



Important changes to French takeover regulations

The AMF published an amended version of its general regulations last month to bring them in line with recent changes to French law as part of the implementation of the Takeover Directive in France. It also published a number of practice notes and recommendations relevant to public takeovers. The new regulations introduce a number of important changes that will affect how public bids are conducted in France.

New regulations in France introduce important changes that will affect the way public bids are conducted. The Autorité des marchés financiers (AMF) published an amended version of its general regulations on 28 September 2006 (the AMF Regulations) to bring them in line with recent changes to French law as part of the implementation of the Takeover Directive in France (the Takeover Law). On the same date, it published a number of practice notes (*instructions*) and recommendations relevant to public takeovers. Please see the box at the end of this briefing for links to the principal texts.

We summarise the main changes below.

Pre-bid conduct

Although the triggering event for the start of an offer period remains the formal filing of an offer with the AMF, the conduct of the bidder before the filing of the bid is now subject to tighter regulation and can have a greater impact on the conduct of the bid itself.

Announcement of bidder's intention

The AMF Regulations set out the details of the new 'announcement of intentions' regime introduced by the Takeover Law following speculation surrounding a possible bid by PepsiCo for Danone during summer 2005. Under the AMF Regulations, the AMF may request a person it has reasonable grounds to believe is preparing a bid to make its intentions public.

If the person announces its intention to launch a bid, the AMF will fix a date by which the terms of the offer must

be made public, or the offer formally launched. If the person announces that it does not intend to launch a bid or fails to comply with the AMF's requirements to disclose the terms of the bid, the potential bidder will be precluded from launching a bid for the same target during a period of six months unless 'important changes occur in the situation or shareholding of the relevant parties, including the potential bidder'.

The requirement for the potential bidder to announce its intention is triggered by significant movements in the price or trading volumes of the target company's securities as monitored by the AMF. The AMF will also have to identify the potential bidder and have reasonable grounds to believe it is preparing a bid. The AMF Regulations specify situations that could indicate the potential bidder is preparing a bid, including discussions between the parties and the appointment of advisers. However, in practice both of these events are likely to occur early in the pre-bid process, when the possible bidder may not have any clear intention to announce. Although the AMF Regulations are not entirely clear on this point, in this situation it should be possible for the bidder to negotiate with the AMF to delay its announcement.

Restrictions on market purchases

The announcement of an intention to launch an offer under the new declaration of intention regime also triggers the following offer period rules on market purchases (which otherwise apply from the time of formal launch of the bid): (1) restrictions on the ability

of the parties (and their financial advisers) to make market purchases other than in relation to a cash only bid that is not subject to any conditions; and (2) daily trade reporting obligations for the parties, their directors and financial advisers and significant shareholders.

Impact on offer price for mandatory bids

The AMF Regulations introduce a new requirement for a mandatory bid to be launched at a price at least equivalent to the highest price paid by the bidder (and concert parties) during the 12 months before the launch of an offer. The AMF has the discretion to require or authorise a mandatory bid to be launched at a different price where justified by a 'manifest change to the characteristics of the target company or the market for its securities'.

Although not specified in the AMF Regulations, it is thought that any such change would have to be outside the ordinary course of business and could not, for example, be simply a significant decrease in the target company's share price over the relevant period (in the absence of any specific event). Likewise, it is not clear how the new rules would apply to a mandatory bid made by way of a share exchange offer without a full cash alternative.

Impact on offer consideration for all bids

Under the AMF Regulations, if a bidder has acquired more than 5 per cent of the target company's share capital or voting rights in cash during the 12 months before the launch of the bid, the terms of its offer must include a full cash alternative. This requirement applies to voluntary and mandatory bids.

New form of offer document

Three important changes have been introduced to offer documents prepared in connection with a bid in France.

Structure and content of the offer document

The structure of the offer document has been split into two separate documents.

- The terms of the offer and information relevant for shareholders in deciding whether to tender their

shares to the offer (eg the bidder's intentions for the coming 12 months and the target company's response to the offer) remain in a formal offer document to be prepared by each of the bidder and target company (or jointly).

- Factual information of a purely legal, financial or accounting nature will be included in a separate information document to be prepared by each of the bidder and the target company.

