Private M&A 2022

Contributing editors
Will Pearce and Louis L Goldberg
Davis Polk & Wardwell LLP

LEXOLOGY
Getting The Deal Through

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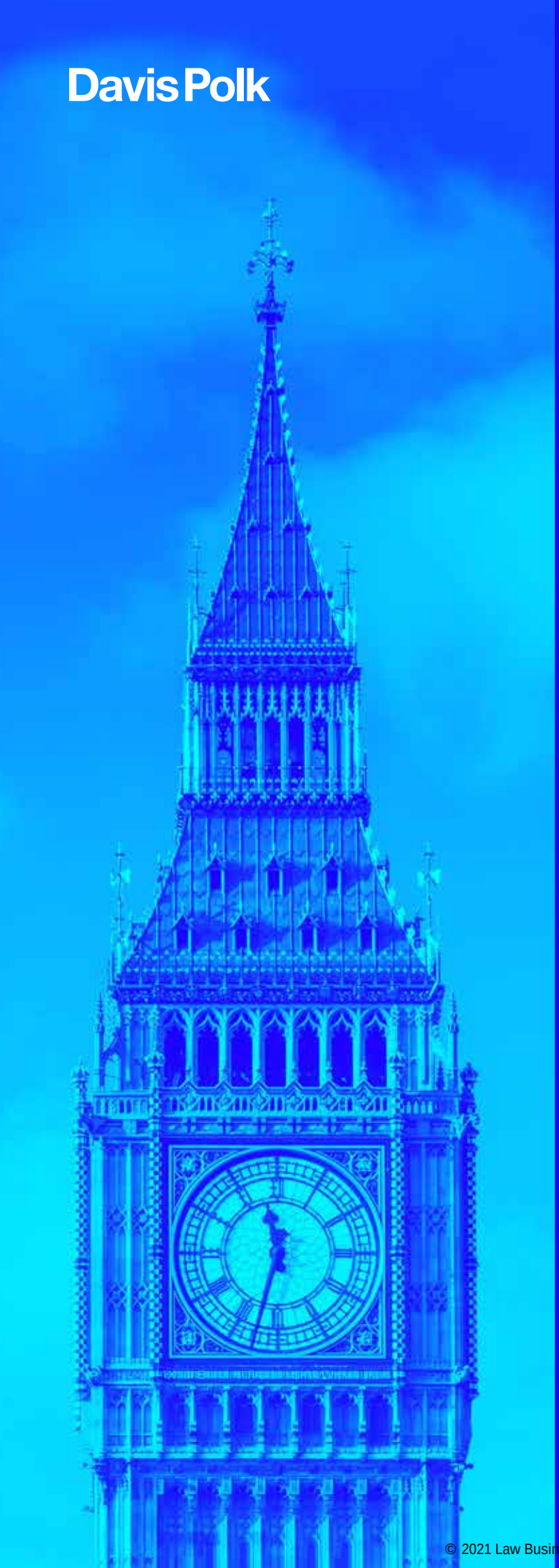

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Lexology Getting The Deal Through is delighted to publish the fifth edition of *Private M&A*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Latvia and Spain.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Will Pearce and Louis L Goldberg of Davis Polk & Wardwell LLP, for their continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

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France

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STRUCTURE AND PROCESS, LEGAL REGULATION AND CONSENTS

Structure

1 How are acquisitions and disposals of privately owned companies, businesses or assets structured in your jurisdiction? What might a typical transaction process involve and how long does it usually take?

In most cases, and unless there is a natural choice (eg, a joint venture partner or a majority shareholder willing to buy out minority shareholders), the seller seeks to promote competition between different bidders through a competitive auction process. The conduct of the process is not subject to specific rules apart from the requirement of good faith.

The typical auction process starts with the seller soliciting offers – typically with the support of a financial adviser or accountant – by providing a short presentation about the target (a teaser). After having signed a non-disclosure agreement, interested bidders gain access to an information memorandum, on the basis of which interested buyers provide non-binding letters of interest. Selected bidders may also be granted access to a data room, the management of the target through management presentations and possible site visits, to be in a position to make binding offers.

