

UPDATE ON TAKEOVERS IN FRANCE

Enforcement Aspects of Takeover Regulations
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Update on takeovers in France

- Major reforms introduced in 2006
- Acting in concert in the Sacyr/Eiffage case
- Annex for information: French rules on foreign investment

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I. Major reforms introduced in 2006

Act of Parliament of 31 March 2006, new AMF regulations in effect since 2 October 2006 (inter alia, implementing the takeover directive)

1. Mandatory bid requirements little changed

- Triggers include exceeding alone or in concert 33.33% of shares or voting rights, and acquiring control of a holding company possessing 33.33% where this is an essential asset of the holding company.
- The law now *explicitly* requires consideration equal to the highest price paid by the bidder or concert party over previous 12 months. This criteria was already largely reflected in AMF practice, and remains subject to review by the AMF on a case-by-case basis (side agreements, exchange offer...).
- However, for both mandatory and voluntary bids, new requirement for a cash alternative if purchases for cash > 5% over previous 12 months.

2. Enforcement aspects of bids

- Under company law, suspension of voting rights if no mandatory bid
- AMF will not allow any offer to open if applicable rules not complied with
- The cash component of all offers must be underwritten by a bank, and the bidder must either have authority to issue any securities as consideration or undertake to call a shareholder meeting as quickly as possible
- AMF may use its investigatory or injunctive powers or issue a fine

I. Major reforms introduced in 2006

3. New framework for defensive action by target

Principle: shareholder authorisation during the bid

- France has implemented art. 9 of the takeover directive requiring “board/management neutrality” during a bid. The board/management must obtain the approval of the shareholders in general meeting before adopting any measure that might frustrate a declared bid.
- This does not appear to represent a major change in French regulatory practice, based on long-standing principles of “fair competition” and “free interplay of bids” in AMF Regulation and “corporate interest” (*intérêt social*) doctrine in company law (cf. AMF disapproval of envisaged dilutive Plavix warrants never issued by Aventis).

The new French “shareholder rights plan”

- In order to enhance legal certainty, company boards are now explicitly authorised, provided the shareholders in general meeting have so decided (by a simple majority) during the offer period, to issue free of charge to all shareholders, warrants allowing the holders to subscribe for new shares on preferential terms (the warrants automatically lapse upon failure or withdrawal of the bid). No situations to date have raised the possibility of implementation of such “rights plans”.

I. Major reforms introduced in 2006

3. New framework for defensive action by target (cont'd)

The reciprocity clause

- In addition to implementing art. 9, France has implemented art. 12-3 allowing a target to take defensive action against a bidder that is not subject to art. 9 or equivalent restrictions (or is controlled by a company not so subject), provided that the shareholders in general meeting have expressly authorised such action by the board no more than 18 months before the bid. Shareholders of many companies have authorised such action.
- Under these conditions, the board may take defensive action (e.g. creating a “rights plan” or “poison pill”) without convening the shareholders during the bid. No such action taken, or threatened, to date.
- The law provides that the AMF shall rule on any dispute regarding the equivalence of the restrictions applying to the bidder (e.g. third country bidders). No use of the reciprocity clause to date, so no challenge either.

“Breakthrough” of structural (pre-bid) impediments to bids

- France has not implemented art. 11 per se of the directive but new statutory provisions have confirmed French regulatory practice prohibiting restrictions on share transfers to bidders and requiring “breakthrough” of any cap on voting rights of a bidder having acquired 66.67% of the target’s shares or voting rights. Also, undisclosed first refusal clauses in shareholder agreements remain unenforceable during a bid.

I. Major reforms introduced in 2006

3. New framework for defensive action by target (cont'd)

Enforcement aspects

- French companies must comply with French company law; violations may result in criminal fines, shareholder suits and/or void or unenforceable contracts.
- The AMF may be called upon to advise companies or courts about legal compliance in market-related areas such as takeovers.
- In the future the AMF may be called upon to advise upon “frustrating action” or rule upon “equivalent restrictions”
- Some legal provisions are self-enforcing e.g. any restrictions on share transfers to bidders would be unenforceable and any undisclosed first refusal clauses in shareholder agreements would be unenforceable during a bid (specific provisions in company law).
- AMF may use its investigatory or injunctive powers or issue an administrative fine; this is a complex area because of the mix of company law and market regulation.

