Overview of the M&A Industry in France

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This report was published in the Chambers and Partners "Corporate M&A 2013" guide and offers an overview on essential issues affecting the M&A sector in France.

How was the M&A market in Q1 2012 compared to Q1 2011?

As seems to be the case for most European countries, Q1 2012 saw a decline in M&A compared to Q1 2011. Although M&A activity remained stable between 2009 and 2011 in terms of transactions numbers, there was a sharp decrease in 2012: between January and March, transactions involving at least one French company were valued at only EUR14 billion – which is three times less than for the same period in 2011, while during the last quarter of 2011, activity was up to 2.5 times more intensive. In addition to the reduction in the number of M&A transactions, the average deal size also decreased, contributing to the fall in M&A activity.

Numerous factors can explain this decline: the market was paralyzed by the continuing euro crisis, the French presidential elections in May 2012 blocked M&A activity until the winner was declared, then the change of government did not restore confidence in companies because of the legal modifications announced, in particular regarding taxes. Furthermore, some French companies that were aggressive buyers changed their position on the market and became defensive sellers (e.g. the Lagardère Group).

Noteworthy transactions in 2012 included the partnership established between Peugeot and General Motors and the subsequent increase in Peugeot's capital; and the aborted merger between EADS and BAE, which would have represented a transaction valued at several billion euros. The acquisition by Toyota Tsusho Corporation of the French listed company CFAO at the end of July 2012 was also significant.

The second quarter of 2012 proved to be much more intensive than the first (two French targets were valued over EUR500 million: Klepierre SA's 28.7% stake and Eramet SA's 25.68% stake), with total deal value rising to EUR4.9 billion, against only EUR3.6 billion in the first quarter – a rise that is likely to have been linked to the increase of cross-border inbound activity.

Some sectors seem to be resisting the crisis affecting M&A activity quite well, such as the energy sector. The future of the M&A market lies in:

(i). the high number of potential buyers, leading to competition among them and resulting from opportunistic approaches from industrial buyers who wish to buy while the market price is low;

(ii). the presence of European and non-European (American, Indian, etc.) buyers on the market; and

(iii). the fierce activity of private equity funds.

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the next three years. The financial sector in particular could see improvement during the course of 2013, as a result of the de-globalization of financial institutions and legal requirements for capital ownership (at the time of writing mainly medium sized transactions were taking place in this sector). It is also likely that, French companies will remain attractive as high quality assets will be available at competitive prices.

The positive signs shown by the M&A market are nevertheless tempered by some elements such as the volatility of the financial markets (which makes it difficult to assess the enterprise value of listed companies), resulting in uncertainty and low confidence, and a lower tax leverage in 2012 due to a change in the regulations. In addition the value of M&A transactions in France dropped by 46% in the third quarter reaching the lowest level since 2010. It is likely that M&A activity in 2013 will depend much more on the evolution of market conditions, than on the valuation of French companies.

What were the top trends in France in Q1 2011 compared to Q1 2012?

French companies seldom practice M&A activity outside Europe, but when they do, it is most often to acquire an American company.

In 2011 as in 2012, the bulk of M&A activity involving French companies (77%) took place in France. Since 2009, French groups have preferred to invest and take control of companies in France itself, with the United Kingdom as a second choice. However, it should be noted that there seems to be a renewed interest by French companies in Spain and Italy. French companies seldom practice M&A activity outside Europe, but when they do, it is most often to acquire an American company.

The acquisitions made by French companies in Europe in 2011 and in the beginning of 2012, were evidence of a wish to reinforce their position at the European level. Acquisitions made outside Europe were driven by the search for growth in promising sectors (such as biotechnology or renewable energy), by positioning on markets with high growth prospects, and generally by a desire for global expansion.

French buyers tend to dominate the market, followed by European buyers with 30% of the market and American buyers with 13%. The BRICs represent only 5% of the buyers. In the French market, acquisitions are much more numerous than sales.

