AUTORITÉ
DES MARCHÉS FINANCIERS

AMF

AMF position-recommendation
Major Asset Disposals and Acquisitions – DOC no. 2015-05

Background regulations: AMF General Regulation articles 223-2 II and 236-6

The protection of savings, which is the AMF's primary mission, depends on the good governance of listed companies and the quality of the financial information they disseminate.

Major asset disposals by a listed company are not subject to a takeover bid process - nor to the fundamental principles governing them, particularly the free play of bidding or outbidding, fair trading, competition, or market integrity - and therefore, in principle, they are not governed by securities regulation[1]. They are essentially subject to corporate law, which, in France, gives great latitude to senior management and governing bodies (board of directors, or executive board and supervisory board).

There are multiple challenges in supervising these transactions: needing timely and reliable financial reporting, preventing and managing potential conflicts of interest, acting in accordance with the corporate interest, as well as protecting the minority shareholders and their capacity for expression when a company radically changes its profile. However, these considerations must be balanced with the council's prerogatives, which determine how responsive the company is and how long it survives.

Thus, the AMF wanted to improve supervision of the decision-making procedure for such transactions[2] (*see* I). It recommends, first of all, that listed companies conduct a prior consultation with the shareholders **for disposals of the majority of their assets**. In addition, to better supervise all major asset disposals by listed companies, the AMF requests more complete reporting from shareholders and recommends that best practices be followed to demonstrate that the transactions are in accordance with the corporate interest.

Furthermore, the AMF found it advisable to expand the measures recommended for major asset disposals **to major asset acquisitions, also likely to substantially change a company's profile**, for the purpose of improving market intelligence and promoting best practices which demonstrate that the transaction is indeed compliant with corporate responsibility. However, these transactions do have special features that justify certain adaptations (*see* II).

1 There is the notable exception of rules applicable to the listed company with regard to financial reporting (*i.e.* the ongoing disclosure requirement on any sensitive transaction that is likely to have a significant effect on price, including transactions on subsidiaries or major assets) and Article 236-6 of the AMFGR, which allow the AMF to require that the controlling shareholder launch a public offer under certain conditions, in the event of a disposal of the " *majority of the assets*."

2 This decision comes in response to the publication and subsequent public consultation of the report from the group created by the AMF in 2014, as chaired by Christian Schricke, member of the AMF Board, tasked with reviewing the advisability and methods of enhancing the supervision of major asset disposals by listed companies, a mandate that was later expanded to acquisitions.

1. Oversight on major asset disposals

1.1. Consulting with the general meeting of shareholders

While corporate law does assign competence to the company's management, its board of directors or its supervisory board to decide on major asset disposals, as long as they are compliant with the corporate purpose, the AMF considers it legitimate and desirable to consult with shareholders prior to the actual disposal of the assets, if those assets represent the majority of the company's assets and activities and if their disposal **substantially changes the physiognomy of the business and/or the strategy stated by the company and integrated by the market**.

Recommendation

The AMF recommends that any company whose shares are admitted for trading on a regulated market schedule a consultation with the general meeting of shareholders prior to the disposal, in one or more transactions, of assets representing at least half of its total assets on average over the past two financial periods[3]. Undertakings to sell or put options are also addressed.

The AMF recommends that this consultation be carried out once at least two of the five ratios, generally considered relevant, reach or exceed half the consolidated amount calculated for the disposing company, on average, over the past two financial periods:

- **the ratio of the turnover realized by the transferred asset(s) or activity(ies) to consolidated turnover;**
- **the ratio of the disposal price for the asset(s) to the group's market capitalization;**
- **the ratio of the net value of the transferred assets[4] to the consolidated balance sheet total;**
- **the ratio of earnings generated by the transferred assets or activities to consolidated earnings before taxes;**
- **the ratio of current employees of the transferred activity to global employees in the group.**

The AMF recommends that consultation of the company's general meeting of shareholders be done with a *quorum* and a majority of the ordinary general meeting (i.e. a simple 50% majority), unless the board decides otherwise in view of the circumstances, specifically the configuration of the shareholding. Such consultation should take the form of a vote on a resolution presented with a view to a document by the board of directors or supervisory board or the executive board, the content of which should match the information set out in § 2 *infra*.

