



# Public takeovers in France



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This booklet is a guide to the regulations governing public takeovers in France. It forms part of a series covering countries where Freshfields Bruckhaus Deringer has an established M&A practice. The series is aimed at those with an interest in acquiring or advising on the acquisition of a public company in different European jurisdictions. The information and opinions contained in this document are not intended to be a comprehensive study, nor to provide legal advice, and should not be treated as a substitute for specific advice concerning individual situations. This document speaks as of its date and does not reflect any changes in law or practice after that date.

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## Introduction

### **How common are recommended or hostile takeovers of listed companies in France?**

Recommended and hostile takeovers have been used to take control of listed companies in France for more than 30 years and the regulatory framework that has evolved alongside this practice is among the oldest in Europe. All forms of public offers (hostile, recommended and mandatory) have become increasingly common in recent years, with on average approximately 90 takeover offers being made each year.

### **Are public takeovers regulated?**

Public takeovers in France are now regulated by a single market authority, the Autorité des marchés financiers (AMF), which replaced the Commission des opérations de bourse (COB) and the Conseil des marchés financiers (CMF).

The AMF has issued and enforces a *Règlement général* (General Regulation), which contains both the rules on the conduct of takeovers and associated disclosure obligations.

A takeover is subject to the General Regulation if the target is a French company listed on a French regulated market. The AMF will also apply the provisions of its General Regulation (other than those regarding mandatory and squeeze out offers) to takeover offers for foreign companies with a sole listing on a French regulated market. In the case of a takeover offer for a foreign company listed on both a French regulated market and a foreign regulated market, it is unlikely that the AMF would seek to apply the provisions of its General Regulation regarding the conduct of the offer. However, in that case, the AMF will require the bidder to prepare either (i) a French full offer document (*note d'information*), or (ii) if the bidder is required to prepare an offer document to be approved by a foreign stock exchange authority, a *communiqué* in French containing the main terms of the offer.

In addition, certain fundamental principles apply to public takeovers in France: equality of treatment of shareholders, transparency and integrity of the market, fairness in transactions and free competition between bidders. Most of the underlying regulations are based on these principles.

The General Regulation distinguishes between 'normal' public offers and 'simplified' public offers. The purpose of a normal public offer is to take control of a target company, whereas the simplified procedure is used to acquire or increase an interest in a company without seeking to acquire control (for example, where a bidder

makes a bid for a limited percentage of the target's outstanding share capital or already has a controlling interest in the target). A number of rules, including the offer timetable, differ depending on whether the normal or simplified offer procedure is followed. For example, a simplified offer may be made through market purchases, while a normal offer is centralised by Euronext Paris, allowing shareholders to withdraw their acceptances any time up to the closing date of the acceptance period.

Implementation of the Takeover Directive (due before May 2006) is not expected to bring major changes to the General Regulation.

### **Is litigation a feature of takeovers?**

Decisions of the AMF on public takeovers can be challenged before the Paris court of appeal (Cour d'appel). Although litigation is a common feature of hostile takeovers in France, the Paris court of appeal has rarely obliged a bidder to revise the terms of its offer. Decisions of the AMF can be challenged within 10 days of their publication in the *Bulletin des annonces légales obligatoires* and the AMF can decide to suspend or extend the offer timetable while judicial proceedings are pending. Alternatively, the AMF may decide to reopen the offer following the court's decision.

Minority shareholders of listed companies are able to create special groups (*associations*) to defend their interests. These groups are entitled to participate in shareholder meetings, put questions to the directors and commence litigation in relation to a takeover offer. In recent years, the number of these shareholder groups has risen, resulting in an increase in litigation.

### **Antitrust and regulated industries**

The French domestic merger control regime, which was substantially amended in 2001, 2002 and 2004, is enforced by the French economy ministry (the Ministry) through the Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes (DGCCRF) and by the Conseil de la Concurrence (the competition council).

Under the new regime, a notification to the Ministry is now mandatory (the notification regime was previously voluntary) when the following merger control thresholds are met:

- the worldwide turnover of all of the undertakings involved is greater than €150m;
- the turnover achieved by at least two of the undertakings in France is greater than €50m; and
- the transaction does not have a Community dimension.

The notification may be made at any time after the parties have entered into a form of 'gentlemen's agreement' or signed a letter of intent regarding the acquisition of a controlling interest or announced a public takeover. If the parties to a transaction that meets the thresholds fail to notify it to the Ministry, they may be fined 5 per cent of their pre-tax turnover in France for the last financial year.

**What are the waiting periods and does implementation of the takeover have to be suspended?**

The Ministry may investigate a concentration in two phases.

- Phase I: the Ministry has five weeks to review the transaction. This period may be extended by an additional period of three weeks if the notifying parties propose undertakings more than two weeks after the transaction was notified. After a Phase I review, the Ministry may approve the transaction (with or without undertakings) or express reservations about it. In the latter case, the Ministry will refer the case to the competition council for a Phase II review.
- Phase II: the competition council has three months to carry out an in-depth examination of the proposed transaction and report to the Ministry. The report is not binding on the Ministry, which has a further four weeks to approve, veto or modify the transaction. The total time period for the Ministry to reach a decision in the event of a Phase II review is therefore approximately five months.

In principle, a transaction cannot be completed until it has been approved by the Ministry. However, a bidder is allowed to proceed with a public takeover offer before obtaining the Ministry's approval, provided it does not exercise the voting rights attached to the shares acquired. The discussion on page 17 considers the new provisions on antitrust conditions on bids for French targets.

**Are any industry sectors protected from takeovers?**

The prior authorisation of the French government is required for investments in a limited number of 'sensitive' sectors, including activities relating to the exercise of state authority; investments that could affect public order, security or national defence; investments made in companies involved in the research, manufacture or sale of weapons, munitions and explosives and investments made in the gaming and casino sector.