The period for achieving the transaction varies depending on the circumstances, but it usually takes three to five months to execute an agreement once the process has started.

Legal regulation

2 Which laws regulate private acquisitions and disposals in your jurisdiction? Must the acquisition of shares in a company, a business or assets be governed by local law?

Private acquisitions and disposals are generally governed by contracts law, as provided by the French Civil Code, which underwent a major reform in 2016 with the aim of modernising and simplifying the applicable rules. In addition, specific additional legislation may be applicable depending on the nature of the assets being sold. By way of example, the transfer of real estate assets require the assistance of a French notary. In addition, the transfer of certain sensitive activities to a foreign investor requires the prior approval of the French Ministry of Economy and Finance.

Where one or more of the parties are non-French or where there are assets located in various jurisdictions, it is possible to subject a transaction involving a French target or asset to a foreign law (except for certain specific assets such as real estate).

Legal title

3 What legal title to shares in a company, a business or assets does a buyer acquire? Is this legal title prescribed by law or can the level of assurance be negotiated by a buyer? Does legal title to shares in a company, a business or assets transfer automatically by operation of law? Is there a difference between legal and beneficial title?

In general, a buyer acquires the title of ownership over shares in a company, a business or assets and all the powers attached thereto (ie, the right to use or dispose of such shares, business or assets). The transfer of ownership occurs either upon the entry into the relevant sale and purchase agreement or, as applicable, upon the satisfaction of mandatory regulatory conditions or contractually agreed conditions precedent.

Where title to shares is concerned, such title is transferred via registration in the buyer's shareholder account of the company's register, which may be done, for unlisted securities, by using blockchain technology.

French law does not distinguish between legal and beneficial title, but provides a single concept of ownership right. However, a few concepts under French law may be analogous to beneficial title, such as:

- the *fiducie*, whereby one or more persons may transfer assets, rights or guarantees to a third party, who has the duty to administrate these on behalf on the beneficiary; and
- the division of shareholder rights between a bare owner and a beneficial owner (the latter benefiting solely from the right to use and receive the revenue from the assets).

Multiple sellers

4 Specifically in relation to the acquisition or disposal of shares in a company, where there are multiple sellers, must everyone agree to sell for the buyer to acquire all shares? If not, how can minority sellers that refuse to sell be squeezed out or dragged along by a buyer?

As a general principle, a buyer must obtain the consent of each shareholder to buy his or her shares. No squeeze-out mechanism is currently available under French law for non-listed companies to allow a buyer to force a minority shareholder to sell his or her shares unless he or she previously consented to (eg, through a drag-along clause, an exclusion clause or a call option, all of which can be stipulated in the by-laws or in a shareholders' agreement).

Exclusion of assets or liabilities

5 | Specifically in relation to the acquisition or disposal of a business, are there any assets or liabilities that cannot be excluded from the transaction by agreement between the parties? Are there any consents commonly required to be obtained or notifications to be made in order to effect the transfer of assets or liabilities in a business transfer?

As long as the transfer of a business results in the transfer of an autonomous and complete branch of activity, such transfer would entail the automatic transfer of all related assets and liabilities, with the exception of agreements concluded *intuitu personae* (ie, specifically in consideration of the other party) as well as agreements that expressly prohibit such transfer without the other party's approval.

The transfer of real estate assets may require specific formalities and authorisations.

Consents

6 | Are there any legal, regulatory or governmental restrictions on the transfer of shares in a company, a business or assets in your jurisdiction? Do transactions in particular industries require consent from specific regulators or a governmental body? Are transactions commonly subject to any public or national interest considerations?

Generally, there is no restriction on such transfers, including in relation to foreign investors. Nonetheless, French authorities may object to foreign investments in a few specified sectors, the list of which was expanded in 2014 (following the battle between Siemens and GE over Alstom's energy business), and again in 2018 and 2020. Such strategic sectors now include activities that are essential to guarantee the country's interests in relation to public policy, public security or national defence (the supply of energy sources or of water, transport and electronic communications services, etc) and, in certain circumstances, research and development activities with respect to semiconductors, artificial intelligence, cybersecurity and robotics and, since 2020, biotechnology.

