AUTORITÉ DES MARCHÉS FINANCIERS
AMF

18 May 2022

CLARIFICATION OF THE ROLE OF THE AUTORITÉ DES MARCHÉS FINANCIERS IN THE PUBLIC OFFER FOR SUEZ INITIATED BY VEOLIA

For several months, the public offer for Suez launched by Veolia triggered strong opposition from the protagonists, involving numerous stakeholders and their advisers, and several jurisdictions and authorities in France and abroad. “Stock market battles” of this scale are rare in France. The last one to involve stakes and antagonisms of a similar scale was probably in 2004 with the public offer for Aventis by Sanofi.

Like all major "*stock market battles*", Veolia's takeover bid for Suez raised complex legal issues, some of them unprecedented, in areas as varied as stock market law, company law, labour law and competition law. Several authorities and courts were called upon to settle the disputes that ensued. However, some of these proceedings were not carried through to the end, since an agreement between Veolia and Suez brought an end to the various disputes.

The Autorité des Marchés Financiers (AMF) was naturally at the heart of some of these developments. The AMF Board discussed and ruled on this matter at 16 meetings from September 2020 onwards, analysing and taking into account the arguments put forward and opposed by the various parties, and in particular the 23 academic consultations submitted to it, in equal proportions, by Veolia and Suez.

Now that the public offer has come to an end, it seems appropriate to review some of the issues raised by this transaction. In this regard, three stock exchange law issues that have raised questions are addressed below: the start of the pre-offer period (I), the possibility of changing intentions within the meaning of Article L. 233-7 of the Commercial Code (II), and lastly the link between defensive measures adopted by a company targeted by a public offer and the guiding principles of public offers (III).

I. THE START OF THE PRE-OFFER PERIOD

On 30 August 2020, Veolia publicly announced that it had made a binding offer to Engie to acquire 29.9% of the share capital of Suez at a price of €15.50 per share. The Veolia press release stated, in relation to this proposal to acquire a controlling stake, that "*If it is accepted by Engie, Veolia intends, following the acquisition of the 29.9% of Suez shares, to file a voluntary tender offer for the remaining Suez shares*".[1] The Veolia press release added that *"In accordance with stock exchange regulations, the characteristics of the public offer and in particular its price will be determined at the time of its filing. The price will take into account the price paid to Engie for its 29.9% block of shares, which is an important reference, and, as the case may be, any subsequent significant events affecting Suez".*

Given these elements, the question arose as to whether Suez was, as a result of this announcement, subject to the legal regime of the pre-offer. In other words, had Veolia already announced the "*characteristics of a draft offer*" that it intended to submit for Suez shares, which would have marked the beginning of the pre-offer period? This question may seem technical at first glance, but was of obvious importance to the two companies concerned, since the pre-offer regime prohibits the offeror from acquiring any shares of the company potentially targeted by the public offer that it intends to file, as long as the draft public offer has not been formally filed with the AMF.

The legal regime applicable to the pre-offer period is defined in Article 223-34 of the AMF General Regulation, which states:

> *"When **a person makes the characteristics of a draft offer public** under the terms of Articles 223-6 or 223-33, **including the nature of the offer and the planned price or exchange ratio, that person shall immediately notify the AMF** and the AMF shall so notify the market by means of a publication. This publication shall mark the beginning of the pre-offer period, as defined in Article 231-2 (5°).*
> *If the person referred to in the first paragraph abandons the planned offer, it shall immediately notify the AMF.*
> *In the circumstances referred to in the previous paragraph, or if a draft offer is not filed within the deadline mentioned in Article 223-33, the AMF shall notify the market by means of a publication. "*

Following the press release issued by Veolia on 30 August 2020 and the company's communications as from that date, Suez asked the AMF to declare a pre-offer period for its shares. In particular, it was alleged that Veolia's announcement made "*the characteristics of a draft public offer public*" within the meaning of the aforementioned provisions and that, as a result, the pre-offer regime should apply as from 30 August 2020, with the consequence that Veolia was prohibited from acquiring Suez shares, pursuant to the provisions of Article 231-38 II of the General Regulation.[2]

In response to this request, the AMF stated publicly on 24 September 2020 that "*the terms used by Veolia in its press release dated 30 August, as well as the communication of the company and its management since this date, **did not result in making the "characteristics of a draft offer" public within the meaning of the aforementioned provisions, but the intention to file a draft offer should its proposal to Engie to acquire 29.9% of the share capital of Suez be accepted**, being specified that the characteristics of the draft offer that would follow the acquisition of those shares would depend, in particular, on the potential acceptance by Engie of this proposal, as worded or amended*."[3] It was noted, in substance, that Veolia's intention to make a public offer was then conditional on the acquisition of Engie's 29.9% stake and that the price was not yet known, as Veolia's offer had not been accepted and the price remained to be negotiated.

On 11 February 2021, the Paris Cour d'Appel dismissed an appeal by Suez against the AMF's position, noting in particular that although Veolia's press release of August 30 referred to a price of €15.50 per share for the acquisition of 29.9% of Suez's shares, *"it cannot therefore be inferred from the wording of this press release that the price envisaged for the proposed public offer was €15.50, which corresponds to a simple proposal on which the parties had not agreed, made during a negotiation phase with a view to acquiring a block of shares representing less than one third of the company's capital, which was presented as a prerequisite for the launch of such a public offer."*[4]

Consequently, the Paris Cour d'Appel confirmed the AMF's position, finding that "*Veolia's press release of 30 August 2020 did not inform the public of the characteristics of a proposed takeover bid but only of Veolia's intention to file a proposed public offer in the event that the proposal to acquire a 29.9% stake in the capital of Suez that it had sent to Engie were accepted, and of the fact that the characteristics of the draft public offer that would follow the acquisition of these shares would depend, in particular, on the possible acceptance by Engie of this proposal, as worded or modified."* [5]

Thus, the indication given by Veolia that the price of €15.50 it proposed to pay for the acquisition of 29.9% of Suez shares would be an "*important reference*" for the determination of the price of a possible subsequent public offer, did not amount to bringing "*making the characteristics of a draft offer public*". This meant therefore that there was no pre-offer situation with all the attendant consequences, in particular the restrictions on intervention that are imposed on the bidder.

The Paris Cour d'Appel also noted that "*the press release of 30 August 2020 differs from the press release published by Veolia on 5 October 2020, which gave rise to the publication of a pre-offer notice. That press release states that Engie has accepted Veolia's offer to acquire the company at €18 and, confirming Veolia's intention to make a takeover bid, states that the offer will be at the same price as that paid to Engie, i.e. €18 per share."*[6] Veolia's press release of 5 October 2020[7] announced the characteristics, particularly the financial characteristics, of the forthcoming public offer, thus marking the start of a pre-offer period, which was recorded by the AMF in a publication on its website on 6 October 2020. Conversely, the announcement made by Veolia on 30 August 2020, which did not inform the public of the "*characteristics of a draft public offer*", did not fall within the scope of Article 223-34 of the AMF General Regulation, and therefore did not constitute the start of a pre-offer period.

It should be remembered that the pre-offer period, which was introduced in 2009, is intended to provide a framework for trading in the target company's securities and to strengthen transparency requirements between the public announcement of the characteristics of a proposed bid and the formal filing of the bid with the AMF, which marks the start of the offer period. This pre-offer period is very common nowadays, as the characteristics of filed public offers are usually announced publicly before they are filed.

