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# French Privatizations and International Capital Markets

*Alexander Marquardt and Ellen H. Clark\**

## I. INTRODUCTION

The 1993-1994 privatizations of French public companies have been conducted in an atmosphere of innovation among French lawmakers and politicians. The sale of French industries under French Privatization Law No. 86-912 of August 6, 1986 (as modified by Law No. 93-923 of July 19, 1993, the "Privatization Law")<sup>1</sup> with the use of novel financing methods has dynamized French capital markets. The Privatization Law and recent developments in French stock exchange regulations have permitted France to use privatization as a legal laboratory for testing share placement and distribution techniques developed both in France and abroad. Implementation of the Privatization Law marks a convergence of French and American marketing practices in addition to reflecting lessons learned from privatizations conducted in other countries.

## II. HISTORICAL BACKGROUND TO THE PRIVATIZATION LAW IN FRANCE

It is because of two waves of nationalizations, one right after the second World War, the other in 1982 following President Mitterand's first election and the victory of leftist parties in the Parliamentary elections of 1981, that privatization has a place in the economic picture of France today. In 1945, devastated by war and weighed down

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<sup>1</sup> Law No. 93-923 of July 19, 1993, [1993] J.O. 21 Juillet at 10,255, 1993 D.S.L. at 396 [hereinafter Privatization Law], modifies and completes Law No. 86-912 of August 6, 1986, [1993] J.O. 7 Aout at 9695, 1986 D.S.L. at 430 [hereinafter Law 86-912]. Law 93-923 was renamed the "Law Relating to Privatization Methods" (*Loi relative aux modalités d'application des privatisations*).

by massive unemployment, France embraced the Keynesian idea of State intervention to revitalize its national economy.<sup>2</sup> France, as well as several of its European neighbors, commenced the nationalization of its base industries, such as its steel and coal producers, as well as its three largest deposit banks. This nationalization effort has been given partial credit for France's ability to pull itself up from the brink of financial disaster during the three decades following the war.

With the decade of the 1970's came the fruition of an economic doctrine that viewed public sector industry more critically. Modern economists saw entrenched public sector industries as impediments to a dynamic market economy based on free competition among businesses. During this period of doctrinal transition, international financial institutions such as the World Bank and the Organization of Economic Community and Development (OECD) encouraged third world countries to sell off their public enterprises. Third world privatizations on a small scale began taking place long before the idea of privatization was to be accepted in England or France.

In fact, despite this turning tide of global economic thinking, in 1982, France engaged in the most sweeping wave of nationalizations seen anywhere in Europe since the immediate post-war period.<sup>3</sup> This spate of nationalizations was widely debated. For many, nationalization was clearly incompatible with the new ethos of market liberalization then being manifested in the global economy. The political controversy over nationalization versus privatization continued in France throughout the 1980s. When the moderate right-wing Government, newly-elected in March 1986, instituted the initial legal regime for the privatization of certain public industries in France, Socialist President Mitterand refused to sign the Government ordinance meant to put the new privatization law<sup>4</sup> into effect. Further privatization legislation was prepared and passed into law on August 6, 1986,<sup>5</sup> setting out the regulatory framework for a new French privatization program.<sup>6</sup>

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<sup>2</sup> Post-war France was also influenced by Communist ideals supporting State-owned industry as well as an historical tendency (since the days of Louis XIV's Finance Minister Colbert) to centralize decision-making and administration in Paris.

<sup>3</sup> Law No. 82-155 of February 11, 1982, [1982] J.O. 13 Fevr. at 566, 1982 D.S.L. at 92.

<sup>4</sup> Law No. 86-793 of July 2, 1986, [1986] J.O. 3 Juillet at 8240, 1986 D.S.L. at 391.

<sup>5</sup> Law No. 86-912, *supra* note 1.

<sup>6</sup> Twenty-nine of sixty-five major businesses and banks authorized for privatization were sold under the 1986 Law (through twelve privatizations, some of which involved both parent and subsidiary companies listed in the 1986 Law) including some (CCF, Compagnie Générale d'Electricité (now known as Alcatel Alsthom), Matra, Paribas and Suez) that had been national-

Nevertheless, due to the global stock market crash of October 1987, the first wave of privatizations in France was short-lived. The Socialist Government that followed remained in power from 1988-1993 and was dominated by a determination to do nothing.<sup>7</sup> President Mitterand pronounced his commitment to the status quo in the often-repeated catchword known as “*ni-ni*”<sup>8</sup> meaning “neither [nationalization] nor [privatization]”, and France’s privatization program, although not its capital markets, stood at a near stand-still until a new Government was elected in 1993.

Despite President Mitterand’s “*ni-ni*” declaration, major public sector French industries such as Pechiney and Rhône-Poulenc were able to sell off some of their international subsidiaries during the 1988-1993 period. The French capital markets clearing system was modernized and stock brokerage companies (*sociétés de bourse*) were introduced in France in place of exchange agents (*agents de change*), individuals who held a monopoly on the trading and pricing of shares at the bourse. The *sociétés de bourse*, regulated by the newly-created *Conseil des Bourses de Valeurs* (CBV),<sup>9</sup> were permitted to have the equity backing from major French and international banks that had not been previously possible without ceding control to the individual exchange agent. Although the *sociétés de bourse* maintain the monopoly on share trading and pricing on the French stock exchanges, subject to limited exceptions,<sup>10</sup> the infusion of capital from within and outside France was a welcome financial boost after the stock market crisis of 1987. Other capital markets developments in France included the trading of futures and options on the newly opened Paris futures exchange, *Marché à Terme International de France*, originally named *Marché à Terme des Instruments Financiers* (MATIF),<sup>11</sup> and the Paris options exchange, *Marché des Options Négotiables de Paris*

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ized in 1982; others (Havas and Société Générale) had been nationalized in the immediate post-war period.