In practice, the French authorities adopt a pragmatic approach when dealing with sensitive transactions, using their veto power to impose specific conditions to safeguard national interests. Any such conditions regarding EU investors would typically be more lenient than they would be for non-EU investors. In the event of non-compliance with such conditions, sanctions may be imposed as provided by the 'Pacte law' adopted in May 2019.

In addition, pursuant to an EU Regulation issued on 19 March 2019, the European Union has established a coordination mechanism between member states in the implementation of domestic filtering or control procedures for foreign direct investment from third countries that may adversely affect projects or programmes that are of particular relevance for the European Union. In essence, any investment project that is subject to a domestic supervisory procedure must be simultaneously communicated to the European Commission as well as to any member state concerned to enable them to issue and channel an opinion to the member state responsible for the ongoing control.

Furthermore, transactions in specific industries (eg, banking, telecoms and insurance) may also require the consent from the competent regulatory bodies.

Moreover, the transaction could be subject to the merger control of the European Union, or to French merger control regulations (in addition to merger control regulations of other EU member states). Under such French merger control regulations, transactions meeting the following three thresholds should be filed with the French Competition Authority: (1) the worldwide total gross turnover of all of the companies involved in the concentration exceeds €150 million; (2) the total gross turnover generated individually in France by each of at least two of the companies involved in the concentration exceeds €50 million; and (3) the merger does not fall within the scope of the EU's Merger Regulation.

Finally, other legal or tax restrictions may also affect the possibility of completing a transaction (eg, tax schemes subject to lock-up commitments).

7 | Are any other third-party consents commonly required?

Depending on the corporate form of the entity whose shares are being transferred (eg, closely held companies such as partnerships (SNC or SCS) or private limited liability companies (SARL)), the consent of the other shareholders (or the board of directors in a société anonyme) may be required for one shareholder to transfer his or her shares. Otherwise, such consent is not necessary, unless stipulated in the by-laws.

In a situation where a corporate entity is the seller, the decision to sell is taken by the management. This position, however, ought to be qualified for some strategic decisions (eg, in the event of a sale of the majority of assets) for which, depending on the by-laws, the board of directors' or shareholders' prior approval may be necessary.

Regulatory filings

8 | Must regulatory filings be made or registration (or other official) fees paid to acquire shares in a company, a business or assets in your jurisdiction?

While the acquisition of shares generally involves limited formalities (tax filings and payment of stamp duties and, with respect to certain corporate forms (SNC, SARL and SCS), additional filings with the Commercial Register), a transfer of a business or assets may involve specific disclosures to inform the seller's creditors of the sale or other formalities depending on the assets being sold (eg, the transfer of any real property involves a notarial deed and may require the waiver of municipal pre-emptive rights).

ADVISERS, NEGOTIATION AND DOCUMENTATION

Appointed advisers

9 | In addition to external lawyers, which advisers might a buyer or a seller customarily appoint to assist with a transaction? Are there any typical terms of appointment of such advisers?

Both the seller and the buyer usually appoint financial advisers to help them throughout the course of the transaction. Faced with a vast diversity of financial advisers (ranging from highly regulated investment banks to non-regulated players), in early 2017, the French financial regulatory authority (AMF) launched a public consultation to determine whether it would be appropriate for the AMF to oversee such advisers. Although such oversight proposal was not retained in the end, the AMF has expressed its readiness to support initiatives aimed at improving the industry's practices and, in January 2018, the AMF released a recommendation regarding the assessment of the knowledge and skills of advisers called upon to advise on a transaction such as investment services providers.

For large-scale transactions, the terms of appointment of such advisers are typically standardised, with smaller transactions allowing more flexibility. A financial adviser's engagement letter will typically provide limitation of liability clauses, indemnities and success fees (and rarely a retainer fee).

