the very least, part of their specifically stated goals at about two-thirds (64.1%) of targeted firms.

European M&A Perspective: Disclosure of Intentions in French Tender Offers — the Example of *Artemis/Suez*

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On September 28, 2006, the French government adopted new stock exchange regulations which, among other reforms, are intended to avoid the proliferation of rumors concerning potential takeovers.[1] The new rules permit the French stock market regulator, the Autorité des marchés financiers (the "AMF"), to require any person rumored to be preparing a tender offer to publicly disclose its intentions or refrain from launching a takeover bid for a period of six months (the "Declaration Rule").

In January 2007, the AMF applied the Declaration Rule in the context of market speculation that French businessman François Pinault was preparing an offer for the French oil company Suez, valued at approximately € 60 to 70 billion.[2] This example is a useful indication of how the AMF may apply these rules in the future.

Regulatory context

The AMF General Regulations have for some time required any person "preparing" a financial operation "that could have a significant impact on the price of a financial instrument or the situation and rights of bearers of such in such instrument" to inform the public of such an operation "as soon as possible."[3] However, under this rule, the AMF did not have the authority to demand a statement of intent from a party.

The 2006 modifications to the General Regulations therefore included a new section, providing that:

> especially when the market for an issuer's securities shows significant and abnormal price or volume fluctuations, the AMF may demand of a person whom it has reasonable basis to believe is preparing...a public tender offer, to inform the public of its intentions, within a time period fixed by the AMF. Such would be the case, in particular, in the case of discussions between the issuers concerned or the selection of advisors with the intent of preparing a public tender offer.[4]

The Declaration Rule differs from the pre-existing disclosure rule in several ways. It concerns only public tender offers, rather than any financial operation that could significantly impact the price of a financial instrument. Rather than imposing a new mandatory disclosure obligation on the potential offeror, it leaves considerable freedom to the AMF to use its own discretion in determining when a declaration of intent should be required.

Pursuant to the Declaration Rule, if the AMF requests a party to confirm or deny its intention to launch a tender offer, the party has two possible responses. It may deny that it intends to launch an offer, in which case it will be barred from making such an offer for a period of six months.[5] Alternatively, it can confirm that it intends to make an offer, in which case the AMF will set a deadline by which the bidder must either publish a description of the terms of the offer or launch the bid.[6] Failure to respect that deadline will be deemed a retrospective denial that the party intends to launch a bid, and that party will be barred for six months from making an offer.

International comparisons

The Declaration Rule was modeled largely on Rule 2.4(b) of the UK City Code on Takeovers and Mergers, as a "put up or shut up" request. Pursuant to this Rule, if a bidder has publicly announced the possibility of an offer for a specific target, the target may request that the Panel on Takeovers and Mergers intervene to require the potential bidder to declare its intention whether to make an offer.

Rule 2.4(b) differs from the Declaration Rule in that the declaration obligation is triggered by a request from the target to the Panel on Takeovers and Mergers (the "Panel"), rather than an independent decision by the regulator itself. In addition, a request for a clarification of intentions can only be made if the potential bid has been publicly announced, whereas in France the AMF may request a declaration even if the bidder has issued no formal statements concerning the target.

As in France, the Panel has broad discretion to set the time limit for making the declaration of intentions, and in determining the deadline may take in account many factors, including the friendly or hostile nature of the offer.

The United States does not have specific regulations analogous to the Declaration Rule. Regulation 13D under the Securities Exchange Act of 1934 requires that any person who acquires more than 5% of a registered security must file a report on Schedule 13D, providing detailed disclosure as to the purpose of the acquisition and the acquirer's future intentions.[7] Persons who have acquired the securities with no intention of "changing or influencing control of the issuer" may file an abbreviated Schedule 13G, which requires less disclosure.[8] However, if a Schedule 13G filer changes its intentions, it will be barred from

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voting the securities it holds or acquiring new securities for a period of 10 days.[9]

Under US tender offer regulations, it is a fraudulent, deceptive or manipulative practice for any person to publicly announce that such person plans to make a tender offer if (i) it does not have the intention to commence the offer within a reasonable period of time and complete the offer; (ii) it intends for the announcement to manipulate the market price of the stock of the bidder or the target; or (iii) it does not have a reasonable belief that it has the means to complete the offer.[10]

The Artemis/Suez example

In late 2006, the shares of Suez, a large French oil company, experienced significant price volatility, reaching a record high of € 40.34 per share on January 12, 2007, compared to € 31.19 per share six months previously.[11] Simultaneously, the financial press began to report speculation that Artemis, the holding company controlled by François Pinault, might soon launch a tender offer bid for Suez.