<sup>7</sup> Although the 1986 Law prescribed a five-year privatization period, economic conditions in late 1987 quickly soured for placing shares on the market and, with the election of a left-of-center Government, the privatization program was effectively shelved in 1988.

<sup>8</sup> The “*ni-ni*” requirement was first set out by President (then candidate) Mitterand in a 1988 position paper. Francois Mitterand, *La Lettre à Tous Les Français (Letter to the French People)*, LE MONDE, May 27, 1988.

<sup>9</sup> The *Conseil des Bourses de Valeurs* was created in 1988 pursuant to Law No. 88-70 of January 22, 1988, [1988] J.O. 23 Janv. at 1111, 1988 D.S.L. at 132 [hereinafter Law 88-70], as a professional organization charged with the promulgation of general stock market regulations, control over stock market listings and delistings and was given disciplinary authority over the *sociétés de bourse*.

<sup>10</sup> *Id.* art. 1.

<sup>11</sup> MATIF opened in February 1986.

(MONEP).<sup>12</sup> As a result of these developments, new product trades and trading technology grew in volume and complexity while increased investment began to flow in from abroad.

The return of center to right-wing politicians to the Government in March 1993 also marked the resurrection of privatization in France. The new Government quickly implemented a modified privatization law, the 1993 Law. As will be described below, the 1993 Law introduced several innovations not seen under the 1986 Law while maintaining the emphasis on favoring the development of individual shareholders in France and the opportunity for employees to become shareholders in the companies that employ them. Under both the 1986 and 1993 elements of the Privatization Law, the protection of French national interests, or certain limitations on foreign ownership of French privatized industries, remained a common theme.

### III. FRENCH CAPITAL MARKETS AND INVESTOR FINANCING FOR THE 1993 PRIVATIZATIONS

The transfer of public enterprises to the private sector during 1986-1988 was largely targeted towards individual French investors in an effort to achieve a more "populist" capitalism. Although the number of potential private investors in France is large,<sup>13</sup> attracting investment in privatized companies during a time of relative economic hardship was not seen as a straightforward proposition. Prior to the 1986 privatizations, there were fewer than two million French individuals owning shares in French companies listed on the French stock exchanges. Just after the 1986-88 wave of privatizations, however, this number grew to 6.2 million individual investors. As is typical for French privatizations, however, many investors sell their newly acquired shares in privatized companies within six months of purchase, cashing in on quick profits due in part to the traditionally low initial offering price of the shares. By early 1993, the number of French individuals invested in French stocks had dropped to 4.5 million.<sup>14</sup> Thus, one challenge of the 1993 privatization campaign was not only to at-

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<sup>12</sup> MONEP opened in September 1987.

<sup>13</sup> The population of France is approximately fifty-eight million people. In 1991, less than ten percent of the total population in France were directly investing in the stock market; in the United States, roughly fifteen percent. These figures do not include bond or mutual fund investors. Commission des Opérations de Bourse 1991, *Rapport au Président de la République*, at 46.

<sup>14</sup> Commission des Opérations de Bourse 1993, *Rapport au Président de la République*, at 98 [hereinafter *1993 COB Report*]. These statistics are based on surveys conducted by Sofrès, a French polling company. The margin of error was not reported.

tract French private investors but also to keep them invested in the newly privatized companies over the long-term.<sup>15</sup>

The 1993 Law set out twenty-one groups of State-owned enterprises selected for the auction block, including companies originally chosen in 1986 but not yet privatized as well as groups (such as Renault) that were considered too politically sensitive to be considered for privatization in 1986. To focus the attention of the investing public, the Government again sponsored television and print campaigns for its privatizations as it had done in 1986-87. With an advertising budget of sixty to eighty million francs per transaction, the Government's privatization publicity blitz has had a broad reach, occasionally including celebrity spokesmen to help sell its multibillion franc wares. Already in October 1993, the privatization of Banque Nationale de Paris (BNP) earned the Government 22 billion francs in revenue while in January 1994, Elf Aquitaine, the fourth enterprise privatized under the 1993 wave of privatizations, brought in 34.9 billion francs and Rhône-Poulenc's second tranche was sold for 23 billion francs.<sup>16</sup>

Increases in trading volume on the French financial exchanges in 1993 can be credited in part to the increasing participation of investors from abroad. Attracted by speculation that the French economy was emerging from the European recession and by publicity concerning the 1993 privatization program, British, American, and Middle-Eastern investors and arbitrage experts, among others, invested in France. Foreign investors in 1993 accounted for one-third of France's market capitalization. Similarly, one-third of all stock brokerage firms (*sociétés de bourses*) were controlled by foreign interests and forty percent of MATIF members, participants in the Paris futures exchange, were foreign institutions.<sup>17</sup>

The overall market capitalization on the Paris bourse at the end of 1993 amounted to nearly 2.7 trillion francs,<sup>18</sup> a small amount compared to the size of the entire French economy. Part of the reason for this imbalance may be due to the scarcity of large, internationally

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<sup>15</sup> A new survey entitled "*Porteurs des Actions*", published September 29, 1994, by the *Commission des Opérations de Bourse* and commissioned by the *Commission des Opérations de Bourse*, the *Banque de France* and the *Société des Bourses Françaises* indicates that the number of individual direct shareholders in French companies at year-end 1993 had increased to 5.7 million, an improvement over 1992 figures and yet disappointing for not having reached the 6.2 million level attained during the 1987 privatizations.

