# Global Wisdom on Business Transactions, International Law and Dispute Resolution

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(the knowledge of which may affect the desirability of the transaction), a director who inadequately or incorrectly informs the shareholders could well be liable for compensatory damages if the transaction were to fail.

In view of such an uncertain and risky regime of liability for directors issuing a reasoned opinion, the AMF (like its American counterpart, the Securities and Exchange Commission (SEC)), encourages[39] the use of an independent third party.[40] Article 261-1 of the AMF general regulation (RGAMF) provides for the appointment by the target company of an independent expert when the operation is likely to generate conflicts of interest within the board of directors that may impair the objectivity of the reasoned opinion. In such a case, the independent expert would prepare a report on the financial conditions of the bid in the form of a fairness opinion.[41] Fairness opinions, well-known to American courts,[42] do not relieve directors from all liability for the information they give to shareholders, but may be used to demonstrate that the board of directors made informed decisions and thus could reduce the risk of future liability.

### *c) The normal conduct of corporate affairs*

An offer period does not suspend the activities of a company. Notwithstanding the bid, the directors of the target must continue to oversee the normal conduct of the company's business, and therefore to implement measures that are not likely to frustrate the bid. Once again, it is necessary to question what constitutes the "normal conduct" of the company's business. Measures affecting the substance ("consistance") of the company within the meaning of Article 232-11 RGAMF[43] have been found to be beyond the normal management of the company.[44] Unfortunately, the substance of a company is no better defined than the "normal conduct" of its business.

## *II. Maintaining pragmatic flexibility*

Notwithstanding these restrictions on the powers of the directors of the target, and as part of the newly instituted freedom discussed above, the concept of corporate interest is now the defining guide for the acts of directors in the event of an unsolicited takeover bid (A). Once the legitimacy of their acts is established, directors have at their disposal a sizeable arsenal of practical measures that will allow them to influence, directly and indirectly, the outcome of the bid (B).

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[39] The mandatory nature of recourse to an independent expert is questionable despite the content of article 261-1 of the AMF General Regulations. *Daigre*, Responsabilité des dirigeants confrontés à une offre non sollicitée, Option finance, 2004.

[40] *Cafritz/Caramalli*, La responsabilité des dirigeants de la société cible quant à leur prise de position sur l'offre envisagée, Recueil Dalloz, 2004, pg. 122.

[41] AMF General Regulations art. 262-1.

[42] *Smith v. Van Gorkom*, 488 A.2d 858, 867 (Del. 1995). Although Delaware law does not consider recourse to an independent expert to be a prior obligation, fairness opinions are widely used in the United States.

[43] Paragraph 2 states that "l'initiateur peut également renoncer à son offre si l'offre devient sans objet, ou si la société visée, en raison des mesures qu'elle a prises, voit sa consistance modifiée pendant l'offre ou en cas de suite positive de l'offre. Il ne peut user de cette faculté qu'avec l'autorisation préalable de l'AMF qui statue au regard des principes posés par l'article 231-3" (author's translation: the initiator may also withdraw its offer if the offer is without purpose or if the target, because of measures it undertook, finds its consistency modified during the offer period or after a positive response to the offer. It may not take advantage of this option without the prior approval of the AMF, which will make its decision taking into account the principles of Article 231-3).

[44] *Nabasque*, Les mesures de défense anti-OPA depuis la loi n° 2006-387 du 31 mars 2006, Revue des Sociétés, 2006, pg. 237.

### 1. Decisions of directors and corporate interest

Since the adoption of the Florange law, the question of corporate interest is all the more important as it is now at the heart of the directors' powers to enact measures that could frustrate a bid. It is the corporate interest that legitimises the adoption of anti-takeover measures. But if corporate interest is the "compass"[45] meant to guide directors, the direction in which it points is not necessarily clear, given the vagueness of the concept itself.

Two competing definitions of corporate interest stand out. On the one hand, market regulation under Article 231-19-4 RGAMF and French jurisprudence seem to advocate a broad understanding of corporate interest as the interest of the company (the sum of stakeholder interests). It is an understanding close to the stakeholders' theory, or at the very least contrary to a consideration solely of the interests of shareholders. The AMF, more explicitly than its predecessor the *Commission des opérations de bourse* (COB),[46] considers that the reasoned opinion of the target's board must explain the interest of the bid and its consequences for the company, its shareholders and employees.[47] Case law also seems to support a broad vision of corporate interest during a takeover bid. Thus, the Court of Appeal of Paris, in a dispute over the adoption by the directors of the André group of a defensive measure against a takeover bid launched by the Atticus fund,[48] held that the determination of a possible breach of the corporate interest is not to be confused with the interest of a few shareholders or shareholder groups.[49]

On the other hand, for a considerable number of authors, the beginning of an offer period requires giving priority to the shareholders' interest. The role of the directors of the target company is to maximise to the extent possible the consideration proposed by the initiator. On this theory, the corporate interest is, in practice, limited to the interest of shareholders, who are the first and foremost interested parties in the bid, because its success depends on their willingness to retain or sell their shares.

