# France

## Takeover Guide

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## Contents

## INTRODUCTION TO THE LEGAL AND REGULATORY FRAMEWORK

The Autorité des Marchés Financiers (AMF) regulates and supervises tender offers in France. The AMF is responsible both for enacting takeover regulations, consistent with the French Monetary Code, in particular Articles L. 433-1 to L. 433-4, and enforcing them. The involvement of the AMF in the tender offer process is also characterised by a certain degree of discretion, subject to the review of the Paris Court of Appeals with respect to the AMF's exercise of its enforcement power, and the French administrative appellate system (Conseil d'Etat) with respect to the exercise of the AMF's regulatory power.

The rules governing tender offers are essentially set forth in the French Monetary and Financial Code and the AMF's Règlement Général ('General Regulation') – specifically, Title III of Book II.

Consistent with Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (the EU Takeover Directive) with which French national law is required to conform, the General Regulation sets forth certain general principles governing the conduct of all tender offers.

In this respect, the General Regulation states that, to ensure the orderly conduct of tender offers in the best interests of investors and the market, the offeror, target company and all individuals or entities acting in concert with any of them (collectively, the 'persons concerned by the offer'), must respect the following general principles:

- free competition between offers and competing offers;
- equal treatment of and equal information to all holders of the securities of the persons concerned by the offer;
- the transparency and integrity of the market;
- fair dealing; and
- fair competition.

These general principles apply throughout the offer period (*période d'offre*): that is, from the moment the AMF first publishes the key terms and conditions of the offer until the AMF publishes the offer results, or, as the case may be, the results of any subsequent offering period (*réouverture de l'offre*).

In addition to its role as the overall market regulator, the AMF has a concrete role in supervising individual tender offers. In this capacity, the AMF:

- initially receives all proposed tender offers, which must be filed with it before any offer can commence;
- reviews the terms of the offer and the offer documentation to ensure compliance with applicable regulations, and, as part of that review, may require an offeror to amend the terms of its offer if, among other things, the AMF determines that the offer does not comply with the general principles referred to above;
- sets and publishes the calendar of the tender offer process, including when and for how long the offer is open for acceptance (as well as whether to subsequently extend the offer period);
- publishes the results of the offer; and

- under certain conditions, including in the event of a competing offer, assesses the offer price (or the exchange ratio in an exchange offer). The AMF does not generally conduct a substantive price review.

## PREPARING AND NEGOTIATING THE DEAL

**Leaks: market rumours**

Although the disclosure of a potential tender offer might be deferred (see 'Announcement' below), it is nonetheless advisable to prepare a 'leak strategy' to be in a position to react immediately in the event of unexpected leaks.

Where the AMF has reason to believe that a tender offer is being prepared, and particularly where the market for the securities of the issuer has shown significant price volatility or unusual trading volume, the AMF may require a suspected offeror to publicly disclose its intentions with respect to the suspected target. The General Regulation expressly provides that discussions between the bidder and target, and the appointment of advisers in the preparation of a bid, are indications of the potential offeror's intentions.

In the event such disclosure is required, it takes the form of a press release, which must be submitted in advance to the AMF and must set forth the characteristics of the offer as detailed below (see 'Announcement').

**Due diligence**

Pre-acquisition research on a listed target can be conducted first on the basis of public information, from the target's knowledge and then possibly by way of a due diligence exercise, which requires the target's cooperation and creates issues in terms of confidentiality and privileged information.

*Public disclosure*

Due diligence based on public disclosure is conducted through the information contained in the target's:

- annual and interim financial statements;
- disclosure of any material development that is price-sensitive (eg, major litigation or investigations, M&A transactions and management changes);
- articles and by-laws (*statuts*);
- universal registration document (URD) aggregating all the information required in relation to the management report, annual financial statements and the information required under Regulation (EU) No 2017/1129 governing prospectuses; and
- minutes of shareholders' meetings, including the annual management report to shareholders (*rapport de gestion*).

*Exchange of non-public information*

It is possible to set up a confidential data room to permit more detailed due diligence than available from the public record or otherwise to exchange non-public information regarding financial and commercial

matters. Such data rooms are permitted when the offeror has a serious interest in a future transaction and when the future transaction relates to significant shareholdings. Obviously, all such information would be subject to a confidentiality agreement between the target and offeror.

While in possession of any material non-public information, the offeror is prohibited from trading any shares in the target (unless such information was previously made public). In the event of an eventual offer, the offer document would have to disclose that a data room was established and disclose any material information exchanged.

**Deal protections**

*Break-up fees*

Any break-up fees (including any reverse break-up fees) must be considered to be in the best interest of the target. Break fees given in the context of a negotiated business combination must be reasonable. Such fees are generally considered reasonable if they are commensurate with inducing the counterparty to enter into serious discussions (eg, the fees cover the costs and expenses of negotiations, due diligence etc and are reciprocal).

There is, however, no express statutory or regulatory text on this topic. In the context of a tender offer, the amount of the break-up fee should not deter the target from recommending (or shareholders from accepting) a competing offer in order to comply with the principle of free competition between offers and competing offers. Accordingly, the AMF accepts break-up fees of up to 2 per cent of the target's equity value (calculated based on the offer price).

*Irrevocable commitments*

In general, and in application of the principle requiring free competition between offers and competing offers, a commitment by a shareholder to tender into an offer must provide that it is revocable in the event of a competing offer. However, it is possible to combine a commitment to tender with a break fee payable by the shareholder giving the commitment. In such an arrangement, the shareholder would pay a break-up fee to the offeror in the event that it exercised its right to tender into a competing offer. Again, the fee would have to be reasonable and could not be set at such a level that it would effectively frustrate any potential competing offer.

*Exclusivity agreements*

Provided they are of limited duration, exclusivity agreements providing that the target's directors will not commence discussions with other potential offerors are permissible. These kinds of agreement (and 'no-shop' provisions or 'matching-rights' provisions) can, however, be challenged by third parties on the basis that they violate the general principles of free competition between offers and competing offers.