The bidder's and target company's formal offer documents continue to be subject to review and approval by the AMF before the opening of the offer acceptance period (see 'Merger of AMF review of offer document and offer terms' below).

The bidder's and target company's information documents, which have to be published no later than the opening of the offer acceptance period, will not be subject to the prior review or approval of the AMF. However, following publication, the AMF may require a correction to be disclosed if it considers that the information document 'omits significant information or includes a significant error'. The correction must be published five days before the closing of the offer acceptance period, which the AMF may delay for this purpose. In addition, at least one presenting bank must sign a responsibility statement (*attestation*) confirming that the information document contains all the information required to be disclosed (although this is unlikely to extend to the actual content of the information disclosed) and that all related documents have been filed with the AMF. The same responsibility statement is required from the relevant company.

The AMF published an updated *instruction* with the new AMF Regulations setting out detailed content requirements for offer documents. These are broadly in line with the previous regulations. However, there is increased emphasis placed on the disclosure of the bidder's business plan for the target company and ensuring that this is consistent with its intentions regarding the target company's employees for the first 12 months following its bid.

Publication of draft offer documents

The AMF Regulations introduce the requirement for the bidder and target company to publish their offer documents in draft form upon filing with the AMF. The publication is made on the company's website, with a copy of the draft offer document being sent to any person who requests a copy. There is no requirement for updated drafts of the offer document to be published as they evolve during discussions with the AMF.

The previous requirement for a detailed press release to be made upon the bidder's filing its draft offer document and the publication of final versions of the offer documents has been maintained.

Joint offer documents

The AMF Regulations limit the possibility for a joint offer document to be prepared. Under the new rules, where a fairness opinion is required (see below), other than in connection with a squeeze-out offer, the bidder and target company are required to prepare a separate offer document and response document, even if the bid is recommended. However, the separate offer document and response document may be filed simultaneously with the AMF.

Merger of AMF review of offer document and offer terms

The AMF Regulations bring together the AMF's review of the offer document (*visa*) and review of the offer terms (*avis de recevabilité*). Both reviews are now conducted together during a 10-day trading period (the previous review period was five trading days for each of the *visa* and the *avis de recevabilité*) and give rise to a declaration of conformity (*déclaration de conformité*) by the AMF.

In delivering the *déclaration de conformité*, the nature of the AMF's review of the offer price has changed. Under the new rules, this will be conducted through the AMF's control of the level of disclosure in the offer document rather than a standalone analysis of the offer price per se and the bidder will continue to be required to include a multicriteria analysis of the offer price in its offer document. Accordingly, it remains to be seen what consequences in practice (if any) will result from this change.

Fairness opinions

A key part of the AMF Regulations has been to introduce a new section on fairness opinions following a detailed review by a working group of experts in 2005 and a broad public consultation on the working group's recommendations. The key principles have been reflected, although the AMF Regulations have not adopted all of the recommendations. The AMF has also published an *instruction* and recommendations on how the new regime will operate in practice.

Situations where a fairness opinion is required

An independent expert is required:

- where a transaction is likely to:
 - give rise to conflicts of interest among the target board; or
 - threaten the equality of treatment of shareholders;
- where there is a share capital increase at a large discount in favour of an investor under which it acquires control of the 'target' company; or
- in the event of a squeeze-out (*retrait obligatoire*).

The AMF Regulations include a non-exhaustive list of situations of conflicts of interest where a fairness opinion is required. These include where the target company is already controlled by the bidder and where there are a number of ancillary transactions related to the main bid that are likely to have a significant impact on the offer price.

The principal responsibility for appointing an independent expert to deliver a fairness opinion lies with the target company, although the bidder may also appoint one itself.

Independent expert

The appointment of an independent expert is no longer subject to the prior approval of the AMF. However, the expert is required to confirm in its formal valuation report that it does not have any prior, current or known future relationship with the parties concerned by the offer, including their advisers. The expert's independence is further protected by the rules on fees, which must be fixed, not dependent on the outcome of the offer and paid only by the company in respect of which the report was prepared.

