The Legal 500 & The In-House Lawyer
Comparative Legal Guide
France: Mergers & Acquisitions

This country-specific Q&A gives an overview of mergers and acquisition law, the transaction environment and process as well as any special situations that may occur in the France.

It also covers market sectors, regulatory authorities, due diligence, deal protection, public disclosure, governing law, director duties and key influencing factors influencing M&A activity over the next two years.

This Q&A is part of the global guide to Mergers & Acquisitions. For a full list of jurisdictional Mergers & Acquisitions Q&As visit http://www.inhouselawyer.co.uk/index.php/practice-areas/mergers-acquisitions/

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1. **What are the key rules/laws relevant to M&A and who are the key regulatory authorities?**

   The key M&A legal provisions can essentially be found in the French Civil Code (Code civil), Commercial Code and Monetary and Financial Code (Code monétaire et financier).

   Spawned by the Napoleonic codification, the French Civil Code still sets out the basic principles of contract law and company law. The contract law reform of 10 February 2016 directly affects the practice, particularly in so far as it enshrines a general duty of

information based on good faith, which refers to any information (other than an estimate of the value of the benefit) that a party knows is material to the consent of the other party when the contract is formed. Non-compliance with this rule of public policy may incur the defaulting party's liability or the cancellation of the contract (Article 1112-1). Henceforth, the judge may alter the contract in the event of unforeseeable circumstances making the contract's execution excessively onerous for one of the parties (Article 1195).

Dispositions of the French Commercial Code and Monetary and Financial Code, beyond the general principles, detail the specific set of rules relevant to commercial companies for the different types of legal structures.

In addition to these standard sources, European Union law has acquired a central place, particularly, through the assertion of the freedom of establishment principle by the Court of Justice as well as by the directive on cross-border mergers of limited liability companies or the takeover directive for example. Furthermore, through its growing regulatory power, the Financial Markets Regulator (Autorité des Marchés Financiers or AMF) has increased its clout: it is the French supervisory authority for public offers and its general regulation frames market practices. The French Competition Authority (Autorité de la concurrence or FCA) and the French Ministry of the Economy play also an important role in M&A transactions.

2. What is the current state of the market?

2017 marked a profound upturn, courtesy of an European economy that consolidated its recovery, favourable financing conditions and a stabilization of macroeconomic and political environments. The value of French corporate deal making has thus surged to its highest level in a decade: according to Thomson Reuters, M&A transactions involving French companies jumped by 50% in 2017 to reach 205 bn euros, their highest level since 2007. The dynamic seems fairly general with a good diversity of cross-border, domestic consolidation and restructuring operations. The Argos Mid-Market index, which tracks the price performance of mid-market LBOs in the euro area, reached its highest level ever in the third quarter of 2017, with an average multiple of 9.5 times Ebitda. Large French groups are also reinvesting M&A operations at a French as well as at a transnational level, as epitomised by Unibail Rodamco's acquisition of its Australian competitor Westfield.

3. **Which market sectors have been particularly active recently?**

Activity has been buoyant in all sectors, from real estate to luxury, through distribution and industry. Nevertheless, this upswing has been driven in particular by finance and consumer goods, but also by industry and insurance, which are experiencing a marked upturn in activity. France also benefits from a nursery of young innovative companies, especially in the area of new technology that gives momentum the small cap deals market.

4. **What do you believe will be the three most significant factors influencing M&A activity over the next 2 years?**

First and foremost, M&A activity will inevitably be influenced by the profound changes that are taking place in our economy today due to the influence of new technologies. In particular, big data and digitalization are poised to cover a wide range of fields, from banking to mass distribution.

The international environment will also be more decisive than ever: the Brexit negotiations, and their potential economic and financial consequences represent a major source of concern, especially for the financial sector. Beyond that, a likely rise in interest rates is worrying as the major central banks, primarily the Fed and the ECB, are currently engaged in the process of normalizing their monetary policy. The evolution of the Iranian situation and the normalization of economic growth in China will also have fundamental implications on French companies at international level.

Finally, the regulatory environment will continue to play, as always, a key role in the level of M&A activity in France. Especially, the improvement of the labour law environment and tax law attractiveness are structural factors that keep coming back into the concerns of international investors. Recent changes have been earmarked as positive.

