French takeover rules and practices ②
Strategies of the Offeror, Target Company and Minority Shareholders
(Interview with French M&A lawyers)

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[Introduction]

This is the transcript of an interview with French M&A lawyers regarding French takeover rules and practices, mainly on the issues about “strategies of the offeror, target company and minority shareholders”. “Darrois Villey Maillot Brochier” is known as a law firm which has well-experienced lawyers on takeover deals in France. The interview was held on February 2011, at the conference room of Darrois Villey Maillot Brochier A.A.R.P.I., Paris office. (Watanabe)

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1. French-style poison pill ("bons-Breton")

CARDI: It’s a real pleasure to meet you here. At the moment, I’ll answer your questions. (※ At the time of starting the meeting, Monsieur Cardi only was present from the law firm, and after that, Monsieur Brochier and Monsieur Diaz joined the meeting one by one.)

WATANABE: Thank you very much for taking time to meet with me today. I have been involved in much research on European takeover rules and its actual practices both in an official capacity and as an individual; however, there are still many points that I do not understand very well. Also, I have a great interest in what kind of characteristic each jurisdiction’s takeover rule has and where we should place each of them in the whole Europe. Since you are professional experts in M&A practices and takeover bids in France, I would like to ask you questions on these topics.

First of all, I’d like to ask you questions about the French-style poison pill, the applicability of the French poison pill. Suppose a case where the bidder is an American company that has not adopted a poison pill. The target French company is exercising a French poison pill toward the bidder. Can the target company exercise French poison pill toward the bidder?

CARDI: When you say “poison pill,” you are referring to the share subscription warrants which the target company could issue to its existing shareholders, the same type of warrants that exist in the US? This is what you have in mind? The bons Breton? OK.

Bons Breton, as you know, have been included in the French legislation in 2006.

WATANABE: It was introduced as a result of the implementation of the EU Takeover Directive, OK?

CARDI: Yes. Absolutely. This was a little bit of a paradox, because through the implementation of the Takeover Directive in France in 2006, the famous Lois Breton introduced two defensive measures: the bons Breton, and also maybe we can discuss later the “put up or shut up” mechanism.

But let’s focus first on the bons Breton. So bons Breton was introduced at that time. They work quite simply. Actually, in the case of a takeover offer, the target can issue warrants to receive shares to all its existing shareholders, and the conditions of the warrants must be linked to the conditions of the takeover offer of the bidder. This is not very clear. But what does it mean for us as practitioners? We believe that basically, warrants, bons Breton, could be structured saying: if the offer price is not sufficient, then our shareholders will be able entitled under the terms of the bon to subscribe for shares at a very low value (at nominal value for example) in order to be compensated for the unfair offer price, and the bidder will be diluted. So this is the summary.

But it is important to note that the issuance of bons Breton can only be approved by an extraordinary shareholder’s meeting of the French target company.

This extraordinary shareholder’s meeting must approve the issuance in accordance with the majority and quorum required in an ordinary shareholders’ meeting (i.e., by simple majority). It’s 50% plus one vote of the shareholders present or represented. There is only one exception, one case, in which no general meeting of the shareholders of the target could be necessary. This is the case where the bidder, the hostile bidder, is not what we call “reciprocal”. So the two conditions are: the bidder must not be reciprocal, which means that a different (and more favourable) legal regime applies to the bidder than the regime of the French target in terms of approval of defensive measures. And basically, it means that if in the US, you do not need a shareholders meeting to approve a poison pill, then the French target could
issue the bons Breton without a shareholders meeting, and the management board of the target could decide alone, provided that the board has a delegation by the shareholders meeting not older than 18 months. These are the conditions under which the board alone of the target could issue the bons Breton. Am I clear?

WATANABE: Yes. It is the prevailing interpretation among French lawyers? I heard that some people objected to such an interpretation, based on a provision of the code of commerce. It could be read that the target company couldn’t issue bons Breton by the resolution of its board. But of course, it could be read as you interpret.