<sup>16</sup> The Government's shareholdings in Rhône-Poulenc were divested in separate tranches over time. The first tranche of Rhône-Poulenc was sold to the public in 1986. The second tranche was sold in November 1993.

<sup>17</sup> 1993 COB Report, *supra* note 14, at 85-86.

<sup>18</sup> 1993 COB Report, *supra* note 14, at 81.

known industries listed on the Paris bourse. One of the Government's ambitions in implementing its new wave of privatizations was to enhance Paris' standing as a financial center in Europe by bringing major companies to its market.

The Privatization Law opened the entire competitive sector of French industry to both French investors and members of the European Union in general, through privatization. Under the 1986 privatization program, all industries proposed for privatization under the 1986 Law had to be privatized within a five-year period. Through the 1993 Law industry list that became part of the Privatization Law, Parliament gave a clear mandate to the Government to recommence privatizations of State assets while prescribing no particular time frame for their sale.

#### Financial Incentives/Employee Tranche

As part of the preparation for the 1993 privatization program, the Government offered generous financial and tax incentives for French investors to transfer their savings to French stocks and bonds. The Government sought ways to encourage stock investments in an environment where most individual investors were keeping their savings in liquid, low-risk, money market funds. A new law gave tax incentives to investors who agreed to roll their money market funds (*SICAV monétaires*) directly into longer-term stock investment plans (*plan d'épargne en actions*).<sup>19</sup> New investments in these stock plans could also be used for the purchase of shares in privatized companies. In addition, the "Balladur Bond," a Government bond issue launched in the summer of 1993, raised one hundred and ten billion francs (19.3 billion dollars) and gave French citizen holders of the bond the option to convert their holdings into shares in companies sold by the State, tax-free, on a priority basis over other investors.<sup>20</sup>

The Privatization Law requires that ten percent of the shares sold by the Government in a public offering be reserved for purchase by employees of that company or of its directly or indirectly majority-owned subsidiaries, or by former employees having served at least five years with the company or any such subsidiary.<sup>21</sup> This employee tranche can prove difficult to fill without offering employees, whose

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<sup>19</sup> Law No. 93-859 of June 22, 1993, art. 28, [1993] J.O. 23 Juin at 8815, 1993 D.S.L. at 377.

<sup>20</sup> *Id.* art. 9. See also Decree No. 93-862 of June 23, 1993, [1993] J.O. 24 Juin at 8901. The Balladur Bond issue was expected to raise thirty billion francs. Nearly four times that amount was actually sold. See Privatization Law, *supra* note 1, art. 13(IV).

<sup>21</sup> Privatization Law, *supra* note 1, art. 11.

resources are often limited, special incentives to purchase company shares. Thus, the Privatization Law provides price discounts and supplemental extended terms of payment for the sale of shares in the employee tranche. The discounted offering price for the employee tranche may not exceed twenty percent of the lowest offering price proposed to any other investor in the privatization.<sup>22</sup> An employee acquiring shares through the employee tranche must hold them for a period of two years and may not sell them thereafter until they are fully paid. These modified placement incentives were designed to alleviate problems associated with the traditional solution of offering shares at deep discounts to employees. Under the 1986 Law employee tranche mechanism, employees tended to quickly resell their employee tranche shares on the secondary market for a fast profit.

In addition to statutory incentives, the Government looked to the private sector for financing innovations to ensure greater participation from employee investors. One such successful financial plan was developed by Bankers Trust Company. The Bankers Trust solution, devised with respect to the Rhône-Poulenc privatization, helped employees increase their purchasing power and protected them against a decline in their investment. For every share purchased by an employee, a French bank lent that employee enough money to purchase an additional nine shares. In addition, the employees were guaranteed that they would recover, at the least, their initial investment in the shares plus a minimal yield.

Personal loans for the purchase of additional shares in Rhône-Poulenc were ultimately provided to the employees by Credit Commercial de France (CCF) and guaranteed by Bankers Trust, allowing the employees to purchase ten times the number of shares that their personal contributions would have purchased alone. To benefit from certain tax advantages, the employees acquired their shares through an employee savings plan and agreed to hold them in the plan for a period of five years. The personal loans to employees, tied to a matching five-year amortization period, would be reimbursed from the proceeds realized upon the sale of the shares from the savings plan.