**Pre-announcement stake-building: bloc acquisition or irrevocable commitments**

*Insider trading*

Insider trading in France is subject to criminal and regulatory sanctions. In general, a person in possession of non-public, price-sensitive information relating to a listed company is prevented from trading in the shares of that company, as long as this information is not publicly disclosed.

As a result, while the exchange of confidential information between the target and offeror in advance of a tender offer (see 'Due diligence' above) would bar the offeror from acquiring any shares in the open market, the disclosure of this material information in the offer document would remove any bar to the purchase of the shares in settlement of the offer.

*Pre-offer bloc trade versus irrevocable commitments*

When the target is controlled by one or several shareholders, or has one or several significant shareholders, with whom the offeror entertains discussions, the offeror may wish to secure these shareholdings to ensure or facilitate the success of the ensuing tender offer.

The offeror may acquire a bloc of shares ahead of disclosing its intention to file a tender offer, subject to the insider trading restrictions discussed above. The bloc trade will have to be completed off market by a broker and reported by the broker to the AMF (in addition to any possible reporting of any threshold crossing). It may trigger the obligation to file a tender offer.

The offeror might prefer to enter into irrevocable commitments to tender into the offer with the relevant significant shareholders. Irrevocable commitments have the advantage that, where the shareholdings subject to the irrevocable commitment are not material enough to secure the success of the offer (and in any event are less than 30 per cent), the offeror is permitted to subject its offer to a success condition without the risk of acquiring a minority stake.

However, the AMF will refuse to declare the offer in conformity with the regulations if they make the success of any future competing offer impossible. In practice, parties to such commitments generally provide that their agreement shall automatically terminate in the event of the filing of a competing offer.

The same applies to revocable commitments (ie, commitments that give the committed shareholder a way out in the event of an offer) when they are coupled with a break-up fee. These undertakings are valid in principle unless the amount of the break-up fee makes a competing offer impossible. In this respect, a revocable commitment providing for a break-up fee corresponding to the difference between the initial offer price and the competing offer price, capped at circa 10 per cent of the offer price, has been upheld as valid.

**Concert**

Where the shareholder is acting in concert, and not alone, its holding and hence the thresholds are calculated by aggregating the holdings of all the shareholder members of the concert.

## ANNOUNCEMENT

The general rule in France is that any person planning a financial transaction that may have a significant impact on either the market price of a security or the rights of the holders of that security must publicly disclose the terms of that transaction as soon as possible.

However, disclosure can be deferred if confidentiality is essential to the transaction and it is possible to maintain such confidentiality. Accordingly, a potential offeror is not required to make any public announcement as long as the offeror is able to maintain confidentiality. Similar rules apply to the target.

Accordingly, in the context of a friendly transaction, neither the offeror nor the target is obliged to publicly disclose the negotiations, provided they have put in place customary confidentiality measures, including entering into a confidentiality agreement and limiting the number of persons aware of the negotiations.

When the potential offeror states that it intends to make an offer, the AMF sets a deadline for the offeror to either make a public announcement of the terms and conditions of its offer or file its draft offer with the AMF.

Any public announcement must set forth:

- the financial terms and conditions of the proposed offer;
- any agreements that could affect its outcome;
- the level of share ownership that the offeror already holds in the target;
- the conditions that need to be met before the draft offer can be filed with the AMF; and
- the proposed timetable.

The AMF may request any other information that it deems necessary.

Whether in response to the AMF's deadline or pursuant to its general disclosure obligations, whenever a person discloses the terms and conditions of an intended offer (in particular, whether it is a cash or exchange offer and the price or exchange ratio to be offered), that person is obligated to inform the AMF immediately. The AMF then issues an announcement informing the market generally. The AMF's publication of this announcement marks the start of the 'pre-offer period' (*période de préoffre*) that, among other things, triggers certain share trading restrictions as discussed below.

## TYPES OF BIDS

**Exchange or cash offers**

In the event that an offeror has acquired more than 5 per cent of the target shares for cash in the 12 months prior to filing a tender offer, it will be obligated to offer an all-cash alternative in the event of an exchange offer or part cash/part shares. In this respect, practitioners generally recommend caution, even where this 5 per cent threshold has not been reached but substantial cash purchases have been made.

A cash alternative must also be offered where the securities offered as part of the exchange offer are not liquid securities admitted to trading on a regulated market in the European Union or in the European Economic Area.

**Mandatory offers**

Where a person, acting alone or in concert, comes to hold, directly or indirectly, more than 30 per cent of a company's equity securities or voting rights, such a person is required, on its own initiative, to inform the AMF immediately and file a proposed offer for all the company's equity securities, as well as any securities giving the right to acquire its capital or voting rights, on terms that have to be acceptable to the AMF.

The same obligations apply to persons, acting alone or in concert, who, directly or indirectly, hold between 30 per cent and 50 per cent of the total number of equity securities or voting rights of a company and who, within a period of less than 12 consecutive months, increase such a holding by at least 1 per cent of the company's total equity securities or voting rights.

Many exemptions to the mandatory tender offer exist. In a few cases, where the shareholder fulfils the conditions determined in the General Regulation, there is no requirement to file a mandatory offer. As a general rule, there is no requirement to file a mandatory offer when there is no significant change in the relative shareholdings of the parties forming the concert group.

In addition, the AMF may grant an exemption to the obligation to file a mandatory offer where the transaction triggering the obligation corresponds to the cases listed exhaustively in the General Regulation.

A temporary authorisation to cross the mandatory offer thresholds can be granted, in particular, if the aggregation rules lead to an unjustified or disproportionate obligation to file a tender offer for a shareholder in light of the circumstances. In such a case, the relevant shareholder must undertake not to exercise the rights corresponding to the shares in excess.

The AMF has discretionary power to refuse to grant an exemption, even if the situation corresponds to one of the possible exemptions listed above. It should be noted that the key factor used by the AMF when it decides whether to grant an exemption is the fact that minority shareholders should not suffer a change of control of the issuer against their will.

Exemption decisions are published by the AMF and can be challenged before the Paris Court of Appeals.

**Simplified offer**

The General Regulation provides for the possibility to follow a simplified offer procedure in several circumstances that it lists exhaustively. It includes, notably, the situation where the offeror holds, following or not following an acquisition, directly or indirectly, alone or in concert, half or more of the target company's equity and voting rights.

