



Update on implementation of the Takeover Directive in France

NEW LAW ON TAKEOVER OFFERS AND USE OF WARRANTS AS DEFENCE TACTICS

To implement the Takeover Directive, France has published a new law on takeover offers. This briefing looks at this law, including France's position on the Directive's optional articles and new defence tactics involving the issue of warrants in the event of a hostile bid.

To implement the Takeover Directive, France has published a new law relating to takeover offers which applies with immediate effect. Additional changes to the French securities regulator's (AMF) takeover regulations will be required to achieve full implementation of the Directive and these are expected in June 2006. As well as implementing the Takeover Directive, the new law introduces two defence tactics relating to the issue of warrants.

Implementation of the Takeover Directive

France's final position on the optional articles of the Takeover Directive

The new law confirms the position France was expected to take on the optional articles of the Directive. France has opted into article 9 of the Directive (prohibition on frustrating action) and will apply reciprocity in respect of article 9. France has formally opted out of article 11 (breakthrough), although two provisions were already part of French law and practice (and remain in force) and French companies will be able to adopt the other provisions on a voluntary basis. Reciprocity will not be permitted in respect of article 11.

France has also maintained its broad interpretation of reciprocity. In France target companies will be able to take reciprocal action in the event of a bid by any bidder, including unlisted and non-EU companies. In the case of multiple bidders and concert parties, it will be sufficient for one of the parties not to apply article 9 of the Takeover Directive (or equivalent measures) for the

target company to be released from the restrictions of article 9 against all of the bidders.

Finally, the law does not include any details on what are 'equivalent measures' in the case of a foreign bidder. Early indications from the AMF suggest that the burden of proof will be on the bidder to show that it is subject to equivalent restrictions and that the AMF is likely to be reluctant to take a formal position itself.

Other changes to French takeover laws

Other changes to French takeover laws introduced in previous drafts of the law have been confirmed or clarified in the final version:

- the introduction of provisions on 'put up or shut up' orders;
- the minimum price requirement for mandatory bids will be the highest price paid for target company securities in the 12-month period before the launch of the bid. A bidder does not have to offer a cash alternative on a mandatory bid;
- a bidder will be able to start the squeeze-out procedure within three months of the end of the main bid at the same price. It may include a share element and may also extend the squeeze-out offer to equity-linked securities; and
- there are increased employee consultation obligations, including the obligation to provide details of the bidder's business plan for the target company to the target company's works council.

Introduction of new defence tactics

The closing stages of negotiations on the new law focused on defence tactics, including specific changes to permit the issue of warrants to all target shareholders in the event of a hostile bid, similar to a rights plan in the US (shareholder warrants), and the clarification of how existing provisions of French law may be used to issue equity-linked securities to a white knight (white knight warrants). In each case, the relevant warrants may be issued by the directors of a target company during an offer period if this has been authorised by shareholders in advance and if reciprocity applies. If not, specific shareholder approval will be required during the offer period.

Shareholder warrants

The issue of shareholder warrants has been justified primarily on the grounds that they are designed not to prevent a hostile bid from succeeding, but to ensure that the bidder has to negotiate with the target board, which is likely to result in the bidder having to increase its bid.

The law contains few details on the terms that will be allowed for shareholder warrants. The shareholder warrants must be issued for free, they can be exercised on 'preferential terms' (ie at a discount) but cannot discriminate between bidders. There is no need for the shareholder warrants to be listed or transferable. The beneficiaries of the shareholder warrants will be all of the target company's shareholders as at a reference date no later than the end of the offer period (ie the publication of the result of the offer).

The warrants proposed by Aventis as part of its defence against Sanofi's hostile bid are likely to be used as a starting point for setting the terms for the shareholder warrants. Although the AMF considered the warrants proposed by Aventis as contrary to its regulations, it is unlikely to be able to adopt the same position regarding the shareholder warrants, as parliament has formally voted for them to be used as a defence tactic.

The shareholder warrants may be issued during or after the offer period. The aim of issuing shareholder warrants after the end of the offer period would be to dilute a successful bidder at a time when its only option would be to make a new bid for the additional shares issued upon exercise of the warrants. In this case, the target company would be required to announce its intention to issue the

warrants before the end of the offer period, presumably to allow the bidder to withdraw its offer (for which it would require the approval of the AMF).

The issue of shareholder warrants during an offer period is likely to raise more practical issues, because it would give the bidder an opportunity to react to the issue at a time when its offer is still live. In addition to the likelihood of the AMF allowing the bidder to withdraw its bid in these circumstances, bidders might try to factor in the issue of the warrants to its offer terms to try to neutralise the effect of the shareholder warrants.

White knight warrants

The ability of companies to issue white knight warrants does not require any change to French law and the new law relating to takeover offers only includes an oblique reference to them (details of how the white knight warrants would work were included in a second report on the law relating to the Takeover Directive from Senator Marini published on 13 February 2006).

The issue of white knight warrants to a 'category of investors' would be approved by shareholders ahead of a takeover offer. In the case of an offer to which reciprocity applied, the target board would be able to issue equity-linked securities to one or more investors of their choice from the category defined by shareholders.

Like shareholder warrants, the principal terms of the white knight warrants will be left to negotiations between directors and shareholders and it is likely that the two types of warrants will be similar in certain respects, such as being issued for free. However, the absence of a specific legal basis to confirm the validity of white knight warrants as a defence tactic means that there is more legal uncertainty surrounding them than shareholder warrants.

In particular, the principal concern is likely to be whether the issue of white knight warrants complies with the AMF's general principle of free competition between bidders. In this respect, the characteristics of the white knight warrants will be key to determining their validity – for example, whether the white knight is required to launch an offer and whether the white knight warrants are exercised at a discount.

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