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Top Tips for Doing Private M&A Deals in France

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Status: **Law stated as at 20-Mar-2024** | Jurisdiction: **France**

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A Practice Note setting out top tips from French counsel for doing private share or asset acquisitions in France. It highlights unique issues lawyers from outside France should be aware of when doing cross-border private M&A deals in France.

As an important member of the European Union and key economy in Europe, M&A lawyers from outside of France may have many reasons to find themselves in private M&A transactions in France.

This Note outlines top tips that a French resident counsel would give to a non-French resident counsel undertaking private M&A transactions where the target company or business is based in France. Recommendations can vary according to the sector the target operates in but sectoral considerations are outside the scope of this Note. The Note is based on insights and views shared by French counsel, Sébastien Pontillo, of Kramer Levin.

For a guide to Practical Law's resources that may be relevant when undertaking an acquisitions of a company or a business as a going concern in France, including links to the relevant materials, see Private Mergers & Acquisitions Toolkit (France).

Conducting a French M&A Transaction

International counsel may want to be aware of the following when conducting private M&A transactions in France:

- Foreign investment in certain sensitive or strategic industries in France may be subject to the prior approval of the French state. See Compliance with Regulation on Foreign Direct Investment.
- Transactions may need to comply with the antitrust regulation. See Compliance with Antitrust Regulations.
- Labour regulations need to be complied with, especially the consultation to the works council (*comité social et économique*) (CSE) and informing target's employees on the contemplated sale and their right to make an offer to buy the target in accordance with act number 2014-344, 17 March 2014, on consumers (loi nº 2014-344 du 17 mars 2014 relative à la consommation) (Hamon Law). See Compliance with Labour Regulations.
- Structuring the transaction as an asset purchase or a share purchase will have very different legal consequences in France. See Consider the Transaction Structure: Share Purchase or Asset Purchase.
- Payment adjustments structured either as a locked-box or completion accounts have a different treatment in France. See Consider Purchase Price Adjustment
- Managers can receive part of the purchase price in non-cash form, known as rollover. See Consider Rollover of the Managers.
- The concept of abusive breach of negotiations can impact the transaction. See Consider Consequences of Abusive Breach of Negotiations
- When engaging in transactions in France, parties should pay thorough attention to the treatment of information during due diligence. See Due Diligence Enquiries and Treatment of Information.

Compliance with Regulation on Foreign Direct Investment

Foreign investment in certain sensitive or strategic industries in France may be subject to the prior approval of the French State.

According to articles L.151-3 and R.151-1 to R.151-17 of the Monetary and Financial Code (*Code monétaire et financier*) the requirement to obtain mandatory prior authorisation from the French Ministry of Economy (*Ministère de l'Économie et des Finances*) (MINEFI) before proceeding with a sensitive investment is triggered when:

- The investor is a foreign investor.
- The investor acquires directly or indirectly:
  - all or part of a branch of activity of a French company;

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  - the control of a French company as defined under article L.233-3 of the Commercial Code (Code de Commerce); or

    According to article L.233-3 of the Commercial Code, a company is controlled by another company when it owns (directly or indirectly) the majority of the voting rights of such company, or holds the majority of the voting rights through an agreement entered into with other shareholders, or determine the shareholders' decisions with its voting rights, or has the power to appoint or terminate the appointment of the majority of the company's directors.

    Any shareholder is deemed to exercise control when it holds (directly or indirectly) more than 40% of the company's voting rights, and no other shareholder holds (directly or indirectly) more than that percentage.

  - only if the foreign investor is a non-European Union entity, a stake of at least 25% of the share capital or voting rights of a French company if such company is non-listed, or 10% of the share capital or voting rights of a French company if such company is listed.

- the French target is involved in certain activities likely to threaten public order, public safety or national defense interests or in relation to research, production or selling of weapons, ammunition, powder and explosive substances, it being specified that French law (Article R.151-3 the French Monetary and Financial Code) provides for a broad list of activities falling within the scope of the French foreign investments' regulation (for instance, activities carried out by entities in possession of national defence secrets or having entered into a contract with the French Ministry of Defence, either directly or indirectly (through sub-contracts), for the manufacturing of goods or the provision of services in connection with such activities).

The approval of the MINEFI must be obtained before completion of the contemplated transaction. The MINEFI has, on filing of the request, 30 business days either to approve or reject the transaction or otherwise to notify the investor that further analysis is needed to determine whether the transaction can be authorised subject to certain conditions or undertakings to protect national interests. If no response is received within this 30 business days timeframe, the request for authorisation is deemed rejected. If the MINEFI notifies that further analysis is required, the MINEFI has 45 additional business days to either grant the authorisation (with or without conditions) or to refuse the contemplated investment. If no decision is given by the MINEFI after this additional 45 business days period has elapsed, the contemplated investment is deemed rejected.