Some of the main differences between a simplified offer procedure and the normal procedure concern the timetable of the offer, as well as the price proposed. When the offeror owns, alone or in concert, more than 50 per cent of the shares and voting rights of the target, and unless the AMF accepts otherwise, the offer price may not be lower than the volume-weighted average stock market price of the shares over the 60 trading days preceding the filing of the offer.

The use of the simplified procedure is, in any event, optional. When a shareholder has acquired, through a bloc trade, more than 50 per cent of the shares and voting rights of the target before it initiates its offer, whether the offer has to be made under the simplified procedure or not has to be discussed, bearing in mind that the AMF may insist, in any event, that the minimum price limit applies.

**Possible relevance of mergers as an alternative**

There are other structures available to combine businesses under French law, but they are used more rarely, and the public tender offer is the most common transaction structure.

The acquisition of the principal assets of the target could be envisaged in the context of a friendly transaction supported by the target’s management. However, this structuring is very rarely used by listed companies, notably due to the legal, tax and organisational complexities involved. In addition, where the target is controlled by the offeror, or is under common control with the offeror, the AMF may require the target’s controlling shareholder to initiate an exit offer, unless the target’s shareholders’ situation is not significantly affected by the merger (in terms of rights, dividend policy etc).

A merger between the target and offeror, when both are French companies, is a possible option in a friendly context (cross-border mergers with other EU companies are also possible but will not be addressed in this guide).

In France, a merger involves the universal transfer of all assets and liabilities of the disappearing company to the surviving company, which issues new shares to the benefit of the disappearing company’s shareholders. However, as cash mergers and triangular mergers (ie, mergers involving

subsidiaries) are not permitted in France, the use of mergers to structure business combinations is not very flexible or common in France.

The AMF may grant an exemption to file a mandatory offer in the event of a merger.

In practice, the AMF will not accept that the target be merged into a non-listed company. Therefore, any merger between a target and a non-listed company must be made with the target being the surviving company, or concurrently with the listing of the surviving company.

**Exit offers (*offres publiques de retrait* or OPR)**

The AMF is likely to require the controlling shareholders to launch an exit offer when it considers that the rights of the minority shareholders are affected by any of the following changes contemplated by controlling shareholders:

- the controlling shareholders have proposed to submit significant changes to the articles of association of the listed company to the other shareholders for approval;

- when the controlling shareholders have decided to merge the company with its holding company or a company controlled by its holding company; to sell or contribute to another company all or the principal assets of the company; or to change its activity or suspend dividend payments for several accounting periods; and

- when a listed company incorporated as a *société anonyme* resolves to change its form to a *société en commandite par actions*. Absent controlling shareholders, the obligation to file an offer is imposed on the general partners (*associés commandités*).

An OPR relating to the shares of a company (or, respectively, to investment certificates or voting right certificates) may equally be initiated by shareholders holding, in concert, at least 90 per cent of the share capital or voting rights of a listed company either spontaneously or at the request of the AMF upon application by a minority shareholder. An OPR follows the same procedure as the simplified offer and cannot be subject to an acceptance condition.

When the offeror already holds, directly or indirectly, alone or in concert, half or more of the target company's equity and voting rights (including in the context of an OPR), the consideration may not be less than the volume-weighted average stock market price of the shares over the last 60 trading days preceding the opening of the pre-offer period or offer period, except if the AMF agrees otherwise.

An OPR may be conducted in connection with shares that are traded on a regulated market and shares that have ceased to be traded.

## MECHANICS OF FORMAL BIDS

**Regulatory process**

*Filing of the draft offer*

The tender offer process begins with the filing of a draft offer (*projet d'offre*) by one or more presenting banks acting on behalf of the offeror. The filing is accompanied by a letter signed by at least one of the presenting banks, guaranteeing the performance and the irrevocable nature of the offeror's undertakings.

This letter must set forth precisely the main characteristics of the offer, such as, notably, the purposes and intentions of the offeror; the number and type of securities of the target already held by the offeror; the cash price or exchange ratio and the precise technicalities of the acquisition of the targeted shares.

The letter is accompanied by the preliminary offer document (*note d'information*) and any filings already made with any government agency competent to authorise the transaction.

The AMF publishes a notice (*avis de dépôt*) summarising the key terms and conditions of the draft offer. This publication marks the beginning of the offer period. At this time, the AMF may request that trading in the target securities – and/or trading in the securities of the offeror (or any concert party) – be suspended, but generally for a short period of time.

In addition, no later than the time of the filing of the draft offer, the offeror must publish a press release summarising the key terms of the offer and advertising where the preliminary offer document can be obtained, subject to the review by the AMF. Then, the target may issue its own press release in order to publicise its board of directors' opinion with respect to the offer.

*Content of the offer document*

The required content of the offer document is set forth in the General Regulation and a further detailed Instruction of the AMF, and includes, for example:

- the terms of the offer (price or exchange ratio proposed, number and natures of securities targeted and already held by the offeror, conditions to which the completion of the offer is subject, provisional timetable, terms of financing for the offer, etc);

- the offeror's intentions over, at least, the coming 12 months with respect to: (1) the industrial and financial strategy of the relevant companies; and (2) the continuance of a stock market listing of the target;

- its employment policy; and

- if relevant, the opinion and supporting reasons of its board of directors (or comparable governing body) with respect to the benefits or other consequences of the offer for the offeror, its shareholders and its employees.

The offer document must be signed by a representative of the offeror and a representative of one of the presenting banks certifying the accuracy of the information included in the document.

*Content of the response document*

The required content of the target's response document is set forth in the General Regulation and a further detailed Instruction of the AMF. Required disclosure includes, among other things:

- any restrictive agreement among the target, any of its concert parties and its shareholders that might have an impact on an evaluation of the offer or its result;

- the independent valuation expert's report, where such a report is required;

- the opinion and the reasons therefor of the board of directors (or comparable governing body), regarding the benefits and consequences of the offer for the target company, its shareholders and its employees;

- as the case may be, the measures that the board of directors has implemented or intends to implement that may frustrate the offer;

- the opinion of the target's works council (TWC) and the expert appointed by the TWC (the 'TWC expert'); and

- whether members of the board of directors (or comparable governing body) intend to tender their shares to the offer.