All in all, as is frequently the case when considering corporate interest, there is no absolute certainty, and especially so in the context of cross-border takeovers where external interests, such as the protection of national industries and public health, may come into play. However, if directors seem, in theory, to be constrained to take into account the interests of economic actors other than shareholders, it appears that, in practice, the interest of shareholders will continue to prevail, even if the power to decide is not entirely theirs anymore (and in spite of the recognition of a broader concept of corporate interest).

Nonetheless, the hold of the company's corporate interest over directors must not be overestimated in the realm of anti-takeover defences, as their implementation during an offer period has always been a delicate matter.

Indeed, if the concept of corporate interest seems to protect the interests of shareholders and to constitute a deterrent for directors in their implementation of defensive measures, by placing them in a situation of conflict of interest, or even of misuse of company assets, could it not also be interpreted as an obligation on directors to act and defend the interests of the company? By following the reasoning of case law and a broad interpretation of

[45] *Cozian/Viandier/Deboissy,* Droit des sociétés, 26th edition, 2013.

[46] In its General Decision of 1978, the COB noted that acts not in conformity with the interests of the relevant company or those constituting maneuvers should not be made to influence the choice of the shareholders or to change the situation that existed at the beginning of the offer. It further noted that directors of the companies concerned, particularly those of companies whose shares are the subject of the offer, must be very attentive to the responsibilities they have after the making of a public offer to the shareholders concerning the use of corporate assets, and to their responsibilities to the general public.

[47] AMF General Regulations, art. 231-19-4.

[48] There, the issue was a sale of treasury shares in order to dilute the initiator.

[49] Court of Appeal of Paris, March 15, 2000, Bull. Joly Sociétés, June 2000, pg. 625.

corporate interest, it would appear reasonable for a director to be able to oppose a takeover on the grounds of corporate interest in a broad sense.

By pushing the reasoning even further, could the liability of directors not be asserted because of their failure to act and to have defended the interests of the company?

In the André group case mentioned above, the Court of Appeal of Paris considered that directors could legitimately oppose actions of the shareholders, provided that they do so legally and in order to defend the interests of the company.

It seems clear that the determination of the corporate interest is first and foremost the responsibility of directors, who must reconcile interests other than the maximisation of profits for the shareholders, given that they have the duty – if not the obligation – to defend the interests of the company, and in particular to "resist" in the event of a unsolicited takeover. Although the law and the courts have yet to confirm this duty of resistance, the latter must be included in the necessary respect for the corporate interest, and it is conceivable that the liability of directors could be claimed on such grounds.

### *a) The application of anti-takeover defences*

#### *aa) The "traditional" anti-takeover defences*

Given the wide range of potential anti-takeover measures, it hardly comes as a surprise that the legislator reserved, in 2006, most of them to the sole power of the shareholders.

Briefly, anti-takeover defensive measures seek either to retain and control the share capital of the target (with the notification of crossing of specific shareholding thresholds, share capital increases, the introduction of caps on voting rights, the payment of loyalty dividends, the free allocations of shares to employees, etc.) or to increase the cost of the takeover (by the absorption of listed subsidiaries by way of exchange offers (*fatman defence*), the issuance of poison pills, the implementation of double voting rights subject to the holding of shares for a minimum duration, etc.) or even, as is the practice in the United States, to decrease the initiator's interest in the success of its takeover bid (by selling strategic assets (*crown jewels*), transforming the company into one limited by shares, *Pac-Man defences*, etc.). In any case, these defences must (i) comply with the corporate interest and the principles governing the conduct of takeover bids defined by the AMF and (ii) be approved by the shareholders when their adoption is within their sole power.

#### *bb) The "put up or shut up" rule*[50]

While the effectiveness of a defence is contingent on its swiftness, it is also affected by the party against whom the defence is raised. As such, the first right of a director is to know whether the company he/she runs will indeed be the target of a takeover bid in order to protect it more swiftly if necessary. The "put up or shut up" rule was implemented in France by the "Danone amendment" during the transposition into national law of the Takeover Bids Directive, in response to rumours of an unsolicited takeover by PepsiCo of Danone, in order to compensate for the lack of regulation and means to manage rumours in France. This mechanism is the only way to obtain the "confession" of a potential bidder, by allowing the AMF to request from a person or company, when there are reasonable grounds for believing that it is preparing a bid, to make a declaration confirming or refuting such rumours. It is a procedure used in the sole discretion of the AMF, contrary to the equivalent UK regulations. A company may ask the AMF to interrogate the potential bidder, but the decision whether or not to do so remains exclusively in the hands of the regulator.