Before filing an authorisation request to the MINEFI, the investor or the French target can, if any doubt exists, file a written request before the completion of the investment asking the MINEFI whether the contemplated investment is subject to a prior authorisation (*rescrit* procedure). However, in this event, the lack of response from the MINEFI within a two-month period does not exempt the investor to request a prior authorisation if the investment falls within the scope of the legislation. The MINEFI is fairly responsive. In practice, as soon as there is a reasonable doubt, an authorisation request is directly filed (instead of a *rescrit*) to save time.

In practice, filing should be done after signing of the share purchase agreement subject to the condition precedent of obtaining the MINEFI authorisation.

Any investment falling within the scope of the French foreign investments' regulations and completed before obtaining the MINEFI authorisation will be null and void (article L.151-4, Monetary and Financial Code). The MOE may:

- Order the sale to be rescinded at the sole cost of the investor (article L.151-3-1, Monetary and Financial Code).
- Impose financial sanctions (up to twice the amount of the irregular investment, or 10% of the annual turnover (tax excluded) of the French target, or an amount of EUR5 million) and criminal sanctions on the investor (for individuals, up to five-year imprisonment and a fine of an amount between the amount of the investment and double the amount of the investment and, for legal entities, a fine of five times the amount applicable to individuals) (article L.151-3-2, Monetary and Financial Code).

It is usually difficult to completely exclude filing for clearance with the MINEFI given that the list of activities falling within the scope of the French foreign investments regulation can be interpreted broadly. However, in practice, the need for a prior authorisation from the MINEFI would only be required to the extent that the concerned activities are essential or critical to the safeguard of French national interests. As a consequence, an extensive understanding of the French target's activity is needed to be able to consider, in practice, if French national interests are likely to be jeopardised (for instance, it is recommended to assess if the activities would be difficult to substitute or not, in particular by considering whether the French target owns a significant market share in France and the number of competitors on the French market).

For more information on foreign investment regulation in France, see Practice Note, Foreign Investments in France. To view and customise comparison charts on foreign investment, see Quick Compare Chart, Regulation of Foreign Direct Investment (FDI).

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Compliance with Antitrust Regulations

Article L.430-2 of the Commercial Code provides that a transaction qualifying as a concentration must be notified to the French Competition Authority (*Autorité de la Concurrence*) when:

- The combined aggregate worldwide pre-tax turnover of all the undertakings to the merger exceed EUR150 million (for this purpose, pursuant to Council Regulation (EC) No. 139/2004 of 20 January 2004, on the control of concentrations between undertakings (EC Merger Regulation), an "undertaking" is an economic unit which may consist of several distinct persons, natural or legal, engaged in an economic activity, that is, an activity consisting in offering goods or services on a given market, regardless of its legal status and the way in which it is financed).
- The individual pre-tax turnover generated in France by at least two of the undertakings concerned exceed EUR50 million.
- The transaction is not subject to clearance by the European Commission.

According to article L.430-2 of the Commercial Code, if the concentration involves undertakings in the retail trade sector, it must be notified when:

- The combined aggregate worldwide pre-tax turnover of all the undertakings to the merger exceed EUR75 million.
- The individual pre-tax turnover generated in France by at least two of the undertakings concerned exceed EUR15 million.
- The transaction is not subject to clearance by the European Commission.

According to article L.430-2 of the Commercial Code, if the concentration involves undertakings in French overseas departments and French overseas communities (namely, French Guiana, Guadeloupe, Martinique, Mayotte, Réunion, French Polynesia, Saint Barthélemy, Saint Martin, Saint Pierre and Miquelon, Wallis and Futuna), it must be notified when:

- The combined aggregate worldwide pre-tax turnover of all the undertakings to the merger exceed EUR75 million.
- The individual pre-tax turnover generated in France by at least two of the undertakings concerned exceed EUR15 million (reduced to EUR5 million in the retail trade sector).
- The transaction is not subject to clearance by the European Commission.

According to article L.430-1 of the Commercial Code, a transaction qualifies as a concentration if, either:

- Two or more formerly independent undertakings merge.
- One or several persons acquire control (in accordance with article 3 of the EC Merger Regulation) of all or part of one or several undertakings, it being specified that control arises from rights, contracts or any other means that enable the party to exercise a decisive influence on the activity of an undertaking, individually or jointly.
- A "full-function joint venture" that performs all the functions of an autonomous economic entity on a lasting basis is created (*enterprise commune accomplissant de manière durable toutes les fonctions d'une entité économique autonome*).