If the proceeds prove inadequate to reimburse the loans under this particular employee incentive plan, Bankers Trust will pay the shortfall to CCF under its guarantee plus a twenty-five percent minimum yield to the employee investors. As Bankers Trust has hedged

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<sup>22</sup> Privatization Law, *supra* note 1, art 11.



its guarantees to the employees by holding options on the stock itself and through swap option agreements with CCF, it has minimized its risk of loss if the guarantee is called into play. To pay for the coverage of the guarantee and the loan, the employees agreed that thirty-four percent of the gains realized on their shares (including the shares acquired through loan financing) would be paid to Bankers Trust and CCF as fees.<sup>23</sup>

Special French tax and banking law considerations compelled Rhône-Poulenc to offer this financing package exclusively to its French employees. Despite its complexity, the loan/guarantee financing operation for the employee tranche was warmly received. The French employees oversubscribed by two-fold the employee allotment offered to them. As a result, eighty-three percent of the employees at Rhône-Poulenc became shareholders of the company. It is expected that both private and Government financial incentives will continue to be employed in future privatizations.

#### IV. CHARACTERISTICS OF FRENCH PRIVATIZATIONS

The privatization of a French public company listed in the Privatization Law is initiated by a *décret* of the Government.<sup>24</sup> The offering price per share is then set by the Minister of the Economy with advice from the Privatization Commission. The 1986 Law first created the concept of a Privatization Commission, renamed in 1988 the Commission for the Valuation of Public Enterprises,<sup>25</sup> to value the companies to be privatized. The 1993 Law re-established the Privatization Commission and gave it expanded powers. Not only is the Privatization Commission authorized to evaluate and set a minimum price for the public company to be privatized, but it also selects members of the *noyau dur* or group of stable shareholders who purchase a percentage of the company's shares by off-market placement and determines the terms of such placement, subject to confirmation by the Minister of the Economy.<sup>26</sup>

##### A. The *Noyau Dur* or Group of Stable Shareholders

The *noyau dur* is a French invention aimed at reducing two perceived risks in the privatization of a State enterprise: (1) the absence

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<sup>23</sup> *Rhone-Poulenc Innove Pour Convaincre Ses Salaries*, 295 OPTION FINANCE, Feb. 21, 1994, at 21, 31-32.

<sup>24</sup> Privatization Law, *supra* note 1, art. 2(II).

<sup>25</sup> Décret No. 88-1054 of November 22, 1988, [1988] J.O. 24 Nov. at 14617, 1988 D.S.L. 469.

<sup>26</sup> Privatization Law, *supra* note 1, arts. 3 & 4.

of a shareholder base concerned with the future of the company, its market strategy and development, and (2) the potential intervention by an undesirable third party that could take advantage of the shareholder power vacuum created by selling up to one hundred percent of the company's shares onto the market. Although most companies to be privatized already have some shareholders other than the State, the threat of acquisition by unfriendly investors compelled the Government to set aside a percentage of shares to be privately placed with a group of hand-picked, stable shareholders that would become the *noyau dur*, or hard core shareholders of the company.<sup>27</sup>

Although the 1993 Law provides for the possibility of off-market placement of a tranche of shares in a privatization,<sup>28</sup> the most important document related to the creation of the stable shareholder group, the *cahier des charges*, is not mentioned in the law or in any decree relating to privatizations. Nevertheless, the *cahier des charges*, a type of general conditions of sale specific to the company being privatized, is where the term "group of stable shareholders" appears. It includes the number of shares to be privately placed, the sale price, and the minimum and maximum amounts that may be purchased by a single investor. The *cahier des charges* also provides for pre-emption rights among the stable shareholder group that normally applies to eighty percent of the privately placed shares and remains effective for a three year period. The pre-emption pact annexed to the general conditions serves as a contract among the members of the shareholder group rather than a simple agreement between each investor and the Government.

When the *noyau dur* concept was first introduced under the 1986 Law, critics complained that the choice of investors for the stable group was too politically motivated because the Minister of the Economy alone made the choice. Under the 1993 Law, the choice of stable group members may be made by the Minister of the Economy only in accordance with the consent of the Privatization Commission.<sup>29</sup> Pursuant to a *décret* issued in 1993, however, the choice of investors remains limited to those candidates pre-selected by the Minister of the Economy.<sup>30</sup> Thus, the issue remains that, despite the veto rights of the Privatization Commission, there is no fixed criteria as to the Min-

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<sup>27</sup> Privatization Law, *supra* note 1, art. 4.

<sup>28</sup> Privatization Law, *supra* note 1, art. 4

<sup>29</sup> Privatization Law, *supra* note 1, art. 5.

<sup>30</sup> Decree No. 93-1041 of September 3, 1993, [1993] J.O. 5 Sept. at 12501, 1993 D.S.L. 497.

ister's initial selection of the candidate pool and the *noyau dur* concept remains susceptible to the initial criticism of political favoritism.

### B. The *Action Spécifique* or Golden Share

The Golden Share concept had already been introduced into French privatizations in 1986 following the example of Great Britain in its privatizations of Jaguar, Britoil, and British Aerospace.<sup>31</sup> At that time, however, the Government's Golden Share consisted only of a five-year right to block any acquisition of more than ten percent of a privatized company by any investor or concerted group of investors.<sup>32</sup> The Golden Share was never a true shareholding but rather a protectionist legal facility that gave the Government added control over the eventual ownership of its newly privatized companies. Under the 1986-88 wave of privatizations, the Government exercised its Golden Share rights in only two instances.<sup>33</sup>

