

Investors in France Face a New Rise in Minority Shareholder Activism

Over the past few years, France has seen a marked increase in minority shareholder activism, in particular where listed companies are concerned. Several takeover bids have failed to succeed after being vigorously challenged by minority shareholders, who are using a variety of tools at their disposal to make their demands heard.

Among the instruments most frequently used by these minority shareholders in the takeover bid process, there is one in particular that seems to be gaining popularity. It is to challenge the statement of compliance issued by the regulator, the Autorité des Marchés Financiers ('AMF'), before the Paris Court of Appeals.

Pursuant to article L.621-8 of the French Monetary and Financial Code (the 'MFC'), all takeover bids are subject to the prior authorisation of the AMF, granted by way of a visa published in a statement of compliance. For the purpose of this decision, the AMF examines the intentions of the offeror and the terms (in particular the financial terms) of the bid, to determine whether they comply with the principles set out in article 231-3 of its General Regulation ('AMF GR'), i.e., the free interplay of offers and counter-offers, equal treatment and information for all holders of the securities of the persons concerned by the offer, market transparency and integrity, and fairness of transactions and competition.

The control of the AMF, however, does not extend to the relevance of the offeror's project in terms of industrial, commercial and social consequences. In particular, when reviewing the price of the bid (the element which is most likely to be disputed by minority shareholders), the AMF is limited to controlling that it was calculated in compliance with the provisions of article 231-18, 2 of the AMF GR, on the basis of 'generally accepted objective valuation

criteria'. In addition, offerors resort more and more often to having a fairness opinion delivered by an independent appraiser on the valuation of the shares of the criteria used in the calculation of the price (such intervention is mandatory when a 'squeeze-out' is contemplated at the end of the takeover bid but, pursuant to article 261-3 of the AMF GR, may also be freely decided by any offeror). Consequently, the AMF very rarely withholds its authorisation for price reasons, especially when offerors are in the position to provide extensive and consistent information on their methods of calculation.

The statement of compliance can nevertheless be challenged, though exclusively before the Paris Court of Appeals. The Court of Appeals' powers are limited to an appraisal of the AMF's decision. Accordingly, the Court of Appeals can only approve or cancel the statement of compliance, but is unable to overrule the AMF and decide itself the authorisation of a bid or the modification of certain of its terms, and in particular, of the price. Such limitation of its powers have been acknowledged by the Court of Appeals since 1989 (decision CA Paris, 1re ch., stock market section, 12 July 1989, Bastien-Vanniere c/ COB, JurisData n°1989-023420) and reiterated since (decision CA Paris, economic and financial section, 11 June 1997, Geniteau c/ Sté Lagardère, JurisData n° 1997-021370).

The combination of the limited control that the AMF can exert on the price of a bid with the restricted powers of the Court of Appeals therefore results in most instances in a rejection of the claims of minority shareholders. Nevertheless, the challenge of the statement of compliance before the Paris Court of Appeals retains one major advantage for activist minority shareholders: the considerable delay of the procedure. While the filing of a claim before the Paris Court of Appeals, which must occur within 10 days of the notification of the AMF's decision for concerned parties and of its publication for other interested parties, does not automatically suspend a takeover bid, the duration of the challenge procedure is not fixed – in practice, it takes at least six to seven months for a hearing to be held and an additional two months for the Court of Appeals to render its decision. In the meantime, the AMF's practice is to systematically suspend the bidding period. In other words, because of the length of the challenge procedure, minority shareholders hold a very strong weapon to gain time and try to increase the chances of failure of the bid, thus putting additional pressure on the offerors.

The takeover bid announced on the shares of Club Méditerranée ('Club Med'), a leading French resort operator, is the most recent illustration of this trend. In May 2013, Fosun (a Chinese conglomerate) and Axa Private Equity (now known as Ardian) announced their intention to make a friendly takeover bid on the shares of Club Med, of which they were two of the biggest shareholders. The board of Club Med voted unanimously in favour of the offer on 24 June 2013. The bid, valuing the company at EUR 557 million and offering a price of 17.50 euros per share, was approved by the AMF in a statement of compliance dated 16 July 2013. The bidding period was due to close on 30 August 2013.

However, certain minority shareholders, among which the investment fund CIMAF and several other shareholders regrouped under the French investors association ADAM, argued that the offer was made at an insufficient price and questioned the independence of the appraiser appointed to assess the offer. Accordingly, they filed a claim before the Paris Court of Appeals respectively on 24 and 26 July 2013. Their claims were rejected by the Court of Appeals in a decision dated 29 April 2014, in which it found that:

- the factual elements invoked by the minority shareholders to question the appraiser and the circumstances of its appointment were unfounded;
- the conditions of the management package offered to 400 executives were not related to their capacity as shareholders of Club Med and therefore did not breach the equality between shareholders;
- the AMF had ascertained that Club Med had complied with its recommendations concerning the disclosure of insider information through data-rooms to enable the offerors to prepare the bid; and
- nothing prevented certain managers of Club Med to take part in a concert with an offeror.

Consequently, the Court found that the AMF was justified in considering that the offer complied with the principles of equality of treatment of the shareholders, of transparency and loyalty in competition, and that the offer had been lawfully assessed.