The transaction is suspended until the French Competition Authority delivers its clearance decision or not. Obtaining clearance from the competition authority constitutes a condition precedent.

Failure to notify before closing (gun-jumping) is severely sanctioned by the French Competition Authority which can impose a fine on the notifying party or parties (that meaning, in the case of a sale, the notifying party is the person acquiring control of all or part of an undertaking and, in the case of a merger or the creation of a joint venture, all the parties involved in the transaction are considered notifying parties (article L.430-3, Commercial Code) of:

- In the case of a legal entity, amounting to up to five percent of the notifying party's consolidated turnover in France for the last given year, calculated on the basis of the last certified consolidated annual accounts.
- In the case of an individual, amounting to up to EUR1.5 million.

The transaction may be cleared by the French Competition Authority unconditionally or subject to behavioural or structural remedies. The French Competition Authority may prohibit a transaction when it is likely to harm competition and the proposed remedies are insufficient to compensate this harm.

An appeal can be brought in front of the French Administrative Supreme Court (*Conseil d'Etat*) within two months of publication of the decision on the French Competition Authority's website by the parties or by any interested third parties.

Mergers may also be scrutinised post-closing by any European competition authority, based on third party complaint, if it is likely to result in an abuse of a dominant position (*Towercast (Case C-449/21) ECLI:EU:C:2023:207*).

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On 26 March 2021, the European Commission revised the approach of the referral mechanism set out in article 22 of the EC Merger Regulation allowing national competition authorities to request the European Commission to review a transaction not meeting European Union or national merger thresholds to prevent predatory or consolidating acquisitions (killer acquisitions). In the event of a referral by the French Competition Authority to the European Commission, the European Commission will consider, for example, the value of the transaction and the difference between the turnover of the purchaser and the turnover of the target to assess the competitive potential of the target. This new mechanism will allow the European Commission to catch transactions that have escaped their review in digital, biotechnologies, pharmaceutical and industrial sectors for example.

For more information on competition and antitrust regulation in France, see Practice Note, Competition: Private Acquisitions (France). To view and customise comparison charts on antitrust regulation, see Quick Compare Chart, Merger Control.

Compliance with Labour Regulations

Consultation with CSE

In France, companies employing at least 11 employees over a 12-month period must set up a CSE (Article L.2311-2, Labour Code (*Code du Travail*)). In companies with more than 50 employees, the CSE has extended powers, including the right to be informed and consulted in the event of changes to the company's economic or legal organisation. In this context, when a company (as seller, purchaser or target) with more than 50 employees is a party to a transaction, the CSE must be informed and consulted on the contemplated transaction before signing.

The consultation process with the CSE involves the following steps:

- The company representative must convene a meeting of the CSE.
- When convening the meeting, or at the day of the meeting at the latest, the company representative must provide the CSE with a detailed memorandum describing the contemplated transaction, its rationale, timing and consequences on the employees (Transaction Memorandum).
- At the meeting, the company representative must present the Transaction Memorandum to the CSE members and answer any of their questions.
- After the CSE meeting, the CSE has one month to give its opinion (which can be positive or negative).

  This one-month period can be extended to:

  - two months if the CSE appoints an expert. The CSE can appoint the expert at its own discretion, without the employer's prior consent; or
  - three months if one or more experts' reviews are carried out at the level of the both the central CSE and one or more local CSEs.

  If the CSE does not issue its opinion in the applicable timeframe, it will be deemed to have issued a negative opinion.

Irrespective of the opinion the CSE ultimately renders (positive, negative or absence of opinion which is deemed to be a negative opinion), the parties can still complete the proposed transaction following the consultation. The rationale is that the CSE has the right to be consulted and give its opinion on the proposed transaction (failing to consult the CSE would be a criminal offence for the legal representative), but the opinion in itself has no legal or operational impact on the decision to buy or sell the company.

For more information on the employee information and consultation process, see Practice Note, Employee Information and Consultation Process: Private Acquisitions (France).

Compliance with Hamon Law

The seller and the target must comply with the Hamon Law if the target:

- Has no obligation to set up a CSE.
- Has the obligation to set up a CSE and has fewer than 250 employees and:
  - an annual turnover (*chiffre d'affaires*) that does not exceed EUR50 million; or
  - an annual total assets (*total de bilan*) that does not exceed EUR43 million.

Pursuant to articles L.141-23 and L.23-10-1 et seq. of the Commercial Code, before the transfer of its business as a going concern (*fonds de commerce*) or the transfer of one stake (to the contrary of aggregate stakes) representing more than 50% of the shares or the securities giving access to a majority of the capital, of a private or public limited liability company, the legal representative of the target must individually inform each target employee in writing of the contemplated transaction (the MINEFI website provides for templates of notice by letter and it is common practice to use templates).