The response document must be signed by a representative of the target certifying the accuracy of the information included in the document.

When the offer is friendly, the response document and offer document can be merged into one joint document, provided there is no potential conflict of interest. Considering the high likelihood of the existence of a conflict of interest, joint offer documents are quite rare in practice.

*Review of the draft offer*

If a fairness opinion from an independent valuation expert is required, or if the works council of the target needs to be consulted, the AMF issues its decision on the offer, at the earliest, five trading days after the target has filed its draft response document. Otherwise, the AMF has ten trading days from the date the draft offer is filed to review whether it complies with applicable law and regulations.

The AMF reviews the following factors:

- the purposes and intentions of the offeror;

- if relevant, the type, terms and market prices of the securities being offered in exchange;

- the conditions of the offer (if any);

- the disclosure of information in the offer document; and

- if a fairness opinion of an independent expert with respect to the offer price is required, the financial terms of the offer, with particular reference to the expert's fairness opinion and the opinion and reasoning of the board of directors (or comparable governing body).

The AMF can require the offeror to modify the terms of the offer if it finds that they do not comply with the applicable law and regulations.

While the AMF has broad discretion in its review, in general, it does not review the substantive fairness of the price offered, except in the case of mandatory offers and, to a lesser extent, possible conflicts of interest.

If the AMF determines that the draft offer complies with applicable regulations, it publishes a *déclaration de conformité*, which also serves to approve the content of the offer document. This action by the AMF triggers certain key events in the tender offer calendar:

- Within five trading days of the *déclaration de conformité*, unless a joint offer document/response document has been submitted, the target must file its response document. Some exceptions exist regarding this time lapse given to the target.

- Within two trading days of the *déclaration de conformité*, the offeror must disseminate the definitive offer document.

In any event, the definitive offer document is made available in electronic form on the website of the AMF (and, in practice, on the website of the offeror and target (if a joint document)).

The declaration of conformity may be challenged before the Paris Court of Appeals within ten days of its publication. In principle, the challenge does not suspend the enforcement of the AMF's decision. The Paris Court of Appeals has to rule within five months.

**Timetable**

The offer calendar, which is controlled by the AMF, is determined according to the dates on which the offer documentation is disseminated.

In addition to the period of days mentioned above, the acceptance period (*durée de l'offre*) begins, and the offer is open for acceptance one trading day after the latest of the following events: (1) dissemination of the offer document; and (2) where a fairness opinion by an independent expert is required, on the day after the response document is disseminated; *provided* the target and offeror have provided the AMF with the general information documents discussed above. The AMF will also delay the opening of the acceptance period until any required governmental approvals have been received.

The AMF publishes the dates of the opening and closing of the acceptance period, and the date of the publication of the results.

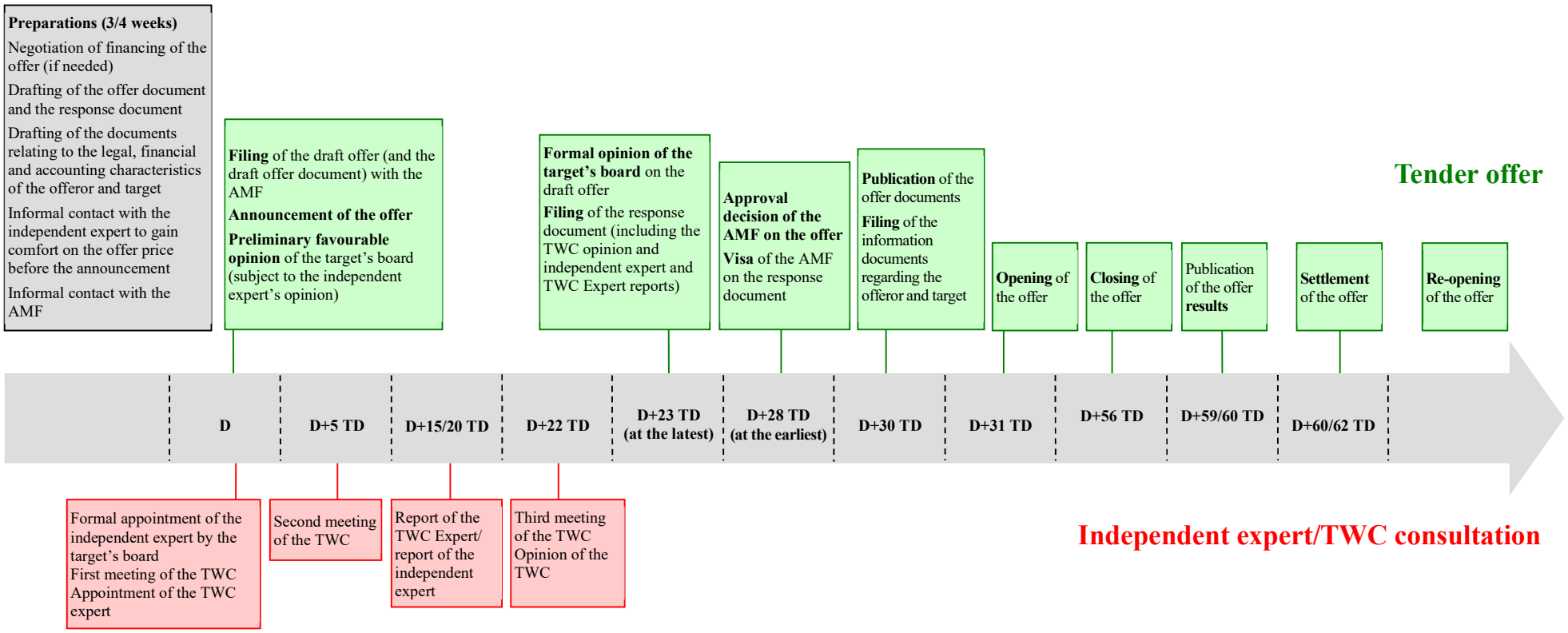
A tender offer under the normal procedure (which applies whenever the offeror owns less than 50 per cent of the share capital or voting power of the target) is open for 25 trading days, which may be extended to 35 trading days in cases in which the target has filed a separate response document. The only exception is if the offer is submitted to an antitrust condition, in which case, the calendar for the offer and the closing date for the acceptance period are set and published by the AMF after it has received evidence that the competition authorities have approved the transaction.

