

Public to Private Deals in France

Six key things you need to consider

Here are the key things you need to consider in a take private deal (“P2P”) where French laws and regulations apply.



→ Structure and Timeline



→ Secrecy and Disclosure



→ Financing



→ Diligence



→ Special Deals and Management Incentivisation



→ Deal Protections



Structure and Timeline

Strategic considerations to structure a tender offer

Structure of a tender offer

- Bidder may acquire a stake over 50% of the share capital and voting rights of the target: possibility to apply the simplified tender offer regime (*offre publique d'achat simplifiée*) (i.e. shorter timing).
- Bidder may acquire a stake between 30% and 50% of the share capital and voting rights of the target: the crossing of the 30%-threshold would lead to filing of a mandatory tender offer (*offre publique d'achat obligatoire*), the success of which is subject to the crossing of the 50% threshold in term of capital and voting rights. If the offer is unsuccessful (and therefore null and void), the bidder shall keep its initial stake (between 30% and 50%) but the shares above the 30%-threshold shall be deprived of voting rights and the bidder shall observe rules limiting further acquisition.
- In case of acquisition of a stake of the target, the price set out in the stake acquisition documents will be the minimum price for the subsequent mandatory tender offer.
- Bidder may acquire less than 30% of the share capital and voting rights of the target and file a voluntary tender offer (*offre publique d'achat volontaire*). The price would be freely determined. Alternatively, possibility to secure irrevocable undertakings (this type of undertakings are irrevocable subject to a competing offer being filed with the *Autorité des Marchés Financiers* (the “AMF”) (upside sharing is possible though).

90% squeeze-out threshold

- The current French regulations provide that the squeeze-out procedure may be implemented if target securities not tendered to the offer do not represent more than 10% of the outstanding share capital or voting rights of the target after the closing of the offer.
- The squeeze-out may be carried out within three months of the closing of the offer or at any time thereafter subject to filing of a buy-out offer (*offre publique de retrait*).





Structure and Timeline (cont'd)

Alternative paths to reach the squeeze-out threshold post offer

- Market purchase – if the gap to bridge is limited: this is generally made at the same price as the offer (except if legitimate new circumstances justify a price increase) in order to avoid any challenges by the minority shareholders having tendered to the previous offer for a price complement on the grounds that they have not been treated equally.
- Filing of a second offer – if the gap to bridge is more substantial: if this second offer is filed in a relatively short period of time following the initial offer (e.g. less than one year), any increase in the price will need to be justified by new circumstances regarding the target.

Independent expert

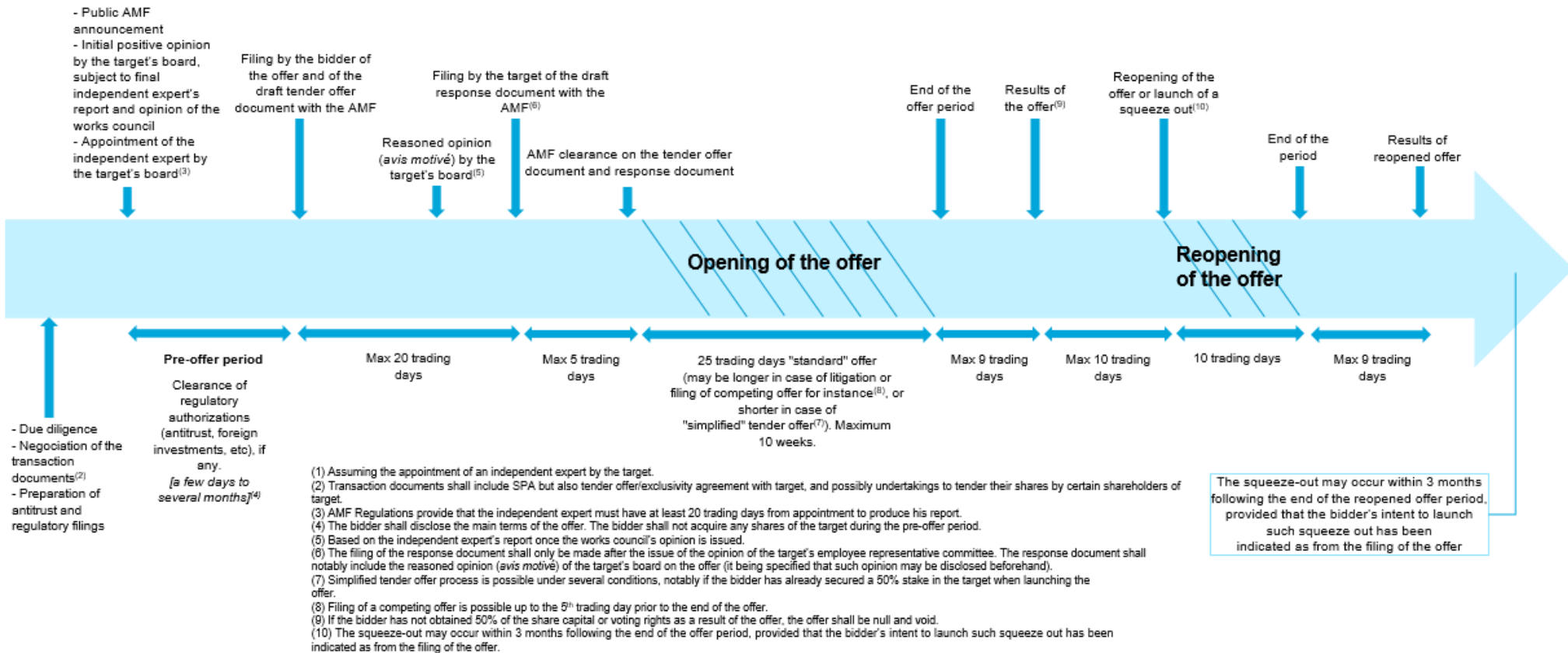
- In most cases (*i.e.* conflict of interest or squeeze-out), an independent shall be appointed by the target board of directors, upon proposal by an *ad hoc* committee composed of at least three directors and comprising a majority of independent directors. If the target is not able to constitute such *ad hoc* committee, the target will propose the name of the independent expert, with a right to oppose held by the AMF.
- The independent expert shall issue a fairness opinion on the terms of the contemplated offer (and the squeeze-out).
- This fairness opinion is required prior to the issuance of target's board opinion on the offer (the independent expert has at least 20 trading days to issue its report).