The information to be shared includes the intention of the owner of the business or of the shares to sell, and the right of the employees to submit an offer to take over the business or the company. The seller is under

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no obligation to provide more detailed information. Employees are informed by any means that can provide proof of the date of receipt. In practice, this information is often provided by one of the following:

- During an employee information meeting, at the end of which employees sign the attendance register.
- Hand-delivered letter, with written evidence of receipt.
- Registered letter with acknowledgment of receipt.

The seller has no legal obligation to accept any offer received from the target's employees.

The timing to provide the information is as follows:

- In companies without an CSE with extended obligations (less than 50 employees), at least two months before the signing of the purchase agreement.

  In this case, the transaction must be completed within the two months following the notice from all employees informing on their decision not to submit an offer. This decision must be explicit and unequivocal (in practice, waiver letters signed by the employees are collected).
- In companies with a CSE with extended obligations (at least 50 employees), at the latest, on the day of the CSE meeting (see Consultation with CSE).

  As soon as the CSE consultation is completed, the Hamon Law will be deemed complied with, provided that the employees have individually received the information on the transaction.

Non-compliance with Hamon Law does not render the transaction null and void but it triggers a civil fine for the seller of up to 2% of the purchase price.

Consequences of the CSE Consultation and the Hamon Law on French M&A Transactions

A definitive agreement cannot be entered into by the seller before the consultation process with the CSE and the employees of target (as applicable) is fully completed.

Market practice in France is often for the parties to first enter into a put option agreement, pursuant to which the purchaser undertakes to acquire the target business, and the seller has the right (and not the obligation) to exercise the put option on completion of the CSE consultation and Hamon Law requirements. A fully negotiated purchase agreement is attached to the put option agreement. In exchange for the put option, the seller grants the purchaser a long-term exclusivity (generally six months). The purchase agreement is then signed once the consultation process has been completed. Before the signing of the purchase agreement, the seller should provide the purchaser with supporting evidence that the CSE has delivered an opinion (or is deemed to have delivered an opinion) and that the Hamon Law has been complied with.

It is not common practice in France to include in the put option break costs to be paid by the seller to the purchaser if the seller does not exercise the put option. Even when break costs are set, the amount of such break costs must be reasonable (and usually correspond only to the costs incurred by the purchaser).High break costs might constitute a criminal offence as it could be considered that the seller had no choice but to exercise the put option considering the amount of the break costs. Under French law, break costs (regardless of their amount) are considered as a penalty clause (*clause pénale*) and therefore may be freely reduced by the competent commercial court.

For more information on employee information and consultation process, see Practice Note, Employee Information and Consultation Process: Private Acquisitions (France).

Consider the Transaction Structure: Share Purchase or Asset Purchase

The two principal methods to acquire a business in France are either a share transfer or an asset transfer. However, it is common practice in France to opt for a share transfer rather than an asset transfer, as the latter can qualify as a transfer of a business as a going concern (*cession de fonds de fonds de commerce*) if certain conditions are met. Generally, the transfer of a business as a going concern is more complex and costlier to implement than a transfer of shares.

It is generally accepted that there is a transfer of a business as a going concern if and provided that the asset sale results into a transfer of the "*clientele*" attached thereto. A business as a going concern may also include inventory, equipment, commercial lease for the premises and insurance policies. In addition, employment agreements attached to the business as a going concern are automatically transferred to the purchaser. However, a business as a going concern does not include other assets such as real property, contracts other those set out above, receivables or debts. It is nevertheless possible to expressly include these items when transferring a business as a going concern provided that the specific rules applying to the transfer of these items are duly complied with.

For more information on the differences between a share purchase and an asset purchase, see Practice Note, Acquisition Structures: Comparing Asset and Share Purchases (France).

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Asset Purchase

Anyone who is contemplating to purchase or sell a business as a going concern in France should be aware of the main following constraints attached to this structure.

