

TAKEOVER BIDS: THE LAW OF 31 MARCH 2006

September 2006

Law no. 2006-387 of 31 March 2006 transposes the European Directive of 21 April 2004 on takeover bids.

Only certain provisions of the law will be addressed below, since this presentation is not intended to be exhaustive.

I. "Rumours"

If there are reasonable grounds to believe that a person is planning a takeover bid (such as significant trading activity), that person may be required to declare its intentions to the AMF (Financial Markets Authority), under conditions to be specified in the AMF's General Rules. Information on that declaration will be brought to the knowledge of the public.

These rules will also determine the applicable penalties, and in particular the conditions under which any person having denied having the intent to submit to takeover bid may be refused the right to submit the proposed offer document.

II. Concerted action

In addition to the persons covered by the definition of concerted action given in Article L. 233-10 of the Commercial Code, the following persons are considered to be acting in concert during a takeover bid period:

- persons concluding an agreement with the offeror aimed at acquiring control of the target;
- persons concluding an agreement with the target company aimed at preventing the successful outcome of the bid.

III. New rules on the implementation of anti-takeover defences

1. Restriction on the powers of directors with respect to anti-takeover defensive measures

- During the period of the bid, the directors of the target company must obtain authorisation from the general meeting of shareholders before taking any measure liable to frustrate the successful outcome of the bid (excluding searches for other bids).
- For these meetings, the articles of association may provide for the suspension of restrictions on the exercise of the voting rights contained under those articles or in any other agreement subsequent to 21 April 2004.

- The powers granted by the shareholders to the directors of the target company before the bid period, in view of taking measures liable to defeat the bid, are suspended during the bid period.

- Decisions by the directors of the target company liable to frustrate the bid, taken before the beginning of the bid period, which are not taken in the company's normal course of business and that are not yet fully implemented, must be approved or confirmed by the general meeting of shareholders.

However, the above limitations do not apply if one of the offerors, or one of the companies controlling them, is not required to comply with these rules or equivalent measures.

Any dispute involving the equivalence of such measures shall be settled by the AMF.

2. Unenforceability of restrictions on transfers of securities

Provisions of the articles of association restricting the transfer of securities (authorisation, right of first refusal clauses, etc.) are unenforceable against the offeror for the securities concerned by the bid.

The articles of association may also provide that the provisions of any agreement concluded after 21 April 2004 setting forth restrictions on the transfer of shares are unenforceable against the offeror.

3. Creation of "poison pills"

The target company can now issue warrants free of charge to all of its shareholders, enabling them to subscribe for shares at preferential terms. The exercise of these warrants seeks to dilute the offeror's holding and to make the transaction more costly for it.

The company must inform the public that it intends to issue such warrants, which automatically lapse if the bid is unsuccessful, expires or is withdrawn.

IV. Protection of the parties to the bid

1. Protection of the market: increased obligation of information

New Article L. 225-100-3 of the Commercial Code increases the obligation to provide information applicable to listed companies. The management report presented to the general shareholders meeting must now present and explain factors that are "liable to have an impact on the outcome of a takeover bid".

It also restrictively enumerates such factors, among which are the following:

- restrictions in the articles of association or contractual restrictions on the exercise of voting rights or on the transfer of shares,
- direct or indirect holdings in the capital of the company of which it is aware,
- control mechanisms in connection with employee shareholding,
- description of the securities having special control rights and the list of holders of such rights,
- agreements creating golden parachutes to the benefit of directors or employees, etc.

2. Information to be given to employees

The target company's works council may decide to hear the offeror, in which case the latter is required to present its industrial and financial policy, its strategic plans and effects of the bid on employment, business sites and the location of decision-making centres.

It should be recalled that if the offeror fails to go to the meeting of the works council to which he has been invited to attend, then the offeror will be unable to exercise the voting rights attached to the securities of the target company that are already or come to be held by it (Article L. 432-1 of the French Labour and Employment Code).

3. Protection of minority shareholders: setting of a minimum price in case of a mandatory bid

So as to increase the protection of minority shareholders, a minimum price is now defined in the event of a mandatory bid. Article L. 433-3 of the French Monetary and Financial Code provides that the price offered must *"be at least equivalent to the highest price paid by the offeror, acting alone or in concert with other persons within the meaning of the provisions of Article L. 233-10 of the Commercial Code, over the twelve-month period preceding the submission of the bid."*

However, the AMF may, depending on the circumstances and the criteria set forth in its General Rules, request or authorise a change in the price offered.

4. Protection of the offeror: simplification of the squeeze-out procedure

The squeeze-out procedure can now be implemented at the end of any bid (including a takeover bid through exchange of securities) and no longer only after a buy-out offer, when the securities not presented represent less than 5% of the capital and voting rights.