CARDI: What do you mean? Some people would say that a bons Breton. . .?

(※ Emmanuel Brochier came in.)

CARDI: We are discussing French takeover mechanisms, and in particular we were starting with the bons Breton, which is not the most simple.

So you were saying that some people try to criticize the bons Breton, about the validity of bons Breton or the possibility to issue bons Breton without a shareholders meeting of the target?

WATANABE: Yes, concerning the case of the US bidder which doesn’t adopt poison pill.

CARDI: I understand. So, basically, there could be discussions whether a US bidder would be reciprocal or not for the French bons Breton system. I have to admit that I would prefer to get back to you later on this after discussing the subject of the status of the US bidder with one of our US partners.

(※ This subject has in fact been rediscussed later in the interview)

WATANABE: By the way, in France, when the target company exercises its bons Breton, Mr. Diaz said last year that it should be noted to the market. A kind of disclosure is needed.

CARDI: Of course.

WATANABE: Based on which article?

BROCHIER: Well, there is a general rule saying that when there is an offer period, all big measures have to be communicated very clearly to the market.

WATANABE: The general regulation of the AMF?

BROCHIER: Yes, as a principle.

CARDI: On the bons Breton, the board of the company, if it decides to issue bons Breton during the offer period, it has to make this decision before the closing of the offer, and it has to make this decision public before then, for the simple reason that it will decide to allocate this bons Breton to the shareholders of the target company at the closing of the offer, not to the bidder, and this is a decision that has a significant impact for the target as well as on the ongoing offer process. So this decision has to be made public before the closing of the offer.

Also, if the target company is asking, even if it is not yet subject to any offer, to give a delegation to issue a bons Breton to its board, by definition it has to be approved by the shareholders meeting, and the shareholders meeting must be convened in France 35 calendar days in advance, with an agenda, and all the terms of the delegation would be made public at the time of the convening of the shareholders meeting.
2. Possibility of “discounted takeover bid”

**WATANABE:** Thank you. Next, I’d like to ask you the questions about the price regulation in takeover bids. Is it possible to make so-called discount takeover bids in France? This discount is from the market price. 

**CARDI:** The answer is yes. In theory, it is possible. 

**WATANABE:** Even under the existing rule? 

**CARDI:** Yes, even with the existing rule. There is the theory and there is the practice. In theory, when you launch a voluntary offer, the AMF does not have the power to fix the price. So the bidder is fixing, alone, its price. So in theory it could do a takeover offer below market price.

Now, what are the protections which make that very theoretical? First, in many takeover offers now, when they are friendly, there is a need to appoint an independent expert at the level of the target. And this independent expert has to give a fairness opinion to the board of the target about the price. So by definition, if this fairness opinion is negative, the offer has little chance of success. But this is more a question of information of the market than of control of the price.

In France, you know, the independent expert has to work based on a multi-criteria financial analysis. But the share price, by definition, is an important one. So it would be difficult, certainly, for an independent expert to say that the price is good if the price is below market price, except if the liquidity is so low that the market price is no longer a fair reflection of the value of the target.

**WATANABE:** Concerning the fairness opinion you mentioned, does the AMF review the fairness opinion (rapport d’expertise) or not? 

**CARDI:** The fairness opinion is important for the AMF, because, after having been issued to the board of the target, the fairness opinion is inserted in the information document to be made public by the target, which also has to be approved by the AMF. 

**WATANABE:** Does the AMF review the fairness opinion formally or substantially? 

**CARDI:** Formally. It does not validate the price. 

**BROCHIER:** The AMF has the power to control if the independent expert, who is in charge of writing the fairness opinion, is really independent or not. And the AMF has the power to say no, we do not agree with this guy as an independent expert. 