- **Execution of a business sale agreement drafted in French.** The business as a going concern transfer must be structured on the basis of a business sale agreement, which must be drafted in French. A written document containing monthly sales as from the end of the previous fiscal year until the month before completion of the sales must also be signed by the parties (article L.141-2, Commercial Code).
- **Pre-emption right from the city council.** If the business as a going concern is located in a safeguard perimeter, the transfer of such business as a going concern will be subject to a pre-emption right from the city council in which the business is located. Consequently, the absence of pre-emption by the city council (which takes the form of either an authorisation or a failure to respond within the two months following the notice request sent by the seller) must constitute a condition precedent to completion of the transaction in the purchase agreement.
- **Publicity formalities.** To protect creditors, the sale of a business as a going concern requires compliance with certain publicity and registration formalities:
  - publication by the purchaser of the main terms and conditions of the sale in a legal newspaper. The publication covers: name and address of the seller and the purchaser, date of the sale, place of business, price and time period for the exercise of the creditor's rights (article L.141-13, Commercial Code). The information is published within 15 days following the signing of the business sale agreement (articles L.141-12 and L.141-13, Commercial Code). The list of available legal newspapers is determined by the applicable law; and
  - publication at the purchaser's request to the clerk of the competent commercial court of a notice relating to the sale in the *Bulletin Officiel des Annonces Civiles et Commerciales* (BODACC) within 15 days as from the signing of the business sale agreement (article L.141-12, Commercial Code). The BODACC publication is made within three days as from the publication in the legal newspaper (article R.123-212, Commercial Code).
- **Tax registration of the business sale agreement.** According to article 635, 1-4º of the General Tax Code (*Code Général des Impôts*) and French tax authorities guidelines (*Bulletin Officiel des Finances Publiques* (BOFIP)), the business sale agreement must be registered with the business tax service (*service des impôts des entreprises*) within 15 days from the signing of the agreement, and in any case before the publications in the legal newspaper and the BODACC.

  In addition, further to article 201 of the General Tax Code, the seller must notify the sale of the business as a going concern to the business tax service within a time period of 45 days since the last of the publications in the legal newspaper and the BODACC. This notification shall include the closing date, the identity of the purchaser and the address of the purchaser. If the seller is subject to standard tax rate (*régime réel d'imposition*), it must notify its profit (*bénefice réel*) and a detail of its profit and loss account (*compte de résultat*) to the business tax service within 60 days as from the last of the legal publications.

  Additional formalities are required when real estate property is transferred at the same time as the business as a going concern.
- **Creditors' rights.** To secure the repayment of their receivables, the seller's creditors have the right to file an opposition against the payment of the purchase price by the purchaser to the seller within ten days as from the last of the legal publications. All oppositions must be sent to the postal address specified by the purchaser (*domicile élu du cessionnsaire*) in the notice published in the legal newspaper (Article L.141-14, Commercial Code).

  If the purchaser pays the purchase price to the seller before the expiry of the above ten-day period, then the seller's creditors may obtain repayment of their receivables (that they hold against the seller) from the purchaser (Article L.141-17, Commercial Code).

  If any opposition is filed within the above ten-day period and the purchase price has not already been paid by the purchaser to the seller, then the President of the competent French Commercial Court acting in summary proceedings (*statuant selon la procédure accélérée au fond*) at the seller's request can authorise the seller to receive the purchase price from the purchaser promptly despite the opposition(s) made, provided that the seller pays to the *Caisse des Dépôts et Consignations* (or to any other third party appointed for this purpose by the seller with the approval of the President of the competent French commercial court) an amount equal to the receivables held by the opposing creditor(s) (Article L.141-15, Commercial Code). In that case, the opposing creditors no longer have the right to obtain repayment of their receivables (which they hold against the seller) from the purchaser and will ask the *Caisse des Dépôts et Consignations* (or the third party appointed for this purpose, as the case may be) to release the amount of their receivables.

  If any opposition is filed within the above ten-day period and the purchase price is paid by the purchaser to the seller while the procedure set out above has not

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been complied with, then the opposing creditors may obtain repayment of their receivables (that they hold against the seller) from the purchaser.

Usually, the business sale agreement provides that the absence of opposition from creditors is a condition precedent to the closing. In addition, as a consequence of the above, payment of the purchase price generally does not take place at completion and, the business sale agreement generally provides that the payment of the purchase price is subject to escrow pending the expiry of the ten-day period for creditors to exercise their opposition rights (and the expiry of the period available for the French tax authority to exercise its rights described in below). However, such proceedings initiated by creditors are rare in practice given that they require creditors to check legal newspapers (containing legal announcements) on a regular basis or to set up an IT watch, and initiate proceedings rapidly.

- **Tax duties and value added tax (VAT).** Registration duties provided for in articles 638 and 719 of the General Tax Code payable to the business tax service are higher than for a share purchase:
  - for the portion of the purchase price between EUR23,000 and EUR200,000 (excluding goods for sale (*biens destines à être vendues*)), registration duties amount to 3% of the purchase price; and
  - for the portions of the purchase price over EUR200,000 (goods for sale excluded), registration duties amount to 5% of the purchase price.

  Unless otherwise agreed between the parties and as is market practice, the purchaser bears the cost of the registration duties. In any case, both the purchaser and the seller are jointly liable for the payment of the registration duties in case the purchaser fails to do so.