The 1993 Law strengthened the clout of the Government's Golden Share. The 1986 Law had already allowed the Government, prior to the privatization of a company, to determine if national interests require the creation of a Golden Share by *arrêté* as to that company.<sup>34</sup> Under the modified Privatization Law this determination gives the Government the right to issue a *d'ecret* reserving for the Government certain veto and control rights over the company to be privatized.<sup>35</sup> Among the rights reserved for the Government are its ability to block the acquisition of shares or voting rights in a privatized company by any single investor or group of investors beyond whatever threshold limit is set in the decree. Thus, the ten percent acquisition trigger of the 1986 Golden Share was abandoned so as to allow the Government to intercede as deemed appropriate on a case-by-case basis. Moreover, unlike the 1986 Law's five-year rule, no time limit applies to the Government's exercise of its 1993 Golden Share rights. The Golden Share also allows the Government to name one or two non-voting directors to the governing board of the newly privatized company.<sup>36</sup> Finally, as the goal of the Golden Share is basically protectionist, the Privatization Law gives the Government veto power

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<sup>31</sup> *Report of the Finance Commission*, No. 392 Doc. Ass. Nat. 87s (1992-1993).

<sup>32</sup> Law 86-912, *supra* note 1, art. 10.

<sup>33</sup> The Government reserved for itself Golden Share rights in four companies: Havas, Matra, Elf-Aquitaine, and Bull. Only Havas and Matra were actually privatized during the 1986 wave of privatizations.

<sup>34</sup> Law 86-912, *supra* note 1, art. 10.

<sup>35</sup> Privatization Law, *supra* note 1, art. 7.

<sup>36</sup> Privatization Law, *supra* note 1, art. 7.

over any sale or pledge of a privatized company's assets which the Government deems to be in conflict with the national interests of France.<sup>37</sup>

### C. Further Protection of National Interests

In addition to the Government's Golden Share, the 1993 Law reserves other rights that enable the Government to limit foreign ownership in privatized companies in order to protect national interests. Restrictions on the number of foreign investors allowed to purchase privatized French companies had been set at a level of twenty percent of the capital of the company to be privatized under the 1986 Law.<sup>38</sup> The Government's bill for the 1993 Law contained no such restriction, but after Parliamentary debate, the twenty percent of total capital restriction was reinstated under the 1993 Law.<sup>39</sup> However, the impact of this restriction was significantly reduced as "foreign investor" now means "non-European Union investor" and the twenty percent measurement now applies to the totality of the company's share capital, not to twenty percent of the offered tranche. In addition, the twenty percent restriction applies only to the shares being sold pursuant to the privatization without reference to prior and concurrent ownership by foreign investors.<sup>40</sup> Thus, if the State were to sell thirty percent of a company's capital to the public, two-thirds of the offer could be purchased by non-European Union investors<sup>41</sup> irrespective of the percentage of non-European Union ownership prior to the transaction. In addition, the twenty percent limit on foreign investment applies only to the initial public offering and not to secondary sales.<sup>42</sup>

The 1993 Law also provides a five percent limit on foreign investment in health and defense industries.<sup>43</sup> Unlike the twenty percent limitation on foreign investment applicable only during the initial public offering, the five percent rule applicable to national health and defense industries can be imposed by the Government at any time during or after the initial sale of shares to the public. In the event these investment limitations are not respected, Government sanctions

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<sup>37</sup> Privatization Law, *supra* note 1, art. 7.

<sup>38</sup> Law 86-912, *supra* note 1, art. 10.

<sup>39</sup> Privatization Law, *supra* note 1, art. 8.

<sup>40</sup> Privatization Law, *supra* note 1, art. 8.

<sup>41</sup> *La Semaine Juridique* (JCP), Ed. G., No. 40, *Etude* No. 3705, at 397 (*édition* E.93, I, 281).

<sup>42</sup> Privatization Law, *supra* note 1, art. 8.

<sup>43</sup> Privatization Law, *supra* note 1, art. 7.

will be imposed against the undesired investor, including the suppression of voting rights and the forced sale of shares.<sup>44</sup>

## V. INNOVATIONS OF THE 1993 PRIVATIZATION PROGRAM

Although there was a lapse in privatization activity between 1987 and 1993, France did not remain isolated from the developments on the international capital markets or the need to invigorate its own markets. With a remarkable willingness to progress motivated by the market disruption resulting from the October 1987 stock market crash, the CBV approved new regulations allowing for greater flexibility in the placement and marketing techniques of shares to be listed on the stock exchange. In tandem, the *Commission des Opérations de Bourse* (the COB, the French equivalent of the Securities and Exchange Commission) modified its registration and prospectus requirements to facilitate the sale of shares in privatized companies in the French and international marketplaces.<sup>45</sup>

New placement procedures, such as pre-marketing, bookbuilding, and purchase by installments, were introduced in France by the CBV<sup>46</sup> and the COB. In addition to allowing private sales to the *noyau dur* and mandating offerings to employees, the Privatization Law includes the authorization to sell shares in privatized companies in accordance with procedures used on the financial markets.<sup>47</sup> With only minimal guidance from the Privatization Law on the placement procedures to follow,<sup>48</sup> the Government has recently applied offering techniques involving all or a combination of: (1) a public offering in France open to French citizens or individual residents of France or the European Union and to French or European Union institutional investors free from the control of a non-European entity (investors in this tranche are usually sold only a limited number of shares, although on a priority basis, and are given a limited number of free shares after

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<sup>44</sup> Privatization Law, *supra* note 1, art. 7.

<sup>45</sup> COB Regulation No. 91-02 on "Information to distribute for share listings and for share offerings for which a listing is requested"; COB *Communiqué* of September 9, 1993 [hereinafter *COB Communiqué*].