**CARDI:** Absolutely.

**BROCHIER:** But being designated and after the fact that the AMF said, “We have nothing to say against Mr. Dupont or Mr. Durand,” the independent expert does his work and gives his report, and the AMF does not have the power to say, “We do not agree with the conclusion of this report.” The only thing which can happen is you can have some difficulty to get the final approval by the AMF, not on the specific report of the independent expert, but on the whole documentation which is given to the public. On this documentation, which we call note d’information, the AMF has to say “I agree with that.” So if there is a problem in the preparation, lawyers are in the process of having discussions with the authority, and the authority says, “I would like to get precision on that point, I do not understand that point,” and the practice is that the AMF sends you a lot of questions, but in a very clear direction, which is that the AMF tries to make the information clear for the public. It happens however that the AMF questions the quality of the diligences of the independent expert and asks for further information or clarification.
WATANABE: Is a discounted takeover bid possible only for voluntary offers?

CARDI: Now we are discussing voluntary offers. So the first protection against a discounted bid is the fact that there is an independent expert, and that if there is a discounted bid, the AMF will want to make a big warning (avertissement) in the information document that the independent expert has said that the price is not sufficient.

There is a second protection, which would be much more difficult for the AMF to use, which would be to say that in France, you know, the general principles applying to a takeover offer are very important, and they are repeated at the beginning of the AMF general regulations. These are loyalty, transparency, fairness in competition. And so the AMF could try to use these general principles to say that the offerer is disloyal, because if he’s doing a discounted bid, it’s just disturbing the market without a real intent to take control.

But this is much more difficult. We had a case this year in which the firm here worked, this was the offer by Axel Springer for Seloger.com, a small Internet company. And there were questions around that.

So this is the second type of protection.

You also want to see if a discounted bid is possible in a mandatory offer?

WATANABE: Yes.

CARDI: In a mandatory offer, it’s much more difficult.

WATANABE: But theoretically it’s possible, OK?

CARDI: Yes, but it has been very rare.

WATANABE: There seems to have been such a case in Germany.

CARDI: Porsche’s bidding for Volkswagen.

WATANABE: In France as well, you will find some cases of a mandatory bid discounted to the market price.

WATANABE: So, there were actually some cases in France?

CARDI: Yes, but not a lot. But why is it much more difficult? Because for a mandatory bid, the AMF is gaining back its control of the price. So in the general regulation, it is expressly said that the AMF will accept a mandatory offer only if the pricing is satisfactory to the AMF.

BROCHIER: So there is a very big difference on the price between voluntary and mandatory offer. In one case you have no control in principle, and in the other case you have a clear control.

3. How to decide the “fair price” of the offer

WATANABE: Thank you. I have another question about the offer price regulation. When the target company issues some classes of share, some different type of share, how do we think about the equitable offer price for each class of share?

CARDI: When there are different classes of share? That’s a good question, and on that one there is one case in which the firm was involved as well. The principle is simple: the same price should be offered to all the ordinary shares, and the offer in France must also cover all other instruments giving access to the share capital. So all classes of shares. And the principle is just that the treatment of each class of shares shall be consistent. So if you offer a different price for different classes of shares, you must have a reasonable financial justification for offering different prices. So you have to take the characteristics of each class
of shares into account, and you have to value them consistently. 

**BROCHIER:** You have to explain the difference of price, explaining that with one class of share you will have smaller dividends or less power. And if you don’t have such a difference, you cannot make a different price. 

**WATANABE:** Who decides ultimately the fairness of the prices for each class? 

**CARDI:** The bidder takes responsibility, but the AMF will control that. The consistent treatment of the classes of shares must be controlled by the AMF. 

**WATANABE:** It just controls, but doesn’t determine? 

**CARDI:** No. It’s not controlling the price for each class. 

**BROCHIER:** It’s a general rule. For instance, the AMF can, as Bertrand(Cardi) explained to you, control price, especially in the mandatory offer. But they can never fix the price. 