  Goods for sale are subject to VAT which is recoverable by the purchaser in principle, to the extent the purchaser is subject to VAT.
- **Commercial and business risks.** The transfer of a business as a going concern may raise commercial and business risks relating to the continuation of the activity after completion as the business may be split as part of the transaction (assets, contracts, staff, among others) and commercial contracts necessary for the business are not automatically transferred to the purchaser and often require third party consent. In addition, the absence of audited financial statements covering only the business being transferred requires the preparation of new pro forma accounts to confirm the purchase price.

Despite the above drawbacks, the transfer of a business as a going concern has the significant advantage to exclude liabilities (namely existing liabilities as at completion, not future liabilities arising from the running of the business after completion which will be borne by the purchaser). In addition, as a consequence of this structure, the purchaser acquires the full ownership and direct control of the relevant assets (as opposed to a share acquisition where the assets are directly controlled by a target company).

Share Purchase

Share transfer of a commercial company in France is simpler (as no specific formalities are required) and much cheaper in terms of registration duties (the tax rate is 0.1% of the purchase price). In addition, in case of share transfer, the risk of absence of assignment of commercial contracts is limited as, with the exception of specific change of control provisions and contracts entered into in consideration of the target (so-called intuitu personae contracts), all contracts shall remain in force. However, as part of this structure, the purchaser acquires the target company with all liabilities and it is always difficult to assess such liabilities and obtain appropriate protections (even if contractual protection, such as representations and warranties and specific indemnities, is obtained).

Consider Purchase Price Adjustment

Locked box share purchase agreements are very frequent in the French market, in particular in private equity (PE) transactions. For M&A transactions, the choice between locked box and post-closing adjustment of the purchase price depends on the context and the industry where the parties operate at stake. Locked box is frequent for M&A transactions that are bolt-on acquisitions of a PE backed company, but less frequent between pure industrial players that may prefer a post-closing adjustment which, although it is more cumbersome, is more reliable and reflects accurately the purchase price of the company at closing.

For more information on purchase price adjustments, see Practice Notes, Earn-out, locked box and retention: private acquisitions (France) and Locked Box Mechanisms in Private Acquisitions (France).

Consider Rollover of the Managers

It is common that managers of the target company (who are also shareholders) rollover a portion of the company's shares they hold to the purchaser or a company of the purchaser's group.

In this context, in order to protect minority shareholders of the purchaser, and to the extent that the purchaser is a French company, French law requires the appointment of a contribution auditor (*commissaire aux apports*) who cannot be the statutory auditor of the target company and whose mission is to verify that the value

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of the shares being transferred is at least equal to the value of the shares issued by the purchaser (beneficiary company) in exchange of the contributed shares (Article L.225-147, Commercial Code). The contributor auditor then issues a report which shall be filed with the commercial court at least eight days before closing, which has an impact on the timing of the transaction. The content of this report cannot be challenged.

Consider Consequences of Abusive Breach of Negotiations

In the context of all discussions and negotiations before the signing of the transaction (completion being subject to any condition precedent), French law provides for the concept of abusive breach of negotiations (*rupture abusive des pourparlers*). On the basis of article 1112 of the Civil Code which requires to conduct negotiations in good faith, a party to a round of negotiations on a transaction may claim for damages if the other party is deemed to have abusively breached the negotiations. In determining whether there has been an abusive breach of negotiations, judges consider several criteria and particular the abruptness of the breach of the negotiations, the duration of the negotiations, the advanced stage of the negotiations and the fact that the victim of the breach was in good faith thinking that the transaction would be completed. In practice, the abusive breach of negotiations is hard to demonstrate.

Due Diligence Enquiries and Treatment of Information

General data protection and antitrust regulations applicable in France prevent the disclosure of certain sensitive information and, consequently, have a direct impact on the way certain documents are communicated during the due diligence process.

In particular, any data that makes it possible to identify a natural person is personal data and should be anonymised before being made available in a data room (for instance, employee identity data).

In addition, to ensure compliance with antitrust regulations, certain measures must be taken to avoid communication of sensitive data when the purchaser and the seller are competitors. In practice, the purchaser should set up a "clean team" which will be in charge of auditing the most sensitive information. Members of the "clean team" should be subject to strict confidentially provisions and should not hold operational functions. In other words, the "clean team" will be composed mainly of lawyers and legal staff. A clean team agreement is often signed to organise this specific process.