In addition, any proposed takeover of a French bank has to be notified to the governor of the Banque de France at least eight business days before it is filed with the AMF or announced. Furthermore, the approval of the French banking board (Comité des établissements de crédit et des entreprises d'investissements) must be obtained before the opening of the acceptance period of an offer

to acquire a French bank, broker or any other financial institution. The French banking board is entitled to delay its decision until antitrust approval has been obtained from the Ministry or the European Commission.

Similarly, the acquisition of an interest in a French insurance company is also subject to the approval of the French insurance board (Comité des entreprises d'assurance).

Other regulated sectors in France include the press, broadcasting and the mining industries.

Certain previously state-owned companies (eg Thales) have a 'golden share' enabling the French government to retain specific rights and prevent a change of control. The French government held a golden share in Elf but did not use it when TotalFina launched a takeover offer for Elf in August 1999. The validity of the French golden share in TotalFinaElf was considered by European case law, which held that golden shares must be justified by 'imperative reasons of general interest' and in any event should not grant disproportionate rights to the state. The government may transform a golden share at any time into an ordinary share.

## **Barriers to acquiring control**

### **Are shares in public companies freely transferable?**

Shares in a French listed company may be held in registered or bearer form and, as a general rule, are freely transferable. Both bearer and registered shares are 'dematerialised' ie represented by book entries rather than share certificates. Shares are transferred by entries in the company's share register (registered shares) or the shareholder's account with his or her financial intermediary (bearer shares). In principle, in addition to share disclosure obligations (see page 13), a company may include a specific provision in its by-laws enabling it to identify its shareholders from time to time.

Except for certain regulated areas determined by law, provisions restricting the free transferability of shares are prohibited for listed public companies. However, shareholders are free to agree to grant each other pre-emption rights and generally restrict the free transferability of their shares. Such agreements are very common in French listed companies.

If an agreement contains 'preferential' terms for the sale or acquisition of shares (such as pre-emption rights or put and call options), and relates to at least 0.5 per cent of the share capital or the voting rights of a listed company, it must be disclosed to the company and the AMF within five trading days of it being entered into. The AMF publishes the principal terms of such agreements.

Failure to disclose an agreement will result in its terms being ineffective if an offer is launched for the company to which it relates.

**Are there any company law provisions or common provisions in constitutional documents that make takeovers difficult?**

A number of mechanisms exist under French law that can make a company less vulnerable to a hostile takeover.

The most effective defence is for a company to be incorporated in the form of a *société en commandite par actions* (SCA). An SCA is a form of limited partnership, with limited partners who hold transferable shares as in a 'normal' *société anonyme* (SA) and general partners whose shares are not transferable and who benefit from veto rights on significant corporate decisions (including the appointment or removal of directors and amendments to the by-laws). In practice, a takeover of an SCA gives the bidder virtually no management control of the target. Re-incorporating a listed SA as an SCA triggers an obligation to make a buyout offer (see page 27).

Other defence mechanisms include provisions limiting the number of voting rights that may be exercised by a single shareholder. However, the AMF strongly advises those companies whose by-laws include a limitation on voting rights to remove such limitation when a shareholder acting alone or in concert acquires a controlling interest following a takeover offer.

By-laws of certain French listed companies provide for double voting rights for shares registered in the name of the same shareholder for a certain period of time (usually two years). On the transfer of such shares the double voting rights cease, meaning that a successful bidder will acquire shares with simple voting rights, while the relative weight of shareholders not having tendered their shares to the offer will increase.

Once an offer is filed with the AMF, special rules apply to restrict the management's ability to implement defensive measures (see page 23).

**At what level of shareholding can a bidder replace the board of directors or supervisory board of a target company and control shareholder resolutions?**

A French SA may have either a single board of directors (*conseil d'administration*) or a two-tier structure consisting of a management board (*directoire*) and supervisory board (*conseil de surveillance*). In both structures, directors may be removed by a resolution of the shareholders of the company in a general meeting. In addition, members of a management board may also be removed by the supervisory board if this is provided for in the by-laws.

Members of the supervisory board may be dismissed 'without just cause', notice or the payment of damages (except if the dismissal is deemed abusive or vexatious). Dismissal of members of the management board is possible 'with just cause', otherwise the dismissal may give rise to damages.

In principle, meetings of the shareholders of a company are convened by the board of directors. However, if following a takeover offer, the bidder holds more than 50 per cent of the share capital or voting rights of the target, it may also convene a shareholder meeting.

A shareholder resolution to remove the directors of a company requires a simple majority vote. Resolutions to amend the company's by-laws (including matters relating to the issue of equity securities) require a two-thirds majority.

**Can public companies in France make themselves bid-proof?**

Management's ability to take defensive measures during an offer period is limited. No decisions may be taken contrary to the interests of the company or the principle of equal treatment of, and information to, the shareholders of the companies concerned.

In addition, any agreement that could influence the outcome of the offer must be notified to the AMF and made public. Although the target management is not prohibited from taking action outside the normal course of its business, it must notify any such action to the AMF in advance unless it has been otherwise authorised by its shareholders during the offer period. The AMF will require appropriate disclosure of such action to be made to the market and may ultimately block the proposed action or request an injunction from the president of the commercial court of Paris (Tribunal de Commerce de Paris).

The target company may buy back its share capital during a takeover if the offer is in cash and if the shareholder resolution authorising the buy back programme expressly allows this.

The board of the target company may have been authorised to issue new shares by the shareholders' meeting before the filing of the offer. This authorisation to issue new shares would be suspended for the duration of the offer period, unless such issue is within the ordinary course of business of the target company and is not likely to undermine the success of the offer.

The Takeover Directive provides for restrictions on frustrating actions and for the unenforceability of limitations on the transfer of securities and certain voting rights. However, member states may decide not to apply these provisions to companies with registered

offices in their territories. To date, France's position in this respect has not yet been made public.

## **Access to information**

### **What information will be publicly available on the target?**

Listed companies in France have to file certain information with the companies and commercial register (including constitutional documents, minutes of shareholders' meetings, names of directors, annual accounts and management reports). This information is freely available to the public.

