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## REVIEW

of Pepper D. Culpepper, ‘Quiet Politics and Business Power: Corporate Control in Europe and Japan’ (Cambridge University Press, 2011)

### CORPORATE GOVERNANCE OR CORPORATE GOVERNMENT?

*By BENJAMIN FARRAND\**

### CORPORATE GOVERNANCE OR CORPORATE GOVERNMENT? - A REVIEW OF PEPPER D. CULPEPPER’S ‘QUIET POLITICS AND BUSINESS POWER’

BENJAMIN FARRAND

‘Quiet Politics and Business Power: - Corporate Control in Europe and Japan’<sup>1</sup> is the new book by Professor Pepper D. Culpepper, currently based at the European University Institute in Florence, Italy. In this ambitious work, Culpepper seeks to address the question of how corporate interests can shape policy. In order to do so, the book adopts a case-study methodology, analysing how corporate actors have been able (or not) to influence the development of law relating to corporate governance and hostile takeovers, focusing on examples taken from France, Germany, the Netherlands and Japan. While being a work that falls categorically into the field of political sciences, it nevertheless is of value to lawyers and legal academics who wish to go beyond the question of *what* corporate governance is, and ask *why* corporate governance develops in a certain way.

In Chapter 1, Professor Culpepper seeks to explain that whereas some writers in the field believe that regulation of issues such as the hostile takeover of companies is an ideological issue with legislative control (or protection) being

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<sup>1</sup> Pepper D. Culpepper, *Quiet Politics and Business Power: Corporate Control in Europe and Japan* (Cambridge University Press, 2011).

favoured by left-leaning political parties<sup>2</sup>, differences in regulatory mechanisms are not ideologically based, but are determined by '*political salience*'. Culpepper defines political salience as being the importance of an issue to the average voter, relative to other political issues<sup>3</sup>. In other words, where an issue is of high political salience, or of high importance to voters, then politicians are likely to exert strong influence over the direction of policy, most likely along ideological grounds (such as, for example, when dealing with issues such as income taxation). Where issues are of low political salience, Culpepper argues, then issues are decided through 'quiet politics' as the issues are regarded as being of low political importance to voters, and corporate actors are much more able to determine the direction of policy. One such area, according to Culpepper, is corporate governance. Due to the limited public interest in such subjects, corporations and corporate lobbying groups have much more influence over corporate structuring. Furthermore, as these bodies are deemed to be experts in their fields, corporate representatives are substantially (and sometimes over-) represented on political committees concerned with corporate regulation. Culpepper provides an empirical framework for analysis of these issues in Chapter 2, where change and stability in markets is examined, taking into account both the number of hostile takeovers attempted and the number of successful takeovers. Culpepper presents this somewhat complex information in a systematic and effective manner, making frequent use of tables that help to break down information into digestible statistics. While perhaps unsurprisingly the liberal free-market countries such as the United States and the United Kingdom dominate the tables of hostile takeovers attempted and achieved, countries such as Germany and the Netherlands demonstrate strong markets of patient capital – companies are predominantly characterised by concentrated ownership and few hostile takeovers. In comparison, France and Japan have seen higher drops in stable ownership<sup>4</sup>. Yet what explains these differences?

Chapter 3 brings Culpepper's hypothesis that political parties and political ideology are not the main reason for changes in corporate governance. Both France and Germany saw left-leaning political parties come to power in the period between 1995 and 2006, yet the legislative efforts on hostile takeovers

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<sup>2</sup> Culpepper refers here to works such as John W. Cioffi, Martin Höpner, '*The Political Paradox of Finance Capitalism: Interests, Preferences, and Center-Left Party Politics in Corporate Governance Reform*' [2006] 34(4) *Politics & Society* 463 and Yves Tiberghien, '*Entrepreneurial States: Reforming Corporate Governance in Germany, Britain, the United States and Japan*' (Cambridge University Press, 2007).

<sup>3</sup> Pepper D. Culpepper (n 1) 4.

<sup>4</sup> Pepper D. Culpepper (n 1) 37.