The AMF publishes the results of the offer maximum nine trading days after the closing date of the acceptance period. If the offer is subject to a minimum acceptance condition or automatic invalidity threshold, the AMF will publish the preliminary results of the offer as soon as it has been informed of the number of securities that have been tendered to the offer.

Summary timetables for the following scenarios of tender offers are set forth on the following pages:

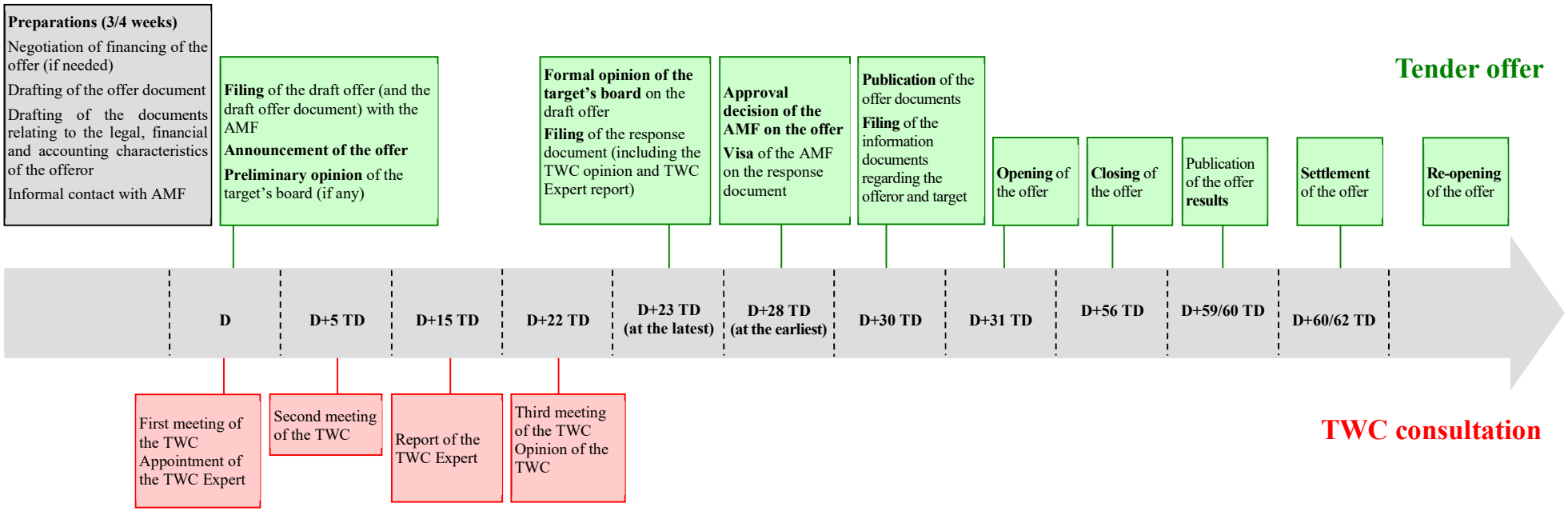
- friendly offer;
- unsolicited offer; and
- simplified offer procedure.