Although not very common, there is also an increasing number of situations where third-party appraisers are used for private M&A deals. For instance, third-party appraisals may be used to mitigate the risk

of tax reassessment of leveraged buyout management packages by providing evidence that managers are bearing a financial risk and that the transaction has been made at fair market value.

Duty of good faith

10 | Is there a duty to negotiate in good faith? Are the parties subject to any other duties when negotiating a transaction?

As part of the reform of the Civil Code, the duty of good faith has been expressly extended to the negotiation phase – in addition to the signing and implementation phases – as an 'imperative' duty. Because good faith is a generic concept, it is difficult to fully identify what this requirement actually means in practice beyond the general duty of loyalty it underlies. In the event of a sale process, for instance, one could argue that such requirement should be construed as entailing the need for any seller to treat alike prospective bidders in the same situation. More precise guidance, however, has been provided with respect to pre-contractual information.

In a negotiation context, directors of a buyer or a seller must also pay attention to the specific duties that apply to them, such as the duty to act in the company's interest (which may differ from the shareholders' interests) or the duty of loyalty which prevents, for instance, directors from buying minority shareholders' shares at a price lower than that which could be offered by a third party thanks to the inside information they hold because of their functions. This tighter framework may be considered as part of the explanation of the increased use of third-party appraisals.

Documentation

11 | What documentation do buyers and sellers customarily enter into when acquiring shares or a business or assets? Are there differences between the documents used for acquiring shares as opposed to a business or assets?

In addition to preliminary agreements such as non-disclosure agreements or term sheets, buyers and sellers enter into definitive long-form agreements (typically a sale and purchase agreement), which are tailored to the specific circumstances of the transaction and include a description of the transferred assets, the price, the representations and warranties granted by the seller, the conditions precedent, and pre-closing and post-closing covenants. Furthermore, asset purchase agreements must comply with a more rigid framework, including some compulsory statements (eg, the name of the previous owners and details about revenue).

When definitive long-form agreements cannot be executed until the information and consultation process of the relevant employees' representative bodies has been completed, it is common practice to secure the terms of the transaction through a put option agreement with the fully negotiated but unsigned long-form agreement attached to the put option agreement.

12 | Are there formalities for executing documents? Are digital signatures enforceable?

Except for real estate transactions, no public notary involvement is required. Digital signatures are generally enforceable provided the signing process is reliable (the rules in this respect are provided by both the Civil Code and Regulation (EU) No. 910/2014 on electronic identification, authentication and trust services). In the context of the covid-19 pandemic, most M&A transactions were signed through a digital format.

DUE DILIGENCE AND DISCLOSURE

Scope of due diligence

13 | What is the typical scope of due diligence in your jurisdiction? Do sellers usually provide due diligence reports to prospective buyers? Can buyers usually rely on due diligence reports produced for the seller?

The scope of due diligence typically varies depending on the size of the contemplated transaction (ie, whether the buyer intends to acquire a minority interest or 100 per cent of the share capital of the target). Due diligence usually covers corporate documentation, commercial contracts, employment, taxation, intellectual property, IT, regulatory, litigation, environment, compliance, accounting and financials. Compliance matters are increasingly becoming a key issue of due diligence, particularly following the new requirements enacted by the 2016 French Anti-Corruption Law (the Sapin 2 Bill).

Vendor due diligence reports are very common in auction processes to expedite the due diligence exercise of prospective buyers. The successful bidder is often entitled to rely on such report, subject to applicable qualifications and limitations, pursuant to a reliance letter drafted by the relevant service provider.

Liability for statements

14 | Can a seller be liable for pre-contractual or misleading statements? Can any such liability be excluded by agreement between the parties?

As a direct consequence of the good faith requirement for pre-contractual negotiations, the Civil Code now provides specifically that any party having knowledge of a fact that is key for the consent of the other party must inform such other party thereof, provided, however, that such other party is legitimately unaware of such information or relies on the knowledgeable party. This pre-contractual duty to inform is likely to have an important impact on M&A negotiations, especially because it cannot be excluded or limited by the parties. In addition, in the case of a breach, it may lead to the contract being null and void. Furthermore, specific regulations (real estate and environment) may also impose specific disclosure obligations.