Drafting M&A Documents

International counsel may want to be aware of the following when drafting the most common private M&A documents in France:

- French Civil Code general concepts may have a direct impact on corporate transactions. See Direct Impact of the Civil Code.
- Certain transaction documents may need to be drafted in French. See Consider the Use of Language.
- When drafting the transaction documents parties need to pay to attention to the dispute resolution clause. See Consider the Dispute Resolution Mechanism.
- Transactions involving real estate in France require the involvement of a notary and the signature of notarial deeds. See Consider the Role of the Notary.
- Electronic signature can be used in M&A transactions in France provided that certain requirements are met. See Consider When Electronic Signature are Used
- Agreements should be drafted taking into account limitations and approach to the representations and warranties. See Warranties and Indemnities Limitations and Use.

Direct Impact of the Civil Code

Pre-Contractual Disclosure Obligation

Article 1112-1 of the French Civil Code states that the party who has knowledge of decisive information for the other party's consent must inform that party in the event that, legitimately, it ignores this information or has placed its trust in the buyer or the seller (as the case may be). Failure to comply with this pre-signing disclosure obligation may result in damages and, in some cases, the nullity of the contract. The same article specifies that the estimated value of the assets or shares sold is not an information concerned by this obligation. The parties may neither limit nor exclude such information duty in the purchase agreement.

Therefore, in practice, the seller must reasonably seek out and provide information in writing to the purchaser that is significant with respect to the sale. For instance, the absence of regulatory approval necessary to the company's regulated business should be considered as a significant information, as well as the ownership of the shares of the target.

To protect the seller, it is common to include in the purchase agreement that the purchaser has had access to the data room and the opportunity to conduct

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its own due diligence of the target company and, in this respect, has obtained from the seller, the target company's information it considered necessary to finalise its analysis and assess the value of the target company. To protect the purchaser, it is common to include in the purchase agreement a representation from the seller that states that the data room has been prepared in good faith and that the seller is not aware of any circumstance not disclosed in writing to the purchaser and that renders any information provided to the purchaser and its advisers untrue, inaccurate or misleading or the disclosure of which might reasonably affect the willingness of the purchaser to buy the target company or the price at or terms on which the purchaser would be willing to purchase it.

Specific Performance

Article 1221 of the Civil Code provides that the creditor of an obligation may not pursue specific performance in case of manifest disproportion between the cost to the debtor in good faith and the benefit to the creditor (in practice "manifest disproportion" can be difficult to determine since there are no legal criteria to determine and the appraisal of disproportion depends solely on the judge's discretion). Such article also provides that specific performance cannot be requested when it is impossible to do so (in particular for service agreements as judges are reluctant to force a party to do a particular thing even if provided for in the contract).

It is market practice in France that the parties agree, in the purchase agreement, on a clause under which each party waives the application of article 1221 of the Civil Code and may seek specific performance (without prejudice to any other rights or remedies that the concerned party may have).

Therefore, the claiming party can more easily take legal action and obtain a court decision ordering the transfer of the shares or the assets of the target company.

Hardship

Article 1195 of the Civil Code provides for a mechanism similar to a hardship clause (*revision pour imprévision*). If a change in circumstances, unforeseeable when the contract was entered into, makes performance of the contract excessively onerous for a party who had not agreed to assume the risk, that party may request renegotiation of the contract from its co-contracting party. If renegotiation fails, the judge may, at the request of any party, change or terminate the contract.

It is market practice in France that the parties agree, in the purchase agreement, on a clause under which each party waives the application of article 1195 of the Civil Code and agree to assume any risk which may arise from any occurrence of unforeseeable circumstances.

Determinable price in put and call option agreements

Article 1591 of the Civil Code states that a sale is null and void if its price is not determined or determinable.

Put and call option agreements which may be entered into as part of an M&A transaction must provide for a determined share or asset price (as applicable) or clear and precise methods to determine such price (for example, a multiple of EBITDA less net financial debt). Otherwise, the promising party could argue that the option agreement is null and void and refuse to execute its obligations.

To avoid this risk, it is market practice to include the appointment of an independent expert in the option agreement in case of disagreement between the parties on the calculation of the purchase price (on the basis of the method or price formula provided for in the share purchase agreement). The parties can freely decide who will bear the fess of the expert (for instance, the purchase agreement can determine that the expert's fees shall be equally apportioned between the parties or that the party who has been contradicted by the expert shall bear the expert's fees).

Consider the Use of Language

Share purchase agreements of French targets may be drafted in French or English. However, the business sale agreement in the context of the transfer of a business as a going concern must be drafted in French. (See Consider the Transaction Structure: Share Purchase or Asset Purchase.)

Any other documents which are subject to filing formalities with French authorities must be drafted in French. For instance, articles of association must be drafted in French as they are publicly available and filed with the commercial court, as are shareholders' minutes deciding a share capital increase or board minutes appointing a legal representative. On the contrary, board minutes relating to decisions that are not subject to filing (for example, authorising the execution of a share purchase agreement) can be drafted in French or in English, except if the articles of association state otherwise.