**WATANABE:** They have no such power? 

**BROCHIER:** That’s very clear. They can say “I disagree with the difference between the price of class A and class B,” but they are not allowed to say, “Well, the price of shares of class B is 10 euros, and of class B, is 20.” They have no power to do that. Only to control and to say “I disagree with the difference, and you have to explain and correct.” 

**WATANABE:** I suppose the judges in France don’t have such a power. 

**CARDI:** They don’t have the power to fix the price either, but every decision of the AMF of approval of an offer (décision de conformité) is subject to a challenge in front of the Paris Court of Appeal. And the Paris Court of Appeal checks that the AMF has respected its regulation and the French legal environment. So it cannot fix the price. But if it estimates that the AMF has wrongly approved a different treatment for different classes of shares, it can annul the decision of the AMF. This happened in the Schneider/Legrand case. It was in 2002. 

**BROCHIER:** In fact, the Paris court controls the control of AMF. 

**WATANABE:** Concerning the appeal of the AMF decision, I heard that about 6% of AMF decisions have been subject to appeal. 

**CARDI:** Yes. It’s not very customary, and not many decisions of the AMF are subject to appeal. 

**WATANABE:** I’d like to have an overview of such appeals… 

**CARDI:** In fact what you would have to do, if you want to have an overview of the appeals, the AMF publishes an annual report. And in this annual report, you have the major cases. 

**WATANABE:** When I visited Paris last year, I heard from the president of ADAM, Madame Neuville. She complained that the time allowance for an appeal was very short. 

**CARDI:** In France? I think it’s already long. 

(※ Olivier Diaz came in.) 

### 4. Reconsidering the points at issue, and minimum acceptance condition

**CARDI:** We have already discussed a number of issues, and I’ll just summarize for Olivier. We discussed a little bit the bons Breton, and the reciprocity issue. I have to check something, by the way, because I was asked if a US bidder would be considered reciprocal, and to be honest I have to check whether they also have to have a shareholders meeting to approve poison pills?
DIAZ: It’s a problem because you know, in the US, the body that has the competence to issue a poison pill is the board. Actually, the shareholders meeting would not have the power to issue a poison pill. It’s only the board that has the power to issue a poison pill. So I think the situation is two-fold. Either the bidder is a US company with an existing poison pill, and obviously they cannot claim the benefit of reciprocity, or it’s a US company that has nothing special, a Delaware company that has nothing special. And then I guess that if the transaction was not friendly, the French target could always say, “Yes, but you have something that I do not have, which is that you can decide by yourself to issue a poison pill, and I cannot. I have to go through my shareholders meeting.”

CARDI: So you are not reciprocal. So basically this was what you thought, that the main view in France would be that the US bidder may likely not be reciprocal.

DIAZ: Nobody knows how the reciprocity clause would play out. There are certain safe grounds like, if it’s an EU company and it has no defense because you have the Takeover Directive and any defensive measure will have to be taken by the shareholders meeting, then, of course, reciprocity applies. But outside of the EU, I think it would be a big battle.

CARDI: And there is also a question which we had in theory in a case, which is, if there is a foreign bidder but he is controlled by a private company, even if the foreign legal regime is the same as in France, if you are controlled by your private company, by definition you cannot be subject to a takeover offer. So there may be many questions.

DIAZ: There are two different views. Some people say that you can only look at the legal situation. You cannot look at the facts. And even if you are controlled by a company, if you have no defenses it means that you can consider that you enjoy reciprocity. This is the view of Professor Viandier.

When you look at the debate that took place before the French parliament, there was one member of parliament who took the example of a controlled company, and said, “Well, a controlled company could not enjoy the benefit of reciprocity, because it cannot be taken over, because it’s controlled by the shareholder.” So the situation is not very clear. I don’t think the law is clear on that. And for example, any French company that is controlled knows that if it were to make a hostile offer against another French company, one of the defenses could be to say that they do not enjoy reciprocity because they are controlled. It’s difficult to know unless we have the first case of application.

