

Acquiring a Minority Equity Stake in a French Public Company

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With Paris positioning itself as Europe's new favorite investment destination¹, acquisitions of minority stakes in French public companies should continue to attract interest from investors, whether as stand-alone passive investments or as strategic stakes². Activists also share this growing interest and increasingly target French listed companies, among which CAC 40 blue-chip companies³. Beyond that, the recent decline in global financial markets could create a further boost in the number of potential opportunities for attractive investments in French public companies, with commentators optimistic that the recent "yellow vest" protests that have gripped the country will not affect such dynamics.

Below we address the key deal points that we believe will be of interest to any investor considering a minority investment in a French public company, as these transactions – depending on their structure and size – could raise complex legal issues.

I. Acquisition Methods

Typically, acquisitions of minority stakes in French public companies take one of two forms: the investor may purchase shares in the open market, or the investor may acquire shares directly from significant shareholder(s) or the issuer⁴.

Open market purchases are often chosen because they are fast and easy to implement, especially if the investor believes that its investment may not be welcomed by the target company. There are, however, limits on how much an investor may purchase in the market at a given price depending on the liquidity of the relevant issuer's securities.

¹ Please see the Davis Polk Paris memorandum entitled "[France's Reform Agenda: First Year Overview](#)" and memoranda on other topics at <https://www.davispolk.com/offices/paris>.

² Minority investments may also be key components of broader partnerships (e.g. the minority stakes acquired in 2017 by Delta Air Lines and China Eastern Airlines in Air France-KLM or the minority stake acquired in 2014 by China's Dongfeng Motor in French car manufacturer Peugeot).

³ See for instance the stake in excess of 2.5% of the French spirits company Pernod Ricard recently acquired by U.S. fund manager Elliott Management. On this topic, we note that activists campaigns aimed at blocking buyout transactions – which have developed significantly in France over the past few years (for example, Elliott Management appeared in both the APRR and XPO Logistics Europe transactions) – are projected to decrease through the contemplated reduction of the squeeze-out threshold to 90 percent from 95 percent in the pending PACTE Bill.

⁴ Acquisitions of minority interests in French public companies may also result from privatization processes (please see the Davis Polk Paris memorandum entitled "[French Privatizations: practical tips for prospective bidders](#)").

A negotiated transaction, on the other hand, typically takes longer to execute, but can offer a number of benefits, including potential board representation⁵ and certain minority protection rights⁶. In the process of significant negotiated transactions, potential investors may also have access to non-public information through a data room, but such access is contingent upon the investor confirming it has a genuine interest (“*intérêt sérieux*”) in completing the transaction and the market must be provided with the same information at the time the transaction is made public⁷.

Investors may also purchase securities by subscribing to capital increases with a cash or assets⁸ contribution. This technique, known as a Private Investment in Public Equity (PIPE), frequently implies a capital increase reserved to one or more investors and, as such, means taking into account significant corporate legal issues, including the need for shareholder approval unless prior delegations to the board are available. On this topic, it is to be noted that the French Financial Markets Authority (“AMF”) has recently softened its restrictive stance with respect to issuances of shares by private placement with shareholders or executives as sole or main beneficiaries⁹. In addition to ordinary shares, PIPE transactions can lead to the issuance of more complex securities, such as warrants or convertibles bonds but issuances of preferred shares are not so common in the French market for public companies as compared with the U.S.

II. Transparency Requirements

Following the Transparency Directive¹⁰ providing for the harmonization of transparency requirements across the European Union, French securities laws impose certain strict filing and disclosure requirements to which prospective minority investors should pay particular attention.

Such reporting obligations fall primarily within the mandatory disclosure of major shareholdings¹¹. The French Commercial Code¹² thus requires the disclosure within four trading days to the issuer and to the AMF¹³ of any holding of shares or voting rights when the percentage of such shares or voting rights reaches, exceeds or falls below the following thresholds (whether through open market purchases, negotiated transactions or otherwise): 5 percent, 10 percent, 15 percent,

⁵ Board-level representation must also take into account the recommendations on corporate governance included in the Afep-Medef and Middlednext corporate governance codes (the Afep-Medef corporate governance code being the reference code for most large French listed companies).

⁶ Any clause negotiated during the transaction providing for preferential terms and conditions for buying or selling shares and covering at least 0.5% of the capital or voting rights of the issuer must be disclosed to the market.