There have been a number of both classic and more innovative transactions in recent years, including transactions such as the acquisition of minority shareholdings (e.g. EDF buying Edison) and the forced disposal of assets for both States and companies (e.g. the sale of a shareholding in Klépierre by BNP Paribas). Sales by French companies were also linked to a strategy of portfolio revaluation, consisting of the transfer of non-strategic businesses or those that are not profitable enough, in order to refocus on core activities ("shrink to

grow"), and on the other hand related to a strategy of deleveraging, and strengthening of the financial structure ("shrink to deleverage").

De-listing was also an important trend in 2011 and 2012: in 2011, 24 such processes were implemented – 30 if bankruptcy is taken into account. An acquisition by funds or industrial conglomerates proceeded 13 of the delisting operations, and 11 of them resulted from a shareholders' decision.

There were also numerous share re-purchases as a result of a few French companies holding an abundance of cash.

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What industries in France experienced significant M&A activity in 2011/Q1 2012?

In 2011, the most active sectors involved in M&A activity were the energy and raw materials sectors, with 29% of all transactions, followed by services and consumption goods, with about 14%. The financial sector represented 14%, followed by, in order, industry, real estate, health and technology, all between 7 and 11%.

In 2012, 26.5% of transactions concerned the retail sector, 19% the financial sector, 18% industry, and 13% IT. As for healthcare, it represented 5% of M&A transactions, while energy and materials represented 7% and utilities 1.7%.

What are the primary means of acquiring a company in France?

The most common means of acquiring a company in private M&A transactions is the use of a share deal, though asset deals also represent a significant proportion of private business combinations. In particular for small businesses, mergers and contributions of assets are less frequently used in this context.

Public M&A, transactions can be made in several ways. Takeover offers are usually employed when the target is not closely held, or when there is no controlling shareholder(s). Voluntary takeovers are also employed in the case of hostile bids. Otherwise, because many French listed companies are closely held, many investors prefer to make an acquisition of a controlling interest first, resulting in a mandatory offer, which is triggered pursuant to Article 234-2 of the General Regulation of the AMF when any person, acting alone or in concert, crosses the threshold of 30% of share capital or voting rights of a listed company.

A French listed company may also be acquired by a merger transaction, defined in France as an agreement between two companies, according to which all the assets and liabilities of one of the companies are transferred to the other, while the transferring company disappears. In return, the shareholders of the disappearing company receive shares from the beneficiary company.

Furthermore, foreign investors may acquire control of a company by a contribution of business or assets, in exchange for shares. Contributions of business or assets follow similar rules to mergers. They require the company receiving the asset to approve the transaction via an extraordinary general meeting.

Who are the primary regulators for M&A activity in France?

Numerous regulators supervise M&A activity in specific sectors, such as banking and insurance ("ACP", Prudential Supervisory Authority), energy ("CRE", Commission for Energy Regulation), telecommunications ("ARCEP", Regulatory Authority for Electronic Communications and Postal Services). More generally, the Competition Authority ("Autorité de la Concurrence") is responsible for merger control, and works to prevent illegal economic practices.

As for public M&A, they are regulated by the Financial Markets Authority ("AMF") which has to give its approval ("visa") of the public documentation filed by the bidder. The AMF regulates corporate finance transactions by listed companies and checks documents issued by such companies when they make transactions such as initial public offerings, capital increases and rights issues, public cash offers, exchange offers, buyout offers, mergers, demergers, etc.

Are there any restrictions on foreign investment in France?

Foreign investments in France are not in principle restricted, but must be declared to the authorities. Foreign investments are defined as:

(i). the creation of a new business in France by a foreign business or a non resident person;

(ii). the acquisition of all or part of a branch activity of a French business by a foreign business or a non resident person; and

(iii). all operations performed with the capital of a French business by a foreign business or a non resident person where, after the transaction, the capital or the voting rights held by a foreign business or a non resident person exceed 33.33% of the capital or the voting rights of the French business.