Consider the Dispute Resolution Mechanism

Dispute resolute is flexible in France. The parties may decide, in the share purchase agreement, to submit any dispute in relation to the agreement to the jurisdiction of the commercial court or an arbitration court. In most cases, the parties submit any dispute to the French Commercial Courts.

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The parties may provide for the exclusive jurisdiction of the international chamber of the Paris Commercial Court (*Chambre Internationale du Tribunal de commerce de Paris*) which is familiar with agreements drafted in English and where the use of the English language (or other languages) is permitted.

Consider the Role of the Notary

The appointment of a French notary is mandatory in case of the sale or acquisition of a real estate property to the extent the object of the sale is the transfer of the real estate asset. On the contrary, if the shares of a company (owning real estate assets) are sold, the involvement of a notary is not required in principle but it is common practice to appoint one who will verify the ownership of the real estate assets.

For more information on the role of the notary in transactions in France, see Practice Note, The Role of the Notary in Corporate and Commercial Transactions (France).

Consider When Electronic Signature are Used

Electronic signature is commonly used in France, including for share or asset purchase agreements as well as ancillary documents and closing deliverables. However, the Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market (eIDAS Regulation), which is directly applicable in France, provides for certain requirements regarding the process used. Therefore, it is necessary to use a qualified trust service provider (the full list of providers is available online on the European Union Commission website). Docusign and Yousign are for instance two providers commonly used in France. In this regard, PDF documents with scanned signatures should not be used.

To mitigate the risks, the parties usually agree on a clause which provides that the electronic signature has the same legal validity as a handwritten signature and under which each party waives all claims with regard the electronic signature used.

For more information on electronic signature use in France, see Practice Note, Executing Contracts in France: Electronic Signatures.

Warranties and Indemnities Limitations and Use

There are no specificities in France concerning the scope of warranties and indemnities. For more information on warranties and indemnities in French transactions, see Practice Note, Warranties and Indemnities: Acquisitions (France).

Difference with the Anglo-Saxon Approach

French practice regarding warranties and indemnities is different from the Anglo-Saxon practice. In particular:

- There is no separate disclosure schedule and the disclosures are directly appended to the share purchase agreement (which include all representations and warranties and indemnification provisions). Alternatively, though increasingly rarely, a separate warranty agreement is executed.
- There is no separate tax deed and, generally, rather than providing that all tax liabilities arising out of events before completion will be borne by the seller, as is the case in Anglo-Saxon countries, the seller indemnifies the purchaser for tax liabilities only to the extent the tax representations and warranties are breached, which implies that the purchaser must prove that a representation has been breached, damage has been caused to the purchaser or the target and such damage directly results from the breach of the relevant representation. A different approach can be adopted in large cross border transactions, which tend to replicate the Anglo-Saxon practice.

Common Limitations

It is market practice in France to include financial limits in the purchase agreement. The most common financial limits are as follows:

- **De minimis threshold.** This threshold means that the purchaser cannot claim for breach unless the claim (or a series of claims based on the same or related facts) exceeds a certain amount. It is usually equal to 0.1% of the purchase price.
- **Deductible** (also referred to as a basket) or **threshold** (also referred to as a tipping basket).

  A deductible (basket) means that the indemnification of the purchaser starts when all losses resulting from all claims (each above the de minimis threshold) exceed the amount of such deductible, in which case the purchaser is indemnified only for losses above such deductible.

  A threshold (tipping basket) means that the indemnification of the purchaser starts when all losses resulting from all claims (each above the de minimis threshold) exceed the amount of such threshold, in which case the purchaser is indemnified as from the first euro.

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They are usually equal to 1% of the purchase price.

- **Liability cap.** The liability of the seller under the representations and warranties usually ranges from 10% up to (for strategic acquisitions) 25% of the purchase price. However, it is generally provided for that such liability cap shall not apply to fundamental representations and warranties (for instance, authority of the seller, ownership of the target shares) or in case of fraud or wilful misconduct.

It is also common practice in France for the parties to waive the statute of limitations and to agree to a time limit ranging from one to two years. However, as regards fundamental representations (for instance, ownership of the target shares or authority of the seller), tax and labour representations, time limit usually matches the statute of limitations.

French law defines damages that can be indemnified as only damages which are direct, certain and foreseeable can be indemnified. However, this rule is not a matter of public policy so that the parties may freely adapt it. Market practice is also to specifically exclude the indemnification of any indirect damages, such as loss of profits.

Warranty and indemnity insurance is common practice in France for large and upper mid-market transactions. For more information on warranty and indemnity insurance in France, see Practice Note, Warranty and Indemnity Insurance (France).

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