The mechanism is directly inspired by the UK's Takeover Code and its own "put up or shut up" procedure, which serves to manage rumours in the event of an unsolicited takeover. Contrary to the French system, the decision to trigger the mechanism is reserved exclusively to the

[50] Monetary and Financial Code, art. L. 433-1; AMF General Regulations, art. 223-32 to 223-35.

target of an unsolicited takeover, and the regulator, the Takeover Panel, has far less initiative. The target may, in the event of substantial rumours, ask the potential bidder via the regulator to clarify its intentions within a period that is set by the Takeover Panel. In France, on the other hand, the AMF has no obligation to comply with the request of a target.

If the rumour is true, the initiator must clarify its intention. If it declares it has no intention to make a takeover bid, it will be prevented from doing so for the following six-months, during which the target will be able to decide to implement protective measures. In any event, since requesting the use the anti-rumour mechanism is optional and the final decision belongs to the regulator, it is unlikely that the liability of directors who choose not to make such a request to the AMF could be claimed.

*cc) Seeking competing bids (white knight)*

Prior to the Florange law, the only defence at the disposal of directors that did not require the prior authorisation of shareholders was seeking a competing bid ("white knight"). Today, this defence is the one most often used both as a way of foiling a bid entirely as well as a means of negotiating a better price.

The search for a white knight also remains, in practice, the most credible threat,[51] and the one with the best chance of achieving the desired effect, because it results in either a more attractive offer or a more adequate price than the one proposed by the initiator of the initial bid.[52]

This anti-takeover defence mechanism may occasionally transform an unsolicited bid into an amicable one by leading to the improvement of the conditions of the initial bid.[53]

Though it actually involves the target developing a defensive position in common with the white knight, the mechanism itself remains subject to general principles of public offerings, such as the free interplay of bids and counter-bids.

The *Cour de Cassation*[54] has pushed the reasoning even further, by requiring that directors reveal to the shareholders the existence of negotiations conducted with third parties. During the offer period, directors were put under the obligation to reveal the existence of negotiations undertaken in their search for a white knight, even if they had not yet resulted in a counter-bid, and despite the fact that this was the only prerogative expressly excluded from the prior authorisation of the shareholders before the Florange law. It remains to be seen whether the *Cour de Cassation* will continue to uphold this position now that the prior authorisation of the board is no longer required by law for the adoption of defence measures.

Since the board has no legal obligation to seek a competitive bid, it seems unlikely that the liability of directors should be successfully claimed on such grounds (including by a shareholder dissatisfied with the initial bid).

*dd) Contesting the AMF's decision of conformity*

Directors may also decide to initiate legal proceedings, in particular against decisions of conformity by the AMF.

This action is initiated before the Court of Appeal of Paris[55] by persons (natural persons and legal entities) who were subject to a decision of conformity (which in practice means the target, the presenting bank and the initiator of the bid) and by any interested party (in principle, the court admits that such interested parties are the shareholders or bondholders of the persons concerned by the decision). In principle, the proceedings do not suspend the offer, but the AMF often spontaneously postpones the closing date, which transforms the proceedings into the perfect delaying tactic.

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[51] See, e.g., Aventis/Novartis dispute of 2004.
[52] See, e.g., Paris Expo/Unibail dispute of 1999.
[53] See, e.g., Alcan/Pechiney dispute of 2003.
[54] Court of Cassation, Commercial Chamber, n° 00-15618 (May 12, 2004).
[55] Monetary and Financial Code, art. L.621-30.

The most recent example is the offer initiated on July 17, 2013 by Fosun (a Chinese conglomerate) and Ardian (ex-Axa Private Equity) for the shares of Club Méditerranée that was postponed by the AMF until further notice, after the shareholders appealed the decision of conformity of the bid, putting into question the independence of the expert that evaluated it. On April 29, 2014, the Court of Appeal of Paris rejected the claims of the shareholders, but the decision was rendered nine months after the initiation of the bid. A competing bid had been made since then, and the success of the takeover of Club Méditerranée by Fosun and Ardian, although now amicable, has been compromised.