**Indicative simplified timetable for a friendly tender offer**



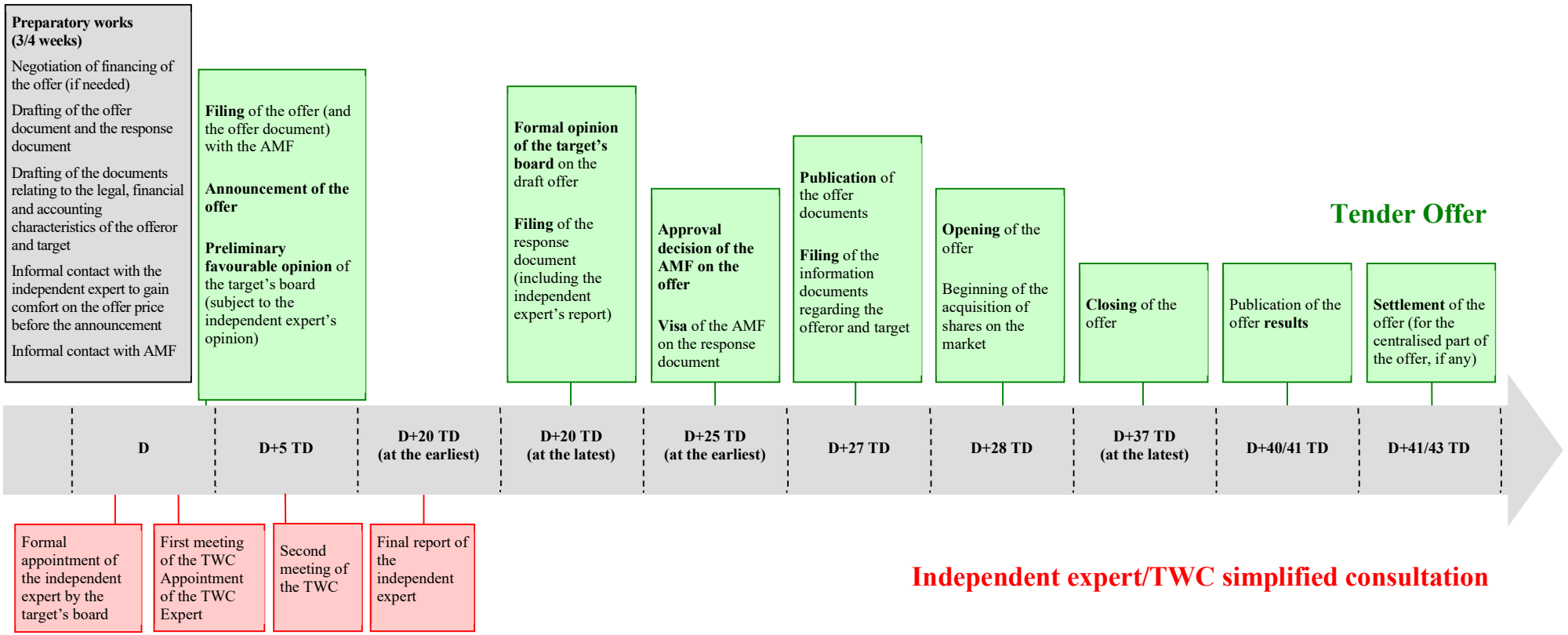

**NB:** '**TD**' means trading day; '**TWC**' means target's works council.

**Indicative simplified timetable for a hostile tender offer**




**NB:** '**TD**' means trading day and '**TWC**' means target's works council.

**Indicative simplified timetable for a simplified tender offer**




**NB:** '**TD**' means trading day and '**TWC**' means target's works council.

**Conditions**

The completion of the offer might be subject to conditions that are permitted in a limited number by the French regulation:

- *Minimum acceptance condition*: The offeror making a voluntary offer may condition the closing of an offer on a minimum level of acceptance by the target shareholders, which is necessarily: (1) above the automatic invalidity threshold: that is, 50 per cent of the total number of equity securities or voting rights of the target; and (2) below the threshold of 90 per cent, at which minority shareholders can be involuntarily 'squeezed out'. A minimum acceptance condition can only be reduced or waived in the context of an improved offer (*surenchère*).

- *Minimum acceptance condition in a cross-linked offer*: Where an offeror simultaneously makes separate offers on two or more targets, the closing of that offer may be subject to the further condition that the automatic invalidity threshold and/or minimum acceptance condition are also met in the other offer or offers.

- *Limited antitrust condition*: To the extent that such approval is required, an offer may be conditioned upon receipt of antitrust approval from the European Commission, French Competition Authority, competent national competition regulator of any other state within the EEA and antitrust authorities of any jurisdiction, provided that the review process is compatible with a ten-week period starting on the opening of the offer, unless the AMF agrees to extend the offer timetable.

- Under EU competition law and French national competition law, an offeror may acquire target securities in a tender offer before the receipt of antitrust approvals, provided the offeror does not vote in the case of the securities it has acquired before approval is granted. In effect, there are three possible approaches to addressing an antitrust review.

- *Required shareholder approvals*: In an exchange offer, should the authority to issue a sufficient number of shares not been previously delegated to the board of directors by the shareholders, the completion of the offer is conditioned on the approval of the issuance of the offeror's shares to be used as consideration in the offer. However, the offeror has to give an irrevocable undertaking that such a resolution will be put before its shareholders.

- In the event that applicable law or the offeror's by-laws provide that a tender offer (even a cash offer) must be approved by its shareholders, the AMF can permit the opening of the acceptance period to be conditioned on obtaining the necessary approval, provided that the convening notice for the general meeting of shareholders has already been issued at the time that the proposed offer is filed with the AMF.

- *Other regulatory approvals*: The AMF may condition the opening of the acceptance period on the receipt of mandatory regulatory approvals, such as those required in the insurance and banking sector or covered by the foreign direct investment (FDI) regime.

It is not permissible to include a financing condition or material adverse change condition.

**Withdrawal rights**

A holder who has tendered shares into the offer may withdraw its instruction at any time up to and including the closing date. After the closing date, the shares cannot be withdrawn.

**Disclosures**

From the beginning of the pre-offer period until the end of the offer period, the following persons must report any purchases or sales of any securities that are subject to the offer on a daily basis, as well as any other transaction that could reasonably be expected to transfer the ownership of such securities or voting rights in the target or agreements having an economic effect similar to the ownership of actual shares:

- The persons concerned by the offer (ie, the offeror, target and their respective concert parties);
- Any person holding, alone or in concert, at least 5 per cent of the share capital or voting rights in the target;
- Any person holding, alone or in concert, at least 5 per cent of any class of securities subject to the offer, other than shares; and
- the members of the board of directors, the management board or the supervisory board of any of the offeror, target or any of their respective concert parties.

The same daily reporting obligation is imposed on any person who, acting alone or in concert, since the beginning of the offer period or the beginning of the pre-offer period, where applicable, has acquired target securities representing more than 1 per cent of its share capital or more than 1 per cent of any securities (other than capital stock) subject to the offer.

The report must be filed with the AMF no later than the trading day following the date of the transaction. The AMF is entitled to request any clarification or additional information that it deems necessary. On filing, the AMF makes the declarations publicly available.

## DUTIES OF DIRECTORS

Even if France had chosen to adopt the 'board passivity rule' when implementing the EU Takeover Directive, the board of directors of the target is entitled, subject to certain limitations, to take any measure that may frustrate the offer. In addition, the board may also use the so-called *bons breton* as a defensive measure (their effectiveness remains to be tested).

It is to be noted that French listed companies are, however, granted the option of reinstating in their by-laws another regime under which, during the offer period:

- prior authorisation of the shareholders' meeting is required before any measure is taken that may frustrate the offer;
- shareholder approval or confirmation must be obtained with regard to any decision taken prior to the offer period which: (1) is not yet partly or fully implemented; (2) is outside the ordinary course of business; and (3) may result in the frustration of an offer; and
- delegations given by the shareholders to the board are suspended.

In the event that the by-laws adopt this option, they may also introduce the reciprocity rule pursuant to which the limitations on possible defensive measures are only applicable in the event the offeror (or its controlling entity or the parties acting in concert with it) is subject to the same or equivalent limitations.

In any case, during the offer period, the board of directors is subject to limitations:

- The board of directors is not entitled to impinge on powers explicitly granted to the shareholders' general meetings. It essentially means that the board of directors cannot amend the by-laws or modify the share capital of the target without prior shareholder approval or pursuant to a valid delegation.

- The board of directors must act in accordance with the corporate interest (*intérêt social*). Although the concept of corporate interest remains undefined, it is generally accepted that it refers to the interests of the company as a whole and is distinct from that of any of the involved constituents: shareholders, employees, creditors and other stakeholders.