The contract entered into by the parties may make completion of the transaction conditional on the approval of the general meeting of shareholders, **thereby making this consultative deliberation binding**.

[3] This is a fairly short period for it to be a distinct change in physiognomy, but long enough to hamper any attempts to bypass the consultation by artificially splitting the disposals.

[4] Only liabilities allocated to the transferred assets are to be recognized when implementing this criterion, not the company's overall liabilities.

If the issuer does not apply the above criteria to assess whether the transaction involves the majority of assets, he must provide, according to a strict interpretation of the "comply or explain"[5] principle, an explanation that is understandable, relevant, and convincing as to why these criteria do not appear relevant with regard to his situation and to the transaction under consideration. This explanation must be suited to the company's particular situation and convincingly state why this situation justifies the exception. The company must state **the alternative criteria it has applied and prove that they are relevant to its situation**.

Likewise, a company that thinks it must dispense with consulting the general meeting of shareholders should explain, in the same conditions, the reasons why it thinks that doing without this consultation is in line with the corporate interest.

Corporate governance codes

The AFEP-MEDEF Code[6] of Corporate Governance of Listed Corporations states that the board "*must*" refer the matter to the meeting of shareholders if the transaction relates to a "*material part*" of the group's assets or businesses "*even when no change in the corporate purpose of the company is involved".*
The French Asset Management Association (AFG), in its recommendations on corporate governance, has also included a chapter dedicated to "*Special Attention to Particular Resolutions*" in which the AFG "*recommends asset disposals having a significant and/or strategic character*
to be submitted to the prior vote of the shareholders."
The MiddleNext Association code does not set out any provision on consulting shareholders.

For discussion:

The AMF wants corporate governance codes to require that any company whose shares are traded on a regulated market consult with the general meeting of shareholders prior to disposal of the majority of its assets, according to the procedures described above.

1.2. Enhanced disclosure of the context and conduct of major asset disposals

Listed issuers are subject to a certain number of financial reporting requirements, particularly an ongoing disclosure requirement on any event or transaction that constitutes privileged information[7]. These provisions apply to major asset disposals, no later than completion of the transaction, if the company has previously abstained from making the information public for reasons allowed by regulations, taking measures to ensure the information will remain confidential.

This requirement covers a **broad scope, including any transaction involving major assets, which is not necessarily determined using the criteria mentioned above for consulting with the general meeting of shareholders for the disposal of the majority of assets (*see* § 1 *above*) and may be less than 50% of the company's assets.**

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5 Pursuant to a joint acceptance of the European Commission (Recommendation 2014/208/EU of 9 April 2014 on the quality of corporate governance reporting ("comply or explain")), the AMF and the AFEP-MEDEF Code (in its revised version of June 2013).

6 Point 5.2 of the AFEP-MEDEF Code of June 2013: "*The shareholders' meeting is a decision-making body for the areas stipulated by law; it is also a privileged moment for the company to engage a dialogue with its shareholders.* (…).
"*The Board of Directors must take care not to infringe upon the specific powers of the shareholders' meeting if the transaction that it proposes is such as to modify, in fact or in law, the corporate purpose of the company, which is the very basis of the contract founding the corporation.*
"***Even when no change in the corporate purpose of the company is involved, the Board of Directors must refer the matter to the meeting of shareholders if the transaction relates to a material part of the group's assets or businesses.***"

7 In other words, specific information about them that, were it made public, would be likely to have a significant influence on the price of the financial instruments they have issued (Article 223-6 of the AMFGR).

For this requirement, **specific disclosure on the context and negotiation of the major asset disposal agreement**, contained in a document published by the issuer, is desirable so that shareholders and the market may be better prepared to anticipate the transaction and appraise its interest for the company.