In addition, listed companies must publish certain information as part of their listing obligations (such as quarterly and half-yearly financial statements and prospectuses or registration documents prepared in connection with securities offerings). Listed companies are also required to keep the market informed of any event or material development in their business that is likely to affect their share price (for example, major litigation, disposals or acquisitions).

Finally, the AMF publishes certain information about listed companies (for example summaries of shareholders' agreements and shareholding disclosure notices).

### **How can the bidder get information about target shareholders?**

Share registers held by the company (or its financial intermediary) are not available for inspection by shareholders or third parties. In addition, a company's share register only contains details of the holders of its registered (and not bearer) shares.

However, shareholders are under an obligation to notify the company and the AMF each time they cross certain thresholds either alone or in concert (5 per cent, 10 per cent, 20 per cent, one-third, 50 per cent and two-thirds of the share capital or the voting rights of the company). This information is published by the AMF (see page 13). A draft bill providing for additional thresholds (15 per cent, 25 per cent and 95 per cent) is being discussed in parliament.

### **Can the bidder rely on the target's accounts?**

Financial information published by a company is either certified (in the case of annual accounts) or reviewed by its statutory auditors (in the case of interim financial information) and therefore should be regarded as fairly reliable. Although directors are liable to criminal sanctions if they publish misleading accounts, French law and practice has not yet evolved to the point where it is generally accepted that directors or auditors are at risk of civil liability to the bidder in such a case.

## **Preliminary issues**

### **Negotiation**

**Is a bidder required to negotiate before announcing an offer and, if so, with whom?**

There is no legal requirement for a bidder to negotiate or even approach the target before announcing an offer. In practice, however, it is often considered advisable to make preliminary contact on an informal basis with the AMF and any other authorities whose approval will be necessary for the launch of the offer (see page 3).

**Will a merger agreement be used?**

The bidder, target and any principal shareholders of the target may enter into an agreement governing the conduct of the bid.

**Can the bidder expect contractual representations or warranties?**

A bidder might seek warranties from a controlling or dominant shareholder in the context of a friendly takeover. However, warranties cannot be included in the terms of the general offer to shareholders.

**What liabilities can arise for misstatements or omissions during negotiations?**

Despite the absence of contractual representations and warranties, the directors, financial advisers and other professional advisers of the target involved in pre-bid negotiations could be held liable for any misleading statements. However, there are no clear precedents of litigation having been successfully brought by a bidder on these grounds.

**Is there a requirement to negotiate in good faith?**

As a matter of principle, under French law parties are free to terminate negotiations at any time. However, depending on the circumstances (for example, where the terms of the deal had been essentially agreed or discussions had been ongoing for a long period of time), a party may be liable in damages to the other if it 'recklessly' pulls out of negotiations. The exact scope of this obligation to negotiate in good faith is unclear and whether (and at what point in time) a party is entitled to terminate discussions without having to justify its decision is essentially a matter of fact. The examples of case law on the subject do not relate to negotiations preceding a public takeover.

Therefore, in practice, the parties will often enter into a non-binding letter of intent (or memorandum of understanding) making clear that they are each entitled to walk away without incurring any liability to the other.

## **Confidentiality**

### **Will the bidder be expected to sign a confidentiality agreement?**

On a recommended bid, a confidentiality agreement between the bidder and the target is fairly common. This will cover the fact that a transaction is being discussed, as well as the confidentiality of the information provided.

### **Will the bidder be expected to agree to a 'standstill' restricting the acquisition of shares or making a hostile bid?**

Agreements restricting the bidder's ability to acquire shares or make a hostile bid are becoming more common in France.

## **Due diligence**

### **What is the usual level of due diligence?**

In contrast with some other European jurisdictions, an offer may not be made conditional on the absence of adverse events affecting the target during the offer (see page 18). This makes pre-bid due diligence all the more important.

In practice, due diligence prior to the launch of a recommended bid usually tends to focus on high level financial and business issues. Of course, on a hostile transaction, due diligence will be limited to a review of publicly available information.

Although French takeover regulations do not impose any specific restrictions on the level of due diligence that may be carried out, other general rules, in particular relating to insider dealing, are likely to limit the scope of the bidder's due diligence.

### **Will the receipt of any information affect the bidder's ability to make a bid?**

French rules on insider dealing, which are subject to criminal and regulatory sanctions, prevent a bidder in possession of price-sensitive information relating to a company from buying shares in that company.

This restriction falls away as soon as the information becomes public. Therefore, a bidder who receives price-sensitive information on the target that cannot subsequently be disclosed (for example for reasons of confidentiality) would be in breach of the insider dealing rules if it were to acquire target shares through the offer (although there does not appear to be any established case law on the point). In practice, however, the target would be under a continuing obligation to disclose any such price-sensitive information to the market.

Although the case law on the question is not entirely clear, it is generally considered that the bidder's knowledge of its own intention to make an offer should not be inside information.

**Is there an obligation to publish details of any information exchanged between the bidder and the target?**

Details of information exchanged between the bidder and target do not need to be disclosed to the market. However, the AMF considers that the market should be informed of the existence of a data room. In addition, target shareholders must be treated equally and are entitled to sufficient information to allow them to make an informed assessment of the bid.

**Will the information have to be disclosed to a rival bidder?**

There is currently no specific obligation for a target to give the same level of information to all bidders. However, the AMF takes the view that the general principle of fairness of competition between bidders could oblige the target to give the same access to information to all bidders.

**Deal protection**

**What can the bidder do to deter other bidders from coming in?**

Under the General Regulation and the general law on directors' duties, it is difficult for a target to agree to deal protection measures during pre-offer negotiations (see page 23).

The simplest and most common way to gain protection from competitors is to control as many shares in the target as possible before the offer is announced. This can be achieved through outright purchases of target shares or by persuading shareholders to undertake to accept the offer when it is made.

