their shares.

**WATANABE:** So it is more penalizing in the UK, where the ratio of block shareholding is lower. If someone acquires target shares in the market and crosses the threshold, the person will be obliged to make a mandatory offer with far more severe requirements than those of a voluntary offer. So in the UK, in most of actual takeover bids, bidders necessarily choose to make a voluntary offer from below the threshold.

On the contrary in Germany and France, where the ratio of block shareholding is higher, the takeover seems to result from an intentional wish to acquire the company. First, the bidder acquires over half of the shares of the target intentionally. After that, the bidder makes a mandatory offer. So, substantially, such a “mandatory offer” is really more voluntary than mandatory, based on the bidder's intentions. Therefore I would conclude that in France most of the mandatory offers are substantially a kind of voluntary offer.

**THOMAS:** Well, most of the times when someone crosses the threshold, it is because it buys shares on the market or through blocks, which is always intentional. It is only in certain specific situations, when doing for example M&A transactions or in mergers situation that someone might cross the threshold without such intention.

**WATANABE:** I understand.

**THOMAS:** Especially because some exceptions exist in this respect. When the threshold is crossed due to technical reasons, and the shares are kept for a limited period of time, the AMF may decide that the crossing person is not obliged to launch a mandatory offer. In a way the threshold crossing is not the consequence of a voluntary action.

**WATANABE:** In this exception to the mandatory offer requirement, is the time allowance for exemption from the mandatory offer reasonable?
THOMAS: Six months.
WATANABE: Is that reasonable? Is the any other limit to such exemption?
THOMAS: It is fixed. In the past, the threshold for mandatory offers was one-third of the share capital or voting rights and the technical breach of the threshold was limited to 3% of the share capital or voting rights. Following recent amendments there is no more cap and an exemption can be obtained from the AMF if someone crosses it by more than 3%.

However, it shall be demonstrated to the AMF that it does not exist any intention of taking control of the company and that such crossing is for a limited period of time of six months maximum. Within six months it has to go back to a position below the threshold. In addition, the voting rights attached to the shares that are over the threshold cannot be exercised. As the power to vote is removed, it does not harm the market.
SEGAIN: The interesting thing about setting it at six months is that the crossing person has six months to sell the excess shares back to the market and can actually slowly put them back onto the market without affecting the stock price.
THOMAS: It also exist listed and limitative exceptions in relation to specific transactions whereby a bidder can request from the AMF to be granted a derogation and not be obliged to launch a mandatory offer. Such derogations are not temporary.
WATANABE: Yes, it is a very reasonable system.

9. Demands for reforms of French takeover rules

WATANABE: To conclude, I would like to hear your opinion about the advantages and disadvantages of the French takeover system.
SEGAIN: That is what I want to read in your paper! You will have a better overview than we do of the merits and demerits, because you are comparing the takeover system of several countries. So you would have a better perspective.
WATANABE: Is there any concrete proposal for reforming the rules from you?
SEGAIN: I have one for you. It is that the French regulations should take a friendlier approach to exchange offers. Right now, pure exchange offers are impossible to structure when the company making the bid is a company outside the EU. If a Japanese company wants to bid for a French company just by exchanging shares, the Japanese company cannot do it, without a prior listing in an EU country that takes at least 3 to 4 months.
THOMAS: My reforming proposal relates to cash-settled mechanism that hides the real shareholding of the company and the Wendel and LVMH cases discussed earlier.

So we should clearly have a rule that goes through this veil of economic interest, and include cash-settled mechanisms and the economic interest in the threshold rules. The proposal made by Philippe Marini is a good starting point to amend French regulations in this respect.
WATANABE: Yes. Thank you.
SEGAIN: We look forward to reading your paper. Thank you very much, Professor Watanabe.
THOMAS: Thank you very much Professor Watanabe.
WATANABE: I have very much appreciated your excellent lecture, comments and concern. Thank you
so much for everything.

Endnotes:

1 The CAC 40 is a benchmark French stock market index. The index represents a capitalization-weighted measure of the 40 most significant values on NYSE-Euronext Paris.

2 French securities authority.