The initiator of a draft offer, the characteristics of which have been made known to the public, is thus prohibited from trading in the securities of the target company during the pre-offer period, subject to certain exceptions. During this period, the announced plan, which is not completely set in stone, is often subject to conditions precedent, but naturally the fact that the offer is in the pre-offer period cannot in itself prevent the conditions precedent from being fulfilled. It should also be noted that the offeror's interventions are also limited between the filing of its draft offer and the opening of the offer. Indeed, the period during which shareholders may tender their shares to the offer, on the basis of all the relevant information, is the period from the opening to the closing of the public offer (a period that corresponds to the duration of the offer). In other words, there is no "*public offer before the public offer*", i.e. before the compliance decision and the opening of the public offer. These rules are intended to ensure the orderly conduct of business and the proper functioning and transparency of the market.

In the case at hand, the opening of the pre-offer period for the Suez shares on 30 August 2020 would have had the effect of preventing Veolia from implementing its two-phase operational plan (acquisition of Engie's stake in Suez, followed by the filing of a public offer), whereas its offer to acquire the block of shares held by Engie was unilateral and, as it had not been the subject of any negotiation, could be modified, as was ultimately the case. While it was stated that the price offered for this block of shares would be an "*important reference*" for the possible future public offer, which was to be filed in case of acquisition of the block, it was not possible to consider in these circumstances that the mere reference to a unilateral offer for a block of shares amounted to an announcement of the characteristics of a subsequent proposed public offer for the entire share capital of Suez. To reason otherwise would have resulted, in this case, in the pre-offer period being used as a defensive measure for the target company, which was never the purpose of this regulation.

Veolia's public offer for Suez thus made it possible to clarify the fit between, on the one hand, the provisions of Article 223-6 of the General Regulation,[8] which require any person who prepares a financial transaction likely to have a significant impact on the price of a financial instrument to inform the public as soon as possible, which Veolia did as soon as it submitted its block purchase offer to Engie, and, on the other hand, the provisions of Articles 223-34 and 231-38 of the General Regulation, which require a person who informs the public of the "*characteristics of a draft offer, including the nature of the offer and the planned price or exchange ratio*" to inform the AMF immediately, and prohibit the offeror from acquiring securities of the target company.

Over and above the issue of the start of the pre-offer period, it may be noted that Veolia made a "*firm offer for the acquisition of 29.9% of Suez shares*"[9] held by Engie (29.9% out of a total of approximately 32% held by Engie), a block purchase proposal which, if accepted by Engie, did not place Veolia in a mandatory offer situation. In French law, "*the obligation to make an offer - which may be a purchase or an exchange offer - arises, and* ***since 1989 may only arise, from the crossing of predefined thresholds in terms of capital or voting rights***".[10] The threshold for a mandatory offer is 30% of a company's equity securities or voting rights.[11]

In the case at hand, in addition to the fact that it had not been established that the purpose of this structuring was to evade the rules relating to mandatory public offers, particularly with regard to setting the financial terms of the offer, it should be noted that respect for the equality of shareholders does not impose any obligations derogating from the freedom of contract other than those provided for by the law and the General Regulation.[12]

II. CHANGE OF INTENT AND FILING OF A PUBLIC OFFER

On 8 October 2020, in its initial declaration of intent[13] made after acquiring 29.9% of the share capital of Suez from Engie on 5 October 2020, Veolia indicated that it "*intends to file a public takeover bid on the remaining Suez shares under the conditions described in its press release of 5 October 2020*".[14] This press release specified in particular that the filing of its public offer would not take place without Veolia "*first having obtained a favourable opinion from the board of directors of Suez*".[15]

On 8 February 2021, Veolia amended its initial declaration of intent by noting "*that its repeated attempts to establish a friendly relationship with Suez, reiterated in its offer proposal dated January 7, 2021, were all met with opposition from Suez. Over the last four months, Suez has multiplied actions intended to obstruct Veolia's offer proposal. […]. Consequently, in accordance with the regulations [...], Veolia can only draw the consequences and modify its [initial] declaration of intent by no longer requiring that the tender offer be subject to the approval by Suez's Board of Directors.*"[16] Veolia then made a public offer for the remaining Suez shares not held by Veolia at a price of €18 per Suez share cum dividend.

Some questions have been raised about whether it is possible to change intentions in this way.

In stock exchange law, intentions may be modified under certain conditions. The last paragraph of Article L. 233- 7 of the Commercial Code thus stipulates:

> "*In the event of a **change in intent** within the six-month period following the submission of the original statement of intent, a **substantiated** new statement must be issued promptly to the company and to the AMF and made public under the same conditions. The six-month period mentioned in the first paragraph runs again with this new statement.*"

In accordance with the recommendations of the Field Report,[17] Order no. 2009-105 of 30 January 2009 **abolished the requirement that the change of intent be based on significant changes in the environment, situation or ownership of the persons concerned**.[18] Today, a change of intent is allowed provided that it is justified, although this justification must not fall within a limited list of predefined cases.

The **duly substantiated** change of intention must be justified by objective and serious grounds, and not merely potestative reasons. As with the initial declaration, the market needs to be **truthfully informed**.[19]

In this case, the four months that elapsed after the initial declaration of intent revealed, in particular, Veolia's failure to obtain a favourable response from the Suez board of directors, despite repeated attempts, in a context where the conditions that prevailed at the time of Veolia's initial declaration of intent had themselves evolved, which may have led Veolia to modify its intentions on this point. Moreover, the AMF could not find any evidence that its initial declaration was not accurate.

III. THE LINKAGE BETWEEN DEFENSIVE MEASURES AND THE GUIDING PRINCIPLES FOR PUBLIC OFFERS

Under French law, a company whose securities are the target of a public offer may implement a very wide range of defensive measures, including measures likely to frustrate the successful outcome of the offer. Despite these extensive measures, the right of a company to defend itself against an unsolicited public offer is not absolute. Over and above consideration of the company's corporate interests, the offeree company, like the offeror, must comply with certain fundamental principles that organise and govern the public offer procedure. In the case of Veolia's takeover bid for Suez, the AMF reiterated in its press release of 2 April 2021 the importance of compliance with these fundamental principles in the conduct of the bid and the implementation of defensive measures:

"*Article L. 233-32 of the Commercial Code allows the board of directors, during the offer period, to take any decisions, the implementation of which might make the offer fail, subject to the powers expressly granted to general meetings within the limits of the company's corporate interest.* ***The measures taken must be in line with the rules and principles governing public offers,*** *as defined in particular by the European Directive of 21 April 2004, the Monetary and Financial Code and the AMF General Regulation. These texts, as clarified by case law, require that public offers be conducted in an orderly fashion and define, in particular, the principle of the free interplay of offers and counter-offers, equal treatment and information for all holders of the securities concerned, market transparency and integrity, and fairness of transactions and competition*."

A. **The bases of the guiding principles for public offers**

Since its beginnings, French takeover law has been based on rules and fundamental principles. These principles are known as "*general*" or "*guiding*" principles.[20] Principles are different from rules and play a prominent role[21] in the legal system, especially in the field of public offers.[22]

The guiding principles of public offers are as old as the legislation on public offers.[23] For several decades now,[24] they have been expressed in normative texts and enshrined in case law. As an expression of the imperatives of takeover bids, these principles constitute legally binding standards that express the most essential values in this domain. They are the basis of the regulations that govern public offers. They also serve as standards against which the actions and behaviour of those involved in a public offer are assessed. Lastly, they help to clarify the interpretation of the technical provisions of the regulations.