A minimum period of 15 trading days is required between the appointment of the independent expert and the finalisation of its report. A practice note sets out the content requirements for the independent expert's fairness opinion report.

In a situation where a fairness opinion is required (other than for a squeeze-out offer), it is not possible for the bidder and target to prepare a joint offer document. In these situations, a copy of the fairness opinion report has to be included in the target company's response document, although the target company may elect to exclude certain information from the fairness opinion report in its offer document to 'protect its own interests'.

Increased flexibility for share exchange offers?

The AMF Regulations provide that the offer must include a full cash alternative where shares offered as consideration in a share exchange offer are not listed on a regulated market in the European Economic Area. This implies that it is now possible for a bidder to offer unlisted securities as consideration, which would mark a significant shift in AMF policy if it is confirmed in practice by the AMF.

Offer timetable

The AMF Regulations do not bring about any fundamental changes to the offer timetable of a French bid, save for the increase in the AMF's review period of the offer terms and document and the requirement in certain situations for the target company to appoint an independent expert to issue a fairness opinion (in which case the bidder and target company cannot prepare a joint offer document), both of which will affect the start of the offer acceptance period.

The AMF Regulations have also changed the end of the offer acceptance period by making the reopening of the offer for additional acceptances during an additional 10 trading day period automatic if the offer is successful.

Challenges to the 'equivalence' of defensive measures

The Takeover Law implemented article 9 of the Takeover Directive and adopted reciprocity, such that if a French company is the subject of a hostile bid from a company that does not apply the French restrictions on taking frustrating action, or 'equivalent measures', the French target company will be released from the restrictions of article 9 of the Takeover Directive.

Although the AMF Regulations set out the broad framework for challenging the equivalence of defensive measures, they do not specify how equivalence is to be established in the first place. For example, is there a presumption that every foreign bidder is deemed to be subject to equivalent measures until this is successfully challenged? Or does a foreign bidder have to include proof that it is subject to equivalent measures in its offer document? Likewise, there are no details on when the equivalence of the defensive measures may be challenged.

Once the challenge is launched, the target company has 10 trading days to comment and the AMF will render its decision within a further period of five trading days.

The AMF Regulations have also clarified the situations in which a bidder may withdraw its offer if the target company takes action during the offer period to change the offer's substance. Under the new drafting, the issue of shareholder warrants as a defence tactic by a target company during the offer would more than likely entitle the bidder to withdraw its offer (with AMF consent), even if the minimum acceptance threshold is reached.

Squeeze-out offers

The AMF Regulations have brought about a number of important changes to the way squeeze-outs may be conducted in France, principally by implementing the new automatic squeeze-out procedure following a bid provided for in the Takeover Law.

Follow-on squeeze-out procedure

Until the AMF Regulations, a follow-on squeeze-out may be implemented within three months of the end of an offer if the bidder holds 95 per cent of the company's

share capital and voting rights (calculated on a fully diluted basis). However, any market purchases made during the three-month period following the end of the offer will be excluded for the purposes of calculating the 95 per cent threshold in connection with the follow-on squeeze-out procedure. The bidder must also have disclosed its intention to implement a follow-on squeeze-out at the time of launch of the principal offer.

With a few exceptions (likely to be quite rare in practice), the launch of a follow-on squeeze-out requires a fairness opinion and an offer document and is subject to review by the AMF (which will result in a *déclaration de conformité*).

Share consideration

The consideration paid to the minority shareholders must generally be in cash. However, in the context of a follow-on squeeze-out procedure, the Takeover Law introduced the right for the bidder, if the initial offer included a share element, to offer securities in the squeeze-out procedure as well. The AMF Regulations do not include details of how this will work in practice.

Links to principal texts

Takeover Law

www.legifrance.gouv.fr/imagesJOE/2006/0401/joe_20060401_0078_0001.pdf

AMF Regulations

www.amf-france.org/documents/general/7344_1.pdf

AMF practice note (takeover offers)

www.amf-france.org/documents/general/7333_1.pdf

AMF practice note (independent expert)

www.amf-france.org/documents/general/7334_1.pdf

AMF recommendation (independent expert)

www.amf-france.org/documents/general/7336_1.pdf

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