Some foreign investments, as defined above, are subject to prior approval by the Minister for the Economy if made in one of the eleven "strategic business sectors", which include:

(i). businesses involved in the gambling industry;

(ii). regulated businesses providing private security services;

(iii). research and development or the manufacture of means of fighting the illegal use of pathogens or toxic substances by terrorists and preventing the adverse health-related consequences of such use, and

(iv). companies that have contracts in certain fields with the French Defense Ministry, whether directly or through a subcontractor.

Foreign investors must file a statistical declaration with the bank of France when the investment exceeds EUR15 million and involves the purchase of more than 10% of the capital or voting rights of a resident French company, or the crossing of a 10% ownership threshold in such a company, any direct foreign investment between related companies, including loans, deposits, or real estate investments, or the purchase or sale of real estate in France by a non-resident.

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What anti-trust regulations apply to business combinations in France?

If an acquisition is subject to merger control, a merger clearance notice must be given before the change of control. In France, the merger of two or more previously independent companies, the acquisition by one or more companies of the whole or parts of one or more other companies, and the creation of a joint venture performing the functions of an autonomous economic entity in a sustainable manner, must necessarily result in a notification to the French Competition Authority, if:

(i). the parties worldwide pre-tax turnover is greater than EUR150 million; and

(ii). the pre-tax turnover achieved by at least two of the parties in France is greater than EUR50 million.

The calculation of the turnover is made in the same way as for European merger control. It should be noted that some sectors (banking, insurance, retail, etc.) are subject to special regulations. In the case of a business combination taking place in the European Union, the French regulations recede and are replaced by the European Merger Regulations.

What labor law regulations should acquirers primarily be concerned about in France?

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The works councils of both companies taking part in a private M&A transaction must be informed and consulted in advance of the transaction. This is mandatory as the French Labor Code provides that the council has to be informed and consulted about modifications of the economic or legal organization of the company, particularly in the event of merger, sale, acquisition or sale of subsidiaries, investment in a company, etc. The works council must have sufficient time and information provided by the legal representatives, during this information and consultation period.

However, in tender offers the information and consultation process by the bidder follows the public announcement of the deal. On the target side it is similar, right after the offer is made, the board of the target must inform the works council about it, and convene a works council meeting. Moreover, the offer document that was provided by the bidder must also be sent to the works council.

During this first meeting, the council decides whether to hear the bidder during a subsequent meeting. These prerogatives must be closely respected by the bidder' otherwise the works council could decide to go to court.

A second meeting must be convened within 15 days after the publication of the offer and before the general meeting of the shareholders of the target company being held to decide whether to establish defensive measures. During the meeting the information note has to be examined, and if decided during the first meeting, the offeror's representative must be heard– usually the CEO.

If the representative does not show up, the punishment is severe: the voting rights attached to the shares the bidder already owns or is meant to own are suspended until the day following an actual meeting between the representative and the council.

However, even though the works council prerogatives seem to be important, and it may indeed recommend or not recommend the offer, the works council does not have any actual means to really influence the decision either of the shareholders of the target or of the bidder.

What has been the most significant court decision or legal development in France in the last 5 years related to M&A?

The most significant court decision came from the "Sacyr-Eiffage" case and concerns the notion of *action in concert* when investing in listed companies in France.

In "Sacyr-Eiffage", in 2007 the Supreme Court considered that in the absence of a written agreement, the existence of an *action in concert* can be demonstrated by a serious, precise and concordant body of evidence.

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Numerous elements were selected as proving the *action in concert* including:

(i). the massive purchases of shares in the target reflecting not simply parallel behaviors, but a collective and organized approach aimed at obtaining a change of the target's board voted in general meeting; and

(ii). the similarities between the behaviors of the executives of the companies acting in concert during the target's general meeting.

In 2010, Hermes International SCA's family shareholders sought to bolster their defense against a possible takeover by LVMH Moet Hennessy Louis Vuitton SA by setting up a holding company for more than 50% of the share capital. As a result of such a contribution of shares, the holding company would cross the 30% share capital and voting rights threshold which triggers the obligation to file a mandatory takeover offer for all the shares in Hermes.

The founding family, which had previously stated it did not act together, considered the holding company a reclassification of its shares and asked for an exemption on the basis that they were acting in concert (no mandatory takeover offer has to be filed in the event of a sale of shares among companies or persons belonging to the same group).