5. **What are the key means of effecting the acquisition of a publicly traded company?**

The key means of effecting the acquisition of a publicly traded company are cash or share deals. For a cash deal, it must be structured as a tender offer, often preceded by

an acquisition of share blocks, when friendly, to secure the transaction. For a share deal, the acquirer may structure its acquisition either as a public exchange offer or a merger. Merging is a way to squeeze out minority shareholders at the level of the target. However, mergers with a non-French company may raise difficulties.

6. What information relating to a target company will be publicly available and to what extent is a target company obliged to disclose diligence related information to a potential acquirer?

By-laws, minutes of shareholders' meetings, documents on corporate reorganizations and annual and interim financial statements, as well as past prospectuses and "documents de référence" (annual reports), are available, without the target being alerted of the search.

Moreover, any listed company is under a continuing obligation to make public announcements as to any information of a precise nature, which has not been made public, relating, directly or indirectly, to it or its financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments (inside information).

The target company may (but is not obliged to) permit due diligence and open a data room provided that in particular the project is a significant one and the potential acquirer has expressed a real interest (intérêt sérieux) in implementing the contemplated transaction and signed a confidentiality agreement. The existence of the due diligence as well as any privileged information disclosed through the due diligence must be disclosed in the offer documentation. There is no possibility to file an offer that is conditional upon the findings of a due diligence review. If a bidder had access to a data room, any other bidder should have access as well.

7. To what level of detail is due diligence customarily undertaken?

The scope of due diligence undertaken usually differs between private acquisitions and public takeovers. If the target is a listed company, the level of due diligence required is generally moderate given the extensive mandatory disclosures monitored by the target. The standard of due diligence in private deals is more rigorous since publicly available information concerning the target company will be rather limited, but market practice is

moving towards a risk-only approach and red flag reports to avoid cost-intensive exercises. Vendors due diligence reports are becoming more common practice than in the past to facilitate sale processes.

8. **What are the key decision-making organs of a target company and what approval rights do shareholders have?**

Where the transaction is structured as a sale and purchase of shares, the role of the corporate bodies of the target are in practice limited.

Conversely, where the deal is structured as a merger or a share capital increase, the shareholders' meeting of the target company, play an important role.

Finally, where an public offer is filed, the target's board must provide a reasoned opinion on the offer, such opinion being made public in the offer documentation.

9. **What are the duties of the directors and controlling shareholders of a target company?**

The obligations of the directors towards the shareholders are focused on a fundamental duty of loyalty imposed by the judges. This duty derives from the very mission of the officer who, as a corporate officer, must exercise his powers in the interest of the company. It follows that he cannot take advantage of his privileged position to exercise his powers in another interest, either his own or that of a competing company. This is first of all true when he acquires, directly or through an intermediary company, shares or property to the detriment of shareholders. This translates into the obligation not to compete in a wrongful manner with the company he manages.

Controlling shareholders must respect the rights of minority shareholders. In particular, they must not commit majority abuse: any vote contrary to the social interest and issued with the sole intention of favouring the majority to the detriment of other shareholders will be sanctioned.

10. **Do employees/other stakeholders have any specific approval,**

consultation or other rights?

In case of negotiation of the acquisition of a controlling block, the target’s works’ council (if any) must be informed and consulted ahead of signing the share purchase agreement.

In the event of a public offer, ahead of the target’s board providing its opinion on the offer, the target's workers' council (if any) must be convened by the target’s CEO immediately following the filing or the announcement of any offer, to be informed and consulted in respect of the offer. Such obligation to inform and consult the target's workers' council is not applicable if the target is the subject of an offer by a bidder, which, alone or in concert, hold more than 50% of the share capital or voting rights of the target. In such a case, the target's workers’ council shall only be informed about the offer. The works' council may decide on the friendly or hostile nature of the offer. In the context of the works council’s consultation, the council has the right (i) to invite the bidder to make a presentation to it within 1 week after the filing of the draft offer (or its announcement) and (ii) to appoint an accounting expert who shall within 3 weeks provide a report assessing the bidder's industrial and financial policy and strategic plans as well as the consequences of their implementation on the various interests at stake, employment, sites and the location of target's decision-making centers.

In the above-mentioned cases, the opinion issued by the target’s works council is not binding and cannot block the acquisition of the controlling block or the public offer, but may slow its timetable.