CARDI: Absolutely. So we discussed as well the price, the fact that in a voluntary offer, the AMF has no power to fix and does not have the control of the price, differently from a mandatory offer, where the price has to be satisfactory, but the fact that nonetheless, there is the system of the independent expert, which is a way to try to ensure that the price is fair even if it would be difficult for the AMF to ask for a price revision if the independent expert’s report is negative.

DIAZ: There is another debate that is taking place in France at the moment, and that also is a hot topic in Germany, which is, should an offer always need to have a minimum tender condition? Because some people say that if the AMF does not control the price of the offer, and it’s the same in Germany, then anyone can make an offer with no minimum tender condition. Very few people will come to the offer because the price is not very exciting, and they will be able to be in a position which gives them de facto control, and they will never have paid the offer premium. And some people say, well if you have a minimum tender condition, like if you make an offer you need to have at least 50%, a lot of people say that if you have a minimum tender condition, then the issue of the price goes away, because if you want your offer to be
successful, then you need to offer a price that is acceptable to the shareholders.

But if there is no minimum tender condition and you are not so interested in acquiring all of the company but to take the position that will make you the main shareholder of the company, then maybe this is something you could do without paying the offer premium. So that’s a hot topic now. There has been a case where the target has lobbied the AMF to impose a minimum tender condition, and it was actually against a German bidder. And the AMF, after much hesitation, decided that under the regulations, it was not in its power to impose a minimum tender condition. And then those people are lobbying for new tender conditions.

You may know that in Germany it’s the same, because in Germany there is a rule that your offer price has to be, I think, it’s okay if you pay the highest of what you’ve paid to someone. And what happened in the past is that people have agreed to buy a block of shares at a certain price. The holder of a significant block of shares may be happy to sell at that price, because they know that if they were to sell on the market, they would have a discount. And the price at which they are ready to sell is pretty much the market price. And then you make an offer at the market price, and the shareholders do not come, because they think that there is more value in this company than the offer price. But still, the company is de facto controlled. So there has also been a lot of lobbying on the Bafin, the German FSA, to impose minimum tender conditions. This is what’s been discussed in the context of the offer by ACS, the Spanish company, for Hochtief, the German construction company.

So the issue of minimum tender condition is an important issue, and it’s an important issue articulated with the price.

**CARDI:** But do you think it will lead somewhere in France? Because in this case, the case in which the firm worked recently, the AMF in fact accepted that it cannot impose the minimum tender condition under its general principles, which would require a change of its regulation? Do you think they will try to do that?

**DIAZ:** I think it’s part of the lobbying of certain people, yes.

Some people say that well, you know, an offer is made to take control of the company, so you need a minimum tender condition. And some other people say, well, you know, the market is free to accept or not to accept. And in any case, at least when people make an offer, there is transparency. Whoever wants to comes to the offer can come to the offer. There is a lot of information that is provided in the context of an offer.

So there is a debate. It’s a European debate. And I think that in the UK, it’s very difficult, if not impossible, to make an offer without minimum tender conditions.

**WATANABE:** As we discussed some time ago, I suppose, it is possible to make a discounted takeover in a mandatory offer also in France.

**CARDI:** A discounted bid?

**WATANABE:** Yes. Theoretically. And as you know, in Germany, Porsche made a discounted mandatory offer for Volkswagen. It was a good and bad tactic to tender very few shares.

**DIAZ:** It’s difficult. What we said is that in France, the AMF controls. The price has to be satisfactory to the AMF in the mandatory bid. And except if you have very good reasons to show that the market price is not relevant, for example because there is a very small free float and the market price is very high, and in fact does not reflect the true value of the company, except if you have very valid reasons, it would be very
difficult to do a discounted bid. I think there are two or three examples.

WATANABE: But at that time, the market share price was going up. So, it was possible to make a discounted mandatory offer.