There is some uncertainty under French law as to whether the use of an irrevocable undertaking to tender shares to an offer is compatible with the principle of fairness of competition between bidders. Case law on the subject is not entirely settled, but it seems that an irrevocable undertaking will be held to be valid if it does not prevent another bidder from making a competing offer. This can be achieved by restricting the number of shares covered by the undertaking, or providing that it will automatically lapse on a competing offer being made. In any event, the main terms of such agreements must be disclosed in the offer document.

Exclusivity arrangements, under which target directors agree not to commence discussions with third parties, can bind a company or a major shareholder provided they have a limited duration.

**Can the target agree to pay a break fee?**

As a matter of practice in France, target companies have tended not to agree to pay break fees. From a legal point of view, an undertaking to pay a break fee would raise the question of whether the directors of the target were acting in the best interests of the company. A reciprocal break fee arrangement was first used in France in 1999

and again more recently on the merger between Vivendi, Seagram and Canal Plus. To date, no court has considered their validity.

### **Rights of employees**

#### **Do target employees or their representatives have to be consulted before the offer is announced?**

Under French law, the target company's works council (*comité d'entreprise*) or group works council (*comité de groupe*) must be consulted on any proposed takeover offer. The obligation to convene a meeting of the relevant works council falls primarily on the management of the target company and arises on the day of the filing of the offer document with the AMF. At this meeting, the works council may decide to convene a further meeting with the bidder and will give its opinion on the nature (hostile or recommended) of the offer. If the bidder fails to attend a meeting organised by the works council, the voting rights attached to the target shares it owns or acquires are suspended until it does so. If a merger agreement is to be entered into in connection with the bid, there is an argument that the works council must also be consulted before the agreement is signed by the target company.

#### **What rights do employees have to challenge an offer at any stage?**

Provided the relevant consultation procedure is complied with, the employees of the target have no right to challenge the offer, even if any of the works councils disapproves of it.

#### **Does a bidder have to say anything about the future of target employees?**

A bidder has to give details in its offer document of its intentions regarding the continuation of the target's business and the employment policy that it intends to pursue during the 12 months following the offer. It also has to indicate any likely changes to the size and structure of the target's workforce during the same period.

### **Approaches to target shareholders**

#### **Are there any restrictions on the bidder approaching target company shareholders?**

There are no specific restrictions on a bidder contacting shareholders with a view to seeking irrevocable undertakings in connection with the offer. However, in practice, a number of shareholders may not be known to the bidder (see page 7). It is a criminal offence to send a company's register of shareholders to a third party.

### **Announcement obligations**

#### **How long can the bidder keep its interest confidential?**

A bidder may choose not to disclose its interest in acquiring the target for as long as it can maintain confidentiality. There is no

specific restriction on a bidder announcing a simple intention to make an offer in general terms provided that the announcement does not amount to market manipulation.

The bidder must publish a press release summarising the principal terms of the offer no later than the time at which the offer document is filed with the AMF.

**Does a target have to make an announcement if it receives a bid approach?**

The target will only have to make an announcement if it is the subject of rumour or speculation. The terms of the announcement may be discussed confidentially with the AMF.

## **Share dealings**

**Are there any insider dealing or other restrictions on share dealings either before the offer is announced or during the offer?**

Before the announcement by the AMF of the filing of the offer, there are no particular restrictions on the bidder's ability to buy and sell target shares. However, there may be restrictions in the form of insider dealing rules (see page 9), share disclosure obligations and the rules on mandatory bids. In addition, from the announcement by the AMF of the filing of the offer (which marks the commencement of the offer period) until the closing date of the offer acceptance period, dealings in target shares may only take place on the regulated market on which they are listed. The voting rights attached to any shares acquired in breach of this rule are suspended for two years.

If the offer is in cash and not subject to any conditions, the bidder and persons acting in concert with it may buy target shares in the market during the offer period. However, specific rules govern the price at which market purchases may be made (see page 14).

If all or part of the consideration consists of securities, the bidder, target and their respective concert parties are prohibited from trading in target shares during the offer period (on or off market). The same persons are prohibited from trading in the securities offered as consideration from the commencement of the offer period until the closing date of the acceptance period.

Between the closing date of the acceptance period and the publication of the results of the offer, the bidder and any person acting in concert with it may not sell any target shares in the market.

These restrictions also apply to market dealings by the bidder's and target's respective financial advisers. However, financial advisers are permitted to continue existing arbitrage activities in compliance

with best practice, and in particular by putting in place a system of 'Chinese walls'.

In addition, any dealings by the bidder, target, or any of their respective directors, concert parties and financial advisers and investors holding 5 per cent or more of the target's share capital or voting rights, or if any such person has acquired more than 0.5 per cent since the start of the offer period, must be notified to the AMF at the end of each trading day. This information is published on a daily basis.

#### **What disclosure obligations apply to share dealings?**

Certain disclosure obligations are triggered under French law by the following thresholds being reached (upwards or downwards): 5 per cent, 10 per cent, 20 per cent, one-third, 50 per cent and two-thirds. Shares held by any shareholder or third parties on its behalf or by entities it controls and other parties acting in concert with it and shares it is able to acquire at its own discretion are taken into account for calculating the thresholds. The thresholds apply to the number of shares or voting rights of a listed public company with its registered office in France.

The relevant shareholders must notify the AMF and the target within five trading days of the relevant threshold being reached. The information is then made public by the AMF.

In addition to these statutory thresholds, the by-laws of the target may provide for additional disclosure obligations at thresholds between 0.5 per cent and 5 per cent being reached. These are made to the target company but not made public.

If a shareholder fails to comply with the disclosure obligations, all shares held in excess of the relevant threshold lose their voting rights for two years. In addition, at the target's request, a French commercial court may grant an order suspending the voting rights of all of the shareholder's shares in the company. The shareholder may also be liable to a fine.