Finally, the law of July 31,2014, commonly named Hamon Law, has introduced an obligation to inform employees individually in the event of a share deal involving the sale of the majority of the share capital of a French société par actions in order to allow such employees to make an offer to acquire the relevant shares. Such obligation is applicable to companies (listed or non-listed) without a works council and with a works council but with fewer than 250 employees and falling in the category of SMEs (i.e. companies with a turnover lower than 50M€ or a total balance sheet lower than 43M€). In any case, it does not create any preemption or preferential right in favor of employees and the seller remains free to decline an offer made by any employee.

To what degree is conditionality an accepted market feature on acquisitions?

The transfer of shares may be subject to special conditions. Thus, the parties may validly subordinate the realization of the assignment to a future and uncertain event (condition precedent) or, very rarely in practice, agree that the assignment will be retroactively resolved in the event of the occurrence - or non-occurrence, depending on the wording of the clause - of a future and uncertain event (condition subsequent or resolutory condition).

Public offers, except for certain limited conditions in case of voluntary offers, such as approval from competition authorities or minimum acceptance threshold expressed in share capital and/or voting rights (in practice 1/2 calculated on a fully diluted basis or 2/3 plus one share/vote calculated on an issued share capital or fully diluted basis), cannot be conditional upon any factor and are, in principle, irrevocable upon filing. A bidder may withdraw its offer with the AMF's prior approval, if the target adopts measures modifying its substance during the offer period.

12. What steps can an acquirer of a target company take to secure deal exclusivity?

Exclusive negotiation may be organised through a contract between the parties. It is thus possible to provide in a letter of intent an exclusive negotiation clause aimed at prohibiting, for a certain period of time, either party from negotiating a contract of the same nature with any third party. Such undertakings are generally granted by the selling shareholders as well as, where the target is listed, by the target itself.

13. What other deal protection and costs coverage mechanisms are most frequently used by acquirers?

The acquirer can seek deal protections from the target and/or the controlling or main shareholders (e.g. exclusivity or break-up fees).

In the context of a public offer, a friendly acquirer aiming to lock up its planned acquisition of the target can secure it by purchasing blocks of shares before the offer
11. rather than obtaining the agreement of significant shareholders to tender their shares,

as French law provides that contribution commitments lapse should a competing offer be made. The acquirer may also use break-up fees and undertakings from the target not to actively seek counter bidders. However, general principles on directors' duties (i.e. to act in the target's interests) make break-up fees payable by the target rare or limited in amount.

14. Which forms of consideration are most commonly used?

Cash is the most frequent consideration in non-listed deals.

For a public offer, the consideration may be, in principle, cash, shares, or a combination of both. However, if the shares exchanged are not liquid securities listed on an EU or EEA regulated market, the offer must include a cash option. This also applies should the bidder purchase, alone or in concert, shares in the target in cash exceeding five percent of the share capital or voting rights during the 12 months preceding the offer.

15. At what ownership levels by an acquirer is public disclosure required (whether acquiring a target company as a whole or a minority stake)?

Regarding listed companies, the law requires the disclosure of shareholdings or voting rights to the AMF and the target when crossing certain thresholds (5%, 10%, 15%, 20%, 25%, 30%, 1/3, 50%, 2/3, 90% and 95%). Disclosure must occur within 4 trading days of the thresholds' crossing. Such disclosures are then notified to the market by the AMF).

16. At what stage of negotiation is public disclosure required or customary?

There is no requirement to notify possible bid to target or to disclose it to the public prior to announcing or filing the offer provided that confidentiality is temporarily necessary for the implementation of the transaction, and can be maintained.

If confidentiality can no longer be ensured (notably in case of leak), an immediate announcement is required from bidder and/or target. Bidder may announce at any time, provided that it does not amount to market manipulation. Public announcement without

filing does not constitute an offer.

When there are reasonable reasons to believe that a potential bidder is preparing a public offer, particularly when the market of the securities of an issuer is subject to significant changes in terms of volume or price, the AMF may ask such potential bidder to disclose its intentions to the public in a given time period (i.e. “put up or shut up”).

17. Is there any maximum time period for negotiations or due diligence?

There are no time period limits for negotiations or due diligence.

18. Are there any circumstances where a minimum price may be set for the shares in a target company?

As a general rule, the offer price must equal to at least the highest price paid by the bidder for the target’s shares over the 12 months preceding the offer where the public offer is mandatory (see question 25).

The price of voluntary offers is freely determined.