<sup>46</sup> Arrêté of August 11, 1993, "CBV General Regulations" (*Règlement Général du Conseil des Bourses de Valeurs*) [hereinafter *CBV Regulations*].

<sup>47</sup> Privatization Law, *supra* note 1, art. 1.

<sup>48</sup> The Privatization Law makes three references to placement of shares in the privatized companies. Article 4-1, II indicates that the sale or exchange of shares and the sale or renunciation of preferential rights shall be realized through financial market procedures; Article 13 speaks of offers targeted to individuals; and Article 10-1 limits to twenty percent the total number of shares sold to individual or institutional non-European Union investors. Privatization Law, *supra* note 1.

a holding period of at least eighteen months); (2) a global international offering including an offering of shares to French institutions, a private placement of shares or American Depositary Shares by United States selling syndicate members into the United States markets through Rule 144A,<sup>49</sup> and an offering of shares in the Euromarkets (or shares or depositary receipts in the Canadian market); and (3) an offering to current and former employees of the privatized company and its controlled affiliates. The foregoing tranches are usually supplemented by an off-market placement to the *noyau dur*.

Pre-marketing and bookbuilding, new offering techniques, now allow the issuer and underwriting syndicate to sound out the market in France prior to the determination of share price. The period of pre-marketing, named *pré-placement*, is conducted differently for individuals and institutional investors. Revocable pre-marketing mandates may now be sought from individual investors, while non-binding indications of interest from institutional investors are included in the underwriter's order book.

#### A. Pre-Marketing Mandates

The *pré-placement* mandate technique was used for the first time in France during the BNP privatization.<sup>50</sup> *Pré-placement* mandates allow individual investors interested in purchasing shares to sign a purchase mandate to buy shares conditionally without an agreed price in the company to be privatized. As the investor would not know the actual offering price of the shares until the public offering date, the individual's mandate remains revocable until a specified date after the offering price is announced. Once this date arrives, and in the absence of prior revocation by the investor, the mandate becomes automatically irrevocable and the investor is obliged to make the purchase of shares indicated on the mandate at the public offering price.

Experience with this pre-marketing technique has shown it to be successful. Overall, during the recent privatizations, only ten percent of individual investors who participated in pre-marketing have revoked their mandates. As a volume indicator, the *pré-placement* mandate has proven useful to issuers and underwriters in foreshadowing,

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<sup>49</sup> Rule 144A under the U.S. Securities Act of 1933, a resale exemption allowing placement of shares to certain qualified institutional buyers in the United States without registering the offering with the SEC.

<sup>50</sup> BNP was privatized in October 1993. The Government has continued to use the pre-marketing mandate technique in all its recent privatizations.

through pre-launch indications of interest, the private investor market potential in the shares to be offered.

### B. Bookbuilding

The pre-marketing technique for institutional investors is called "bookbuilding," a procedure borrowed from United States underwriting and used for the first time in France during the 1993 privatizations.<sup>51</sup> Bookbuilding or *la construction du livre d'ordres* takes place during the period prior to pricing. During this bookbuilding period in United States offerings, the underwriting syndicate takes non-binding orders or "indications of interest" from institutional investors based on a preliminary prospectus that makes no reference to offering price. The investors respond with an indication of their interest at different hypothetical prices. The "orders" are entered into the underwriting book indicating each institution and the price level or levels at which such institution would be interested in purchasing shares. The underwriter's book gives a fairly accurate picture of market demand and is central to the ultimate determination of offering price.

In France, bookbuilding is used more as a test of market volume than price.<sup>52</sup> In the Rhône-Poulenc privatization, for example, the financial establishments guaranteeing placement were committed to communicating to the syndicate head the identity of every major investor having indicated a firm, but non-binding, interest to invest at least one million francs in the privatization. Each syndicate member sent its "book" of investors showing major names, quantity of shares, and desired investment level.<sup>53</sup>

Prior to securities law developments initiated by the COB in 1993 and discussed below, it had been impossible to employ the bookbuilding technique in France. The concept of a preliminary prospectus did not exist and underwriters in France, whose commitment is usually on a "stand-by" basis, were compelled to accept a far greater risk than would normally be acceptable to their United States counterparts. This placement risk created incentive to propose a low offering price so as to ensure successful sales. Simultaneous offerings of privatized

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<sup>51</sup> Bookbuilding has been used in Great Britain as well, for the first time during the 1988 British Telecom privatization. The British Government found the technique to be the best means to ensure that it was extracting the most profit for the maximum sale of shares.

<sup>52</sup> Dominique Borde & Aline Poncelet, *Le Nouveau Programme de Privatization Français de 1993: Une Importante Evolution des Techniques de Mise en Vente sur les Marchés Financiers*, 8 RDAI/IBLJ 943 (1993).

<sup>53</sup> Steven L. Wolfram & David W. Smail, *Privatisations: Ouverture du Marche*, BANQUE, Dec. 1993, at 30.

companies in both France and the United States were conceptually difficult for underwriters to accept as the timing of the placement periods would not be synchronized: final sales could be effectuated in the United States rapidly after the price announcement but long before the post-pricing French marketing period had ended.<sup>54</sup> The French placement system, which had previously not allowed for pre-placements, was considered very risky for American underwriters.

