French M&A: More Proactive Boards Could Improve Tender Offer Process

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Because many publicly listed companies in France have significant or controlling shareholders, public tender offers have the potential to create conflicts of interest within the board room. These conflicts arise whether the offer comes from an existing shareholder wishing to take the company private or from a third party that first secures a controlling position. In these scenarios, minority shareholders typically are concerned that the controlling shareholders could leverage their position to propose or force an exit on unfair terms.

The French stock market regulator (the "Autorité des Marchés Financiers" or "AMF") governing takeovers has created a set of rules to address the board's role in these situations. These rules generally are consistent with existing ones in other major markets, and they provide an adequate framework for handling potential conflicts of interest. However, in several recent transactions boards seemed ready to support offers that proved modest once alternative bidders stepped up. These examples seem to indicate that boards should be more active during a takeover, filling their role in a way that allows the corporation to extract more value from initial bidders and avoid potential litigation from minority activists.

The Current System

While offers to acquire public companies are usually directly addressed to shareholders, the rules in France give the target company and its board of directors an important role in a public tender offer. In the face of a tender offer, the target must prepare a response document (note en réponse), which needs to be filed with the AMF within a certain time frame from the date the offer was declared valid (déclaration de conformité). The response document, which is publicly available, must contain certain information pertaining to the target, including all material agreements that could affect the outcome of the tender offer. One of the most important components of the response document is the reasoned opinion (avis motivé) of the board on the merits of the tender offer for the corporation itself, its employees and its shareholders. The reasoned opinion also indicates whether or not the board recommends that shareholders tender their shares into the offer, and whether or not board members (and the shareholders with which they are associated) have decided to tender the shares they own. The reasoned opinion must identify any dissenting views.

In the case of a conflict of interest, which is broadly defined (*e.g.*, the board member has agreed to support the offer, is associated with a company that has agreed to tender its shares into the offer, or the board member will receive payment or other benefit from the bidder), conflicted board members must abstain from voting on the board's reasoned opinion. In such situations, the board also must appoint an independent expert to provide a fairness opinion. The fairness opinion, and the supporting valuation report, must be made available to the board before it forms its reasoned opinion and must be reproduced in the response document. The AMF also recommends that the work of the expert be supervised by an ad hoc committee composed solely of independent directors, although in recent cases (notably in the tender offer for Club Méditerranée), the AMF accepted that the ad hoc committee could include nonindependent directors as long as they were not associated with the offer. Employees' representatives are consulted on an offer to formulate a nonbinding opinion, and the board must be able to review the opinion of the relevant body composed of employee representatives before giving its own reasoned opinion.

The AMF (and the Paris Court of Appeal, if the AMF ruling is challenged) does not have the jurisdiction to rule whether the board members upheld their duties in forming their reasoned opinion but will determine whether the regulatory requirements applicable to the response document have been satisfied. The litigation risk for directors is therefore relatively low, as unhappy shareholders trying to establish the breach of fiduciary duties would need to sue before a different tribunal (the commercial court at the location of the company's incorporation). That tribunal likely would rule only after the offer is closed and award limited damages even if a breach was recognized.

A Formal Observance of the Rules

Because of the investors' attention to take-privates and the checks and balances created by the ad hoc committee and the independent expert, situations in which a controlling shareholder takes a company private have functioned well. These transactions have progressed with limited litigation and have sometimes resulted in an improvement of the terms initially proposed by the bidder, proving the ability of nonconflicted board members to create a constructive dialog with the controlling shareholder. In 2014, when the Italian company Italcementi decided to take private its French-listed subsidiary Ciments Français, it increased its initial proposed price in the face of minority shareholders' opposition during the target board's review period.

However, boards also have been prepared to accept offers sponsored by management with the support of existing significant shareholders where the offer price proved to be significantly inferior to what was ultimately proposed by competing bidders. In the bidding war for Club Méditerranée between Chinese company Fosun and Italy-based Investindustrial (in 2013-14), Fosun ended up paying 45 percent more than its initial bid price, even though the target board recommended accepting the first offer.

Because superior bids have ultimately prevailed, observers could view the regulatory framework as sufficiently fluid to enable the free competition of successive competing offers. In particular, competing bidders are allowed equal access to information, including confidential information, made available by the target company under the careful supervision of the AMF. However, if the ad hoc committee or the board of directors, with the help of a financial adviser, decided to be more proactive, it could potentially extract more value from the first bidder before recommending that shareholders tender into the offer, including, if appropriate, by seeking alternative offers. This approach has the potential to create a less distracting process for the company, diminish minority shareholder litigation and the considerable delay that comes with it, and ultimately secure the greatest value for shareholders.