The guiding principles of public offers are currently expressed in several standard-setting instruments:

- Directive 2004/25/EC of 21 April 2004 on takeover bids (the "**Takeover Directive**") which defines a set of principles and rules that must be complied with in the conduct of takeover bids in the European Union.

  Article 3 of the Takeover Directive, entitled "**General Principles**", contains a number of principles that apply across the board to public offers. These principles are mandatory: Article 3 states that "Member States shall ensure that the following principles are complied with." These principles include the following:

  - "*the board of an offeree company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid*";

  - "*false markets must not be created in the securities of the offeree company, of the offeror company or of any other company concerned by the bid in such a way that the rise or fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted*".

  These principles apply irrespective of whether Member States choose to apply Article 9 (neutrality of administrative or management bodies) or Article 12 (no neutrality) of the Directive. In other words, Article 12, which makes it possible to dispense with the neutrality required of administrative or management bodies, should not have the effect of rendering general principles inapplicable, in particular those referred to in Article 3 above.

- the **Monetary and Financial Code**, and in particular Article 433-1, I, which states that "*in order to ensure equality between shareholders and the transparency of the markets, the AMF General Regulation lays down the rules for public offers of financial instruments issued by a company whose registered office is established in France and which are admitted to trading on a French regulated market."*

- the **AMF General Regulation**, and in particular Article 231-3, provides that "*to allow an offer to be conducted in an orderly fashion in the best interests of investors and the market, the parties concerned shall respect the principles of free interplay of offers and counter-offers, equal treatment and information for all holders of the securities of the persons concerned by the offer, market transparency and integrity, and fairness of transactions and competition.*"

The guiding principles of public offers have been enshrined in case law, which has conferred autonomy on them and broadened, mainstreamed and amplified them.[25] Paris Cour d'Appel, which has general jurisdiction over public offers under the supervision of the Cour de Cassation, has for quite some time now established the general and mandatory scope of these principles.[26] This is particularly true of the principles of **transparency** and the **free interplay of offers and counter-offers**[27] that must govern the conduct of public offers, and the **principle of equality**[28] and **fairness**[29] **in competition**. These principles prohibit, in particular, any defence that gives a competitor "*an advantage that determines in advance the success of its public offer by distorting the interplay of offers and counter-offers*".[30] The competition that may be involved in a public offer is carried out through the free interplay of offers and their counter-offers.

The guiding principles of public offers, which presuppose the existence of a principle of free competition, are deeply interdependent. The principle of the free interplay of offers and counter-offers is itself based on the principles of transparency and equality, particularly as enshrined in case law. This is because *"the free interplay of offers and counter-offers is only effective if no particular advantage is granted to one of the competitors. In other words, the free interplay of offers and counter-offers presupposes the equality of competitors, also known as the principle of freedom of competition, since their inequality distorts this free interplay: this is what the Paris Cour d'Appel admitted in its judgement of 27 April 1993 when it spoke of "equality in competition*".[31] These principles are binding on all persons involved in an offer, including the offeror and the company whose securities are the subject of the bid, as well as on third parties.

The Paris Cour d'Appel firmly upholds the effectiveness of these principles, as well as the role of the AMF in this field,[32] as shown by its most recent case law. In a decision of 12 January 2017, it upheld the "***right of all shareholders to enforce the principle of free interplay of offers and counter-offers during a public offer***."[33] In a decision of 22 April 2021, the Paris Cour d'Appel also affirmed that the general rules and principles governing public offers are part of a "***guiding public policy,***"[34] a finding that had already been made by case law itself, the stock market regulator[35] and policy.[36] As has been observed, "*certain provisions of the stock exchange regulations undoubtedly fall within the scope of economic public policy, which, in this area, is a matter of* ***public policy of direction*** *because it tends to organise economic relations. […] Thus, the public offer procedure, through the public exercise of control over the target company that it contains, leads, through the free interplay of offers and counter-offers, to the determination of the optimal valuation of the securities and undoubtedly contributes to the proper functioning of the market, in the economic interest of all. The* ***public policy*** *nature of stock exchange regulations, and more particularly of the provisions relating to public offers, allows special law to restrict the exercise of contractual freedom."*[37] It is traditionally accepted that public policy justifies the absolute nullity of conflicting agreements, since it is the expression of the general interest, which must prevail over the will of the parties.

B. The linkage between Article L. 233-32 of the Commercial Code and the guiding principles for takeover bids following the transposition of the Takeover Directive in 2006

The Takeover Directive was transposed into French law by Law 2006-387 of 31 March 2006 on takeover bids. For this transposition, the role of the AMF - described as the "***guardian of the general principles of takeover bids***"[38] – was expressly outlined by the parliamentary proceedings.

The Takeover Directive provides a framework for the use of defensive measures that may be taken by a company targeted by a takeover bid, by leaving certain options to Member States. In transposing the Takeover Directive by Law No. 2006-387 of 31 March 2006 on takeover bids, the lawmakers chose to transpose Article 9(2) of the Directive.[39] The result of this transposition was Article L. 233-32 of the Commercial Code, which reads as follows:

*"During the period of a takeover bid for a company whose shares are admitted to trading on a regulated market, the board of directors, the supervisory board, with the exception of their appointment powers, the management board, the chief executive officer or one of the deputy chief executives of the offeree company **must obtain the prior approval of the general meeting** to **take <u>any</u> measure the implementation of which is likely to frustrate the successful outcome of the bid**, with the exception of the search for alternative offers."*

Following the transposition of the Takeover Directive, French law thus made it possible for companies subject to a public offer to take defensive measures likely to frustrate the successful outcome of the bid. When the board of the target company intended to take "***any measure the implementation of which is likely to frustrate the successful outcome of the bid***", it had to obtain "***the prior approval of the general meeting***." However, this requirement was not absolute, as the legislator provided for a "***reciprocity exception***": Article L. 233-33 of the Commercial Code stipulated that the principle of prior approval by the general meeting was not applicable when the bidder was not itself subject to a similar principle under the law applicable to it. Since 2006, the board of a French company that is the subject of a public offer by a foreign bidder not subject to the principle of prior approval by the general meeting can therefore take any measure without the approval of its general meeting that could cause the bid to fail.