Do directors truly have the option of initiating such proceedings when the takeover bid is unsolicited? Some authors consider it possible that the directors could be reproached for not having exercised this option and therefore not served the interests of the target and its shareholders, on the grounds of mismanagement (*faute de gestion*). It is interesting to note that the authors do not argue the opposite hypothesis, whereby the directors could be reproached for having initiated proceedings against the decision of conformity. Consequently, directors may do well to exercise this right automatically, both to gain valuable time for negotiation and to implement, as necessary, defensive mechanisms.

Other legal proceedings may also be possible. For instance, the directors may act against the initiator of the bid for failing to comply with its obligation to declare the crossing of shareholding thresholds, especially in the case of concerted operations, for breaching its obligations to provide information to the public, for antitrust infractions, etc., all essentially available as potential delay tactics.

*ee) The appointment of advisers during the offer period*

Directors are free to appoint advisers, including bankers, lawyers, and consultants to assist the target during the offer period. These will be tasked, among other things, with helping the company to defend itself against an unsolicited bid. The choice of suitable advisers is all the more critical because they may, when appropriate, be called upon to find one or several white knights, and even to negotiate the price. A mandate of pure and simple defence can now also be contemplated, while it was contrary to the principle of reserving defensive measures to the power of the general meeting of shareholders before the Florange law.[56]

*ff) The right to criticise by way of press releases*

When the directors of a target are unable to take action, they still retain the ability to criticise the bid through press releases or press conferences. Yet, such freedom is limited by market regulations, as directors must abide by a duty of care in their statements.[57] Companies are required to limit the information they disseminate to the terms and elements contained in the publications of the AMF, the information notes covered by it and press releases. In practice, however, certain communications may be made without this due care.[58] In such circumstances, penalties may be imposed by the AMF.

[56] *Portier*, Gouvernance d'entreprise et défenses anti-OPA, Ingénierie Juridique et Financière, 2006.

[57] AMF General Regulations, art. 231-36.

[58] The battle between Aventis and Sanofi-Synthélabo is particularly illustrative. Indeed, the Franco-German pharmaceutical group had directly attacked its adversary in daily national and regional press, both in France and in Germany. For instance, an illustration depicting medication on which it was written "*OPA hostile. Attention ce médicament est dangereux pour les collaborateurs et les actionnaires d'Aventis*" (author's translation: hostile takeover. Caution, this medication is dangerous for the employees and shareholders of Aventis) followed by deliberately provocative phrases such as "*Attention, ce médicament risque d'entraîner une perte brutale de valeur […] peut provoquer d'importants troubles de la croissance […] peut causer la disparition de milliers d'emplois*." (author's translation: "Caution, this medication may cause sudden loss of value, may cause serious growth issues, may cause the termination of thousands of jobs"). While this campaign was in conformity with the AMF regulations concerning the criticism Aventis made in its information note in response to the mixed offer by Sanofi, it is difficult to conceive that the duty of vigilance was respected.

## III. The liability of directors for their actions during offer periods

As discussed above, the liability of directors may be claimed on several grounds when they undertake a direct or indirect anti-takeover measure.

It should first be noted that, while the liability of directors may be claimed for the defensive measures they adopted during the offer period without the prior approval of the general meeting (before the Florange law) or without justification based on the corporate interest of the company (after the law), this is not the case where the measures are taken by third parties.

The joint venture agreement entered into between Essilor and Nikon Corporation[59] provides a striking example. The agreement included a call clause allowing Nikon, under certain conditions (including the initiation of an unsolicited takeover of Essilor), to purchase Essilor's 50 % stake in the joint venture or to request the liquidation of the joint venture if control over Essilor had changed.

Pursuant to Article L.225-100-3 of the French Commercial Code, the implementation of this measure would prompt the frustration of the bid, or at the very least would negatively impact it. As such, the use of this contractual provision does constitute a defence measure which, if it were decided by the directors, would fall under the scope of Article L.233-32 of the French Commercial Code.

However, while the directors of the target have contractually awarded a call option to a third party, the latter is the sole possible initiator of the measure when it decides to exercise its option to purchase the stake of its partner. The liability of the directors could not be claimed because the obligation of passivity, in force at the time, was respected. Indeed, the defence measure was contractually agreed to before the bid was made (evidently, the conclusion by the directors of the same agreement during the offer period would have constituted a breach of the obligation of passivity). Consequently, the defensive measure did not require the prior approval of the shareholders.

The freedom to contract combined with the binding nature of contracts therefore allowed the directors to circumvent the obligation of passivity.

In any case, if the liability of directors were to be claimed on the grounds of their actions during an offer period, it is highly likely that it would be at the initiative of a shareholder, as the main beneficiary of the takeover bid and the person endowed with the power of decision – or at least, individually, with a portion of it. Claiming the liability of directors remains, however, subject to proof of misconduct (1) and may be exercised by the shareholders either individually (2) or on behalf of the company (3).