In a decision of January 2011, the AMF granted the Hermes family shareholders an exemption from filing a mandatory takeover offer, based on the fact that a family group among the family shareholders was already in existence before the contemplated transfer of their shares to the proposed holding company, and that such a transfer would not affect the control of Hermes.

As a justification for the exemption, the AMF referred to the existence of a concert party among the family shareholders and gave various criteria to identify a concert.

Have there been any significant changes to takeover law in 2011 and 2012; or is takeover legislation under review in a way that could result in significant changes in the coming 12 months?

In 2011, the mandatory offer threshold, in the context of investment in listed companies in France, was decreased from 33.33% to 30% - thus, any shareholder crossing this threshold is compelled to make a tender offer.

However, a "grandfather" clause was implemented, which allows shareholders holding between 30% and one third of the share capital of a French listed company before the law was enacted not to file a mandatory tender offer.

Additionally, on the organized Multilateral Trading Facilities (Alternext), the price guarantee procedure has been replaced by a mandatory offer when the 50% of share capital or voting rights threshold is passed, whether directly or indirectly, alone or in concert. The buyout offers and squeeze-out mechanism are also extended to Alternext.

It should also be noted that following the "Seloger.com" case, pursuant to which a voluntary offer was filed at a low price allowing the bidder to acquire a significant stake, the AMF is currently contemplating a change in the regulation consisting in the introduction of a compulsory 50.01% minimum condition threshold of shares tendered in the offer under ordinary procedure (voluntary offers) in order for the offer to be a success.

This might operate as a guarantee of better articulated financial conditions and of reinforced transparency in connection with the control of the target. But the introduction of this threshold has raised lots of questions and criticism and the change of regulation has been delayed. Nevertheless the new regulation should be adopted in 2013.

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Is it customary for a bidder to build a stake in the target prior to launching an offer? If so, please describe the principal stake building strategies.

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In October 2010, LVMH disclosed it had amassed as much as 17% of Hermès for a total of EUR1.45 billion. The luxury company accumulated the stake using derivative instruments called equity swaps purchased from banks over a couple of years. It amended the equity swap contracts to deliver shares instead of cash and in one fell swoop passed various ownership thresholds that required public disclosure.

Due to a change in the regulation following this transaction, laws currently allow stake building by cash settled options but they now have to be disclosed.

What are the material shareholding disclosure thresholds and filing obligations in France?

Any natural person or legal entity, acting alone or jointly, who comes into possession of a number of shares representing more than 5%, 10%, 15%, 20%, 25%, 30%, one-third, 50%, two-thirds, 90% or 95% of the share capital or voting rights of a company having its registered office in France and admitted to trading on a regulated market, has to meet disclosure requirements.

Shares or voting rights owned by other persons on behalf of that person, by companies which control that person, by a third party with whom that person acts jointly, by a third party with whom the person has entered into a temporary transfer agreement covering those shares or voting rights, have to be taken into account (assimilated securities) when calculating the ownership of the shares, together with shares granting the use ("usufruit") shares lodged with the person and voting rights which a person may freely exercise by virtue of a power of attorney in the absence of specific instructions from the concerned shareholders.

The person or entity crossing any of these thresholds must inform the company of the total number of shares and voting rights that it holds within four trading days. The AMF must also be informed of the crossing within four days.

Can a company introduce different rules, e.g. higher or lower reporting thresholds – for example in the articles of incorporation or by-laws? What other hurdles to stake building, if any, are common in France?

The French Commercial Code mentions that a company's articles of association may provide for additional reporting obligations to the company, concerning the holding of other fractions of the share capital or voting rights which cannot be below 0.5% of the capital or voting rights of the company.

Additionally, other hurdles in stake building were implemented by French law, in connection with the special regulation due to specific sectors, especially investing in credit institutions and in insurance institutions.