At the time of this transposition**, the question arose as to the linkage between the principle of the sovereignty of the general meeting and the guiding principles of public offers.** Expressly referring to this question, the parliamentary proceedings answered this question, in first and second reading, in particularly clear terms:

- **Report made on behalf of the Sénat Finance Committee, No. 20, 13 October 2005:**

  *"**<u>The sovereignty thus granted to the general meeting</u>** to decide on defensive measures during an offer period **<u>must be exercised in compliance with the general principles of takeover bids</u>**, for which the AMF is the guarantor, first and foremost the **free interplay of offers and counter-offers**."*[40]

- **Work of the Sénat Finance Committee, 13 October 2005**:

  *"He [the general rapporteur] emphasised that **the draft law seeks to <u>strengthen</u> the central role of the AMF**, which promotes **a number of general principles governing the proper conduct of public offers**, referred to in Article 231-3 of its General Regulation, such as the free interplay of offers and counter-offers, equal treatment and information for all holders of the securities of the persons concerned by the offer, market transparency and integrity and fairness of transactions and competition.*

  *He pointed out that, in addition to the regime it was helping to shape, the AMF also had some scope to clarify the terms and conditions of an imminent or ongoing bid, whether, for example, with a view to requesting clarification from an offeror that was rumoured to be making a bid **or to invalidate certain defensive measures taken by the offeree**."*[41]

- **Report made on behalf of the Sénat Finance Committee, No. 197, 8 February 2006:**

  *"French takeover law is more comprehensive than that of other Member States and is **largely based on general principles and rules laid down by the market authority (successively the Commission des Opérations de Bourse - COB - and then, since 2004, the Autorité des Marchés Financiers - AMF)** and **transcribed** into its General Regulation, such as equal treatment of shareholders, market transparency and integrity, fairness of transactions and the free interplay of offers and counter-offers.*

  *It [the Directive] safeguards the ability to carry out an offer without resulting in the "disarmament" of **offeree companies, which have means of defence but must implement them <u>in a way that respects</u> transparency, the free interplay of offers and counter-offers, the balance of power between shareholders and management, and the fairness of the situations of the offeror and the offeree.**"*[42]

Following the adoption of Law No. 2006-387 of 31 March 2006 on takeover bids, the legal literature was almost unanimously in favour of this approach,[43] according to which "*the sovereignty thus granted to the general meeting to decide on defensive measures during an offer period must be exercised in compliance with the general principles governing takeover bids, for which the AMF is the guarantor.*"

A few authors were reluctant to endorse this approach precisely because of the fundamental powers of the general meeting[44] - the company's sovereign body - to adopt defensive measures.

In transferring the fundamental powers of shareholders to adopt measures likely to frustrate the successful outcome of the bid to directors, the Florange Law did not rule out the application of the guiding principles of public offers. **The sovereignty of general meetings of shareholders was curtailed by the guiding principles of takeover law when the Takeover Directive was transposed. This limitation is all the more important when defensive measures are adopted by the board of directors alone, as has been the case since the Florange Law.**

C. **The linkage between Article L. 233-32 of the Commercial Code and the guiding principles for takeover bids following the Florange Law**

By adopting Law No. 2014-384 of 29 March 2014 aimed at giving new perspectives to the real economy (the "Florange" Law), **the lawmakers abandoned the board of directors' "neutrality principle"**, allowing the board to take - without prior approval by the general meeting - all decisions that could frustrate the successful outcome of a bid, subject to the powers expressly attributed to general meetings.

Article L. 233-32 of the Commercial Code was amended accordingly, as follows:

Article L. 233-32 of the Commercial Code (in its version in force between 2006 and 2014)   *"I. - During the period of a takeover bid for a company whose shares are admitted to trading on a regulated market, the board of directors, the supervisory board, with the exception of their appointment powers, the management board, the chief executive officer or one of the deputy chief executives of the offeree company* ***must obtain the prior approval of the general meeting*** *to* ***take any measure the implementation of which is likely to frustrate the successful outcome of the bid****, with the exception of the search for alternative bids".*
Article L. 233-32 of the Commercial Code (in its version in force since the Florange law)   *"I. - During the period of a public offer for a company whose shares are admitted to trading on a regulated market, the board of directors or the management board, after authorisation by the supervisory board of the offeree company,* ***may take any measure the implementation of which is likely to frustrate the successful outcome of the bid,*** *subject to the powers expressly attributed to general meetings within the limits of the company's corporate interests. "*

The change introduced by the Florange Law means that the "*neutrality*" of the board of directors is no longer the rule but the exception.[45] The parliamentary work on the Florange Law shows that this reform was intended to enable French companies to defend themselves more effectively against unsolicited public offers. One of the aims was to "*enable the governance bodies of listed companies to react quickly in the event of a hostile takeover bid.*"[46]

By enshrining the principle of the freedom of the board - instead of the general meeting - to adopt any defensive measure likely to frustrate the bid, **the Florange Law has clearly strengthened the defensive capacity of listed companies by enabling them to adopt anti-takeover measures in a rapid and agile manner. However, it has not called into question the necessary reconciliation between the right of an offeree company to defend itself and compliance with the guiding principles of public offers**.

Article L. 233-32 of the Commercial Code, the purpose of which was to transpose the Takeover Directive, is intended to **apportion** - between the general meeting and the board of directors - the **fundamental powers** to take measures whose implementation is likely to frustrate the successful outcome of the bid. It was never intended to settle the question of the relationship between company law and stock exchange law. When it was adopted in 2006, this article stipulated that the board of directors had to obtain the prior approval of the general meeting to take any measure the implementation of which was likely to frustrate the successful outcome of the bid. Neither the work of the Parliament nor the legal literature considered that this was a basis for rejecting the application of the guiding principles for takeover bids. Contrary to what is sometimes claimed, **it is therefore not the Florange Law that allowed companies targeted by a takeover bid to take "any measure the implementation of which is likely to frustrate the successful outcome of the bid". The possibility of taking any measure likely to frustrate the successful outcome of bid has already existed in French law** – as expressly stated in the first version of Article L. 233-32 of the Commercial Code - **since the transposition of the Takeover Directive in 2006**.

Over and above the legal provisions themselves, the **parliamentary work on the Florange Law in no way asserted that the guiding principles for takeover bids would no longer apply in the event of a hostile takeover bid.** The rapporteur of the Florange Law in the Assemblée Nationale stated, in his comments on double voting rights (which were enshrined in the Law), that "**the free interplay of offers and counter-offers is a component of the principle of free movement of capital"**, a principle which is "**guaranteed by Article 63 of the Treaty on the functioning of the European Union (TFEU)**."[47] However, at no time was it suggested, with regard to the principle of the free interplay of offers and counter-offers and, more generally, the guiding principles of public offers, that the board of directors of a company subject to a public offer could henceforth disregard it. When the principle of free interplay and counter-offers is mentioned in the parliamentary work on the Florange Law, it is to emphasise that it is a component of one of the fundamental freedoms of the European Union, guaranteed by the TFEU.

Furthermore, **nearly all the legal literature has naturally considered - after the adoption of the Florange Law - that companies targeted by a takeover bid must comply with the guiding principles for takeover bids when implementing defensive measures.**[48]

To consider that Article L. 233-32 of the Commercial Code would allow a company - because in 2014 the legislature abolished the requirement for the board of directors to obtain prior approval from the general meeting to implement certain defensive measures - to dispense with compliance with the guiding principles for public offers and, more generally, from any regulatory provision, would be tantamount to allowing it to contravene most of the provisions of stock market law, most of which are found in the AMF General Regulation. If we follow this line of reasoning, a company that is the subject of a takeover bid could engage in unfair behaviour and undermine market transparency and shareholder equality, **all of which would seriously disrupt public policy on the stock market. The lawmakers in 2006 as well as 2014 did not permit or want this behaviour, and it has never been allowed in French law since takeover law came into being.**

The combined application of Article L. 233-32 of the Commercial Code and the guiding principles for takeover bids after the Florange Law is the result of a **need to reconcile, rather than oppose**, the rules and principles governed in their respective fields by **company law** and **stock market law**, on the one hand, the specific ability of a company's board of directors to decide on measures likely to frustrate the successful outcome of a bid and, on the other, the fundamental requirements, constituting guiding public policy, for the proper functioning of the financial market. There is absolutely no doubt about the contribution of the Florange Law to the issue of takeover bids. By giving the board of directors - and no longer the general meeting - the power to decide on the adoption of measures likely to frustrate the successful outcome of a takeover bid, it has significantly increased the defensive capacity of French listed companies, enabling them to defend themselves quickly and agilely, as demonstrated by the vigorous and unprecedented defence implemented by Suez over a period of seven months, between September 2020 and March 2021. The Florange Law has not, however, done away with the fundamental principles of public offers.