This disclosure, which goes beyond reporting on the disposal itself, involves the process that is used to reach the agreement (including whether there are any competing or unsolicited offers and why they were not selected, specifically if they were not the best offer financially), and the considerations that led the management bodies to be in favour of the transaction. It must also explain how potential conflicts of interest were handled.

Position

In any company whose shares are traded on a regulated market, management must report any major asset disposal, as well as the context and negotiation of the disposal agreement, to the market and to shareholders. This reporting must specify the strategic, economic and financial circumstances and reasons behind the launch of the disposal process.
Without prejudice to their ongoing disclosure requirements, issuers must publish this information by the deadlines required for the general meeting of shareholders if they are called upon to vote on the transaction (*see* I.1) or, in other cases, as soon as possible and before there is a final agreement on the disposal.

Recommendation

The AMF recommends that specific reporting on the context and negotiation of the major asset disposal agreement include:

1. **the process of instruction on the transaction by the company's bodies, specifically the conditions in which the board of directors or supervisory board has decided on the asset disposal plan: the assessment procedures and information likely to strengthen objectivity and impartiality in reviewing the offer, such as the appointment and membership of an independent directors' committee, and outside opinions on the transaction's interest and valuation (such as an independent expert report, a fairness opinion, the valuations decided on by financial advisors, etc.) on which the management and administrative bodies have relied to make their decision;**

2. **the quantitative and qualitative criteria clearly stating the reasons why the offer was selected, and, assuming there are several competing offers, solicited or unsolicited, the conditions in which these offers have been appraised and rejected, subject to confidentiality clauses.**

It is up to the company to determine the degree of detail and the timing of the publication of this information according to circumstances and requirements that weigh on it under ongoing disclosure. These considerations may cause it to modulate the degree of disclosure in line with the progress of the disposal process.

1.3. The promotion of best practices demonstrates that a major asset disposal is compliant with the corporate interest.

It is the responsibility of the board of directors or supervisory board, the senior management or the executive board, to appraise the strategic interest of the major asset disposal under consideration and to ensure that it is implemented in respect of the company's interest.
Indeed, the application of these principles should allow a fair appraisal of the various disposal offers on the assets in question, proper management of any conflicts of interest, and sufficient transparency and market reporting to appraise the interest for the company.

Application of these principles covers a broad scope, including any transaction involving major assets, which is not necessarily determined using the criteria mentioned above for consulting with the general meeting of shareholders for the disposal of the majority of assets (*see* § 1 *above*) and may be less than 50% of the company's assets.

Recommendation

In light of the strategic, economic and financial circumstances and reasons behind the launch of the disposal process, the AMF recommends that the board of directors or supervisory board, senior management or executive board pay particular attention to:

1. **the resources and procedures used to identify and oversee any conflicts of interest and strengthen objectivity and impartiality in reviewing the transaction by the management and administrative bodies, such as set-up of an ad hoc independent directors' committee, seeking outside opinions on the transaction's interest, valuation, and the procedures considered (independent expert, fairness opinion, valuations done by financial advisors, etc.), and any assistance to senior management or the executive board, on the one hand, and the board of directors or supervisory board, on the other hand, provided by separate financial or legal advisors.**

2. **the appraisal of items they feel are relevant to determining the disposal's process and procedures, including:**
   - **the disposal price**[8]
   - **the existence of any competitive or non-competitive disposal process;**
   - **where applicable, the handling of unsolicited offers;**
   - **requirements for the confidentiality of the disposal process;**
   - **the social and industrial circumstances and consequences of the transaction;**
   - **the performance conditions and procedures required by the assignee.**

Shareholders are informed of the above items in the conditions described in § I.2 above.

2. Oversight on major asset acquisitions

Major asset acquisitions are just as likely as disposals to radically change the physiognomy of a company (business, risk profile, return profile, *etc*.).