Finally, any person who increases the number of shares or voting rights it holds in the target during an offer period by at least 2 per cent of the total number of shares or voting rights or who acquires a number of shares representing more than 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent or 30 per cent of the share capital or voting rights of the target is required to immediately publish its intentions with respect to the offer.

**If the bidder buys shares, does it have to state its intentions regarding the target?**

In addition to the obligations described above, a person who at any time acquires (directly, indirectly or as part of a concert party) shares representing more than 10 or 20 per cent of the share capital or voting rights of a French listed company must declare his or her intentions with regard to such interest for the next 12 months. This declaration of intention must include a statement of whether the holder's intention is to continue to acquire shares, acquire control of the company, or request appointments to the board and whether the shareholder is acting in concert. It must be notified to the target company and the AMF within 10 trading days of the relevant threshold being reached. The information is then published by the AMF. The intentions may only be changed in the event of a 'significant change to the environment, situation or shareholding of the persons concerned'.

**Will share dealings affect the terms of the bid?**

On a cash offer not subject to any conditions where the bidder is entitled to make market purchases of target shares during the acceptance period, if it (or any persons acting in concert with it) or one of its financial advisers acquires any shares at a higher price than the offer price, the offer price is automatically increased to the higher of the price actually paid for the shares and 102 per cent of the offer price.

**Are there any rules preventing market manipulation?**

Market manipulation is a criminal offence and subject to regulatory sanctions by the AMF. These sanctions are identical to those relating to insider dealing and may be applied together by regulators. As a result of the implementation in France of the Market Abuse Directive, market manipulation is defined as: (a) transactions or orders to trade (i) that give, or are likely to give, false or misleading signals as to the supply of, demand for or price of financial instruments, or (ii) that secure, by a person, or persons acting in concert, the price of one or more financial instruments at an abnormal or artificial level and (b) transactions or orders to trade that employ fictitious devices or any other form of deception or contrivance. Any action falling under the definition of market manipulation but that conforms to certain market practices accepted by the AMF (to date, buy back of shares and liquidity agreements) would not be sanctionable.

## **Offer structure**

### **What is the usual form of takeover offer?**

Generally, a bidder must offer to acquire 100 per cent of the outstanding share capital of the target. The offer must also be made for securities that give indirect access to the target's share capital (such as convertible bonds).

A description of the proposed offer and a draft offer document must be filed with the AMF by one or more presenting banks acting on behalf of the bidder.

The scope of the AMF's review includes the terms of the takeover offer (offer price or exchange ratio) and the level and accuracy of the information provided in the offer document. Once satisfied with the terms of such offer, the AMF formally approves the offer by granting an *avis de recevabilité* (in principle within five trading days of filing) and, following this first decision, approves the offer document by granting its *visa*.

### **Is the offer made by the bidder or its financial adviser?**

The offer document is signed by the bidder, but filed with the AMF by one or more 'presenting banks' acting on its behalf. The presenting bank's primary obligation is to guarantee the bidder's irrevocable undertaking to acquire all of the target's shares tendered to the offer, and in particular to pay the offer consideration. If there is more than one presenting bank, only one of them is required to provide this offer guarantee.

Accordingly, the presenting banks will take a keen interest in the bidder's financial position and will want to be assured that the necessary funds are available. They are likely to insist on the bidder providing them with security for the purposes of the offer, which can often include putting cash equivalent to the maximum offer consideration on deposit with the presenting bank.

### **Does France have a statutory merger alternative?**

French law provides statutory mechanisms by which control of a listed company can be acquired other than through share purchases or a takeover offer. These include a statutory merger of two existing companies (*fusion*) or a contribution scheme of either all of the assets and liabilities relating to a branch (*apport partiel d'actifs*) or the shares of another company (*apport en nature*), in exchange for the issue of shares.

In the case of a statutory merger between two independent companies incorporated in France, a two-thirds majority vote is required at a meeting of the shareholders of both companies. If this is obtained, the merger may be achieved without any takeover offer

being made by either company for the other, although in this case, a document setting out the terms of the merger (*document E*) would have to be approved by the AMF.

### **What experience do French companies have of dual-headed structures?**

Given the practical impossibility of carrying out cross-border statutory mergers (pending the implementation of the European Company Statute or the draft cross border merger directive), there have been some attempts to create dual-headed structures in France. The purpose of a dual-headed structure is to create a single shareholder electorate from the two merging partners while allowing both partners to preserve their individual and national identities.

Dual-headed structures involving French companies have only been achieved through a single shareholders' electorate at the level of a joint venture company. In this structure, both partners contribute their operating assets to the joint venture company in exchange for an issue of shares. Simultaneously, both partners contribute their voting rights in the joint venture company to a French law contractual partnership having a role similar to that of a trustee. Variations of this structure may be driven by specific tax, governance and regulatory considerations. Examples of dual-headed structures involving French companies include Eurotunnel (France and England) and Dexia (CLF and CCB, France and Belgium) before its subsequent full merger.

Alternatively, dividend access schemes may enable certain foreign shareholders to receive all or part of the dividend income directly from a subsidiary incorporated in their own jurisdiction in a tax efficient manner.

## **Terms of the offer**

### **What controls do the authorities have over the price and other terms?**

The terms of an offer are subject to review and approval by the AMF on the basis of the criteria set out in its General Regulation. These include the offer price or exchange ratio, the characteristics of the securities offered as consideration in the case of a share exchange offer and any minimum acceptance level or related offer conditions to which the offer is subject.

The bidder is free to determine the offer price. However, in the case of a simplified offer launched by a bidder that holds a majority in the target company's capital and voting rights, the price stipulated by the bidder cannot, except with the AMF's approval, be lower than

the volume weighted average share price over the 60 trading days preceding publication of the filing of the offer.

As part of its review of the terms of the offer, the AMF will pay particular attention to the proposed offer price using a well-established 'multi-criteria approach'. This involves a detailed review of the offer price against a number of financial criteria, including net asset value, profitability, market capitalisation, discounted cash flow analysis and comparison of similar transactions. The AMF's decision to approve (or refuse) the terms of the offer may be challenged in the French courts.