D. **AMF communication on 2 April 2021**

On several occasions throughout its history,[49] the stock market regulator has intervened during public offers to reaffirm certain fundamental principles. Although such public intervention by the regulator seems rare - primarily in the case of "hostile" bids in France - it has in fact stepped in on several occasions in the context of large-scale public offers that gave rise to marked opposition between the main parties. The COB and then the AMF intervened, by issuing a press release, in the hostile takeover bids involving **BNP/Société Générale/Paribas**[50] in 1999 and **Sanofi/Aventis**[51] in 2004. It is therefore incorrect to claim that the AMF's intervention by way of a press release, such as the one issued on 2 April 2021 concerning Veolia's takeover bid for Suez, was unprecedented.

In the case of Veolia's bid for Suez, between September 2020 and March 2021, the offeree company adopted **many defensive measures**, some of which were considered **bold and unprecedented**. This was the case, for example, with the creation of a foundation under Dutch law with the aim of "*securing the non-transferability of the French water business and thus avoiding the dismantling of Suez in France,"*[52] the decision of the Suez board of directors to "*support Ardian's letter of intent [...] with a view to acquiring 29.9% of the shares held by Engie in Suez, followed immediately by a public cash offer for all Suez shareholders,*"[53] or disposal operations, some of which involved major assets targeted by the offeror.[54] This "robust" defence[55] - ranging from the creation of a foreign foundation to "*secure the non-transferability*" of a major asset, to support for a competing project, to various asset disposal projects - i**mplemented by Suez between September 2020 and March 2021**, against Veolia's offer, **was not challenged by the AMF.**[56]

The AMF did react, however, to the various measures announced on **21 March 2021** by the press releases issued on the same day by Suez and Ardian-GIP, namely, on the one hand, the Suez press release entitled "Suez offers a negotiated solution to Veolia supported by a binding offer from Ardian-GIP" and, on the other hand, the Ardian-GIP press release, published the same day, entitled "Ardian and GIP submit firm investment proposal to support the creation of a new Suez under a negotiated solution".

Firstly, as the AMF considered in its communication of 2 April 2021, these press releases were issued while Suez was in the offer period and did not contribute to the proper information of investors. In substance, they referred to a "*binding offer*" by the Ardian-GIP consortium and, without any real details as to the scope of the assets concerned, put forward a valuation of "*€20 per share*" which did not, in reality, correspond to a price or value that Suez shareholders would be able to receive.

In addition, Suez indicated that it had radically changed the structure of its Dutch foundation, which – breaking with the purpose announced to the market of safeguarding Suez's French water business in order to "*preserve its integrity*" - had henceforth the function of imposing the terms of its offer. The inalienability of the foundation could now be deactivated in limited and constrained cases, requiring Veolia either to file a public offer at the minimum price of €22.50 per share set by the Suez board of directors before the independent expert appointed had submitted his report, or to adhere to a scheme jointly promoted by Suez and the Ardian-GIP consortium, which provided, in addition to raising the price of Veolia's offer, for a significant transfer of assets to the consortium, in the context of a de facto competing project. This consortium - which stated at the same time that it "*could consider making a public offer for the entire share capital of Suez*", in the event that Veolia were to withdraw its offer - had been granted by Suez "*an exclusivity on the assets it has proposed to acquire for a period of thirty days that may be extended to May 30, 2021*", with the understanding that in the event of a breach of this exclusivity undertaking, Suez would have to pay it substantial compensation. In so doing, the consortium placed itself, with the support of the offeree company, which had granted it an exclusivity undertaking, in a situation of competition with Veolia, which had initiated a public offer for the Suez shares.

In France, a company whose securities are the target of a public offer **may implement a very wide range of defensive measures, including measures likely to frustrate the successful outcome of the bid**. The fundamental powers given to the board of directors to adopt such measures since the Florange Law give a major practical significance to this option to adopt defensive measures. However, such measures should not **undermine the guiding principles for public offers that the AMF is charged with enforcing.** These principles are binding on all persons involved in the offer as well as on third parties,[57] and thus in this case on Veolia, Suez and the Ardian-GIP consortium.[58]

In this case, on 21 March 2021, Suez and the Ardian-GIP consortium took and announced a set of **converging measures** consisting in particular of (i) **radically transforming the purpose of the Dutch law foundation** to make it - in contrast to the sanctuary purpose announced to the market - an instrument aimed at **imposing the terms of its offer on the offeror** (ii) **while granting specific and significant advantages** (exclusivity commitment with an indemnity clause) **to the Ardian-GIP consortium**, (iii) which - by stating that it *"could consider **the filing of a tender offer** on the whole share capital of Suez" - **which in fact placed it in a competitive situation with the offeror**, and (iv) announced, in an imprecise communication, a **"firm offer**", "received and unanimously approved by the Suez Board of Directors", which put forward, without any real details on the scope of the assets concerned, a valuation of "**€20 per share**"*, which **did not, in reality, correspond to a price that Suez shareholders were entitled to receive**.

The AMF Board therefore considered that the **combination of these various measures taken and announced by Suez and the Ardian-GIP consortium**, particularly in view of the resulting major impediment to free and fair competition on the market and the inadequate information provided to investors, had **undermined the free interplay of offers and counter-offers, as well as the principles of market transparency and integrity, and fairness in transactions and competition.**

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[1] Veolia, Press release, 30 August 2020

[2] According to this provision, "*During the pre-offer period, the offeror and persons acting in concert with it shall not acquire any of the securities of the target company*. "

[3] AMF, News Release, 24 September 2020

[4] Paris Cour d'Appel, Pôle 5, Chambre 7, 11 February 2021, RG No. 20/13807

[5] Paris Cour d'Appel, Pôle 5, Chambre 7, 11 February 2021, RG No. 20/13807

[6] Paris Cour d'Appel, Pôle 5, Chambre 7, 11 February 2021, RG No. 20/13807

[7] Veolia, Press Release, 5 October 2020. This press release stated in particular that "*Veolia acknowledges Engie's decision to respond favourably to its offer to acquire a 29.9% stake in Suez"* and that "*this offer will be at the same price as that paid to Engie, i.e. 18 euros per share (dividend included)."*

[8] Under the terms of Article 223-6(1) of the AMF General Regulation, "*any person that is preparing a financial transaction liable to have a significant impact in the market price of a financial instrument, or on the financial position and rights of holders of that financial instrument, must disclose the characteristics of the transaction to the public as soon as possible."*

[9] Veolia, Press Release, 30 August 2020.

[10] M.-J. Vanel, À propos de l'arrêt Havas, *Revue du CMF*, n°7, April 1998, p. 19.