⁷ The non-public information must be strictly restricted on a need-to-know basis and the potential investor must execute a non-disclosure agreement prior to accessing any non-public information. See the AMF guidelines DOC-2016-08 on ongoing information dated October 26, 2016.

⁸ See for instance the 2018 disposal by A.P. Møller – Mærsk A/S of Mærsk Oil to Total against the issuance – in particular – of \$4.95 billion in new Total shares, representing approximately 3.76% of the enlarged share capital of Total (Davis Polk advised A.P. Møller – Mærsk A/S on this transaction).

⁹ See AMF position-recommendation DOC-2019-01 dated 8 January 2019 cancelling its former position DOC-2012-09.

¹⁰ Directive 2004/109/EC dated 15 December 2004 as amended.

¹¹ The French major shareholdings notification obligation is applicable to the trading of shares of a company having its registered office in France which are admitted to trading in particular on a regulated market of a Member State of the European Economic Area (such as Euronext Paris).

¹² Article L. 233-7 I and II and Article R. 233-1 of the French Commercial Code.

¹³ The notification takes the form of a standard notification set forth in the AMF instruction 2008-02 and is filed with the AMF through the following email address: declarationseuil@amf-france.org.

20 percent, 25 percent, 30 percent, one-third, 50 percent, two-thirds, 90 percent or 95 percent. The AMF then publishes this information. Issuers' by-laws may also impose additional disclosure requirements – even below the 5 percent statutory threshold – for thresholds of not less than 0.5 percent¹⁴.

These disclosure requirements may look simple on paper but can in fact be quite complicated, with, for instance, specific rules applying to capture derivative financial instruments that may provide access to the issuer's shares or voting rights¹⁵ or the requirement to aggregate securities held by any third party with whom the notifying party is acting in concert (see III below). In addition, investors should closely continue monitoring such disclosure requirements even after making their investment since they can cross a threshold even without any action on their part, for instance, when granted automatic double voting rights in the following two years¹⁶ or in the event there is a change in the share capital or voting rights of the issuer.

In addition, upon crossing the thresholds of 10 percent, 15 percent, 20 percent and 25 percent of the capital or voting rights, the relevant shareholder must also inform the company and the AMF, within five trading days, of its objectives for the following six-month period in a statement of intent ("*déclaration d'intention*")¹⁷. In the event of a change in intent within the six-month period following the statement of intent that was originally filed, a new statement must be issued promptly to the company and the AMF and made public under the same conditions. The six-month period is reset with this new statement.

Any failure to comply with these disclosure requirements may result in the cancellation of the voting rights attached to the shares exceeding the threshold for which notice has not been duly made, for all shareholders' meetings held during a two-year period from the date on which the notification is properly made. Other sanctions may also apply¹⁸.

The AMF may also build upon several provisions of its regulations to require specific disclosures, including when there are circumstances indicating that a minority investment is the first step towards a tender offer ("put up or shut up")¹⁹. If such investor denies that it is planning a tender offer, it will be barred from launching a tender offer of the target company for six months following such declaration, except in case of a specific change in circumstances.

¹⁴ See, for instance, Bouygues' by-laws which provide a mandatory notification within fifteen days for any person, acting alone or in concert, who directly or indirectly holds a fraction of the capital, voting rights or securities giving future access to the share capital of the company which is equal to or in excess of 1% or a multiple of this fraction. As a general rule, the crossing of such thresholds must be disclosed to the issuer only.

¹⁵ Article L. 233-9 of the French Commercial Code.

¹⁶ A particular feature of the French market is the automatic allocation of double voting rights to shares held in registered form for at least two years, unless two-thirds of the shareholders have voted in favor of the "one-share one-vote" principle. Since such double voting rights are intended to reward long-term shareholders, they are lost when the underlying shares are transferred.

¹⁷ Article L. 233-7 VII of the French Commercial Code.

¹⁸ According to article L. 233-14 of the French Commercial Code, a Court may also, upon the request of the company's President, a shareholder or the AMF, order a total or partial suspension of voting rights, for a period not exceeding five years, against any shareholder who has failed in its disclosure obligations or who has failed to observe the content of the statement of intent within the following six-month period.

¹⁹ Article L. 433-1 V of the French Monetary and Financial Code and Article 223-32 of the AMF General Regulation. For instance, this rule was implemented during the takeover battle for Club Med in 2014 which has led to a bidding war between two potential investors (Ardian/Fosun on one hand and Investindustrial on the other hand).