DIAZ: I think the examples have been rather in the reverse situation, where the economy was bad, but still the market was relatively high. And I think in France it’s like Germany, basically. If you find people who have blocks of shares who are ready to sell to you below market price, then probably you can convince the AMF and the experts that you might do an offer below market price.

A lot of the offers below market price that we’ve seen in France were offers where before the offer, a large block of shares was acquired at below market price. And so, I guess the theory is that presumably, the sophisticated seller agreed with the sophisticated buyer on a price that was below market price. And therefore, that must mean that the price was a fair price.

So it depends. There are a lot of companies in France, not the big companies, of course, that have a very high liquidity, but there are a lot of companies that have very little liquidity, because there is either free float or because they are medium sized listed companies and they are not really followed by the analysts. So there are a lot of companies where the market price is not so significant. And these were really the examples where we’ve seen discounted offer prices.

In Germany, I think it’s more complicated, because I think if you make an offer, I think the rules are slightly different.

WATANABE: In Germany there is also average price regulation.

DIAZ: I think also in Germany, as I recall, they do not have the rule that we have in France that if you increase your position by more than 2% in any given 12-month period, you have to make an offer. In France we have this rule. Therefore, I think in Germany, once you’ve crossed the one-third level, you are free to buy on the market. And therefore, if you make an offer on the cheap, you buy the block, you make an offer on the cheap, very few people come, but then you’re free to accumulate on the market, which you can normally do at a discount, because there are a lot of sellers that are able to sacrifice the price for the liquidity.

In France, you’re limited by the fact that you cannot increase your position by more than 2% in any given 12 months. So let’s say that you bought a block of 34% below market, you make a discounted offer, and nobody comes. If you want to move to 40%, you will have to make an offer that will be compulsory, and where, again, the AMF is going to control the price. So the rules are a bit different because of this 2% per year rule.

5. Possibilities of reasonable forecasting the ratio of acquiring target shares under the whole-solicitation

WATANABE: Thank you. I have another question concerning the tactics about offers. As we discussed last year, I think even under the EU directive, it is possible to make a partial acquisition. So it’s a full offer, but partial acquisition. I suppose it’s possible through adjusting the offer price observing the reaction of the target shareholders during the offer period.

DIAZ: As you know, in France, the possibility to do partial offers is very limited. It’s limited to an offer up to 10% of the capital.
WATANABE: But, even under the whole-solicitation, I think that the offeror can reasonably foresee the percentage of acquisition of the target shares in some range, if he make full use of various means.

DIAZ: You mean an offer that would be subject to a minimum acceptance?

WATANABE: Yes.

DIAZ: And adjusting your price depending on the acceptance. Is this what you mean?

WATANABE: Yes.

DIAZ: In France, it’s not so easy for the two following reasons. The first reason is that if you have put a minimum tender condition, you cannot do your offer by buying shares on the market. You can only do what we call a centralized offer, which means that it’s only at the end that you will know the results. And the second restriction we have is that you can only modify or waive your tender condition until five trading days before the last date of your offer acceptance period (closing date). But at that point, because it is centralized, you have no idea how many people have accepted your offer.

Normally, an offer is 25 trading days. Let’s say that when you make your offer, you say “My price is 100, and I have a minimum tender condition, that is two-thirds,” you can only change your minimum tender condition of two-thirds until five trading before the closing date. But at that point, you don’t know how many people will come to your offer. Even the banks do not know, because people often tender on the last days.

WATANABE: Suppose the bidder can know the actual acceptance level day by day?

DIAZ: Not so easily. People have until the last day to tender. They can withdraw at any time. And you have an idea, but you’re not really sure, because a lot of people tender on the last days.

6. Procedure of the appeals against the AMF’s decision

WATANABE: Thank you.