19. Is it possible for target companies to provide financial assistance?

Under French law, it is prohibited for the target companies to provide financial assistance to the buyer.

20. Which governing law is customarily used on acquisitions?

French law is customarily used on acquisitions but we are not reluctant to pick a foreign law, since we are in a civil law environment.

21. What public-facing documentation must a buyer produce in

connection with the acquisition of a listed company?

The filing must contain the draft offer prospectus and, if any, prior notices given to any authorities empowered to authorize the contemplated transaction.

The draft offer prospectus must notably be made public upon filing of the offer with the AMF on the bidder's web site, the AMF's website and, in case of a joint prospectus, on the target’s web site.

The bidder must release a press release setting forth the main terms of his draft offer prospectus, at the latest upon filing its offer with the AMF.

22. What formalities are required in order to document a transfer of shares, including any local transfer taxes or duties?

French law does not require a written deed of sale in connection with a transfer of shares: the transfer of ownership of the shares is carried out by an account to account transfer. For evidentiary reasons, however, it is strongly recommended that the transfer be recorded in writing, stating the characteristics of the transaction.

The transferor must then notify the transfer of shares to the company with the deed of sale or by a movement order containing the information the date of the transfer, the account of the transferor to be debited, the number of shares transferred in full and in figures, the nature of the shares transferred, identification of the holder of the transferee's account to be credited or to be created. The company then registers the purchased shares in the buyer's account and updates the transaction log.

Transfers of shares are subject to registration fees: the purchaser must register with the tax authorities any deed drawn up, or a form n°2759 if applicable, within one month of the signature of the deed or the completion of the sale and pays the registration fees on the transfer of the shares. Lastly, on the capital gain earn from the sale of its shares, the transferor is subject to social security contributions at a rate of 17.20% and income tax.

23. Are hostile acquisitions a common feature?

In France, these operations remain rare (c. 10 hostiles offers since 2010).

24. What protections do directors of a target company have against a hostile approach?

The target company can take any defensive measures that could jeopardize the offer without the prior approval of the shareholders' meeting (unless otherwise provided by the target's by-laws), provided that it does not infringe on shareholders' powers and does not act contrary to the target's corporate interest.

Such measures can include for instance disposal of assets, capital increase, launching a tender offer and issuance of warrants.

The target company may use anti-takeover defences to thwart a transaction, but more generally will use such defences to negotiate a higher price or to postpone an acquisition attempt until competing bidders are involved.

25. Are there circumstances where a buyer may have to make a mandatory or compulsory offer for a target company?

There is such obligation where a person who, alone or in concert, exceeds (even unintentionally) the 30% threshold of the shares or voting rights in the target.

A mandatory offer is also required when a person who already holds between 30% and 50% of the target, increases its shareholding in the target by over one percent of the total capital or voting rights within 12 months.

Exemptions to mandatory offer requirements may be granted by the AMF in some limited circumstances.

26. If an acquirer does not obtain full control of a target company, what rights do minority shareholders enjoy?

Minority shareholders as such enjoy some protection. This is reflected in concrete

prerogatives designed to control operations carried out within the company, and even to prevent or sanction any irregularities committed by the general meeting or members of the management body.

In particular, the voting rights at the general meeting cannot be exercised in an abusive manner by the controlling shareholder. An abuse of majority voting rights will occur if the decision of the majority has been taken in its sole interest and against the social interest of the company. In case of abuse of majority, the decision can be declared null and minority shareholders shall be able to claim damages against the controlling shareholder.

More generally, the minority shareholders shall benefit from the information rights provided by law.

Finally, in some instances, a shareholder holding 95% or more of the voting rights of a listed company may be required by the AMF, upon request of minority shareholders, to launch a buy-out offer. One or several shareholders holding the control of a listed company may also, upon AMF's request, be required to launch a buy-out offer in certain circumstances (sale of the main asset of the company, change of activity of the company, merger with and into a non-listed company, etc.).

27. Is a mechanism available to compulsorily acquire minority stakes?

French law provides for a prohibition in principle to exclude a shareholder, which is nevertheless subject to exceptions.

First, as regards listed companies, for a controlling shareholder to implement a squeeze-out following any public offer, shares of the target held by minority shareholders should represent not more than five percent of the shares or voting rights.

Secondly, in the case of an non-listed company, only an express stipulation of the shareholders' agreement may justify the exclusion of the minority shareholder.