Except for this important caveat, the liability of the seller for any pre-contractual or misleading statements may be limited or extended depending on the terms and conditions of the contract. Any limitations on such liability would, however, be disregarded in cases of fraud.

Publicly available information

15 | What information is publicly available on private companies and their assets? What searches of such information might a buyer customarily carry out before entering into an agreement?

Trade and companies registers are the main public sources of information regarding French privately held companies. They make available, inter alia, companies' incorporation certificates (K-bis excerpts, which certify the legal existence of a company and provide information about their directors and management), their articles of association, their annual financial statements as well as information about potential insolvency proceedings and potential pledges or encumbrances. In practice, these documents may be consulted online on the Infogreffe website (www.infogreffe.com) for limited fees.

It may also be helpful to check other sources of information, such as patent and trademark databases held by the French National Institute of Industrial Property, land registers or the registers of the relevant regulators in the event the target is subject to any specific regulation given

the nature of its business (eg, information about portfolio management companies may be found on the website of the Autorité des Marchés Financiers (the French financial markets regulator).

Finally, in the event that the target is a subsidiary of a listed company, useful information may also be found in the public disclosure of such listed company (eg, through its annual report).

Impact of deemed or actual knowledge

16 What impact might a buyer's actual or deemed knowledge have on claims it may seek to bring against a seller relating to a transaction?

Unless otherwise provided in the transaction agreements, if the buyer was aware or should have been aware of any fact or event giving rise to a claim, French courts would take into account such fact to reduce the amount of the claim or to exclude it.

PRICING, CONSIDERATION AND FINANCING

Determining pricing

17 How is pricing customarily determined? Is the use of closing accounts or a locked-box structure more common?

Pricing is often determined by using the discounted cash flow method based on a business plan with post-closing adjustment mechanisms (typically with respect to net debt and working capital) based on actual closing accounts. Other valuation methods can be used depending on the industry (eg, the revalued net asset method is favoured for real estate companies). Locked-box structures are increasingly used in the context of auction processes.

Form of consideration

18 What form does consideration normally take? Is there any overriding obligation to pay multiple sellers the same consideration?

Cash remains the most common form of consideration, and it is very rare to see shares used as a means of payment for private M&A deals unless the transaction is structured as a combination through a merger or a contribution of assets. Vendor notes are not frequently used except for a limited portion of the price or intra-group transactions.

Although there is no strict obligation to pay multiple sellers the same consideration, it is almost always the case.

Earn-outs, deposits and escrows

19 Are earn-outs, deposits and escrows used?

The decision to use earn-outs, deposits and escrows is made on a case-by-case basis and will depend on the circumstances. Earn-out mechanisms are not common, while deposits and escrows are often seen.

Financing

20 How are acquisitions financed? How is assurance provided that financing will be available?

Debt financing structures are frequently used to finance acquisitions, from single facility loan agreements to more complex structures involving different tranches of debt. To get assurance on this matter, the seller would usually require being provided with a signed debt facilities agreement (or binding commitment papers) before entering into the definitive acquisition documentation with the buyer. In addition, if the buyer has minimal financial substance (ie, it is a special purpose vehicle), the seller will typically seek guarantees from creditworthy entities or directly enforceable equity commitment letters to cover the equity financing.

Limitations on financing structure

21 Are there any limitations that impact the financing structure? Is a seller restricted from giving financial assistance to a buyer in connection with a transaction?

French corporate law prohibits financial assistance schemes whereby a company advances or lends money or grants a security interest – directly or indirectly – to a third party in view of the subscription or acquisition of its own shares. Similarly, any company must refrain from committing a misuse of its corporate assets or acting in contradiction to its best interests. Thin capitalisation rules may also have an impact on acquisition finance transactions.

CONDITIONS, PRE-CLOSING COVENANTS AND TERMINATION RIGHTS

Closing conditions

22 Are transactions normally subject to closing conditions? Describe those closing conditions that are customarily acceptable to a seller and any other conditions a buyer may seek to include in the agreement.