- During the offer period, the offeror and target must ensure that their acts, decisions and declarations do not jeopardise the corporate interest (*intérêt social*) and the principle of equal treatment of and equal information of the relevant companies' shareholders.

- The general principles set out by the General Regulation (eg, free competition between offers and competing offers) must of course be respected, being specified that, in the event of the adoption of a defensive measure, the application of those principles will take into account the target's board of directors' specific authority to take such a measure during the offer period.

## DEFENCE AGAINST A HOSTILE OFFER

**Defence against an unsolicited offer**

The most efficient defence against a hostile takeover is the incorporation of the listed company as *société en commandite par actions* (SCA). Even if the offeror is successful in acquiring the majority of the shares of the target, it will not acquire control over the management against the will of the general partners. However, this corporate form is not appropriate for most companies because it requires general partners who do not benefit from limited liability and is unfavourably regarded by investors.

Another effective defence consists of by-laws (*statuts*) that provide that no shareholder may exercise more than a given percentage of the voting rights. However, the by-laws usually provide that such a limit is no longer applicable if a shareholder holds more than two-thirds of the share capital (which is, in any event, the majority needed to amend the by-laws at an extraordinary meeting of shareholders). In any event, the law provides that any cap on voting rights provided for in the target's by-laws shall not apply at the first meeting of shareholders after the results of a tender offer in which the offeror, acting alone or in concert, obtained more than two-thirds of the share capital or voting rights of the target.

Other defensive measures include double-voting rights, employee shareholdings, cross-shareholdings, shareholders' agreements (eg, rights of first refusal) and regulatory consent:

- Double-voting rights are automatically granted to all shareholders that have held their shares in a registered form (*au nominatif*) for at least two years, unless the by-laws have been amended after 29 March 2014 in order to expressly provide otherwise. As a result, absent a resolution to amend the by-laws being submitted to an extraordinary shareholders' meeting and approved by a two-thirds majority, long-term shareholders may benefit from double-voting rights that will dilute the offeror during two years after the completion of the offer.

- The management bodies of certain French corporations (including all listed companies) may be authorised by an extraordinary shareholders' meeting to grant, free of charge, issued or to-be-

issued shares to all, or certain categories, of employees. The maximum percentage of the share capital that can be granted to employees is 30 per cent, subject to some conditions. However, in most scenarios, this would be too drastic a mechanism to be implemented as a defence against a tender offer.

- Defensive cross-shareholdings used to be common in France in the 1970s and 1980s. These arrangements have since fallen out of favour as companies focus their investments on their core activities. Furthermore, cross-shareholding is restricted by the prohibition on a French company holding any shares of another company when this company already holds more than 10 per cent of the shares of the first company.

- Certain targets may use regulatory consent to a change of control as an effective means of defence against unsolicited offers, especially when the offeror is a foreign company. This possibility is mainly open to targets operating in the banking, insurance and mining sectors, and certain other 'strategic' sectors (ie, FDI regime).

- The recent option for shareholders to define their corporate purpose (*raison d'être*) in the company's by-laws could, according to some legal scholars, serve as a potential form of anti-takeover defence by allowing management bodies to object to hostile takeovers that would contradict such a corporate purpose. This may provide a basis for a recommendation against accepting an offer, but it is hard to see how it could prevent a tender offer, which is made directly to shareholders.

The governing body of the relevant companies, provided that it respects the limitations of its powers mentioned above, can decide to implement a measure that may frustrate the offer. In such a scenario, it must inform the AMF of its measure.

**Defensive warrants**

The law implementing the EU Takeover Directive introduced the possibility for a target to issue warrants as a defensive measure. In an extraordinary general meeting (EGM), the shareholders of the target may approve the issue and free allocation of warrants giving the right to subscribe to the shares of the target, on preferential terms, to all shareholders registered before the expiration of the offer period.

The EGM may delegate this power to the target's board of directors or management board. However, it must determine the maximum share capital increase that can result from the exercise of all such warrants, as well as the maximum number of warrants to be issued. It may also determine the circumstances in which the board of directors or management board shall proceed with, delay or abandon the warrant issuance.

The target must disclose its intention to proceed with the warrant issue before the end of the offer period. Should the offer and any competing offer fail, for any reason, the warrants will be automatically cancelled.

Such warrants may primarily be used as a threat to force the offeror to the negotiating table. Indeed, any decision that would change the substance of the target would give the offeror a right to withdraw his or her offer (with the express consent of the AMF). Therefore, it is to be expected that a board of directors will be extremely cautious prior to making such a decision because it would risk depriving shareholders of an existing offer. In addition, although there is a clear legal basis to issue such warrants, whether they can be efficiently structured in practice without triggering criticism by the AMF remains to be tested.

## COMPETING OFFERS AND IMPROVED OFFERS

A rival offeror may only file a draft competing offer after the opening date of the acceptance period and no later than five trading days before the closing date.

An offeror may improve the terms of its offer either *vis-à-vis* its own terms or those of the last competing offer no later than five trading days before the closing date.

An all-cash improved or competing offer will only be declared compliant with applicable law if it is made at a price that is at least 102 per cent of the price offered in the last best offer.

In all other cases, the AMF will review the terms of the new offer according to the same criteria used to determine the compliance of the original offer and will only declare the new offer to be compliant if it represents a significant improvement (*amélioration significative*) on the terms and conditions proposed to holders of the target securities. However, an improved offer or competing offer may be declared compliant by the AMF if the offeror waives or reduces the minimum acceptance condition (other than the mandatory 50 per cent condition) provided for in the last best offer without otherwise altering its terms.

If an improved offer is deemed compliant, the AMF will determine whether it is necessary to extend the acceptance period of the offer, and whether to cancel and void any instructions to tender that have already been given. The offeror will file a supplement to its offer document updating its disclosures. The opinion of the target's board of directors with respect to the improved offer must be filed with the AMF and published in a press release.

If a competing offer is deemed compliant, the opening date of its acceptance period will be fixed in the same manner as any other offer. AMF will publish a calendar that aligns the closing dates for the acceptance period for all competing offers. The opening of the acceptance period for a competing offer automatically cancels and voids any instructions to tender shares into any competing pending offer.

