

THE INDEPENDENT EXPERT: A NEW PLAYER IN TAKEOVER BIDS

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The AMF has recently broadened the scope of scenarios requiring mandatory recourse to an independent expert.¹

Previously limited to squeeze-outs, the expert's services are now required in the other cases cited by the AMF's General Rules (I). These General Rules specify the rules for the appointment (II) as well as the duties of the expert (III).

Only some of the new provisions of the AMF's General Rules shall be mentioned below, since this article does not purport to be exhaustive.

I. The main scenarios of recourse to an independent expert

1.1. Aside from the squeeze-out scenario a company targeted by a takeover bid is now required to appoint an independent expert when the bid in question is likely to generate a conflict of interests such as to impair the objectiveness of the Board of Directors or of the Supervisory Board or when it is of a nature to interfere with the equality of the security holders targeted by the bid.

Article 261-1 I of the AMF's General Rules contains a non-exhaustive list of cases of mandatory recourse to an independent expert including, *"inter alia"*:

- when the targeted company is already controlled by the initiator before the launch of the bid;
- when the directors or persons controlling the target have concluded an agreement with the initiator of the bid that is liable to affect their independence;
- when the shareholder controlling the target does not tender his shares in response to a share buyback bid made by the company over its own shares;
- when one or more related transactions are liable to have a significant impact on the price or the parity of the bid;
- when the bid covers various categories of shares and provides price terms that are likely to interfere with the equality of the security holders;
- when the purchase of the target is paid for with securities other than shares, providing access to the share capital or voting rights of the initiator or of a company of its group.

1.2. Pursuant to the terms of Article 261-2 of the AMF's General Rules, this expertise is also required for any issuer carrying out a reserved capital increase at a discount, in relation to the trading price, that is higher than the maximum authorized discount for a capital increase without preferential subscription rights (namely 5%), if such capital increase grants a shareholder, acting alone or in concert, control over the target.

II. Choice of independent expert

The AMF recommends that the Board of Directors choose the expert having *"the competence, resources and professional reputation that appear to be appropriate to the assignment."*²

In addition, the expert must not have any conflict of interest with the persons concerned by the bid. By way of example, the AMF cites the following cases of conflict of interests:³

- existence of legal or capital ownership links with the companies concerned;
- assessment of the targeted company over the last 18 months preceding his appointment;
- advisory services to one of the companies concerned;
- existence of a financial interest in the success of the bid, a claim held by or over one of the companies concerned.

Article 261-4-II of the AMF's General Rules adds that the expert should not *"repeatedly work with the same presenting institutions or within the same group when the frequency of his services is liable to affect his independence."*

The expert should include in his report a declaration attesting to the absence of any past link that could affect his independence or objectivity.

III. Duties of the independent expert

The Independent expert must:

- (i) assess the target company as well as the full consideration for the bid;
- (ii) analyze the assessment work carried out by the initiator's advisor or advisors, and
- (iii) establish a declaration that the price, parity or financial terms of the bid are fair.

¹ Articles 261-1 *et seq.* of the AMF's General Rules approved by regulation dated 18 September 2006.

² AMF Recommendation of 28 September 2006.

³ Article 1 of Instruction 2006-08 of 25 July 2006

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.

• **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.

• **COLLECTIVE PROCEDURES**

Alert, restructuring and reorganisation procedures, amicable composition and ad hoc representation procedures. Court-ordered reorganisation, continued operation, sale and continuation plans, liquidation.

• **INDUSTRIAL PROPERTY**

Advice and litigation in the field of trademarks, patents and/or design and model applications, transfers of technology and/or know-how, unfair competition and passing off.

• **COMPETITION LAW (FRENCH AND EU)**

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.

• **IT LAW**

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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