### 1. Misconduct which has caused specific damage to the shareholders

French law provides that directors can be held liable to the company or to third parties.[60] As the liability of directors to the shareholders is not expressly contemplated by the law, it seems, in principle, that it must find its source either in the rules relating to corporate action (*action sociale*) or in the actions by third parties. The distinction is not without interest, since the actions by third parties condition the liability of the director to the proof of misconduct separate from his/her duties (*faute détachable*), while simple misconduct (*faute simple*) may be sufficient to trigger the corporate action. It is therefore more difficult to call into question the liability of a director in one case rather than the other (the giving of a reasoned opinion falling within the normal functions of the board).

With only the general principles of individual action codified by law, it is left to case law to specify the conditions for its application as discussed above. The French *Cour de*

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[59] Essilor Document of Reference, 2007, paragraph 18.4, pg. 78.
[60] Commercial Code, art. L.225-251, L.225-256; Civil Code, art. 1850.

*cassation* appears to consider that simple misconduct is sufficient for a shareholder to commence an individual action for damages against a director.[61] The *Cour de cassation* therefore joins the position of the majority of authors, who consider it unfair to equate the shareholders of a company to external third parties, for whom proof of misconduct separate from the director's duties is necessary to establish liability.

Though it seems that the *Cour de Cassation* effectively relaxes the conditions for engaging directors' liability by requiring only simple misconduct, it should be noted that liability on these grounds remains nevertheless difficult to establish, as it requires the shareholders to prove they personally suffered damage, that is to say damage other than that suffered by the company. Case law on this point remains stringent, as it limits the definition of damage specific to the shareholder by refusing, for instance, to recognize that a loss in share value, even if it is a result of direct action by the director, would be sufficient for a finding of personal liability.[62]

It should be noted that, according to case law, a presumption of individual misconduct weighs on directors. This being said, the presumption may be overcome if the director can prove that he/she acted as a "prudent and diligent director."[63]

### *2. Individual claims*

Shareholders are entitled to bring an action for damages they suffered personally as a result of the decision of the director. To challenge defence measures initiated by a director, the most obvious recourse would be to claim the joint liability of the members of the board for abuse of power,[64] the contested decision having been taken in violation of the law[65] referred to in Article L.233-32 of the Commercial Code. The claimant would have the burden of proof to show the lack of authority of the corporate organ that should have consulted the shareholders before implementing the contested decision. The measure could, if appropriate and upon request, be suspended by a summary judgment pending a judgment on the merits. Ultimately, the measure may even be invalidated by the court.[66]

### *3. Derivative actions*[67]

A derivative action allows a shareholder to take action for damages suffered by the company as a result of a fault of the director. The shareholder, acting on behalf of the company, may invoke the violation of corporate interest in its broadest sense, alleging, not without ulterior motives, that the contested decision compromised the continuity or sustainability of the company. Courts would then be entitled to invalidate the contested decision that is contrary to the corporate interest.[68] This was notably the argument in a case involving the cancellation of treasury shares during a takeover bid that was determined not to be a routine operation and which, because of financial conditions that were unduly favourable to the transferee, harmed the interests of the transferor and the rights and interests of its shareholders.[69]

Derivative claims are therefore distinguishable from individual claims by shareholders against directors because they are brought for damages caused to the company itself rather

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[61] Court of Cassation, n°08-21547 (March 9, 2010).
[62] Court of Cassation, n°641 (April 19, 2005).
[63] Court of Cassation, n°08-17.841 (March 30, 2010).
[64] Court of Cassation, n°05-19.237 (February 6, 2007).
[65] Commercial Code, art. L.225-251.
[66] *Schmidt*, *supra* (fn. 34), pg. 1887
[67] Commercial Code, art. L225-252.
[68] *Carreau/Letreguilly,* Offres publiques (OPA, OPE, OPR), Répertoire de Droit Commercial, 2007.
[69] *Demilac et Nestlé v. Sté de participation et de gestion*, Commercial Tribunal of Paris (March 16, 1992), Bull. Joly 1992, pg. 526. See also Commercial Court of Paris (August 30, 1989); Revue Juridique Commerciale, 1989, pg. 379.

than to shareholders. In an individual claim, damages would be awarded to the shareholder, whereas the company itself would receive the damages in a derivative action brought by its shareholders.

Finally, the liability of directors may be claimed under an *ut universi* action, whereby the company would itself act to obtain compensation for harm through new directors replacing former ones, the latter being held accountable for faults committed during the exercise of their functions.