Signing and closing of a transaction may occur simultaneously. It is market practice, however, to provide for closing conditions, the most common of which being antitrust and other regulatory clearances. A buyer may seek to extend such conditions so as to include, for instance, the availability of financing, and the absence of any material adverse change between signing and closing, but these are typically heavily negotiated terms.

23 What typical obligations are placed on a buyer or a seller to satisfy closing conditions? Does the strength of these obligations customarily vary depending on the subject matter of the condition?

Sale and purchase agreements typically require both the seller and the buyer to take any reasonable actions that are necessary to satisfy the closing conditions that have been agreed upon. However, in competitive auctions, it is not uncommon to see strict 'hell or high water' provisions.

Pre-closing covenants

24 Are pre-closing covenants normally agreed by parties? If so, what is the usual scope of those covenants and the remedy for any breach?

It is a common feature to have pre-closing covenants whereby the seller undertakes to operate its business in the ordinary course of business in accordance with past practice. Any unusual transactions, such as modifications to the share capital, acquisitions or sales of significant assets, incurrence of indebtedness, hiring or firing of managers or officers, and the creation of encumbrances, will generally require the prior consent of the buyer. In this regard, the drafting, negotiation and implementation of provisions relating to the exchange of information and restrictions on the target's business operations must be assessed carefully to avoid any 'gun-jumping' qualification under applicable antitrust laws, so that the transaction is not deemed implemented before receiving the relevant antitrust clearance (see, for instance, the €80 million record fine imposed in 2016 on telecom operator Altice by the French Competition Authority.

Remedies will vary depending on the nature of the breach of such pre-closing covenants and the terms and conditions of the contract, but would generally result in damages rather than permitting a buyer to terminate the transaction.

Termination rights

25 Can the parties typically terminate the transaction after signing? If so, in what circumstances?

Typically, parties cannot terminate a transaction between signing and closing before a negotiated long-stop date, except to the extent that any condition is, or becomes, incapable of satisfaction. That being said, the reform of the Civil Code has made room for hardship in M&A transactions by allowing the amendment or rescission of a contract if, following an unforeseeable change in circumstances, the performance of such contract becomes excessively onerous for one party. However, the parties may (and typically do) contractually agree otherwise and exclusion of hardship has become standard practice for M&A transactions. A contract may also be rescinded in the case of a force majeure event with anticipated long-term adverse effects.

26 Are break-up fees and reverse break-up fees common in your jurisdiction? If so, what are the typical terms? Are there any applicable restrictions on paying break-up fees?

Break-up fees and reverse break-up fees are becoming more common in seller-friendly transactions in France but they are not used as often as in other jurisdictions such as the United States. No specific restrictions apply to them at the stage of the definitive sale and purchase agreement, as long as they are consistent with the corporate interest of the party potentially liable to pay such fees. Where the parties first enter into a put option agreement in order to allow for the information and consultation process of the relevant employees' representative bodies, only modest break-up fees can be imposed on the seller until the definitive documentation is entered into.

REPRESENTATIONS, WARRANTIES, INDEMNITIES AND POST-CLOSING COVENANTS

Scope of representations, warranties and indemnities

27 Does a seller typically give representations, warranties and indemnities to a buyer? If so, what is the usual scope of those representations, warranties and indemnities? Are there legal distinctions between representations, warranties and indemnities?

The seller customarily gives representations and warranties and, depending on the specific issues raised by a specific transaction, often gives specific indemnities, the scope of which is negotiated on a case-by-case basis.

In practice, representations and warranties will be used to cover any adverse unknown event whose origin pre-dates the execution of the transaction document. Representations and warranties will be grouped into two main categories: fundamental warranties and business warranties, with different conditions for indemnification. The basic set of fundamental representations and warranties includes the following items: capacity of the seller and authority, valid title of ownership of the assets being sold as well as the absence of any third-party rights.