[11] This threshold is defined in Article L. 433-3(I) of the Monetary and Financial Code. Article 234-2(1) of the AMF General Regulation states in addition that, "w*here a natural or legal person, acting alone or in concert within the meaning of Article 233-10 of the Commercial Code, comes to hold more than 30% of a company's equity securities or voting rights, such person is required, on its own initiative, to inform the AMF immediately thereof and to file a proposed offer for all the company's equity securities, as well as any securities giving access to its capital or voting rights, on terms that can be declared compliant by the AMF*."

[12] Paris Cour d'Appel, 1st ch., sect. CBV, 10 March 1992, No.°91/24720, Mr. Anastasiades et al. vs Société Pinault SA, Société Alsacienne de Magasins SA et al, Société Maus Frères SA et al. In this case, the Paris Cour d'Appel ruled that "*compliance with equality between shareholders does not impose any obligations derogating from the freedom to contract other than those exhaustively provided for by the law and set out in the General Regulation [... ...] It has not been established that the legal mechanism implemented for this purpose is an artificial or fictitious arrangement designed to evade stock market regulations; Considering, firstly, that the tax reasons invoked by the Maus-Nordmann group are not in themselves argued to be fraudulent, that it was permissible for these persons, who had the power to do so, to transfer the capital of SAMAG in preference to the Au Printemps shares owned by SAMAG and that Pinault was not prohibited from placing itself, by means of legal contractual stipulations, outside the scope of application of Articles 5-4-1 et seq. of the general regulation of the Board."* See also Cass. com., 29 Nov. 1994, No. 92-14.617, Mr. Anastassiades, Bull. civ. 1994, IV, No. 349.

[13] This declaration of intent was made pursuant to the provisions of Article L. 233-7, VII of the Commercial Code.

[14] Major shareholding notification and declaration of intent, 8 October 2020, No. 220C4173.

[15] Veolia, Press Release, 5 October 2020: "*In accordance with the commitments made, Veolia confirms its intention to file a voluntary public takeover bid on the remaining Suez share capital in order to complete the merger of the two companies. This offer will be at the same price as that paid to Engie, i.e. 18 euros per share, under the conditions detailed below. At the same time, Veolia recalls that this offer will not be launched without first having obtained a favourable opinion from the board of directors of Suez, with which Veolia wishes to resume discussions as of tomorrow."* (p. 1); "*However, Veolia's public offering will only take place once the Veolia project has been favorably received by Suez's board of directors, possibly after the general meeting of its shareholders*." (p. 2)

[16] Major shareholding notification and declaration of intent, 8 February 2021, No. 221C0311.

[17] Working group chaired by Bernard Field, Report on major shareholding disclosures and declarations of intent, October 2008.

[18] Under the previous regime, the reporting entity could change its intention within a period of 12 months but this change of intention could only be "*justified by significant changes in the environment, the situation or the shareholding of the persons concerned*".

[19] V. not. A. Viandier, *OPA, OPE et autres offres publiques*, Editions Francis Lefebvre, 5th ed, 2014, No 366, p. 79: "However, this does not mean that the reporting entity can shamelessly and without risk change course shortly after declaring its intentions; there is a risk that the sincerity of its initial declaration will be challenged, with the risk of the AMF sanctioning it for making a false declaration."

[20] No distinction is made here between "general" and "guiding" principles, which are terms that are commonly used synonymously in stock exchange law and have been for several decades.

[21] "*In etymological terms, "principle" comes from the Latin word "principium", which is itself derived from the word "princeps", both formed from "primo" (first) and "caps" (from "capio", "capere": take). The princeps is* ***the one who takes first place, the first share, is first in rank, etc.*** *He is the prince, the leader, the head, the front-line soldier...*" (P. Morvan, *Le principe de droit privé*, Pref. J.-L. Sourioux, Éd. Panthéon-Assas, 1999, No.2, p. 5).

[22]As it has been observed, "*the pernickety regulation of public offers is accompanied by a rise in* ***general principles (fairness, equal treatment, transparency, etc.), which are often the only way to settle the dispute.*** *Two questions then arise: what are the differences between principles and the rules of law? How do the two coexist?* ***Although principles and legal rules are both norms that populate our legal system, it would seem that principles have an overwhelming advantage over rule of law.*** *I'm referring here to certain foreign studies, notably those of Ronald Dworkin.* ***The principle is imperative by nature*** *– princeps, it commands – where the rule may be purely supplementary. Contradiction between principles – for example, between the right to evidence and the protection of privacy – never results in the defeat of one before the other, but to an in casu conciliation depending on the circumstances; whereas two contrary rules of law cannot coexist in the same domain: one repeals the other. Above all, in its very formulation, the principle is endowed with a purity, an "absoluteness" that explains its disregard for this or that specific application, or even the multitude of its possible applications*" (L. Aynès, Moins de règles et plus de principes? Le nouveau rôle du juge, *Rev. de jurisp. com.*, mars-avril 2017, n°2, p. 176). See also G. Canivet, Le juge entre progrès scientifique et mondialisation, *RTD civ.*, 2005, p. 33, which states that "*without the "pull" of principles, to use Dworkin's expression, legal rules would be atomised and precepts without any internal coherence. Fundamental principles ensure that the texture of law, while open, is not discontinuous. They are the normative trunk on which legislation is grafted and which determine their interpretation."*

[23] The general decision of the Commission des Opérations de Bourse on public offers of 13 January 1970, which is the basis of the modern regulation of public offers, consisted of two parts: the first defined "***principles***", the second "***rules***". This structure, made up of "***principles***" and "***rules***", can be found in the general decision of the Commission des Opérations de Bourse of 25 July 1978 on takeover bids and exchange offers. These principles were subsequently incorporated into the body of the regulations on public offers, in Chapter 1 entitled "*General Provisions*" of Commission des Opérations de Bourse Regulation 89-03 on public offers and acquisitions of controlling stakes, Article 3 of which stipulated that *"the competition that may be involved in a public offer shall be carried out through the free interplay of offers and counter-offers*." These principles were subsequently reformulated in Commission des Opérations de Bourse Regulation 2002-04 on takeover bids for financial instruments traded on a market.

[24] See in particular. J.-F. Biard et J.-P. Mattout, Les offres publiques d'acquisition : l'émergence de principes directeurs de droit boursier, *Banque et droit*, mars-avr. 1993, n°28, p. 3 ; M.-A. Frison-Roche, Le principe juridique d'égalité des compétiteurs sur le marché boursier, *Bull. Joly Bourse*, n°6, nov.-déc. 1993, p. 720 ; D. Schmidt, L'office du juge en droit des OPA et des abus de marché*, Bull. Joly Bourse*, mars 2017, n°02, p. 117.

[25] Thus, *"the broad interpretation applied has led to the affirmation of the existence of a genuine public order for the stock market, the principles of which prevail over all other standards"*. (A.-C. Muller, *Droit des marchés financiers et droit des contrats*, Pref. by Hervé Synvet, Economica, 2007, n°571, p. 442).

[26] Indeed, "*in a number of cases, the courts have "discovered" public policy provisions in stock market regulations*. *A study of the main decisions handed down in this area highlights the public policy nature of certain stock market rules"*. (A.-C. Muller, *Droit des marchés financiers et droit des contrats*, Pref. by Hervé Synvet, Economica, 2007, n°571 bis, p. 443).