Apart from the *noyau dur*, no French institutional tranche had ever been offered for privatizations in France prior to 1993. In addition to the adverse placement conditions, priority rights of employees, high demand from individual mandate holders, and foreign institutional buyers in the international tranche left few shares for French institutional investors. A specific French institutional investor tranche was made possible in 1993 by the CBV's authorization of parallel offerings.<sup>55</sup> As a result, French institutional investors had a greater opportunity to invest in the privatizations and, once the COB ironed out obstacles to pre-marketing, the international capital markets opened further to placement of shares in French privatized companies worldwide.

### C. COB Regulatory Initiatives

As a first step, the COB implemented a new procedure for examining the registration statements of companies to be privatized. With the assistance of the National Company of Auditors,<sup>56</sup> the review of files submitted for privatized companies has been sped up and the procedures simplified. The second initiative from the COB set out in a *communiqué* in September 1993 (the "COB *Communiqué*") was a major policy change in the methods and means by which company information was to be distributed to the public. The COB restructured the layout of the required offering documents, developed a document summary system, and simplified the procedure by which the COB's visa is granted to public offering documents.<sup>57</sup>

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<sup>54</sup> Zine Sekfali, *Le Droit Français Des Privatisations a L'Huere Anglo-Saxonnel*, BANQUE, Mars-Avril 1994, at 3.

<sup>55</sup> Title 3, Articles 3-2-4 and 3-2-16 and Title 7, Articles 7-1-8 and 7-1-9, of the *CBV Regulations*, *supra* note 46, as modified, permitting the issuance of shares by public offering to be targeted to different categories of investors.

<sup>56</sup> *Compagnie Nationale des Commissaires aux Comptes* (CNCC). The CNCC worked together with the COB to accelerate the review of files for companies selected for privatization. 1993 COB Report, *supra* note 14, at 107-08.

<sup>57</sup> *COB Communiqué*, *supra* note 45.



The COB *Communiqué* modified the basic prospectus requirements set out in COB Regulation No. 91-02. Under the new registration procedure, the prospectus is submitted and reviewed by the COB over several steps. As an initial filing, an issuer must submit the *document de référence* which describes the issuer in detail and must be registered with the COB for its approval. The reference document submitted to the COB may simply be the company's annual report. The filing of the annual report remains valid until the publication of the company financial statements for the next fiscal year and may be updated from time-to-time with short operational summaries.

The second part of the modified prospectus requirement, introduced for the first time for the 1993 privatizations, is the preparation of the *note d'opération préliminaire* or preliminary offering circular.<sup>58</sup> Well-known on the United States markets, the preliminary offering circular describes the characteristics of the operation to be undertaken without reference to the share offering price or the timetable for the offering. The preliminary offering circular is stamped with the COB visa and, once published and distributed, marks the beginning of the pre-marketing period. Individual investors receive a copy of the preliminary offering circular during the solicitation of their revocable mandates, while institutional investors receive one during the simultaneous bookbuilding period.

Once the offering price is determined, the *note d'opération définitive*, or final offering circular, is prepared. This principally involves completing the preliminary offering circular as to price and offering date. The COB stamps the definitive offering circular with its visa just prior to the launch of the public offering. All investors are given a copy and "pre-marketed" investors make their choice as to whether to commit to their purchase orders or to revoke them.

The COB authorized yet another method of information distribution available for use in the 1993 privatizations. Resume documents, one-page summaries of the company to be privatized, used for mass advertising like handbills for the theater, were approved by the COB for use by issuers. Over three million copies of these summary documents were distributed to the public during the privatizations of 1993 alone.<sup>59</sup>

Overall, the COB's new prospectus architecture allows for greater innovation in placement methods while ensuring control and surveillance by the COB of the information distributed to the public.

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<sup>58</sup> 1993 COB Report, *supra* note 14, at 111.

<sup>59</sup> 1993 COB Report, *supra* note 14, at 112.

The graduated approval system, from basic reference document to final offering circular, permits pre-marketing to investors and thus makes it possible to shorten the actual selling period during which underwriters are at risk. The graduated prospectus approval approach was not meant to be exclusively used in privatizations. It has also been made available to domestic bond issuers. It is expected that in years to come, all types of public offering documents for placements on the French capital markets will follow this revised disclosure system.

#### D. Other United States-Inspired Placement Techniques

Other United States-inspired capital markets innovations adopted in France include the legislation of "green shoe" over-allotments clauses and "claw-back" allocation clauses in the public offering documents. The CBV General Regulations were amended on August 11, 1993 to provide that any public offering could include an over-allotment of shares. The issuer may, thus, increase the number of sales sold by up to twenty-five percent in response to orders received.<sup>60</sup> Similarly, "claw-back" clauses were permitted in placement agreements, allowing underwriters to reallocate shares in favor of a domestic or international market, according to demand. Privately placed shares could also be shifted to the public market up to certain limits as the need arose. The BNP, Elf Aquitaine, and Rhône-Poulenc transactions all included "claw-back" provisions and saw them fully employed.

#### E. Partly-Paid Shares

A financing technique inspired by the privatizations of British Telecom and British Gas involving the transfer to the public of partly-paid shares (*paiement échelonné*) was introduced in France for the first time under the 1993 Law permitting shares in privatized companies to be paid for on a partial deferred basis according to conditions set out by the Minister of the Economy.<sup>61</sup> Although employee purchases had benefitted from a limited deferred payment provision under the 1986 Law, the 1993 modifications allowed for a more expansive application of partly-paid shares, both in the public offering and private placement of shares.