The original offeror can withdraw its offer in the five days that follow the publication of the calendar for a competing offer. The offeror informs the AMF of this decision, which the AMF then publicises.

Once ten weeks have elapsed from the opening date of the acceptance period in the initial offer, the AMF can require the competing offerors to file their successive competing offers on an accelerated timeframe, although this cannot be less than three trading days. The AMF can also require the rival bidders to make, or confirm, their last best offer. Thereafter, no further improvement of the offer is permitted.

## SPECIFICITIES OF OTHER KEY REGULATORY ISSUES IN FRANCE

**Employee consultation rights**

*Consultation with the target's employee representatives*

Under French labour law, the works council (*comité social et économique*) of the target company or the group works council (*comité de groupe*) must be consulted with respect to any proposed tender offer.

The target must convene its own works council on the day that the proposed offer is filed with the AMF. At that first meeting, the works council determines whether it considers the offer to be friendly or hostile

and whether it wishes to summon a representative of the offeror to be present at a second meeting, as well as whether it wants to appoint an expert (the 'TWC expert').

During the second meeting, if any, the offeror presents its industrial and financial strategy to the works council, together with its strategic plans for the target company and the consequences that the offer will have on that company's interests, employment, and the operating facilities and administrative offices of the target. Then, within three weeks from the filing of the offer, the TWC Expert must issue a report on these topics.

During the third and final meeting, after the issuance of the report by the TWC Expert and before the adoption of its reasoned opinion regarding the offer by the board of directors, the works council must issue its opinion within one month from the filing of the offer (failing which, the consultation is, in any event, deemed to be complete).

In the event the works council concludes that it lacks sufficient information to provide its opinion, it is entitled to file a motion before the president of the civil court to order the offeror and target to provide such information.

In the event the information given to the works council between the announcement and filing of the offer changes significantly, any opinion that may have been issued by the works council is voided and the consultation procedure must be repeated.

If the offeror takes control of the target following the offer, it will have to provide the works council with periodic updates.

The foregoing full consultation procedure does not apply if: (1) the offeror holds, directly or indirectly, alone or in concert, half or more of the target's equity and voting rights; or (2) the offer is made by the issuer to buy back its own shares or equity-linked securities. In those cases, a simplified consultation procedure applies, with only the first and second meetings referred to above taking place. A TWC Expert may be appointed to assist the TWC during the second meeting, but it will not issue a report.

*Consultation with the offeror's employee representatives*

The general rule in France is that major management decisions affecting the economic and financial future of a company should be taken only after consultation with employee representatives.

Given the confidentiality issues involved, there is a specific exception with respect to launching a public tender offer. An offeror is only required to consult its own works council with respect to the offer within two trading days after the filing of the preliminary offer document. In any event, except where a foreign bidder has existing French operations affiliated with the bid vehicle, these provisions of the French labour code do not apply to non-French offerors.

Both the target's and offeror's employee representatives have consultation rights only; they do not have approval or veto rights. Provided the consultation procedure is complied with, the TWC cannot challenge or prevent the offer, even if it disapproves of it.

**Foreign investment regime**

The AMF may condition the opening of the acceptance period on the receipt of the approval of the Ministry of the Economy issued in the framework of FDI screening.

The protected sectors of the economy in which foreign investment is subject to prior authorisation by the Ministry of the Economy are, *inter alia*:

1. gambling (excluding casinos);

2. regulated private security businesses;

3. research, development and production facilities relating to toxins or pathogens that could be used in a terrorist attack, as well as facilities relating to preventing the health effects resulting from such terrorist use;

4. surveillance and monitoring equipment;

5. businesses that provide encoding security services and data encryption for IT use;

6. businesses that provide security equipment or services for IT systems that are under contract to public networks;

7. businesses producing certain dual military/civilian use technologies/products;

8. data encryption businesses;

9. businesses that are in possession of national defence secrets;

10. businesses involved in the research, development or production of weapons, explosives and munitions; and

11. businesses under contract to the defence department to provide any goods or services affecting any of the sectors set forth in points (7), (8), (9) and (10) above.

**Antitrust**

As mentioned above, a tender offer might be conditioned upon receipt of the approval of any jurisdiction concerned by the offer from the antitrust authorities. Where the French market is affected, depending on thresholds, the review might be led by the French Competition Authority (Autorité de la concurrence) or European Commission. The procedure before the latter will not be addressed in this guide.

A concentration is subject to review under French national competition law if the following conditions are met:

- the aggregate worldwide turnover (without VAT) of all the parties to the transaction exceeds €150m;

- the total turnover (excluding VAT) of at least two of the parties in France exceeds €50m; and

- the transaction is *not* subject to review by the European Commission under the EU Merger Regulation.

Notification must be filed with the French Competition Authority by the person proposing to acquire control. At the end of the review period, the French Competition Authority may take any of the following three decisions:

- find that the proposed transaction is not within the scope of the required review because the thresholds are not met;

- authorise the transaction, potentially subject to commitments offered by the parties; or

- find that the transaction raises significant anti-competitive issues and open a 'phase II' investigation (*un examen approfondi*).

If any of these three decisions has been taken by the French Competition Authority within the prescribed time period, the transaction is then deemed to have been tacitly authorised.

A phase II investigation can be opened on demand by the French Competition Authority or Ministry of Economy. The phase II review gives rise to a report established by the merger department to which the parties and government commissioner respond within 15 working days. Then, a hearing is held before the French Competition Authority.

After deliberation, the French Competition Authority may take one of the following three decisions:

- prohibit the transaction and enjoin the parties, if necessary, to take the necessary steps to restore sufficient competition;

- authorise the transaction, enjoining the parties to take all necessary measures to assure sufficient competition and requiring them to take the necessary steps to make a sufficient contribution to economic progress to compensate for the reduced competition; or

- authorise the transaction in a reasoned decision, which may be subject to the commitments that the parties have offered.

If the French Competition Authority has not taken any of these three decisions within the prescribed time period, the transaction is then deemed to have been authorised.

As an exception, in some cases, and under conditions provided in the French and European regulations, it may be possible for the offeror to close a tender offer for the target before receiving antitrust approval.