[27] Paris Cour d'Appel, 1ère Chambre, sect. CBV, 20 Nov. 1991, No. 91/15093, Sté Quadral et al. vs/Finmeccanica Int. SA et al; CA Paris, 1ère Chambre, sect. CBV, 27 April 1993, No. 93/5842, Mutuelle du Mans Assurance-Vie et al. vs OCP. As has been observed, case law has given to the principle of the free interplay of offers and counter-offers "a *very broad scope, including all the means of frustrating the successful outcome of a bid*" (A.-C. Muller, *Droit des marchés financiers et droit des contrats*, Pref. by Hervé Synvet, Economica, 2007, n°586, p. 453). See also Paris T Comm., 1ère Chambre, sect. B, 16 mars 1992, SA Demilac et al vs/SPG and Saint-Louis.

[28] Paris Cour d'Appel, 1ère Chambre, sect CBV, 27 April 1993, No. 93/5842, Mutuelle du Mans Assurance-Vie et al. vs OCP. See in particular M.-A. Frison-Roche, Le principe juridique d'égalité des compétiteurs sur le marché boursier, *Bull. Joly Bourse*, n°6, nov.-déc. 1993, p. 720.

[29] Paris Cour d'Appel, 1ère Chambre, H, 17 June 1999, n° 99/06430, SA Paribas and Société Générale vs/Banque Nationale de Paris. See also Paris Cour d'Appel, 3e Chambre, sect B, 18 March 1988, La Télémécanique Electrique SA vs Schneider SA et al.

[30] Paris Cour d'Appel, 1ère Chambre, sect CBV, 27 April 1993, No. 93/5842, Mutuelle du Mans Assurance-Vie et al. vs OCP.

[31] T. Bonneau, A.-C. Rouaud, P. Pailler, R. Vabres, A. Tehrani, *Droit financier*, August 2021, Lextenso, n°1141.

[32] See, for a recent decision, Paris Cour d'Appel, Pôle 5, Chambre 7, 13 March 2020, RG No.°19/189347, in which the Paris Cour d'Appel held that "*it was also its [the AMF]* ***responsibility*** *to* ***verify****, as it did, the amount of the termination indemnity stipulated in this contract,* ***was not such as to hamper the free interplay of offers and counter-offers****.* "

[33] Paris Cour d'Appel, Pôle 5, Chambre 5-7, 12 January 2017, RG 20/17607. More generally, the Paris Cour d'Appel refers several times in this judgement to "***the principles that govern public offers and, in particular, the principle of the free interplay of offers and counter-offers***."

[34] Paris Cour d'Appel, Pôle 5, Chambre 7, 22 April 2021, RG 20/03915.

[35] See in particular. COB, *Report to the President of the Republic*, 1975, p. 103, which states, with regard to contribution commitments, that *"by signing such a commitment, the majority shareholders claim to determine in advance the outcome of the future takeover bid. They prevent the success of a possible competing bid that could give all shareholders a better price. There is thus a contradiction between the indirect consequences of the commitment made and the* ***free and complete interplay of the public offer procedures****, as defined by the market regulations, which are a matter of* ***public policy****.* See also Sanction decision of 11 April 1995, *Bull. mens. COB*, April 1995, No. 290, p. 20.

[36] See in particular. N. Rontchevsky, M. Buchberger, B.-O. Becker, G. Buge, L'inexécution des pactes d'actionnaires, *Actes Pratiques et Ingénierie Sociétaire*, Nov. 2011, dossier 6, n°94, which note that the principle of the free interplay of offers and their counter-offers, ***insofar as it allows the proper functioning of the market, which is essential to the economic interest of the nation, is a matter of financial public policy."*** See also J.-J. Daigre, *Les offres publiques en bourse, Aspects juridiques*, Banque Editeur, 2001, p. 22, which underlines that *"the public interest character of the regulation of public offers is not in doubt. Therefore, to a large extent, this regulation is a matter of public policy (public economic policy of direction and protection) and its violation can lead to the invalidity of the contrary act."*

[37] A.-C. Muller, *Droit des marchés financiers et droit des contrats*, Pref. by Hervé Synvet, Economica, 2007, No. 612, p. 469. See also H. Synvet, Preface, in *Droit des marchés financiers et droit des contrats*, Economica, 2007, p. VII, which notes that "*financial markets law develops a* ***public policy*** *with which contracts concluded outside of it must comply.* **The best example***, – but the reader will discover others, –***is the principle of free interplay of offers and counter-offers in public offers***. *It is remarkable that a principle that is, ultimately, quite general and vague should be given sufficiently broad scope, not only to condemn agreements aimed at frustrating the successful outcome of a bid (as in the famous Perrier case), but also to oppose commitments obtained by the offeror of a public offer, because they would be likely to make a counter-offer more uncertain: taken to the extreme, the principle postulates the exclusivity of the market procedure, and therefore leads to a suspicious view of any external contractual operation that might be likely to influence its outcome."*

[38] Ph. Marini, *Report on behalf of the national committee on finance, budgetary control and the economic accounts on the draft law on takeover bids,* Sénat, No. 20, 13 October 2005, p. 20. This report states that, in addition to the regime it is helping to shape, the AMF also has some scope to clarify the terms and conditions of an imminent or ongoing bid, whether, for example, with a view to request clarification from an offeror that was rumoured to be making a bid or to invalidate certain defensive measures taken by the offeree. *The position thus expressed on 23 April 2004 by the AMF during the issue by Aventis of share warrants called "Plavix" to counter the offer initiated by Sanofi, is emblematic of the* ***AMF's power not only to assess the admissibility of the offer, but also that of any defensive measures decided during the offer period****.* "

[39] This article provides that "*during the period referred to in the second paragraph, the board of the offeree company shall obtain the prior authorisation of the general meeting of shareholders to that effect before taking any action likely to frustrate the bid, with the exception of seeking alternative offers, and in particular before issuing any shares likely to prevent the offeror from obtaining control of the offeree company in the long term.*"

[40] Ph. Marini, *Report on behalf of the national committee on finance, budgetary control and the economic accounts on the draft law on takeover bids,* Sénat, No. 79, 13 October 2005, p. 20.

[41] Work of the Sénat Finance Committee, 13 October 2005.

[42] Ph. Marini, *Report on behalf of the national committee on finance, budgetary control and the economic accounts on the draft law on takeover bids,* Sénat, No. 197, 8 February 2006, p. 79.

[43] See in particular H. Le Nabasque, Les mesures de défense anti-OPA depuis la loi n° 2006-387 du 31 mars 2006, *Rev. sociétés*, 2006, p. 237, who notes that:

"*Regardless of the extent of the powers thus returned, for some, or granted, for others, to the shareholders' meeting during the offer period, it does not seem to us that this restoration of shareholder sovereignty is likely, as has been feared, to make them disregard the guiding principles of stock market law set out in the General Regulation (Article 231-3: equality of competitors, free interplay of offers and counter-offers, fairness in transactions and competition, transparency). On the contrary, the parliamentary work shows that* ***the sovereignty of shareholders, which the draft restores, will be exercised in compliance with the general principles of public takeover law*** *(Marini Report, p. 79)".* See also D. Martin, F. Bouaziz, B. Kanovitch, Chronique OPA, *RTDF*, 2006, n°1, p. 81 ; T. Vassogne, M. Loy, B. Cardi, "France", in *A Practitioner's Guide to Takeovers and Mergers in the European Union*, City & Financial Publishing, Sweet & Maxwell, 5th ed., June 2008, p. 288; O. Dexant de Bailliencourt, *Les pactes d'actionnaires dans les sociétés cotées*, Pref. by Hervé Synvet, Dalloz, Coll. Nouvelle Bibliothèque de Thèses, vol. 115, 2013, n° 148, p. 133.