With regard to credit institutions, a number of elements are to be taken into account including:

(i). any person or group of persons acting together shall obtain the authorization of the Prudential Supervisory Authority ("ACP") prior to carrying out any transaction the effect of which is to enable these persons to acquire or lose effective control over the management of the credit institution or investment firm, or to acquire or lose 50%, 33.33%, 20% or 10% of the voting rights, and

(ii). any transaction whose effect is to enable a person or a group of persons acting together to acquire 5% of the voting rights shall be immediately reported to the ACP.

The regulation concerning insurance institutions provides a procedure of control counting different levels including, prior authorization from the Prudential Supervisory Authority, when the 50%, 33%, 20% and 10% thresholds are crossed by a shareholder and a simple prior declaration in case of transactions resulting in passing the 5% threshold of share capital or voting rights.

Are dealings in derivatives allowed and/or should be disclosed?

Dealing in derivatives is allowed, but has to be disclosed when it comes to calculating shareholding thresholds. The person passing the threshold must account for issued shares covered by an agreement or cash-settled derivative having an economic effect that is equivalent to the ownership of these shares (calculation with the Delta for cash settlement only).

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More precisely, the AMF general regulation indicates that it covers agreements or derivatives that are indexed, referenced or related to the shares of an issuer, and give a long position on the shares of the person required to make the notification.

In particular, this applies to contracts for difference, share swaps or any financial instrument exposed to a basket or an index of shares of several issuers, unless they are sufficiently diversified.

However, derivatives are not taken into account when calculating the mandatory offer thresholds.

Do shareholders have to make known the purpose of their acquisition and their intention regarding control of the company?

Any person or entity crossing the 10%, 15%, 20% and 25% thresholds of a company admitted to trading on a regulated market must file a declaration of intent, specifying in particular:

(i). the means of financing the acquisition,
(ii). whether the buyer is acting alone or in concert,
(iii). whether the buyer contemplates making further shares acquisitions,
(iv). the strategy that the buyer intends to adopt with regard to the issuer, and the operations in order to implement it,
(v). any temporary transfer agreement concerning the shares and voting rights,
(vi). its intention concerning the settlement of any equity derivatives it may own, and
(vii). whether the buyer is seeking to appoint new board members in the target.

At what stage is a target required to disclose a deal (when it is first approached, when negotiations commence, when a non-binding letter is signed, when definitive agreements are signed)?

The French regulations contain a general disclosure obligation, stating that any person preparing a financial transaction liable to have a significant impact on the market price of a financial instrument, or on the financial position and rights of holders of that financial instrument, must disclose the characteristics of the transaction to the public as soon as possible.

However, the AMF provides that this person may assume responsibility for deferring disclosure of those characteristics, if confidentiality is temporarily necessary to carry out the transaction and if this person is able to ensure such confidentiality.

Thus, discussions between a potential bidder and the shareholders of the target may remain confidential if utmost secrecy can be maintained. Most of the time the deal is disclosed when agreements are signed. If the deal is announced after a first approach it is most of the time in the case of hostile bids.

A "put-up or shut-up" mechanism has also been implemented, aiming to oblige potential offerors to anticipate the disclosure of their intent to launch an offer or not. The AMF's decision to launch such a mechanism is discretionary, if there are large swings in the stocks of the target.

The request for disclosure by the AMF may lead to two situations: either the suspected bidder confirms his intention to file an offer, which leads the AMF to set a deadline by which the offer itself must be made; or the suspected bidder announces that it had no such intent, which results in a six-month period during which it cannot file an offer concerning this company and it has the obligation to disclose any purchase representing at least a 2% increase of its prior holding of the company's securities.

What scope of due diligence is usually conducted in France in a business combination?

Basic and fundamental information (annual accounts, auditor reports) can usually be found on public websites, or are available with other information directly on the company's website – (which usually discloses the accounts for the last five years). The Register of Commerce and Companies ("RCS") of the location of the registered offices of the company holds information relating to by-laws, patents, trademarks and real estate owned by the company, which is disclosed to the public.

