

« Categories and Characterisation of Shareholders in France, Status and Prospects: the Key Points».¹

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Becoming a shareholder in France: a timely issue?

Such a question is crucial if not vital in setting up and developing companies. In the existing economic downturn and political turmoil, such a question seems critical in various debates about recent changes in French legislation regulating the management, finance, restructuring or sale of companies. The peculiarities of French capitalism have been the subject of widespread public discussion, along with the various recent M&A transactions as well as the changes in shareholder identity and structure, in particular with regard to French listed companies. New laws and regulations enacted by present and past legislatures (whether predominantly to the left or right politically) reflect the general recognition of the need to address some changes benefiting shareholders and companies, as a matter of urgency.

The following key points are presented by the author:

1- The French Civil Code provides no definition for “shareholder” (although it does define “company”), yet nonetheless quotes various rules as to the rights and obligations of shareholders in general. Not all such rules are mandatory but must be considered as component elements defining the shareholder’s status, which definition remains affected by the ambivalence of the legal nature of the company: both contract and institution.

2- Shareholders and creditors are part of the same query: how to finance companies? An investor may choose to be either a shareholder or creditor, or, as the case may be, both, cumulatively or subsequently. Though the prerogatives respectively of shareholders and creditors are likely to converge, especially as a result of agreed market terms and conditions (covenants and undertakings) of bonds and other syndicated credits granting specific rights to creditors to veto some company’s decisions, the basic legal condition of each of them in terms of overall rights and obligations remains separate.

3- The status of shareholders is basically the result of the apportionment of business risk amongst the various types of shareholders as well as between them and creditors.

4- A definition of shareholder comes necessarily, although only partially, from the definition of shares (a shareholder has first of all to hold shares) and mainly from the doctrine that a shareholder is entitled to specific rights and prerogatives allowing it to be (indirectly) involved in the management of the company and to share profit.

¹ This abstract relates to the article, titled in French « *Catégories et figures d’associés en France, perspectives et proposition de grille de lecture* », which is a result of research works made within the research team « E.A. Patrimoine et Entreprises » at the University of Corsica « Pasquale Paoli » and presently released under the sole responsibility of the author.

5- There is little doubt that when categories of shareholders are based on certain legal criteria, the distinction between majority and minority shareholders remains the most pertinent in examining the various shareholder types (including any classification of the various types of shares, notably ordinary versus preferential shares)

6- The legal framework of shareholders takes into account the following: (i) some restrictions may come from the individual or personal status of each shareholder, (ii) distinctive features granted by law or in the by-laws or by agreement to some types of shareholders have recently developed, introducing unbalanced treatment between the shareholders in terms of powers and revenues, (iii) listing of companies on an exchange, not yet extended to small and some middle-size companies, has become more and more complex and costly, and the rules governing takeovers through public offers reveal substantial drawbacks, (iv) corporate law as well as tax law provides tools (legal engineering) especially used for leveraged transactions, which affect the set up of a company and/or the participation in its management and/or the sharing of its result compared to usual shareholder rights and obligations, and (v) corporate governance has come initially to provide additional controls on the management by the shareholders, and such restored powers may have led to unsustainable demand and perhaps liabilities in terms of shareholder value, which affects various interests: the long term business plan of companies, the employees and other stakeholders, and finally a sort of public interest.

7- Economic policies have boosted the need to change the legal framework of shareholders in France (as presumably in most countries) and a new profile of shareholders has developed, acting more as financial partners looking at maximizing shareholder value as a mantra.

8- New expectations and constraints (such as ESR but also a “better”—in the sense of fairer and more durable—distribution of profits among the various stakeholders, including employees, suppliers and customers) arise from social pressures and government authorities in the name of public interest. These expectations and constraints concern how companies conduct their business in accordance with new standards that go beyond currently applicable laws, objects clauses and by-laws and which, from the shareholders point of view, may affect key legal concepts such as ownership, freedom of action, and contract.

9- The shareholders are not only divided into various and antagonistic categories but also deprived collectively, to some extent, of their rights to have the company managed as they want: the French case concept of “*intérêt social*”, which is mainly applied to check the appropriateness of management’s decisions, is deemed to be based on the company’s interest, different from the shareholders’ interest (even that of the majority shareholder(s)).

10- A simple overview of the main players acting as shareholders allows a better understanding of what French capitalism today really looks like. Financial investors and the French State, often quoted by the media, give the impression of playing a renewed and important role as shareholders in the context of the French economy, even if, as a matter of fact, their importance to the overall economy is still far less than the sum total of family businesses. In this context, the overall control at the macroeconomic level by the French State (notably through competition and tax laws), although potentially deterrent of the decision to invest, helps the State to master, more or less, a large category of short term investors as well as shareholders acting not only on their own behalf but also in the name of the public interest and on a long term basis. Such means, together with incentives, are often determining for investors but are not considered exclusive of direct or indirect acquisition by the French State of shares of companies (up to full control) in strategic areas or socially sensitive circumstances. In addition the developing trend of employee-shareholders and the so called and recently highlighted scheme of “social economy” (“*économie sociale et solidaire*”) seem promising in the light of new ethical requirements for management, although to date, in some cases, they do not show strong results.

11- The taxonomy of shareholders, necessary to understanding of the global picture, is clearly more than economics- or finance-driven. It is in essence a political issue with all related ramifications, as it speaks essentially of governance issues or allocation of power within companies, as well as allocation of profits outside companies. Comparisons between France, Germany and the UK already give some clues as to how significant differences in the empowerment of management depend on the type of governance that is put in place. But what are the expectations and reasoning of international shareholders who invest and are present and active in companies in all such jurisdictions, as they know they will be subject to various or contradictory conditions or restrictions? This is a subject that is still unclear and merits more discussion. Interest in governance and shareholding is in any event a political concern of the legislative power, which, while attempting to compete with other countries for investment, is charged with reconciling conflicting interests of the various players.

12- Actually, as the shareholder's status is of a hybrid nature, a matrix gathering all types of shareholders could be considered, schematically based on a major horizontal axis representing (i) shareholders giving priority to influencing, if not overseeing, the management of the company (including specific rights and prerogatives) versus (ii) shareholders who are satisfied with a given level of risk and profitability, without involvement in the management of the company. The vertical axis would represent the different types or categories of shareholding, including the various tools used by such relevant type or category (such as type of shares or other categories established by specific provisions of law, by-laws or other agreements). It's reasonable to believe that the main shareholder players as described could be allocated along the axis of this matrix.

Finally, French capitalism needs an improved or a new business model for companies as well as some major reforms in terms of reduction of the national debt and labor associated costs which are likely to affect its so called economic and social model. Furthermore, it still bears the marks of the recent and continuing (moral and financial) crisis and then is not yet as successful as it should be. This despite the relative consensus of the main political streams from the right to the left on what is needed to improve its efficiency (including as concerns the much debated role of the French State). Subsequently the legal, and more especially the tax, frameworks seem insufficiently legible and stable from the investor's point of view, likely in part because one of the side effects of political alternance is unfortunately the "back and forth effect" on the lawmaking process.