I. Major reforms introduced in 2006

4. Disclosures by potential offerors

- Where there are “reasonable grounds for believing” that a person is “preparing” a bid, in particular in the event of substantial market movements in the securities that appear to be due to leaks by such a person or his advisers, a new statutory provision enables the AMF to set a date by which that person is required to publicly disclose his intentions:
 1. Should the person deny any intention to make a bid or not respect the disclosure deadline, the AMF shall be able to refuse a bid by that person or any concert party for 6 months unless a material change in the relevant circumstances can be shown;
 2. Should the person declare an intention to make a bid, the AMF shall set a further date by which a new announcement must be made. This second announcement must contain the terms and conditions of the bid, any preconditions to the filing of the bid and an indicative timetable. Failing such an announcement, the AMF would be able to refuse a later bid.
- Implementation of this new regime has shown that the AMF board has broad powers to interpret “reasonable grounds” and to set the disclosure deadline, and that a declaration saying that a person “is considering all the options” (a “holding announcement”) is unlikely to be allowed

I. Major reforms introduced in 2006

5. Content and publication of offer documents

The AMF rules concerning bid documentation have been considerably modified:

- the circular prepared by the offeror must still be approved by the AMF prior to the opening of the bid, but now this circular focuses on the terms and conditions of the bid and the draft is immediately posted on the AMF website upon filing (with an appropriate “warning”);
- the additional information required (e.g. financial statements) must be made public prior to the opening of the bid and is then reviewed during the bid by the AMF. The AMF requires such amendments as are necessary to ensure that full and accurate information is available at least five business days prior to the close of the bid (the AMF will extend the acceptance period for this purpose);
- the response circular of the target must contain the “reasoned opinion” of the board and the outcome of the board vote as before, but now it must also contain the full fairness opinion if such an opinion is required.

I. Major reforms introduced in 2006

6. AMF statement of compliance and timetable

- The AMF rules on both disclosure, and terms and conditions of bids. Henceforth, a single decision, based on the bid circular prepared by the offeror as well as the respect of principles such as equal treatment of shareholders, encompasses both approval of the circular and authorisation of the bid.
- The “statement of compliance with applicable requirements” is no longer based on an examination of the offer price. The AMF only examines *inter alia* the information provided on how that price was determined as well as the characteristics of any securities offered in exchange. It also examines the proposed consideration in cases requiring a fairness opinion, and of course ensures compliance with any applicable minimum consideration requirement such as for mandatory bids.

I. Major reforms introduced in 2006

6. AMF statement of compliance and timetable (cont'd)

- No later than 5 business days after publication of the AMF statement of compliance, the target should file its draft circular in response which is immediately posted on the AMF website.
- The bid opens the first business day following publication of the approved version of either the offeror's circular, the circular jointly prepared by the offeror and target, or the target's response circular where a fairness opinion is required.
- The normal duration of the acceptance period (no anti-trust issue, no competitive situation) for a full bid (involving change of control) is 25 business days, or up to 35 business days where the target does not prepare a joint bid circular with the offeror.

I. Major reforms introduced in 2006

6. Fairness opinions (cf. 2005 Naulot report)

- The requirement to appoint an independent expert has been extended to transactions other than squeeze-outs (long-standing requirement by the AMF that approved the expert) and mergers (long-standing company law requirement for court-appointed expert)
- The new rule requires an independent expert in all situations where there is “a conflict of interest within the board that may affect the objectivity of its reasoned opinion regarding the bid or the equal treatment of shareholders” (it would be relatively difficult for a shareholder in a French company to sue successfully a director in such circumstances)
- Examples of such situations given in AMF regulations include:
 - the offeror is the controlling shareholder of the target
 - the board/management or controlling shareholders of the target have entered into an agreement with the offeror that may affect their independence
 - side agreements may affect materially the consideration offered
- No fairness opinion, however, is required for the new fast-track squeeze-out procedure (i.e. where a full bid by a non-controlling offeror has resulted in such offeror holding more than 95%)

I. Major reforms introduced in 2006

6. Fairness opinions (cont'd)

- AMF regulations also :
 - prohibit the author of the fairness opinion being conflicted in relation to the target, offeror or their advisers (this may preclude the same expert being used repeatedly by the same advisor bank)
 - require that the expert be given a period of time adequate for his task and in any event not less than 15 business days
 - set the contents of the expert's report which must include a self-certification of independence, a description of the diligences performed and a comprehensive evaluation of the target (as well as the expert's remuneration). The conclusion of the report must be presented as a “fairness opinion”
 - prohibit the use of the term “fairness opinion” for any opinion that does not comply with AMF regulations
- AMF ensures compliance with all these requirements :
 - when a fairness opinion must be produced,
 - independence of the author of the report,
 - adequate time to draw up the report,
 - contents of the report, etc.