The AMF fixes the offer timetable and has the power to extend it, for example to ensure that any competing offers close on the same date.

#### **What conditions are permitted or required?**

Historically, French takeover rules have required an offer to be irrevocable and unqualified. However, this principle has evolved in recent years and an offer may now be conditional on:

- bidder shareholder approval (if required);
- the outcome of any related offers made by the bidder;
- a certain level of acceptances (see below); and
- antitrust clearance (see page 2).

Furthermore, the AMF must have received the approval of any administrative or regulatory authorities (such as the French banking or insurance board) prior to the opening of the acceptance period.

The acceptance condition is often set at 50.01 per cent and occasionally at two-thirds, being the majority required to approve a resolution amending a company's by-laws. A 95 per cent acceptance threshold (being the level at which French tax integration can be achieved and the minimum shareholding required for a squeeze out to be effected) is unlikely to be acceptable to the AMF. An acceptance condition can be waived by the bidder at the latest five trading days before the end of the offer period.

Since the end of 2002, an offer may be made subject to an antitrust approval condition. Previously, the opening of an offer for acceptances was generally suspended until antitrust clearance had been obtained. Now, an offer may open for acceptances while antitrust approvals are still pending and will subsequently lapse if the relevant approvals are not obtained. Under the new regime:

- the inclusion of an antitrust condition is optional for the bidder;

- only antitrust approval by the European Commission and/or the relevant authorities in the US and member states of the EU is accepted as a condition; and
- the offer will automatically lapse if:
  - in the case of an offer subject to approval by the European Commission, at the end of a Phase I investigation, a decision is taken to launch a Phase II investigation;
  - in the case of an offer subject to French domestic merger control, at the end of the Ministry's investigation, a decision is taken to transfer the case to the French competition council (equivalent to a Phase II investigation); and
  - in the case of an offer subject to approval by the relevant authorities of the US or a member state of the EU, the equivalent to a Phase II investigation is launched.

Conditions that allow the bidder to walk away from the offer if there is a material adverse change to the target's business are prohibited. Likewise, the offer cannot be conditional on financing.

#### **How easy is it for a bidder to walk away?**

Other than the conditions listed above, the bidder can only walk away from its offer if:

- a competing offer is made;
- a competing offer is improved; or
- during the offer period, the target company takes specific actions that 'alter its substance', or if 'the offer no longer has an object'. This was the case on the pacman offer by Elf Aquitaine for TotalFina, which was held to be 'without object' following the subsequent recommendation by Elf Aquitaine of TotalFina's offer for it. However, in this case, AMF approval is required for the bidder to walk away.

#### **Is there a requirement to treat all shareholders equally?**

The equal treatment of all target shareholders has always been one of the general principles guiding the decisions of the French stock market authorities. A bidder cannot pay one shareholder in cash and everyone else in shares, or encourage certain shareholders to accept the offer by giving them monetary or other incentives. However, stakeholders in different situations (eg shareholders and bondholders) may be treated differently.

## **Share consideration**

### **How usual is it to offer new shares or securities as consideration for an offer?**

Offers of new shares or securities of the bidder are very common and present tax rollover advantages for target shareholders. A part cash and part share (or other securities) offer is also possible. When the shares of the bidder are not listed in France, the bidder will be expected to undertake such a listing.

### **If shares are issued, are a prospectus or listing particulars required?**

The AMF's normal rules relating to the listing of shares on the Paris stock exchange will apply to the listing of shares in connection with a takeover offer in France. These generally require a prospectus to be published by the bidder.

### **Are there any valuation requirements?**

The offer price is subject to review by the AMF according to the multi-criteria approach (see page 17). Details of the valuation, including the criteria used, must be included in the offer document.

There is no strict obligation to obtain or publish an independent valuation or fairness opinion of the financial terms of the offer, except in the case of a squeeze out (see page 27).

However, the AMF strongly recommends the preparation of a fairness opinion by an independent expert where the offer could create a conflict of interests or there is a risk of the principle of equal treatment of shareholders being breached. This would include an offer by a parent company for a subsidiary (for example, France Télécom's offer for the outstanding shares in Orange) where the offer is made for different classes of securities or where the target company is an SCA. The opinion is principally intended for the benefit of the target shareholders and is required to be filed with the AMF along with the offer document. Its main conclusions are published in the offer document.

In addition, the AMF has recently published a report (the Naulot report), which recommends an extension of the obligation to obtain a fairness opinion, in particular for the board of the target company. Recently, fairness opinions have been delivered to the board of the target (at its request) in the context of takeover offers, including the offer launched on Galeries Lafayette.

## Timing

### **Is there a prescribed timetable once a bid has been announced?**

The announcement by the AMF of the principal terms of an offer filed with it marks the beginning of the offer period, which continues until the results of the offer are announced, usually about two weeks after the closing date of the acceptance period (see below). Upon the filing of an offer, the AMF may suspend trading in the target's shares and any other shares affected by the offer. Trading in such shares resumes on the date specified by the AMF before the offer opens for acceptances.

The acceptance period starts the day following the latter of the publication of the bidder's offer document and the obtaining of any regulatory approvals (see pages 2 to 4).

The offer timetable is fixed by reference to the date on which the target publishes its response document to the bidder's offer document (the two generally being included in a single document on a recommended offer). The period between this date and the closing date of the acceptance period is 25 trading days. However, the duration of the offer acceptance period may not exceed 35 trading days. The offer timetable and acceptance period are likely to be extended in the event of a competing offer being filed or litigation arising in connection with the offer. However, the AMF may also extend the offer timetable at any time during the acceptance period for any other reason (for example, to allow the offer to be open for acceptances for at least 20 US business days, if it is also being made in the US).