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With regard to the scope of information disclosed in data room procedures in connection with takeover situations, it is noteworthy that potential buyers can access elements that could influence the company's share price. Thus, the AMF recommends that the procedure be restricted to the sale of significant shareholdings, as the case may be, covered by confidentiality agreements and restricted to persons evidencing serious intent.

In the event of a sale of a significant shareholding followed by a tender offer, the offer document registered with the AMF must ensure that investors have equal access to all the material facts they need to give their opinion. If the sale of a significant shareholding is not followed by a tender offer, the AMF recommends informing the market of the price and the terms communicated by the interested parties, and specifying that a data room was put in place for the purposes of the transaction. Additionally, the company should make public any material and potentially price-sensitive facts that it had undertaken not to disclose, but were made available in the data room.

Are standstills on the one hand or exclusivity on the other hand usually demanded?

Standstills are rare on the French M&A market and exclusivity is more common. Usually, French listed companies are closely held, so that any potential acquirer wishing to engage in a friendly takeover will directly negotiate with the core shareholders since the free float for trading is restricted. Thus the few shareholders holding the company accept exclusivity, though it is not the rule, it is not exceptional.

Is it permissible and/or common for a tender offer to be documented in a definitive agreement?

French regulation allows tender offers to be documented in a definitive agreement. French listed companies are usually owned by a small number of shareholders holding the majority of the shares, so potential bidders wishing to obtain the control of the targets get in touch with the core shareholders to agree on a share purchase agreement, eventually resulting in a voluntary tender offer, intending to take control of the target.

Two situations can arise from this offer:

(i). either the control company is indeed acquired by the bidder through an SPA, making the bid successful, or

(ii). the core shareholders find themselves obliged to tender the stake into the offer under a tender and support agreement (engagement d'apport). The deal is made public at the time of the execution of the SPA and the offer is filed a few weeks after the closing. Where the target company is not controlled, the target can enter into agreements with the bidder, such as merger agreements.

How long is the process generally for acquiring/selling a business in France?

In private M&A the length of the process is determined whether the potential acquirer is familiar with the business, requires due diligence or in the case of financial buyers, financing, and whether the sales process is structured as an auction. Thus the process could be completed within weeks or months.

In public M&A, the tender offer process and timelines are regulated. In public M&A relating to a Paris stock exchange listed target, the AMF, after a period of review that goes from 10 trading days to 20 trading days after the filing of the offer, can approve the offer and allow its opening for a period of a minimum of 10 trading days in simplified cash tender offers or 25 trading days in voluntary tender offers. It can be much longer when the transaction is suspended prior to the approval of the anti-trusts authorities.

Does France have a mandatory offer threshold?

For the Euronext Paris market, the stock exchange market law requires the filing of a mandatory offer in two situations: firstly, where any natural person or legal entity that becomes the holder of more than 30% of a listed company's share capital or voting rights, either alone or in concert, and directly or indirectly, and secondly, where any person that previously held between 30% and 50% of a listed company's share capital or voting rights, either alone or in concert, and directly or indirectly, and increases that holding by at least 2% within 12 months (also referred to as the "speed-limit acquisition").

In such cases, the investor must inform the company and the AMF, and file a tender offer for the remaining equity, and any securities giving access to the company's share capital or voting rights. If the target company holds 30% or more of share capital and voting rights of a subsidiary, which is an essential asset of the target, and is also listed on a regulated market, then the mandatory offer is extended to the subsidiary.

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However, the AMF may grant an exemption to a mandatory offer in nine different situations, which include:

(i). subscription to a capital increase by a company in recognized financial difficulty, subject to the approval of a general meeting of its shareholders,

(ii). merger or asset contribution subject to the approval of a general meeting of shareholders,

(iii). holding of a majority of the company's voting rights by the applicant or by a third party, acting alone or in concert, and

(iv). resale or other comparable disposal of equity securities or voting rights between companies or persons belonging to the same group.

Is cash or shares more common to use in France as consideration?

On the French M&A market, cash is more common form of consideration than shares. It is important to note that if, in the 12 months before an offer is filed, the offeror, acting alone or in concert, has purchased, for cash, securities giving it more than 5% of the shares or voting rights of the target company, the offer must necessarily include a cash option.