By the way, before you came in, we were talking about appeals to the Court of Appeals of Paris against the AMF’s decisions. When we met last year, the president of ADAM, Madame Neuville, complained that the time allowance for an appeal is very short. What do you think about it?

DIAZ: Well you know, as we represent more the companies themselves, we think it’s important that the litigation period be short, because an offer is something that moves the market, and it has to be done in a reasonably short period. I don’t think the delay is so short. At a minimum, the offer becomes public when it is made. And the public is provided with all sorts of information. You have to file with the AMF, which is public, your draft prospectus, etc. So people who do not like the offer have all this time to prepare for the litigation. And they also have the time to send comments to the AMF and complain about the price or the offer terms, and say it’s not valid, etc. Then the AMF makes the decision, and then they have ten days to make the appeal. And then they have 15 additional days to provide their arguments. So frankly, I think the period is reasonable if you take the view that an offer is something that has to be decided quickly. And more and more, you find that there is a delay between the time when you announce your offer and the time when your offer is cleared by the AMF and opens. Frankly, you have a month. And if you are someone who doesn’t like the offer, you have this whole period to prepare your arguments.

WATANABE: How about the time allowance for exemptions from a mandatory offer in France.

DIAZ: Well, it’s the same. What you have to know is that when you make an application for an exemption,
it is not necessarily public. Therefore, I think the minority shareholders have complained that in this case, the AMF makes it decision public, it takes everybody by surprise, and then the delay is very, very short. What happens if the exemption request is disputed or the AMF thinks that it creates an issue? Very often the AMF will tell you, “You have to make your transaction public, and you have to make public the fact that you have requested an exemption from us.” This is so that people can participate in the debate on whether the exemption should be granted or not.

For example, I worked on the first European merger, involving a French listed company, and we wanted an exemption from the tender offer. And we went to the AMF and we said, “We don’t want to announce the transaction unless you’ve told us that we will have an exemption, and it’s a legal decision from you.” And they thought about it and they said, “Well, it’s too complicated. You need to announce your decision to do the merger and the fact that it’s subject to our exemption, so that the minority shareholders can make their arguments known, and we at AMF can take into account the arguments of the minority shareholders before we make the decision.”

And in effect, between the time we announced the merger and the time we got the exemption of the AMF, it was like two months or something like that. So again, you have what the law says, and then you have the practice of the AMF.

7. Irrevocable undertakings to tender to an offer

WATANABE: Thank you, next, I’d like to ask you a question about “irrevocable undertakings”.

CARDI: Irrevocable undertakings to tender to an offer?

WATANABE: Yes. I suppose it is uncertain in France whether the irrevocable undertaking is allowed or not. But in practice, irrevocable undertaking is widely used?

CARDI: You know, when you want to secure your transaction, if you are the purchaser and the bidder, you have two choices. Either you buy what you have to buy, but you take your risk, since if there is only 30% or 25%, you will be stuck with 25% if you lose. Or if you don’t want to buy or if the shareholder does not want to sell firmly, then you use an irrevocable undertaking. But the case law of the AMF is very simple and clear: an irrevocable undertaking must always become void if there is a competing offer. You can however contemplate one measure to secure your undertaking: to ask for a break fee, an indemnity. As the bidder, you can say: if there is a competing offer, and the undertaking in my favour becomes void, and the other party tenders to the competing offer, such party has to give me back part of his gain. The AMF will only accept the break fee, indemnity, if it is not of a nature and amount that can make a competing offer impossible. So it must not be too high: it must be reasonable so that it does not frustrate any competing offer.

WATANABE: Thank you. To my understanding, in French takeover cases it is very usual to make an irrevocable undertaking and the bidder acquires more than 50% of the target’s shares, and after that, the bidder makes a mandatory offer.