In early January 2007, at the request of Suez's management, the AMF demanded that Artemis clarify its intentions with regard to the launch of a tender offer. Artemis' response to the AMF's formal request was considered by some as deliberately ambiguous. The statement filed with the AMF states that, "Artemis confirms that as of this date no decision concerning the possibility of an offer concerning the shares of Suez has been taken, and that all options remain open."[12]

The Declaration Rule does not specify the consequences of a deliberately ambiguous response to an AMF request for clarification of a potential bidder's intentions.

The AMF, however, considered that "by indicating that all options remain open, and by confirming...the existence, even very preliminary, of a plan concerning the Suez Group," Artemis had responded affirmatively to the AMF's question as to whether it intended to launch an offer.[13] The AMF therefore held that Artemis would be required to file an offer within a time period fixed by the AMF or be barred for six months from launching a bid. This is a significant regulatory precedent, as the AMF interpreted a general and ambiguous statement as a positive declaration of the intention to launch a tender offer.

On January 9, 2007, the AMF fixed February 2, 2007 as the deadline for Artemis to either file a tender offer for Suez or to publish details of its offer.[14]

On January 19, 2007, Artemis published a second communiqué in which it stated that "current conditions do not create a sufficiently tranquil environment for an offer," although it would "continue to consider the possibility of such an operation."[15]

The AMF determined that this statement was sufficiently clear to be deemed a definitive statement of Artemis' intention not to launch a bid, and ruled that Artemis would therefore be barred from a bid for Suez during the six months following the announcement.[16]

The AMF has therefore demonstrated that it may interpret any statement, however ambiguous, as either a definitive positive or definitive negative response concerning a potential bidder's intentions.

Conclusion

The Declaration Rule, as applied by the AMF in the Artemis/Suez situation, will have a significant impact on the conduct of French tender offers. Potential bidders should be aware that the AMF may require them to make a definitive statement of their intentions earlier than they would otherwise prefer, and that even deliberately ambiguous statements may be construed by the AMF as clear positive or negative statements of intent. Target companies may view the Declaration Rule as an additional tool for defense against hostile offers, forcing potential bidders to choose between announcing a bid before all preparations are complete or deferring a bid for as long as six months.

Notes

1. Decision (Arrêté) of September 28, 2006 concerning the modification of the AMF General Regulations, implementing Act No. 2006-387 of March 31, 2006 concerning public tender offers.
2. Martine Orange, "Pinault sommé de s'expliquer sur Suez," La Tribune, January 10, 2007, p. 6.
3. AMF General Regulations, Art. 227-7.
4. French Monetary and Financial Code, Art. L. 433-1(V); AMF General Regulations, Art. 227-22.
5. AMF General Regulations, Art. 222-25. The six month period of ineligibility may be waived if the offeror demonstrates significant changes to the target's business environment, situation, or ownership have occurred.
6. AMF General Regulations, Art. 222-23.
7. Securities Exchange Act of 1934, Rule 13d-1(a).
8. Securities Exchange Act of 1934, Rule 13d-1(b) and (c).
9. Securities Exchange Act of 1934, Rule 13d-1(e). The New York Stock Exchange may also suspend trading in or delist the shares of an acquiring company that fails to provide "timely, adequate and accurate" disclosure of information to investors. New York Stock Exchange Listed Company Manual, Rule 802.01D.
10. Securities Exchange Act of 1934, Rule 14e-8.
11. Tom Cahill and Helene Fouquet, "Pinault Steps Back from Suez After Buying Vinci Stake," Bloomberg.com, January 19, 2007; www.chronocomprod.com.
12. Artemis, communiqué, January 2, 2007.
13. AMF, communiqué, January 3, 2007. The reference to "the existence, even very preliminary, of a project concerning the Suez Group," was drawn from a confidential letter from Artemis to the AMF on January 3, 2007 in which Artemis mentioned "exploratory reflections on the feasibility of an offer."
14. AMF, communiqué, January 9, 2007.

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