The squeeze-out may also involve securities providing access to the share capital if the shares created through the exercise of the rights attached thereto represent, together with existing

shares not presented, less than 5% of the share capital on a fully diluted basis.

The compensation offered to the shareholders must be equal to the price offered during the last bid or, in the event of a takeover bid through an exchange of shares, to a valuation which *inter alia* factors in the profits posted, existence of subsidiaries and future business prospects.

AREAS OF LEGAL PRACTICE

• **MERGERS & ACQUISITIONS**

Engineering of takeovers and deal structuring, legal due diligence, restructuring operations, joint ventures, obtaining necessary administrative permits and licenses, drafting and negotiation of documentation (letters of intent, sale & purchase agreements, warranties that assets and liabilities are as stated, bank guarantees, shareholders' agreements, etc.), merger deals, takeovers of companies in difficulty or in the framework of collective procedures.

• **CAPITAL INVESTMENTS AND LBOS**

Representation of investment funds, issuers, targets and company officers, during the due diligence, advisory and negotiation processes.

• **COMPANY LAW**

"Long-term capital" transactions, capital increases, issuance of composite securities (convertible or repayable in shares, investment certificates, priority dividend shares etc.), stock option agreements, company founder share plans, temporary business combinations, management fees and cash management agreements, changes to charter/by-laws and legal secretariat services.

• **SECURITIES LAW**

IPOs and preparatory work, drafting of prospectuses, legal secretariat services for listed companies, relations with market authorities, securities litigation.

• **BANKING AND FINANCE**

Advice on loan and financing agreements, warranties/guarantees, syndication, banking regulations, financing of acquisitions and structured asset financing (particularly of real estate).

• **COMMERCIAL CONTRACTS / ECONOMIC LAW**

Advice and litigation with commercial contracts, i.e. service, sale, distribution, concession, franchise, commercial agent agreements, distributor/supplier relations, general terms of purchase/sale, commercial partnerships, manufacturing and subcontracting agreements, business sale agreements, management leases, consumer law, public and private procurement contracts.

• **ADVERTISING / MARKETING**

Advice and litigation work in advertising and marketing law (validation of advertising or promotional campaigns on all media and related litigation).

• **LABOUR AND EMPLOYMENT LAW**

Advice and litigation work in collective and individual disputes as well as in social security law and criminal labour law.

• **INTERNATIONAL LITIGATION / ARBITRATION**

Advice and litigation work covering all facets of business, company and securities law, as well as collective procedures and white-collar crime. Representation at all stages of the dispute, from pre-litigation to litigation before judicial or arbitral courts, protective measures and enforcement.

• **REAL ESTATE LAW**

Advice and litigation work in connection with commercial leases, real estate due diligences, purchase/sale of property and of preponderantly real estate companies, financing of real estate acquisitions.

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• **COMPETITION LAW (FRENCH AND EU)**

Advice and litigation work in respect of industrial cooperation agreements and structuring of distribution networks. Advice and representation before the competition authorities and courts in cartel, anti-competitive practices, abuse of a dominant position and unfair competition cases. Advice on the control of concentrations (conduct of feasibility studies, preparation of notification files, negotiation with the national and Community control authorities) and on State aids/subsidies.

• **NEW TECHNOLOGIES AND INTELLECTUAL PROPERTY LAW**

Advice and litigation work, notably in IT matters (development and integration of software, licenses, assignments and other software-related contracts, facilities management, maintenance of IT systems and software, software infringement), in the field of new technologies (multimedia, Internet, e-commerce). Creation and hosting of websites, affiliation, partnership, online auctions, ASP licenses.

• **INTELLECTUAL PROPERTY**

Literary and artistic property rights & neighbouring rights. Distribution license, rights of performing artists, infringement litigation. Industrial property, trademark, patent and/or design and model applications, licenses and assignments, transfers of technology and/or know-how, trademark, patent and/or design and model litigation (infringement, opposition proceedings, etc.).

• **AUDIOVISUAL AND MULTIMEDIA LAW**

Advice and litigation work in connection with the production, publishing, co-production, distribution and licensing agreements, in France and abroad, of motion picture and/or audiovisual and/or multimedia works and related agreements. Navigation of audiovisual and motion picture regulations and assistance with financing.

• **TELECOM**

Legal advice and preparation of applications for telecom operator licenses, legal aspects of foreign investments in the telecom sector, link leasing (cable and fibre), co-leasing, leasing of capacity, service and/or capacity supply agreements and general terms of service and/or capacity supply, legal aspects and local loop unbundling.

• **COLLECTIVE PROCEDURES**

Alert, restructuring and reorganisation procedures, conciliation and ad hoc representation procedures. Court-ordered reorganisation, preparation of reorganisation plans, sale and recovery plans, liquidation. Representation and assistance of creditors, company officers (action to make good the shortfall in assets, extension procedures, etc.).

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