Structure and Timeline (cont'd)

Simplified standard timeline on Euronext Paris¹





Secrecy and Disclosure

Inside information

Information prior to a takeover may qualify as inside information and must be treated as strictly confidential. The bidder should therefore establish appropriate internal procedures and a leak protocol. If the bidder intends to contact third parties at an early stage, this should be done exclusively under a non-disclosure agreement reflecting the nature of the P2P.

Put-up or shut-up mechanism

The bidder shall ensure confidentiality of the contemplated offer. If the AMF has reasons to suspect preparation of a tender offer (e.g. in the event of unusual price swings or trading volume), the authority may ask the bidder to communicate its intentions in a press release pursuant to the “put-up or shut-up” principle. If the bidder denies its intention to file a tender offer, it will be prohibited from launching an offer on the target for a period of six months. Should the bidder admit its intention to file the tender offer, the AMF would set up a date for the announcement of for the filing of the offer.

Announcement

As soon as the bidder confirms its firm intention to launch an offer, it must publish the information immediately.

In the event of a leak, an announcement may be required providing details of the status of negotiations.





Financing

- The offer is filed by means of a letter addressed to the AMF and signed by one or more sponsoring banks (*banque présentatrice*) appointed by the bidder. At least one sponsoring bank must fully and unconditionally guarantee the performance by the bidder of its obligations pursuant to the offer.
- Considering the financial risks attached to the sponsoring bank's guarantee, the sponsoring bank practically always require the provision by the bidder and/or its financing bank of a collateral or similar counter-guarantee to secure the funds necessary to pay the consideration of the offer and/or the indemnification of the sponsoring bank (certain funds financing).
- The financing of the offer shall in practice be secured prior to the filing of the offer.





Diligence

Due diligence in P2Ps typically starts with the review of publicly available information due to general ongoing disclosure obligations of the target under applicable capital market laws.

The AMF recommends that the opening of a data room by a listed company shall be strictly limited to bidders that:

- have executed a NDA with the target;
- intend to implement a significant transaction; and
- have executed a letter of intent confirming (i) their intention to enter into a transaction, and (ii) the seriousness of their intention, in particular their ability to finance such transaction.

As part of the due diligence process, inside information may be available to the bidder on a strictly “need to know” basis. In case inside information is made available as part of the due diligence process, the recipient shall refrain from any purchase/disposals of shares of the issuer which might constitute insider dealings. Given the difficulty of determining whether the information constitutes inside information, the safe approach is to refrain from any purchase of the shares during the whole period whilst discussions are held on the P2P.

Inside information made available to bidder as part of the due diligence process will have to be disclosed in the documentation in order to preserve equality of information among all shareholders.





Special deals and management incentivisation

If managers of the target reinvest in the newco and benefit from an incentivisation package, the AMF (and independent expert) will ensure that such incentivisation does not constitute an additional price for their shares (in breach of the principle of equality between shareholders).

The benefit from the incentivisation shall not be certain and shall depend on the performance of the business post completion as well as on the duties the managers will perform within the new group.





Deal protections

In addition to offer conditions, it is common practice in France for bidders to enter into certain arrangements to protect their offers. These might include:

- **irrevocable undertakings** – binding commitments under which certain shareholders irrevocably commit to tender their shares into the offer. This type of undertaking are irrevocable subject to a competing offer being filed with the AMF (upside sharing possible); and/or
- **tender offer agreement** – commitment whereby the target will, in particular, undertake to publicly support the offer and not take any actions to favour any alternative transaction or to frustrate the contemplated offer (subject always to the fiduciary duties of the board of the target).



White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.

This article is prepared for the general information of interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.