differed significantly. According to Culpepper, these differences reflected the differences in managerial structures and objectives in both countries whereas German company managers preferred concentrated shareholding, French companies focused more on being competitive internationally and therefore relied more upon international capital markets, which favoured company deconcentration. As a result, German companies lobbied extensively against adoption of certain clauses seen as unfavourable to concentrated shareholding in the EU Takeovers Directive<sup>5</sup>, whereas French companies lobbied strongly in favour of them. As a result, Germany and French transposition of the Directive matched closely the desires of their respective companies. Due to the low political saliency of the issues involved, corporations were able to achieve their desired objectives through both formal mechanisms such as influence over the transposition of Directives, and informal mechanisms such as internal preferences on the structure of the companies involved. In Chapter 4, which considers the example of the Netherlands, Culpepper argues that while protections against hostile takeovers are formalised through legislation, this is not due to a ‘corporatist coalition’ of neoliberal parties existing between 1994 to 2006, but due to the low political saliency of issues of corporate control. Voters, it is argued, were much more focused on high saliency issues such as taxation and immigration for much of this time<sup>6</sup>, and therefore the issue was not of primary concern to political leaders. According to a quotation from the former Minister of Finance, Gerrit Zalm, *I would never make a cabinet crisis on a corporate issue. I would make a cabinet crisis on budgetary policy or social insurance or tax reforms*<sup>7</sup>. This is due to the low political saliency of the issue voters care about social insurance, and less so about corporate takeovers. This means that in the Netherlands, corporate regulation was often left to informal committees comprised substantially by corporate managers, who were left to dictate the specifics of particular acts of legislation. Chapter 5 considers the case of Japan. Unlike in the other examples, where governmental decisions coincided with the interests of companies, ultimately in the Japanese case, ‘quiet politics’ were less useful to Japanese company managers, due to the high salience of issues of corporate control. Before 2004, Japanese company managers were highly influential in the development of takeover legislation. However, in 2005, corporate control developed into a high salience issue. The issue surrounded the concept of ‘triangular mergers’, where a company could create a subsidiary company in order to merge with a third company, yet do so on the basis of the combined shares of parent and subsidiary company.

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<sup>5</sup> Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

<sup>6</sup> Pepper D. Culpepper (n 1) 113.

<sup>7</sup> Ibid.

Japanese companies were strongly opposed to the adoption of legislation legitimising such mergers, as it would leave Japanese companies open to hostile takeover bids by foreign investors. Despite the strong lobbying of Japanese companies, Japanese legislators nevertheless adopted legislation that allowed for triangular mergers. This refusal to accede to the wishes of corporate actors, argues Culpepper, is due to the saliency of the issue. According to his argument<sup>8</sup>, the issue of hostile takeovers was highly mediatised in Japan post-2005 due to a high profile hostile takeover whereas prior to 2005 there were less than one article per month in Japanese newspapers relating to hostile takeovers, in 2005 and 2006 there was an average of 25 per month<sup>9</sup>. Because of the strong media focus and apparent interest of the public in this matter, legislation was determined along party political lines through formalised institutions, rather than through informal management structures and corporate lobbying.

The argument of political saliency brought by Professor Culpepper therefore helps to convincingly explain why in some fields corporate actors fail to gain their desired outcomes if corporate policy was solely a question of lobbying and the view that ‘money talks’, then it would appear logically consistent that corporations would achieve their desires no matter the saliency of the topic at hand, and that Japanese company managers would have been able to water-down or even drown the legislation pertaining to triangular mergers. However, in areas of high political salience, even where substantial amounts of money are used in lobbying, corporate players are not guaranteed success. While they may still be highly influential, ideology and voter preference will become more important. This is expanded upon in Chapter 6, where Culpepper considers the issue of executive pay. Traditionally considered an issue of low salience, executive pay has increasingly become an issue of high political salience. Due to scandals such as the Enron scandal which broke in 2001, which combined high executive pay with perceived executive incompetence, issues of pay became highly salient issues in the US, with an increase from 184 articles to 545 articles per year in the New York Times, Washington Post and Wall Street Journal alone. Where political salience is high, companies are not able to rely on quiet politics, and must instead seek to rely more directly on partisan political protection, and try to counter or change public opinion<sup>10</sup>. In the case of executive pay, Culpepper argues, public outrage over the fallout of the Enron crisis meant that despite extensive lobbying from corporations, a neoliberal centre-right government nevertheless introduced sweeping legislation to

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<sup>8</sup> Ibid, 128-132.

<sup>9</sup> Ibid, 129.

<sup>10</sup> Ibid, 175.

regulate executive remuneration. In comparison, in France the issue was much less salient, and until 2009, Nicholas Sarkozy left executive pay as a matter of self-regulation by the companies. In 2009 however, a series of pay scandals and the economic crisis more generally began to change public perception of executive remuneration, and developed high political saliency. As a result the Sarkozy administration, also representing neoliberal centre-right economic policy, acquiesced to demands for legislation governing executive pay.

It is this reviewer's belief that Professor Culpepper presents a very convincing argument. '*Quiet Politics and Business Power*' helps to explain why, when it comes to issues of corporate governance, centre-left governments have often allowed businesses to self-regulate and have legislated strongly in their favour, yet has also explained why centre-right administrations have in some instances legislated strongly against the interests of corporations. By engaging in comparative analyses of hostile takeover legislation in several states, and using process tracing to determine not only how legislation is formulated but how governmental policy is changed by increased mediatisation and public interest in an issue, Culpepper provides a robust argument for considerations of corporate regulation which go beyond considerations of party ideology and pragmatism. As such, this book may be of great benefit to lawyers and legal academics seeking to adopt an inter-disciplinary approach to issues of corporate governance which address not only questions of what corporate governance is and what laws dictate the regulation of corporations, but why and how corporate governance regulation comes about.