[44] Two authors noted that "*the question arises as to whether, in view of the sovereignty affirmed by the law, the general meeting may disregard the general principles governing the conduct of public offers, as set out currently in Article 231-3 of the AMF General Regulation (free interplay of offers and counter-offers, fairness of transactions and competition, transparency). It will be recalled that the regulator had considered that shareholder sovereignty, as set out in the former Article 4(4), should in any event be exercised in compliance with stock market public policy. For some, the principle of the meeting's sovereignty in adopting any "red flag" defence, affirmed by the law, would allow the target to free itself from the guiding principles of stock market law set out in the General Regulation.* ***It is clear from the parliamentary work that the sovereignty thus recognised, should be exercised in compliance with the general principles of public takeover law. In other words, these principles should continue to apply, albeit with less severity in the case of a decision by the shareholders as a whole.*** "(Ph. Portier, N. Partouche, Les mesures de défense en matière d'offre publique, *Journal des sociétés*, n° 32, May 2006, p 34).

[45] Companies remain free to continue to include the neutrality of the board of directors in their articles of association.

[46] A. Emery-Dumas, *Report on behalf of the Social Affairs Committee on the proposal for a law to give new perspectives to the real economy*, Sénat, No. 328, 29 January 2014, p. 23.

[47] C. Valter, Report on behalf of the Economic Affairs Committee on the proposal for a law to give new perspectives to the real economy and industrial employment, Assemblée Nationale, No. 1283, 17 July 2013, p. 117. See also Ch. Gaudin, The battle of decision-making centres: promoting France's economic sovereignty in a globalised world, Sénat, Information Report No. 347 on behalf of the joint information mission on the concept of economic decision-making centre, 22 June 2007, t. I, p. 255, which already noted that "***the free interplay of offers and counter-offers during takeover bids*** *is considered to be at* ***the heart of the principle of free movement of capital***".

[48] On this issue, see in particular BonelliErede, Bredin Prat, De Brauw, Hengeler Mueller, Slaughter and May, Uría Menéndez, *Guide to public takeovers in Europe*, June 2016, p. 373 ; B. Cardi, *French Update – Recent Legal Developments Affecting French Tender Offers*, 2 March 2015; *Memento pratique, Sociétés commerciales*, Ed. Francis Lefebvre, 2021, n°65424 ; A. Viandier, Epilogue de l'affaire Prologue, *Rev. sociétés*, 2021 p. 450, spéc. n°30 ; J. Deege, Défenses anti-OPA, *Etudes Joly Bourse*, mars 2020, n°370 ; P.-H. Conac, Transposition des dispositions relatives aux OPA de la loi Florange du 29 mars 2014 dans le RGAMF, *Rev. sociétés*, 2014, p. 598 ; J. Devèze, A. Couret, I. Parachkévova-Racine et alii, *Lamy droit du financement*, Wolters Kluwer, 2020, n°2234, p. 1295 ; A. Pietrancosta, The latest reform of French takeover law : the "Florange act" of March 29, 2014, *RTDF*, 2014, n°3, p. 50 ; A. Couret, H. Le Nabasque, M.-L. Coquelet, T. Granier, D. Poracchia, A. Raynouard, A. Reygrobellet, D. Robine, *Droit financier*, Dalloz, 3e éd., 2019, n° 1677 ; D. Fornoni, Le rôle toujours essentiel des actionnaires dans le processus de défense anti-OPA, même à la suite de la loi Florange, *RTD Com*., 2015, n°46, p. 31.

[49] The interventions of the stock exchange regulator reiterating, in a press release, certain fundamental principles of the regulations on public offers are almost as old as the stock exchange regulator itself (see, in particular, COB, Communiqués de la Commission, Offre publique d'échange Moët-Hennessy - Pommery et Geno, *Bull. mens. COB*, December 1973, n°55, p. 3. See also COB, Committee announcements dated 30 October 1986 on public exchange offers or the company's shares, Presses de la Cité, *Bull. mens. COB*, Nov. 1986, No. 197, p. 8).

[50] Among the many news releases published by the AMF during this stock market battle, see in particular the COB news release of 4 May 1999, in which the COB had stated, "*as guarantor of the equality between competitors during the bidding period and market transparency, that by failing to publish, as provided for by the regulations, the agreements as soon as the Société Générale takeover bid for Paribas was launched, even if it was a friendly one, or at least as soon as BNP launched its unsolicited offers, both Société Générale and Paribas had waived their right to rely on the content of these agreements throughout the duration of the current offers. Otherwise, the implementation of these agreements could be qualified as a manoeuvre to undermine the proper conduct of the public offers."*

[51] The AMF, considers that the issue of warrants planned by Aventis does not comply with the principles governing the proper conduct of public offers, News release, 23 April 2004.

[52] See Suez, Press release, 23 September 2020. See also Suez, press release, 28 October 2020, specifically the "*reminder concerning the safeguarding of the Water France business through the creation of a foundation*" (p. 6).

[53] See Suez, Press release, 1st October 2020.

[54] See Suez, Press release, 6 April 2021.

[55] "*It is the responsibility of a board of directors to accept this reality, to realise that we have gone as far as our robust defence would allow.* " (AFP, Veolia/Suez: the Chairman of Suez mentions the 'reality principle, 12 April 2021). See also Ph. Varin, Interview, BFM Business, 20 May 2021, who refers to an "*unprecedented defence"* and declares that "*the defence had been a success"*.

[56] It should be noted that the compliance with company law of some of these measures in particular the inalienability mechanism introduced by the Foundation - was challenged before the Tribunal de Commerce, which did not have the opportunity to rule on the merits, because the litigation proceedings were interrupted following the agreements concluded between Veolia and Suez in April and May 2021. **Some questions, which are crucial for a company wishing to organise its defence, therefore remain open in terms of company law.**

[57] This requirement has a legal basis (see Art. 231-3 of the AMF General Regulation, according to which "*all persons involved in an offer must comply with the free interplay of offers and counter-offers*") and also from case law (in the "Quadral" case, for example, the Paris Cour d'Appel ruled that "*the above-mentioned rule [Article 3 of COB Regulation 89-03, which defined the guiding principles and in particular the "free interplay of offers and counter-offers"] was general in scope and* ***concerned the conduct of the offeror and the offeree company as well as that of third parties***" (Paris Cour d'Appel, 1ère Chambre, sect. CBV, 20 Nov. 1991, Quadral et al vs Finmeccanica Int. SA)

[58] Regarding the obligation of a third party, such as the Ardian-GIP consortium, to comply with the rules and principles of public offers, the question of the linkage between Article L. 233-32 of the Commercial Code and the guiding principles of public offers does not arise, since Article L. 233-32 of the Commercial Code applies only to the "offeree company". As has been observed, "*Article L. 233-32 of the Commercial Code only concerns measures adopted by the offeree company during a public offer* (A.-C. Muller, *Droit des marchés financiers et droit des contrats*, Pref. by Hervé Synvet, Economica, 2007, No. 643, p. 495). **The breaches of the guiding principles for takeover bids identified by the AMF in its notice of 2 April 2021 with regard to the Ardian-GIP consortium cannot therefore, under any circumstances, be covered by the provisions of Article L. 233-32 of the Commercial Code.**