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Towards a tougher legislation on hostile takeovers

Arnaud Montebourg, Minister of Industrial Renewal, has recently expressed the desire of the French Government to take new measures designed to protect French companies against hostile takeover bids.

These measures, recently developed and commented by the *Association Nationale des Sociétés par Actions* (French association of joint stock companies, hereinafter "ANSA")[1], primarily focus on the fight against creeping takeovers, the development of long-term shareholder loyalty and the softening of the conditions governing the issuance of so-called "*poison pills*".

1. The fight against creeping takeovers

It should be recalled that pursuant to the General Regulation of the *Autorité des Marchés Financiers* (French Financial Markets Supervisory Authority, hereinafter the "AMF") any natural or legal person who comes to **own 30% or more of the equity securities or voting rights** in a target company is **required to file a bid** to acquire all the company's equity securities, as well as any securities giving access to its capital or voting rights[2]; it must be specified, however, that this threshold only applies to French companies whose shares are admitted to trading on a **regulated market** in a Member State of the European Union or in a State party to the European Economic Area.

The same obligation is also imposed on natural or legal persons who directly or indirectly own **between 30% and 50% of the total number of equity securities or voting rights** of a company that meet the aforementioned requirements and who, within a period of less than twelve consecutive months, increase such shareholding by at least 2% of the company's total equity securities or voting rights[3].

The Government is reportedly considering lowering these thresholds, in particular following the recommendations made in this respect by Louis Gallois and the AMF[4].

The Gallois Report suggests **reducing the aforementioned 30% threshold to 20% or 25%**.

This proposal is, however, not supported by the ANSA that has notably recalled that the reduction of the threshold to 30% in January 2011[5] had in particular required the implementation of a burdensome and complex transitional regime in order to allow the holders of ownership interests between 30% and 1/3 of the equity securities and voting rights to benefit from derogating provisions[6].

In addition, the AMF recommends **lowering the above-mentioned 2% threshold to 1%**.

Considering that a more flexible "breathing mechanism" must be maintained in order to foster the development of small- and medium-businesses, the ANSA approved this proposal, provided however that it only applies to "large listed companies".

2. Building long-term shareholder loyalty

Pursuant to Article L.225-123 of the French Commercial Code, a double voting right can be granted in the company's by-laws or pursuant to a decision of the extraordinary meeting of shareholders to any shares fully paid-up that have been registered in the name of same holder for at least 2 years. In addition, such holder can also benefit, subject to the same conditions, from the right to an increased dividend (known as loyalty dividend)[7].

The Government is reportedly considering to adjust the conditions in which such double voting right and increased dividends are granted, following the recommendations made in this respect by Louis Gallois[8] and the AMF.

The ANSA, for its part, believes that this issue should be preliminary addressed in a study.

3. Expanding the conditions governing the issuance of "*poison pills*"

Currently, the extraordinary general meeting of shareholders of a company that is the target of a hostile takeover bid may freely grant to its shareholders share warrants that will enable their holders to subscribe to new shares under preferential conditions[9]. Because of its necessarily dilutive effect, this measure, inspired by the "shareholder right plans" implemented in the North American continent, makes the contemplated takeover more costly.

The Government is reportedly considering expanding the conditions in which such warrants can be issued, notably by allowing the target company's board of directors to take alone the issuance decision; the shareholders would, however, still have the possibility to oppose this decision under certain conditions.

The ANSA, although having pointed out that in practice it is difficult to obtain a decision of the general meeting of shareholders, recommends maintaining the status quo on this issue.

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[1] ANSA, March 2013, n°13-005.

[2] Article 234-1 of the AMF General Regulation.

[3] Article 234-5 of the AMF General Regulation.

[4] *Pact for the competitiveness of the French Industry* (commonly referred to as the "*Gallois Report*"), December 2012; AMF Report on notification of major holdings and declarations of intent, October 2008.

[5] French Banking and Financial Regulation Law n°2010-1249 of October 22, 2010.

[6] Article 234-11 of the AMF General Regulation (so-called "grandfather" clause).

[7] Article L.232-14 of the French Commercial Code. In companies whose shares are admitted to trading on a regulated market, the number of shares eligible for this increased dividend may not, for any single shareholder, exceed 0.5% of the share capital.

[8] The Gallois Report suggests making double voting right automatic after a holding period of 2 years.

[9] Article L.233-32 of the French Commercial Code. These warrants are also referred to as "*bons d'offre*", "*bons Bretons*" or "*poison pills*".