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<sup>60</sup> CBV Regulations, *supra* note 46, at Title 7, art. 7-1-4 (as amended).

<sup>61</sup> Privatization Law, *supra* note 1, art. 6.

Under the 1993 Law, deferred payments are permitted for a period of up to three years for publicly offered shares, while no time limit is imposed for privately placed shares. In the event an investor defaults on making eventual full payment for its shares, the State automatically receives full ownership rights to the partly-paid shares and may resell them onto the market.<sup>62</sup> If the State resells the shares within the calendar quarter prior to the due date of full payment, the State may reimburse itself (plus late payment interest and expenses) and the defaulting shareholder will receive the balance. If the State resells the shares after the expiration of this time period, the defaulting shareholder recovers nothing of its partial payments. The shareholder in possession of partly-paid shares is viewed as a debtor of the Government until the shares are paid in full. It is not clear from the 1993 Law, however, if partly-paid shares sold to a new shareholder become the debt of the new shareholder or if the debt remains with the original shareholder. Commentators suggest that the debt to the Government remains with the initial purchaser who arranged for payment on a deferred basis.<sup>63</sup>

#### F. Privatization Timetable

A state-owned enterprise selected for privatization and included in the annex of companies that accompanies the 1993 Law can be sold onto the market without much delay. The most time-consuming steps involve the due diligence review of the company to be sold and the preparation of the offering documents. Attention must also be given to the corporate articles of association, the by-laws, and the management structure of the company, which all become subject to French company or banking law<sup>64</sup> immediately following privatization. Once the background work is complete, typical privatizations will involve a four to six week time period.

- D - 25 days: Register the *Document de Référence* with the COB and prepare the *Note d'Information Préliminaire*.
- D - 20: Register *Note d'Information Préliminaire* with the COB.  
Commence *pré-placement* with individuals and bookbuilding with institutional investors.

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<sup>62</sup> Privatization Law, *supra* note 1, art. 6.

<sup>63</sup> *La Semaine Juridique* (JCP), Ed. G., No. 40, *Etude: La Loi de Privatization*, at 397.

<sup>64</sup> Law No. 66-537 of July 24, 1966, [1966] J.O. 26 Julliet at 6402, 1966 B.L.D. at 353 for commercial companies and Law No. 84-46 of Jan. 24, 1984, [1984] J.O. 25 Janv. at 390, 1984 D.S.L. at 148.

- Collect revocable mandates from potential investors.
- D Day: Determination of offering price. Publication of *Note d'Information Définitif* with visa from the COB.
- D + 4: Date limit on revocability of purchase mandates.
- D + 6: Public Offering closed.
- D + 8: Private Placement closed.
- D + 9: Results of Privatization announced.
- D + 15: Employee Offering closed.

The following table shows the list of companies authorized for privatization under the 1993 Law and their projected date of sale.<sup>65</sup>

FRANCE'S PRIVATIZATION SCHEDULE		
<i>Company</i>	<i>Government stake</i>	<i>Year of sale</i>
Banque Nationale de Paris (BNP)	72.9%	1993
Rhône-Poulenc	43.4%	1993
Elf Aquitaine <sup>66</sup>	50.8%	1993/94
Union des Assurances de Paris (UAP)	53.5%	1994
Régie Nationale des Usines Renault	70.3%	1994 <sup>67</sup>
Compagnie des Machines Bull	72%	1995
Groupe des Assurances Nationales	79.4%	1995?
SEITA	100%	1995?
Caisse Nationale de Prévoyance	42%	1995?
Pechiney	75%	1995?
SNECMA	97%	1995
Assurances Générales de France	72.7%	1995
Air France	99.4%	1996
Compagnie Générale Maritime	100%	1996
SNI Aerospatiale	74%	1996
Usinor-Sacilor	75%	after 1996
Thomson	82%	after 1996
Crédit Lyonnais	52.5%	after 1996
Société Marseillaise de Crédit	100%	Postponed
Caisse Nationale de Réassurance	100%	Postponed

<sup>65</sup> EUROMONEY, Sept. 1993, at 284 (updated where possible).

<sup>66</sup> Elf-Aquitaine raised receipts of 34.9 billion francs. Combined receipts for the sales of BNP, Rhône-Poulenc, Elf-Aquitaine, and UAP equalled 94.4 billion francs.

<sup>67</sup> Following the privatization of Renault, completed in November 1994, the French Government held no less than 50.1 percent of the share capital and voting rights of the company.

## VI. CONCLUSION

While many political and legal obstacles to the privatization of State-owned enterprises in France have been moved aside, the state of health of the French economy and market conditions both in France and internationally still play a factor in the timing of future privatizations. Financially troubled companies such as Air France and Credit Lyonnais, which have required large cash infusions from the Government in recent months, are unlikely to be offered for sale until they can show prospects of becoming profitable. Difficult economic times in Europe, along with ongoing losses at these companies, make quick corporate recovery seem unlikely. Nevertheless, the Government has made a positive start to its privatization program by reaching its 1994 target of raising fifty-five billion francs on receipts from sales of State assets. There is pressure to maintain this momentum and the Government has already set the same target of fifty-five billion francs again for its privatizations in 1995. There is comfort in the fact that the legal structure for these offerings is finally in place.