Finally, if valid acceptances are received in respect of two-thirds or more of the share capital and voting rights of the target (or 50 per cent if there were competing bids), the bidder may re-open the offer for a further period of no fewer than 10 trading days following the closing date of the acceptance period to allow additional acceptances.

### **Can a bidder revise its offer?**

A bidder may increase its offer price or waive any minimum acceptance condition no later than five trading days prior to the closing date of the acceptance period. It may also waive a related offer condition at any time prior to the closing date of the offer acceptance period. It may not otherwise revise its offer. When a bidder revises its offer, it must publish a supplemental offer document.

**Do target shareholders have withdrawal rights?**

On a 'normal' offer, target shareholders who wish to accept the offer give instructions to this effect to their financial intermediary during the acceptance period. Each financial intermediary forwards its clients' instructions to Euronext Paris, which centralises the instructions until the end of the offer acceptance period. Target shareholders may withdraw their instructions at any time until such date.

Shares tendered to a 'simplified offer' are (in principle) acquired in the market in the usual way rather than being centralised by Euronext Paris. In this case, target shareholders do not have withdrawal rights.

**Can a bidder make another bid if the first one fails?**

There are no particular restrictions on a bidder making a further bid if the first one fails, although it would have to justify to the AMF why the subsequent offer was appropriate.

**Information for target shareholders****What information is the bidder required to provide?**

The General Regulation provides for the level of information to be included in the bidder's offer document as follows:

- general information relating to the bidder (corporate information and business description);
- accounting and financial information relating to the bidder;
- the bidder's intentions for the following 12 months in relation to the target's industrial and financial strategy and the continued listing of the target's shares – this section of the offer document must include details of likely changes to the size and structure of the target's workforce during this period;
- details of the terms of the offer (including the offer price or exchange ratio and valuation criteria, the number of shares subject to the offer, any minimum acceptance level condition, the number of shares already held by the bidder and the method of financing the offer);
- details of any agreements entered into by the bidder relating to the offer;
- the opinion of the bidder's board of directors (or supervisory board) on the consequences of the offer for the company, its shareholders and employees – the opinion is generally given at a meeting of the board of directors and details of the meeting (such as the number of votes cast in favour of the resolution and the identity and opinion of

any dissenting board members) are also required to be included in the offer document;

- the principal conclusions of any fairness opinion; and
- a responsibility statement from the bidder and the bidder's presenting bank and accountants (see below).

#### **What information is the target required to provide?**

The target is required to publish a document in response to the offer, which, like the bidder's offer document, is also subject to review and approval by the AMF. On a recommended offer, the bidder's offer document and the target's response document may be included in one joint document.

The target's response document is required to include:

- general information relating to the target;
- a breakdown of the target's shareholder base;
- details of any agreements that could affect the outcome of the offer;
- the opinion of the target company's board of directors (or supervisory board) on the consequences of the offer for the company, its shareholders and employees, including similar details of the meeting at which the opinion was given as those required to be included in the bidder's offer document; and
- the intentions of the board members to tender their shares to the offer.

#### **Who has to take responsibility for published information?**

The directors of the bidder take responsibility for the accuracy of the information contained in the bidder's offer document and as indicated above, the offer document includes a responsibility statement to this effect. The offer document is also required to include a statement from the presenting bank certifying that the information contained in the offer document relating to the offer price is accurate. Finally, a report from the bidder's statutory auditors on the truth and accuracy of the bidder's accounts is also required. The directors of the target take responsibility for the information contained in the response document.

#### **Are there any special requirements for profit forecasts, asset valuations or statements about merger benefits?**

The bidder is required to include in the offer document a merger benefits statement and any recent asset valuations used in determining the offer price or the exchange ratio.

## **Financing**

### **Can a bid be conditional on financing?**

The presenting bank guarantees the bidder's obligations under the offer, which are primarily to pay the offer price. If the bidder were to fail to do so, the presenting bank would be required to step in and pay on its behalf. This acts as a strong incentive on the presenting bank to verify the bidder's ability to finance the offer (and in particular to check for any financing conditions, such as there having been no material adverse change to the target) before filing the offer with the AMF.

### **Can the target's cash or assets be used to refinance borrowings incurred to finance the bid?**

French law on financial assistance (which carries criminal sanctions) prevents a target from financing the acquisition of its shares by the bidder or pledging its assets as security for loans granted to the bidder for that purpose.

However, the bidder may offer security over target shares to its lenders.

## **Role of target board**

### **What are the duties of the target board?**

The board must consider the merits of the offer and provide its shareholders with its opinion of the consequences of the offer for the company, its shareholders and its employees. In order to assist it in discharging this obligation, the target board will generally (but is not obliged to) seek financial advice, extracts of which may be repeated in the target's response document. In addition, the practice has developed for target directors to include a recommendation to target shareholders to accept or reject the offer.

### **What scope do the target company directors have to frustrate a bid?**

Target directors must ensure that during the offer period, any action taken or decisions and statements made are not contrary to the interests of the company or the principle of equal treatment of shareholders. Any action outside the ordinary course of business must be notified to the AMF unless it has been expressly authorised by the target shareholders in a general meeting during the offer period.

The obligation to act in the 'company's interest' is usually seen as prohibiting the directors from taking action that favours one bidder over another (such as undertakings to sell certain core assets on

preferential terms or to withdraw from certain competitive markets).

## **Role of financial adviser**

### **Does the bidder have to have a financial adviser? If so, what is its role?**

A bidder must have at least one financial adviser to act as the presenting bank and file the offer with the AMF.

### **Does the target have to have a financial adviser?**

The target does not have to appoint a financial adviser, but in practice will almost always do so.

### **Is it usual to sign up an engagement or mandate letter?**

The terms of the presenting bank's engagement with the bidder are normally set out in an engagement letter. This will generally include various provisions relating to the conduct of the offer and the extent of the presenting bank's obligations to the bidder in its capacity as financial adviser and will allocate ultimate risk of liability for inaccurate information in the offer document.