The AMF wanted to apply to these major asset acquisitions the measures aimed at improving market reporting on the circumstances and reasons behind the company's decision for a major asset acquisition (*see* II.1) and to promote best practices for demonstrating that the transaction is in fact compliant with the company's interest (*see* II.2). However, major asset acquisitions do have particular characteristics that justify certain adaptations.

[8] And, if capital securities, debt securities, or forward priced securities are remitted, the counterparty risk

Conversely, the AMF has not found it advisable to consult with the general meeting of shareholders in advance of these transactions. Indeed, in some respects, calling a general meeting seems less relevant than for a disposal. The vast majority of major asset acquisitions are **already put to a shareholder vote**, because they generally require a capital increase to strengthen the balance sheet and have enough cash on hand (or pay with securities, as in a public exchange offer). In addition, amid international competition, the principle of consulting with the general meeting could place French listed companies at a serious competitive disadvantage, due to the deadlines and uncertainty that this consultation would engender, and would cause the seller to remove them from the disposal process first.

2.1 Enhanced disclosure of the context and conduct of major asset acquisitions

Position

In any company whose shares are traded on a regulated market, management must report any major asset acquisition, as well as the context and negotiation of the acquisition agreement, to the market and to shareholders. This reporting must specify the strategic, economic and financial circumstances and reasons behind the launch of the acquisition process.

Without prejudice to their ongoing disclosure requirements, issuers must publish this information by the deadlines required for the general meeting of shareholders if they are called upon to vote on the transaction[9] or, in other cases, as soon as possible and before there is a final agreement on the acquisition.

Recommendation

The AMF recommends that specific reporting on the context and negotiation of the major asset acquisition agreement include:

1. **the process of instruction on the transaction by the company's bodies;**
2. **the method of financing the acquisition (self-financing, taking on debt, capital increase, etc.).**

It is up to the company to determine the degree of detail and the timing of the publication of this information according to circumstances and requirements that weigh on it under ongoing disclosure. These considerations may cause it to modulate the degree of disclosure in line with the progress of the acquisition process.

2.2 The promotion of best practices demonstrates that a major asset acquisition is compliant with the corporate interest.

It is the responsibility of the board of directors or supervisory board, senior management, or the executive board to appraise the strategic interest of the major asset acquisition under consideration and to ensure that it is implemented in respect of the company's interest.

Indeed, it is best if the application of these principles allow a fair appraisal of the various acquisition offers on the assets in question, proper management of any conflicts of interest, and sufficient transparency and market reporting to appraise the interest for the company.

Application of these principles covers a broad scope, including any transaction involving major assets, which is not necessarily determined using the criteria mentioned above for consulting with

[9] Indeed, the vast majority of major asset acquisitions are already put to a shareholder vote, because they most often require a capital increase in order to strengthen the balance sheet and have enough cash on hand (or pay with securities, as in a public exchange offer).

the general meeting of shareholders (*see* § I.1 *above*) and may be less than 50% of the company's assets.

Recommendation

In light of the strategic, economic and financial circumstances and reasons behind the launch of the acquisition process, the AMF recommends that the board of directors or supervisory board, senior management or executive board pay particular attention to:

1. **the resources and procedures used to identify and oversee any conflicts of interest and strengthen objectivity and impartiality in reviewing the transaction by the management and administrative bodies, such as set-up of an ad hoc independent directors' committee, seeking outside opinions on the transaction's interest, valuation, and the procedures considered (independent expert, fairness opinion, valuations done by financial advisors, etc.), and any assistance to senior management or the executive board, on the one hand, and the board of directors or supervisory board, on the other hand, provided by separate financial or legal advisors.**

2. **the appraisal of items they feel are relevant to determining the acquisition's process and procedures, including:**
   - **the acquisition price and the main methods of paying such a price;**
   - **the possible existence of a competing acquisition process;**
   - **requirements for the confidentiality of the acquisition process;**
   - **the social and industrial circumstances and consequences of the transaction;**
   - **and the performance conditions and procedures required by the assignor.**

Shareholders are informed of the above items in the conditions described in § II.1 above.