

A HOSTILE TAKEOVER BID CAN BE SIDESTEPPED BY SELLING SECURITIES ON THE MARKET

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Takeover bid on Compagnie Européenne de Casinos: a hostile takeover bid can be sidestepped by selling securities on the market

For the first time, a takeover bid facing off two potential purchasers was resolved not by a transfer (*apport*) of the target's securities to one of the protagonists but by their sale on the market.

Accor Casinos launched a takeover bid for the securities of Compagnie Européenne de Casinos ("CEC") by obtaining a prior commitment from the founding shareholders ("Der Krikorian spouses") that they would tender securities. In line with the requirements of the market authorities, this commitment would lapse in the event of a competing bid. However, if they accepted a competing bid, the Der Krikorian spouses contractually agreed to "indemnify" Accor Casinos.

Following the competing bid made by Groupe Partouche, Accor Casinos counterattacked with a higher bid, indicating that the commitment made by the Der Krikorian spouses had lapsed.

Instead of tendering their securities to one of the protagonists, the Der Krikorian spouses instructed their financial intermediary to "sell on the market", without any indication other than the sale price.

This sale was made to the benefit of Groupe Partouche pursuant to a mechanism defined by the regulations in force as "the simultaneous production and execution, at the same price, by the same member of the Euronext Market, of two orders to buy and sell by the same client for the same quantity of the same shares."

Following the failure of the bid by Accor Casinos, two proceedings were instituted, with Bersay & Associés representing the Der Krikorian spouses in each:

1. The Financial Markets Authority's (AMF) Enforcement Committee investigated the conditions under which the securities had been sold, by application, by the Der Krikorian spouses to the benefit of Groupe Partouche, during the period of the competing takeover bids.

The AMF's Board considered that the sale by application of a block of securities conferring the majority of the share capital to Groupe Partouche prevented Accor Casinos from making a bid for them and therefore constituted interference with the freedom of the bidding process.

In a display of complete independence, the Enforcement Committee considered, in its decision of 15 September 2006, that this transaction did not constitute interference with the freedom of the bidding process on the part of the Der Krikorian spouses or on the part of Groupe Partouche. The charges against the Der Krikorian spouses were thus entirely dropped.

2. The Court of Appeals of Versailles, in a decision of 21 December 2006, upheld the lower court's decision dismissing all of the claims brought by Accor Casinos, primarily pertaining to the payment under the indemnification clause.

The Court effectively considered that the sale on the market, even through an application, could not be considered as a "disguised transfer", contrary to what Accor Casinos asserted. This being the case, in the absence of transfer, the indemnification clause could not receive application and no indemnification could be claimed from the Der Krikorian spouses.

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Litigation will probably continue concerning the validity of these types of indemnification clauses, on the basis that they:

- lapse upon the lapse of the main commitment to tender,
- are invalid for lack of good and valuable consideration,
- and unlawful as contrary to the principle of the freedom of the bidding process [if the indemnification clause remains in force, the lapse of the transfer commitment is theoretical].

For the time being, the main lesson to be gleaned from this case is that a takeover bid can be sidestepped by a sale of securities on the market, including by application, and not by a tender of the securities to one of the protagonists.

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).

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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.

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Advice and litigation work in respect of industrial cooperation agreements and structuring of distribution networks. 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.

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Development and integration of software, licenses, assignments and other software contracts, facilities management, maintenance of IT systems and software, appraisals of the compliance of IT services, anti-piracy fight.

• **ELECTRONIC COMMUNICATIONS**

Regulatory domain; construction of networks, co-localization of facilities, agreements and general terms of supply of services, access and interconnection agreements, judicial or administrative litigation (against the decisions of the regulatory authority).

• **INTERNET**

Creation and hosting of websites, affiliation, partnership, audit of websites, application for and defence of domain names, market shares, online auctions, ASP licenses.

• **MEDIA**

Advertising (protection, operation) and marketing; sponsoring; regulation of broadcasting and of electronic communication services (TV, mobile phone TV, Internet TV, video on demand etc.).

• **PROTECTION OF PERSONAL DATA AND PRIVACY RIGHTS**

Relations with the CNIL; specific regulations on electronic communications (geolocalization services, storage of traffic data); breach of privacy rights, defamation.

• **LITERARY AND ARTISTIC PROPERTY RIGHTS, COPYRIGHT AND NEIGHBOURING RIGHTS**

Protection and licensing of copyright and neighbouring rights; audiovisual (cinema, TV) and multimedia (online and offline video games, cd-roms etc.) production and co-production; motion picture regulations; distribution licenses (TV, merchandizing, video distribution, derivative rights); rights of performing artists, sports law; infringement litigation (customs seizures, infringement seizures, proceedings before civil and criminal courts).

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