III. Mandatory Tender Offer Rules

The holding of securities of a French listed company in excess of a specified ownership percentage typically results in the purchaser having to make a mandatory general offer for all of the issuer's share capital.

The relevant percentage is **30 percent of the share capital or voting rights**. Investors already holding significant shareholdings between 30 percent and 50 percent should also consider the "acquisition speed limit rule" ("*excès de vitesse d'acquisition*") pursuant to which a mandatory tender offer must be launched when these investors increase their shareholding above 1 percent over a rolling 12-month period.

In principle, the price of a mandatory tender offer must be at least equal to the highest price paid by the relevant purchaser for the securities of the issuer over the 12-month period preceding the event triggering the mandatory filing of an offer.

The 30 percent threshold is therefore the limit that must not be crossed by minority investors due to the consequential risk of having to file a mandatory offer. However, the AMF may grant a waiver from the compulsory filing of a mandatory tender offer in the event the crossing of the relevant threshold occurs as a result of one of specific circumstances listed in the AMF General Regulation²⁰. Therefore, when it is expected that the investor will cross the 30 percent threshold, obtaining such waiver is usually a condition precedent, it being specified that any interested party can appeal the AMF's decision within a 10-day period²¹.

Since persons acting in concert are jointly and severally bound by the mandatory tender offer rules (as well as the disclosure obligations mentioned above), specific attention should also be given to acting in concert issues.

For the purposes of the French Commercial Code, persons acting in concert comprise persons who have entered into an "agreement" – not necessarily in writing – with a view to acquiring, assigning or exercising voting rights in order to implement a common policy or to acquire control of a company.

Because of the largely factual nature of the concept of "acting in concert", there can be much uncertainty as to whether any particular circumstances may lead to the conclusion that the concerned investors are acting in concert, and prospective investors should therefore consult legal counsel when the question arises²².

²⁰ Article L. 433-3 of the French and Monetary Financial Code and Articles 234-7 to 234-9 of the AMF General Regulation. The cases in which the AMF may grant a waiver include in particular:

- distribution of assets by a legal person in proportion to the rights of its members;
- subscription to a capital increase of a company with recognized financial difficulties, subject to the approval of the general meeting of its shareholders;
- merger or asset contribution subject to the approval of a general meeting of its shareholders.

²¹ Article R. 621-44 of the French Monetary and Financial Code.

²² Despite the positive steps taken by ESMA to clarify the distinction between acting in concert and shareholder cooperation by publishing a "white list" of activities in which shareholders may cooperate without being presumed to have acted in concert (such as board consultation, exercise of shareholder rights and exercise of voting rights).

IV. French Regulatory Considerations

Depending on the nature and size of the investment, certain acquisitions of French securities may require regulatory reviews or approvals before they can be completed.

Apart from possible antitrust review, this is especially the case for investments in certain regulated industries, such as banking, insurance and communications. For example, the prior authorization from the ACPR – the French supervisory authority for the banking and insurance sectors – is required for acquisitions or disposals of 10 percent, 20 percent, one-third or 50 percent of banks or insurance companies²³.

In addition, non-French investments in specific strategic or national security sectors – the scope of which has just been expanded to include notably semiconductors, space operations, artificial intelligence, cybersecurity, robotics, additive manufacturing and sensitive data storage²⁴ – may also be subject to prior regulatory approval. However, since the investments concerned are material investments (the acquisition of a controlling interest or – at least for non-EU or non-EEA investors – the acquisition of one third of the share capital or voting rights of a company), minority investments would typically not be expected to be subject to such regime. Considering the background of increased foreign investment controls across the European states, including with respect to minority acquisitions²⁵, this could, however, evolve in the near future.

²³ See Article L. 322-4 and R. 322-11-1 of the French Insurance Code for insurance companies and Article L. 511-12-1 of the French Monetary and Financial Code and the *Arrêté* on the approval and change of situation and withdrawal of the approval for credit institutions dated 7 December 2017 for banks.

²⁴ See Decree 2018-1057 dated 29 November 2018 and Article R. 153-2, 153-4 and 153-5 of the French Monetary and Financial Code.

²⁵ Such as in Germany where the threshold at which non-EU/non-EEA investors are required to notify transactions and obtain clearance from the German government for transactions involving critical sectors has been recently lowered from 25% to 10% of the voting rights.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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