Besides, the seller may also agree to specific indemnities, pursuant to which the seller undertakes to indemnify the buyer against specific risks identified through due diligence. Because specific indemnity provisions usually concern important risks (eg, specific litigations, environmental or compliance issues), they are often euro-for-euro indemnities, which are not subject to the limitations applying to business representations and warranties except for the seller's aggregate liability cap which is, in most cases, equal to the purchase price.

In a seller-friendly market, however, particularly where the seller is a private equity fund, it is not uncommon to limit the representations and warranties given by the seller only to the most fundamental ones (ie, title).

Limitations on liability

28 What are the customary limitations on a seller's liability under a sale and purchase agreement?

Limitations on a seller's liability will typically depend on the types of representations and warranties, with fundamental warranties often carved out from any limitations other than a cap equal to the purchase price.

Business warranties will typically be subject to the following limitations:

- a deductible or a tipping basket;
- a de minimis deductible;
- specific conditions regarding the calculation of claims (net of taxes or insurance proceeds);
- limited survival periods (one to three years, except for tax or labour law warranties, for which the survival period would be the statute of limitation, and environmental representations, which typically survive for five to 10 years); and
- a cap (typically from 5 per cent to 20 per cent of the purchase price).

Transaction insurance

29 Is transaction insurance in respect of representation, warranty and indemnity claims common in your jurisdiction? If so, does a buyer or a seller customarily put the insurance in place and what are the customary terms?

Transaction insurance in respect of representation, warranty and indemnity claims has become more common. When used, transaction insurance policies are customarily put in place by the buyer.

Post-closing covenants

30 Do parties typically agree to post-closing covenants? If so, what is the usual scope of such covenants?

Post-closing covenants are typically agreed to by the parties for limited periods. The following post-closing covenants are customary:

- non-compete;
- non-solicitation;
- confidentiality; and
- access to information.

TAX

Transfer taxes

31 Are transfer taxes payable on the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

Transfers of shares in a company are typically subject to the following stamp duties: 0.1 per cent of the purchase price for shares in joint-stock companies; 3 per cent of the purchase price for shares in limited liability companies or partnerships; and 5 per cent of the purchase price for shares in real estate companies.

There is an exemption from stamp duty for acquisitions of listed securities.

Transfers of a business are subject to stamp duties of up to 5 per cent for the fraction above €200,000 of the purchase price. Transfers of assets are generally not subject to any stamp duty unless they qualify as real property.

It is market practice for the buyer to pay all stamp duties, although the seller and the buyer remain in all cases jointly liable to the tax authorities for such payments.

Corporate and other taxes

32 Are corporate taxes or other taxes payable on transactions involving the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

Transfers of shares, businesses or assets may result in taxable capital gains for the seller.

If the seller is a company subject to French corporate income taxes and if it transfers shares, the tax rate at which the capital gains will be taxed depends on the qualification of the shares transferred. If they qualify as ownership interest (at least 5 per cent interest, held for at least two years), the capital gains will be taxed at a preferred 12 per cent rate. Otherwise, they will be taxed at the applicable corporate income tax rate. If the seller is a French company subject to corporate income taxes that transfers a business or assets, the capital gains on such transfer will be taxed at the normal corporate income tax rate.

Value added taxes are not applicable to transfers of shares or businesses. However, value added taxes may be applicable to transfers of individual assets, depending on the nature of such assets.

EMPLOYEES, PENSIONS AND BENEFITS

Transfer of employees

33 Are the employees of a target company automatically transferred when a buyer acquires the shares in the target company? Is the same true when a buyer acquires a business or assets from the target company?

Employees of a company whose shares are being transferred remain employees of this company and are automatically transferred (indirectly) to the buyer.

In addition, employees of a company are automatically transferred to the buyer who acquires an 'autonomous economic entity' (ie, an organised set of assets and persons facilitating the exercise of an economic activity that pursues a specific objective). However, the acquisition of individual assets from a seller does not always trigger the automatic transfer of employees. Hence, in the event of an asset sale, an analysis of the scope of the transaction must be run to assess whether it will entail the automatic transfer of employees.