CARDI: Absolutely. The bidder, if he wants to secure his transaction, has better to purchase 50% or 51% and do a mandatory bid, because then the purchase agreement is irrevocable, final and binding.
8. Difference in function of the mandatory offer rule between the UK and France

BROCHIER: By the way, in Japan, when you make a public offer, do you have a mandatory offer rule?
WATANABE: We have two thresholds, one-third or two-thirds. The threshold for a mandatory offer is two-thirds. But it’s important that in Japan the approach to calculating the threshold is different from that of EU. In Europe, the threshold is after acquiring basis. However, in Japan, the threshold is hoping-to-acquire basis. It’s totally different. I think that the European style threshold is better.
CARDI: Thank you. Do you have other questions? You have a lot of papers, so there are questions and questions.
WATANABE: I gave my analysis on French takeover cases. You agree with me. If so, in France, the threshold for a mandatory offer is not so severe.
CARDI: It’s not so severe?
WATANABE: Yes.
DIAZ: And it has been modified by the new law.
CARDI: It’s 30%.
WATANABE: Yes, I know that.
DIAZ: It was one-third, and it has been modified to 30% recently.
WATANABE: To my understanding, in many takeover cases in France where the ratio of block holder is higher, the offeror first acquires more than half of the target share before the offer.

So, practically, the threshold for a mandatory offer in France shouldn’t be so severe, on the assumption of the offeror’s whole solicitation,
CARDI: Okay. It depends. It depends, because there are some people who are attracted to the de facto control, and the truth is that in France, when you have 32% or 35% of a company with a large free float, you are very close to de facto control, because of the way votes are calculated at the shareholder’s meetings. . .
WATANABE: Theoretically it’s very important. But in practice, most mandatory offers in France are a kind of voluntary offer, in that the offeror crosses the threshold intentionally. So, there are very few “true” mandatory offers in France or in Germany. Most of them are substantially voluntary.
CARDI: That’s true. But maybe also because there is this protection.
WATANABE: Yes. Of course, its concept is very important. So, I suppose in France, the takeover rules function as a kind of “sellout right”, a sellout right for minority shareholders after the change of control.
CARDI: Yes, but in France a lot of rules are designed to protect the minority shareholders in case of change of control, and this is also consistent with the goals of the European Takeover Directive.
WATANABE: Yes, but in the UK, the shareholding structure is very different from that of France and Germany. The function of the takeover rules is very different between the UK and continental Europe.
DIAZ: I don’t know English law very well. Do you?
CARDI: Not that well. What do you think is very different in the UK?
WATANABE: In the UK, the threshold for mandatory offers is actually very severe, I think.
DIAZ: How much?
WATANABE: In the UK, the shareholding structure is very dispersed and there are little block-holders.
So the threshold for a mandatory offer should be very severe. If someone acquires target shares in the market and crosses the threshold, the person will be obliged to make a mandatory offer with far more severe requirements than that of a voluntary offer. Therefore, in the UK, in most of the actual takeover bid cases, the offeror necessarily chooses to make a voluntary offer from the point under the threshold.

But in Germany and France, where the ratio of block shareholding is higher, the mandatory offer rule is practically not so severe, on the assumption of the offeror's whole solicitation, I think, because most of the takeovers are carried out like this: First the bidder acquires over half the shares. And after that, the bidder makes an offer. So, practically, the one-third or 30% threshold is not so severe.

**CARDI:** Because the free float is more important in the UK than in France. It’s true that there may be more controlled companies in France than in the UK. In France and in Germany, when a company is controlled, it’s really well controlled, and there may be more companies in the UK with a large free float.

**WATANABE:** So in France or in Germany, the acquirer first has to make an agreement with the large shareholders.

**CARDI:** Exactly.

**WATANABE:** Thank you very much indeed for answering many questions for hours today. It was a really useful meeting and I think that at the meeting there were many suggestive points for understanding French takeover rules in Japan and also for the debate on reforming Japanese takeover law. Thank you very much.

**DIAZ:** It was really good for us to have such a meeting.

**BROCHIER · CARDI:** Thank you very much.