II. Acting in concert in the Sacyr/Eiffage case

• A recent cross-border case involving a creeping control attempt

- Prior to the April 2006 AGM of Eiffage, Sacyr had acquired 30% of the Eiffage shares, hoping to reach an agreement on business cooperation and have several of its representatives appointed directors of Eiffage
- Eiffage mgt. refused these advances (mgt. held 5% and employees 21%)
- Prior to the April 2007 AGM of Eiffage, Sacyr had increased its holding to 33.32% and several dozen other Spanish shareholders together held an additional 17.6%
- Meanwhile, the Eiffage stock price had risen by 60% in a few weeks, and the press had speculated on the overthrow of the Eiffage mgt. with the help of Sacyr's « allies »
- During the AGM, the Eiffage chairman refused to allow the other Spanish shareholders to vote based on suspected acting in concert with Sacyr and failure to disclose the consolidated interest of 51%
- The next day Sacyr filed a voluntary, unsolicited exchange offer with the AMF, stating that it is acting alone

II. Acting in concert in the Sacyr/Eiffage case

• A recent cross-border case involving a creeping control attempt

- In June 2007 the AMF rules that Sacyr has been acting in concert with at least 6 other Eiffage shareholders (holding 5%) in order to gain control while avoiding the mandatory bid requirement
- the AMF ruling describes the evidence brought to light by the AMF investigation showing a « concerted collective course of action » intended to overthrow Eiffage mgt. and combine the two companies: mixture of facts (Sacyr's behaviour before, during and after the AGM, personal and business ties between the parties, unexplained financing of purchases made by the allies, emails, press interviews...) and deductions (tacit, undisclosed agreement among the parties to obtain control)
- the ruling states that the exchange offer had been planned for months with a view to providing an exit for Sacyr's allies
- the ruling states that Sacyr breached the basic principles of takeover regulations, i.e. transparency, integrity, fairness and free competition
- the ruling concludes that the Sacyr voluntary bid is non compliant, Sacyr must file a mandatory bid, including a cash alternative at least equal to the highest price paid over the preceding 12 months

II. Acting in concert in the Sacyr/Eiffage case

- **A recent cross-border case involving a creeping control attempt**
- In April 2008 the Paris Court of Appeal rules on the June 2007 AMF decision confirming the AMF's finding that Sacyr and a group of 6 other shareholders had been acting in concert
 - the Court acknowledges a « concerted action with a common goal consisting of uniting together to attend the AGM and impose changes to the mgt. and a business combination »
 - The ruling highlights the secretive nature of the concert parties' manoeuvring which violated French disclosure requirements
 - The ruling interprets however the AMF order requiring Sacyr and its allies to launch a mandatory bid as an « injunction » which should have followed a specific statutory procedure and was therefore declared invalid
- Epilogue: Sacyr disposes of its entire stake in Eiffage a few days later...
- Lessons: clarification of the concept of concerted action in novel circumstances, illustration of the utility of investigations in such cases (first time in context of the review of a proposed bid)

Annex for information: overview of French rules on foreign investments

- NB. This is an outline for information only. The AMF plays no role in these matters and has no expertise in them.
- **EC law background**
 - The free flow of capital within the EU and between third countries and the EU is a right under Art. 56 of the EC Treaty.
 - This right is subject to the limited exceptions provided for by Art. 58 (measures to protect public order and public security) and Art. 296 (measures to protect interests of national defense).
 - Any restrictions under these headings, the scope of which must be interpreted narrowly, must be necessary and proportionate to the threat, must not be discriminatory, and must not violate the principle of legal certainty (i.e. must not be vague).

Annex for information: overview of French rules on foreign investments

- The provisions of French law
- Most foreign investments only require a post-closing declaration for statistical purposes.
- Foreign investments in certain « strategic » sectors however require prior authorisation by the Finance Minister.
- For the purposes of such prior authorisation, French law distinguishes between:
 - « EEA investments » consisting of the acquisition of control of a French business (usually one-half of the shares or voting rights but this also includes e.g. joint control) or acquisition of all or part of a « branch » of a French business by an EEA person,
 - « non-EEA investments » consisting of the acquisition of control of a French business (as just defined), acquisition of all or part of a « branch » of a French business, or acquisition of one-third of the shares of a French business by a non-EEA person.

Annex for information: overview of French rules on foreign investments

- The provisions of French law (cont'd)
- Such investments require prior autorisation where certain defined activities are involved:
 - for non-EEA investments, this includes casinos, lotteries and other forms of gambling, IT security, private security and surveillance, encryption technology, arms production and defense contracting, and R&D related to anti-bioterrorist activities,
 - for EEA investments, this includes only certain of these activities (casinos, encryption technology, arms and defense contracting..) and only in certain limited circumstances (depending e.g. on the specific clients or specific types of products, and for specific reasons e.g. related to anti-money laundering or anti-terrorism)
- The Minister may refuse the autorisation by a reasoned decision which may be based on possible criminal activities or more broadly on the preservation of national interests (e.g. where the activities might be delocalised outside France)
- The Minister may also impose conditions on the acquisition (e.g. fulfilment of public sector contracts or maintaining the activites in France)
- Non-compliance may result in an injunction/fine/void contract