Notification and consultation of employees

34 Are there obligations to notify or consult with employees or employee representatives in connection with an acquisition of shares in a company, a business or assets?

Employees' representatives of a target company must be notified or consulted, or both, prior to the acquisition of the shares or the business of such target company. The acquisition of assets will give rise to notification or consultation obligations to the extent that it results in the transfer of an autonomous economic entity or impacts the production structures of the target company. The relevant notification and consultation process must be run prior to the signature of any agreement obligating the seller to sell the relevant shares or business. This is the reason why put option agreements are signed often in a first step, of which agreement obliges the buyer to buy but does not oblige the seller to sell, and the share purchase agreement is signed only when the employee's consultation is completed. Notification or consultation obligations of employees' representatives may also concern the seller and buyer if they operate in France.

In late 2017, the French government reformed the French Labour Code and, in particular, simplified the framework of the employee representative bodies by merging the then existing various bodies into a single social and economic committee. This social and economic committee has the same function as the previous bodies, notably those attributed to the former works councils. Thus, for companies having more than 50 employees for at least 12 months, the target company's social and economic committee must be notified and consulted prior to any changes made to the target company's economic or legal organisation, including any merger, acquisition, changes to the production structure or upon any acquisition or sale of a subsidiary. In the context of takeover bids for listed companies, a special notification and consultation process applies to the social and economic committee of the target company.

Small or medium-sized enterprises (ie, companies with fewer than 250 employees and an annual revenue or total assets not exceeding €50 million or €43 million, respectively) are subject to specific obligations in terms of employee information in the context of an acquisition so that such employees are given the opportunity to bid for the acquisition of the shares or business of the target company. Hence, in connection with the acquisition of a business or at least 50 per cent of the shares of a small or medium-sized enterprise, the employer must inform the employees at least two months prior to closing the transaction if the target company does not have a social and economic committee, or otherwise no later than at the same time as the consultation of the social and economic committee. This two-month period can be shortened if all employees waive their right to submit a bid for the company. A breach of this obligation may result in penalties for the employer but does not trigger the nullity of the acquisition.

Transfer of pensions and benefits

35 Do pensions and other benefits automatically transfer with the employees of a target company? Must filings be made or consent obtained relating to employee benefits where there is the acquisition of a company or business?

As a general principle, all contractual rights and obligations of employees of a company whose shares are being transferred are transferred to the buyer of such company, pursuant to the automatic transfer rule, without any further filing. However, the automatic transfer rule does not apply to other benefits granted in accordance with specific collective agreements that might be no longer applicable following the transaction, including voluntary supplementary pension schemes. The PACTE Bill has, however, increased the possibilities for employees to continue benefiting from such schemes following a transfer.

UPDATE AND TRENDS

Key developments

36 What are the most significant legal, regulatory and market practice developments and trends in private M&A transactions during the past 12 months in your jurisdiction?

The M&A market has been very active in the past few months and has provided sellers with significant leverage to negotiate very attractive terms in M&A agreements (from both a financial and contractual standpoint). From a regulatory standpoint, foreign investment control has been tightened.

Coronavirus

37 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

France has enacted various pieces of legislation to address the pandemic.

- To assist companies to improve their financial condition, the state has enacted legislation allowing it to act as a guarantor for credit facilities entered into by such companies.
- A piece of legislation has been enacted that prevents contractual termination provisions from being triggered during the pandemic.
- To ensure that companies working on a possible treatment or vaccine against the covid-19 virus would not be acquired by foreign persons or entities without the government having a say in those transactions, biotechnology has been added to the list of sensitive sectors for which foreign acquisitions require the prior approval of the government.
- With respect to listed companies engaged in sensitive sectors, the threshold above which acquisitions by non-US persons or entities trigger the application of the French foreign investment control regime has been lowered from 25 per cent to 10 per cent. This measure is currently scheduled to expire at the end of 2021, but it may be extended (it has already been extended once).
- French corporate law has been amended to facilitate the holding of shareholders' meetings on a remote basis.

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