After the decision of the Court of Appeals, the AMF set a new date of closure of the bid to 23 May 2014, i.e., nine months after its initial date of closure. In the meantime, a new shareholder, BI Invest (owned by Italian industrialist Andrea Bonomi) has progressively acquired over 10.5 percent of the shares of Club Med, thus becoming the



The rights of shareholders have mostly been increasingly reinforced under French law.

the bid. Such failure had not been anticipated by the market and, following its announcement, the share price of Theolia decreased by 23 percent.

The rights of shareholders and, in particular, those of minority shareholders have mostly been increasingly reinforced under French law, which could explain the recent rise in minority shareholder activism. In particular, according to article L.452-1 of the MFC, minority shareholders can gather together to increase their force of action, either as an association of shareholders of a single specific company or, more widely, through an investors association. Acting on behalf

main shareholder of Club Med (overtaking Fosun and Ardian's 9.5 percent stake). Concurrently, the share price of Club Med has increased to 19.10 Euros, thus exceeding the offered price. Both Andrea Bonomi and the Benetton family, who hold around two percent of the share capital and had formerly undertaken to sell its shares, have now indicated that they do not intend to back the bid. Despite these latest turns of events, Fosun and Ardian confirmed on 16 May 2014 that they would not increase the price offered. Hope for the Club Med takeover now solely resides in the fact that the success threshold is quite low (50 percent), but the risk is very much present that the company will follow the same path as fellow French company Theolia.

In 2013, Macquarie Bank launched a friendly takeover bid on the shares of Theolia, a wind energy developer and operator. With a stable shareholder, Theolia would have been able to face its substantial loss of income in 2012 and the approaching refund of certain convertible bonds with more strength and serenity. However, 152 of its minority shareholders filed a claim before criminal courts and sent a list of complaints to the AMF, which included, among others, allegations of a ridiculously low price, illicit agreements, insider dealings and conflicts of interest. While such claims were not proved to be well founded, such campaigning resulted in Macquarie's inability to raise a sufficient number of shares before the closure of

of the shareholders, these associations hold the same powers granted under the French Commercial Code (the 'FCC') to minority shareholders holding at least 5 percent of the share capital, such as the power to request the convening of a general meeting of shareholders (article L.225-103 of the FCC), the addition of resolutions to the agenda of shareholder meetings (article L.225-105 of the FCC), a management audit (article L.225-231 of the FCC), the revocation of the statutory auditors (article L.823-6 of the FCC), and they are entitled to request answers from the board on facts which may compromise the continuity of the business (article L. 225-232 of the FCC).

In addition, they can bring legal action against the management or the company before French courts. In particular, pursuant to article L.225-252 of the FCC, a derivative claim (*action ut singuli*) may be brought by shareholders when the current management has not itself brought a claim in the name of the company; in practice, these are mostly applied when invoking the liability of the management. While such claims are open to all existing shareholders, regardless of the percentage of shares they hold, minority shareholders will prefer to regroup to share costs and appoint one of them as a representative. However, derivative claims seldom hold the preference of minority shareholders as they have to carry the financial burden of the claim, including all

procedural costs, but, because they are acting in the name of the company, any proceeds are awarded to the company and not to the shareholders.

Some investors associations, such as the above-mentioned ADAM, are very often the first involved in challenging companies in matters of corporate governance and are gaining recognition for such actions. French minority shareholders have also been noted to increasingly rely on the advice of proxy advisors when examining resolutions proposed during general meetings of shareholders.

The only area where shareholder rights have been pushed back recently concerns the implementation of measures resulting in the frustration of a hostile takeover bid. Since the implementation of the Takeover Directive (EC/2004/25) in 2006, France had been one of the countries which had adopted the principle of board neutrality – no frustrating action could be taken by the management without the prior approval of the general meeting of shareholders (which, necessarily, includes the minority shareholders). Law n°2014-384 of 29 March 2014 modified article L.233-32 of the French Commercial Code and reinstated, for all takeover bids filed after


1 July 2014, the freedom for the management to decide on frustrating actions, unless such freedom is expressly restricted in the company's articles of association. Shareholders will now not be able to oppose such measures directly, but only *a posteriori* and under much stricter conditions, by way of legal action invoking the liability of the management.

With the French Government regularly adopting 'economic patriotism' measures, such as the decree of 14 May 2014 which increases the number of sectors where the prior authorisation of the Government is required for foreign investments, and the increasingly belligerent behaviour of minority shareholders, French companies may find it harder than ever to attract foreign investors.



Jacques Buhart
Partner, McDermott Will & Emery

Jacques Buhart is a partner at McDermott Will & Emery's Paris office. Jacques is experienced in corporate transactions and merger notifications for a wide range of national and international companies.



Making Business Sense

Targeting Your Customers for MAXIMUM Results

For Advertising in Inter-Pacific Bar Association Journal, please contact:

T: +852 3796 3060

Abid Shaikh

E: abid@ninehillsmmedia.com

Clariss Tam

E: claris@ninehillsmmedia.com

nin9hills
media