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Québec's Securities Tribunal Prevents Group Mach from Blocking Transat A.T./Air Canada Deal

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The Tribunal administratif des marchés financiers (Québec's securities tribunal) issued a split 2–1 decision resulting in a cease trade order on an offer made by Group Mach to acquire 19.5% of Transat A.T. Inc.'s shares. Certain features of Group Mach's mini-tender, which was designed to potentially block Air Canada's proposed acquisition of Transat, were found to warrant the Tribunal's intervention. In addition to the cease trade order by the majority of the panel, the Tribunal ordered Group Mach not to take up shares tendered to the offer, if any, and to return proxies deposited with the tendered shares.

Mini-tenders are offers to purchase securities made to all of the shareholders of a public company and are designed to avoid triggering the takeover bid rules under Canadian securities laws.

In its decision, the majority of the Tribunal panel focused on the following characteristics of the offer, which it found to be problematic – namely:

- The offer provided for a deadline of 11 days, which was found to be insufficient;
- It was structured in a way that allowed Group Mach to exercise voting and dissent rights attached to all of the shares tendered, whether or not they would be taken up and paid for, potentially resulting in the acquisition of vote far in excess of the 19.5% of Transat shares that may be ultimately acquired; and
- The public disclosure urged shareholders to act quickly or risk losing an opportunity presented as being “certainty of value,” and contained inconsistent statements as to whether proxies deposited were revocable or not.

Background

On April 30, 2019, Transat announced that it was in preliminary discussions with more than one potential acquirer. On May 16, 2019, Transat announced that it had agreed to a 30-day exclusivity with Air Canada to negotiate a definitive transaction whereby Air Canada would buy all of the outstanding shares of Transat at a price of \$13 per share. On June 27, 2019, Transat and Air Canada announced that they had entered into a definitive agreement for the acquisition of Transat by Air Canada at \$13 per share. The special meeting to vote upon the arrangement is scheduled for August 23, 2019.

On August 2, 2019, Group Mach announced an offer to acquire 19.5% of Transat's Class B voting shares at \$14 per share. This offer was openly made with the view to blocking the proposed transaction between Transat and Air Canada.

On August 6, 2019, Transat announced that Transat and Air Canada had filed a complaint with the Tribunal asserting that the offer was coercive and abusive, and that the Tribunal should exercise its public interest jurisdiction to prevent Group Mach from acquiring and voting the shares tendered. During the hearing, the Autorité des marchés financiers, Québec's securities regulator, supported Transat and Air Canada's position.

The Tribunal's Decision

Group Mach's offer was structured to ensure that it was not a takeover bid under National Instrument 62-104 – *Take-Over Bids and Issuer Bids* (which would have applied had the offer contemplated the acquisition of 20% or more of the Class B shares). The majority nonetheless held that even if NI 62-104 did not apply, its spirit should guide the Tribunal's approach. The majority also held that in presence of a somewhat novel strategy (i.e., using a mini-tender as a tool to block a potential transaction), the Tribunal should be more prone to intervene.

The dissenting judge held that since the regulator had decided not to regulate this type of offer, it was not the Tribunal's role to impose upon the market new norms that the regulator had chosen not to impose. The dissenting judge expressed concerns of the impact of such a result on the market.

The majority held that a combination of several factors resulted in the Tribunal's intervention being required.

First, the majority found that the 11-day deadline (including four weekend days) was insufficient for Transat shareholders to adequately assess the offer, especially in a context in which the offer was primarily targeting retail investors, as was acknowledged in Group Mach's offer materials. While NI 62-104 does not apply to Group Mach's offer, the majority took into account the fact that it provides for a minimum bid period ranging between 35 and 105 days. The majority found that the deadline was too short as it required the shareholders to act quickly at the risk of losing an "opportunity" that was presented as being "certainty of value" and a "significant cash premium." The majority did not, however, indicate what deadline would have been acceptable in the circumstances.

Second, the majority expressed concerns about the structure of the offer, which was intended to allow Group Mach to obtain substantially more than 19.5% of the voting and dissent rights while only having to acquire 19.5% of the Class B shares, if any at all. The majority also expressed concerns about the timing of the offer, which resulted in the shareholders not knowing whether they would receive the full consideration, or a diluted amount, until after Group Mach had exercised the voting and dissent rights, even for the shares that would ultimately not be acquired. It is questionable, practically speaking, that an offeror could exercise dissent rights in respect of shares that it has not yet acquired, since section 190 of the *Canada Business Corporations Act* provides that only a registered shareholder may exercise dissent rights.

The majority was also concerned that Group Mach would be in a position to exercise voting and dissent rights, and therefore make critical decisions on behalf of shareholders without ultimately acquiring their shares. Group Mach's offer would enable it to rely on the closing conditions of the offer to not take up and pay for the shares while keeping the ability to vote them.

Finally, the majority was concerned about Group Mach's disclosure, which did not sufficiently inform shareholders about the risk that the shares tendered in response to the offer may not be acquired. The majority also expressed concerns about Group Mach's conflicting and confusing indications as to whether proxies deposited were revocable or not.

Given the tight deadline and since no other remedy could efficiently address the Tribunal's concerns, the Tribunal issued a cease trade order on August 11, preventing Group Mach from acquiring and voting any Class B shares tendered under to its offer.

Consequences

While this decision provides important guidance on the principles applicable to mini-tenders in Canada, it does not conclusively determine whether a mini-tender made for the purposes of blocking a proposed transaction is in itself impermissible. This decision must, however, be read in conjunction with the Ontario Securities Commission's 2014 intervention in the Orange Capital, LLC's mini-tender for units of Partners REIT. There the regulator required Orange Capital to amend its offer to allow tendering shareholders to revoke proxies associated with securities not taken up as a result of pro-rata or the withdrawal of an offer, and to securities being withdrawn by securityholders. Once again, Canadian securities regulators (in this case the Tribunal) have decided to intervene in a context where a mini-tender is used as an incentive to collect proxies.

Postscript

On the same day as the Tribunal's decision was issued, Air Canada announced that it would increase its offer price to \$18, from \$13, per share. Letko Brosseau, Transat's largest shareholder (holding 19.3% of its outstanding shares), entered into a lockup and support agreement supporting Air Canada's revised offer.

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