### **Will the financial adviser have to give a public opinion on the offer?**

Apart from confirming that the information contained in the offer document relating to the offer price is accurate, the presenting bank does not have to give a public opinion on the offer. Any fairness opinion that is required to be produced in connection with the offer must be prepared by an independent financial expert, which would prevent the presenting bank from giving such an opinion.

## **Mandatory offers**

### **Are there any rules requiring a bid to be made if a certain level of shareholding is reached?**

The filing of a takeover offer in France is mandatory where a person, acting alone or in concert, acquires more than one-third of the share capital or the voting rights of a company. The same obligation is triggered by a person who already holds between one-third and 50 per cent of the company's share capital or voting rights increasing its shareholding by more than 2 per cent within a rolling 12 month period. A mandatory offer cannot be subject to any minimum level of acceptance condition.

The mandatory offer regime also applies to a situation where control is acquired of a holding company that in turn holds more than one-third of the shares in a listed company if this shareholding represents a substantial part of its assets.

Acting in concert is defined as having entered into a written or oral agreement relating to the acquisition or sale of voting rights or using voting rights in order to implement a common policy in respect of a company. Certain situations are deemed to constitute a concerted action (for example between the company and its directors or affiliates).

In certain circumstances, the AMF may grant relief from the requirement to make a mandatory offer for a limited period of six months if a shareholder exceeds the relevant thresholds by no more than 3 per cent. In this case, the shareholder must undertake not to exercise the corresponding voting rights.

There are a limited number of exceptions to the obligation to make a mandatory offer. However, for these exceptions to apply, they must be requested by the acquiring shareholder and are then considered by the AMF on a case-by-case basis. Essentially, the AMF checks whether or not an actual change in the control of the target company has taken place.

The AMF may rule that a shareholder reaching the relevant threshold is exempt from filing a mandatory offer:

- if the shareholder already held (alone or in concert) the majority of the target company's voting rights before the triggering event; or
- if the thresholds were only crossed by a shareholder as a result of acting in concert with one or more shareholders who previously held more than 50 per cent of the share capital or voting rights and who continue to hold more shares or voting rights than that shareholder; or
- if the thresholds were crossed by a shareholder as a result of acting in concert with one or more shareholders that already held, alone or in concert, between one-third and one-half of a company's share capital or voting rights provided that such shareholders maintain a larger holding and that, upon the formation of this concert party, do not exceed one of the thresholds requiring a mandatory bid (see page 24).

The AMF may also grant an exemption from the mandatory bid obligation in certain additional cases. These include:

- certain situations that have been approved by the company's shareholders in a general meeting (such as mergers and contributions in kind);
- situations where the existing shareholder base is not changed (for example a reduction in the total number of shares or voting rights or transfer of shares between group companies); or

- subscribing for new shares in a company with financial difficulties, if this has been approved by the target company's shareholders.

Failure to comply with the obligation to make a mandatory offer results in the voting rights attached to the shares exceeding the relevant threshold being suspended. In addition, the shareholder may be fined by the AMF or ordered by the court (upon application by the AMF or any other interested party) to file a takeover offer.

Special mandatory offer rules apply where a shareholder acquires a block of shares in cash, which, together with its existing holding, gives it more than 50 per cent of the share capital or voting rights of a listed company. The new majority shareholder is required to file a 'price guarantee offer' (*garantie de cours*) for the remaining shares in the target.

The main difference between this type of offer and a standard mandatory bid is that the *garantie de cours* generally has to be made at the price at which the block of shares was acquired. The bidder will only be allowed to file a *garantie de cours* at a lower price if the acquisition of the block of shares included specific warranties or a deferred consideration element that would justify a different price being paid for the remaining shares.

A *garantie de cours* is carried out according to the rules applicable to the procedures for simplified public offers.

## **Minority squeeze out**

### **Do French companies have a procedure for requiring minority shareholders to accept a bid?**

A shareholder holding at least 95 per cent of the voting rights of a listed company, or a previously listed company, may initiate a buyout offer (*offre publique de retrait*) followed by a squeeze out offer to remove minority shareholders. There are two separate stages to this process:

- a public buyout offer effected by the bidder making purchases in the market for at least 10 trading days at the offer price; and
- immediately following the end of the buyout offer, the automatic transfer of all outstanding shares to the bidder as part of the squeeze out offer, provided that the bidder reached 95 per cent of the share capital and voting rights of the company – a draft bill providing for a decrease of this threshold from 95 per cent to 90 per cent is being discussed in parliament.
- A buyout offer may be launched at the discretion of a holder of 95 per cent of the shares in a company or at the request of the AMF upon application by outstanding minority shareholders who can

demonstrate that there is no longer sufficient liquidity to enable them to sell their shares in the market.

In addition, the AMF may request that a buyout offer be made when the controlling shareholder(s) (even if it(they) hold(s) less than 95 per cent of the voting rights):

- proposes significant changes to the company's by-laws (for example a change to the corporate form or the procedure for transferring shares or voting rights);
- proposes to merge and for the company to be absorbed by or to dispose of all or substantially all of its principal assets;
- decides to change the business purpose or not pay dividends for several years; or
- causes an SA to be re-incorporated as an SCA company.

However, in these circumstances, the squeeze out procedure will only be available if, following the buyout offer, the majority shareholder holds at least 95 per cent of the company's share capital or voting rights.

Under the squeeze out procedure, the price offered to the minority shareholders is based on a valuation of the target's securities by the bidder using 'objective methods applied to business or share transfers, based on the value of the company's assets, its earnings, the market price of its shares, its business prospects and its subsidiaries', in each case, appropriately weighted. The bidder's valuation must be accompanied by an independent expert valuation report giving its opinion on the bidder's valuation, including the relevance of the criteria used and their respective weighting. The appointment of the expert has to be approved by the AMF.

As with any other form of takeover offer, the terms of the offer are subject to review and approval by the AMF, and the AMF's decision may be challenged in the French courts.

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