In any case, whether the consideration is composed of cash or shares, the cash offer or the valuation of the securities has to meet the minimum price requirements, in connection with mandatory or voluntary offers aimed at control.

What conditions are common for a takeover offer; do regulators restrict the use of offer conditions?

A tender offer must generally be unconditional, however, some exceptions exist. The most frequent condition is a minimal condition, which can apply only in voluntary offers: the offer made by the bidder can contain a clause making his offer conditional on the purchase of a minimum percentage of the share capital or voting rights.

Usually, the minimum is set at the majority of the share capital or voting rights of the target. This condition can be waived within five trading days before the end of the offer. It should be noted that the minimum percentage can be based on a fully diluted share basis, but does not have to be.

A takeover offer can also be made on the condition that antitrust approval is obtained: for the bid to be maintained the competition authority (either national or international) has to grant a competition clearance, otherwise the offer is automatically withdrawn.

A third condition is allowed by French regulation, though its implementation is extremely scarce: a person or company may launch an offer on numerous companies, knowing that each offer is conditional on the success of the other offers.

What minimum acceptance condition is usual for tender offers and why (i.e., what are the relevant control thresholds in France)?

An OGM (Ordinary General Meeting) has the ability to vote on subjects such as approval of accounts, but also decisions concerning common operations for a company.

Persons or entities wishing to take control of a company must pass the 50% threshold of voting rights. This threshold, apart from giving control to the shareholder, whether acting alone or in concert, provides the majority during the Ordinary General Meetings (OGM), the decisions of which concern numerous aspects of the life of a company.

An OGM has the ability to vote on subjects such as approval of accounts, but also decisions concerning common operations for a company (agreements between the company and a director, authorization prior to the conclusion of certain transactions by directors, purchase by the company of its own shares, etc.). But most importantly, the OGM is the assembly that has the ability to appoint or replace members of the board.

Consequently, a bidder acquiring at least 50% of the voting rights of a target will have the capacity to recall the board, and replace all the management after a merger or an acquisition. In practice, depending on the shareholding structure of the capital, a percentage of less than 50% of the voting rights can give control of the target.

Another essential control threshold relates to the majority necessary to control the Extraordinary General Meetings (EGM), for which purpose a shareholder must hold at least two thirds of the voting rights. Indeed, the EGM has the ability to modify the by-laws of a company, which includes the modification of the corporate purpose, the change of name of the company, the transfer of registered offices, and most importantly, the decision to increase or decrease the capital. For all these operations a shareholder must own at least 66.6% of the voting rights, subsequently giving it control of both Ordinary and Extraordinary General Meetings.

The 95% threshold of share capital and voting rights should also be noted, mainly for two reasons. First, this level allows the core shareholder to launch a squeeze-out procedure, and eventually to obtain control of 100% of the share capital. Secondly, combined with other conditions, the ownership of 95% of the share capital of a subsidiary allows the holding company to avail of tax consolidation and to gain a strong advantage in the tax field. However the AMF does not currently allow 95% to be minimum acceptance condition of an offer but only lower thresholds.

Can a business combination be conditional on the bidder obtaining financing?

In a private M&A transaction, a financing condition can be implemented in the offer provided by the prospective acquirer.

In a public deal, pursuant to French regulation, a takeover offer made to a company whose equity securities are admitted to trading on a regulated market cannot be conditional on the bidder obtaining financing. Indeed, the draft offer has to be filed with the AMF by one or more investment services providers (banking institutions) – authorized to act as underwriter(s), and acting on behalf of the offeror.

The filing is made by means of a letter addressed to the AMF guaranteeing the tenor and irrevocable nature of the commitments made by the offeror, and must be signed by at least one of the sponsoring institutions. Thus these banks themselves guarantee that the bidder has the financing, which is why the filing of a takeover offer cannot rely on this condition.

What types of deal security measures can a bidder seek, if any (e.g., break-up fees, force the vote provisions, non-solicitation provisions)?

Break-up fees are not prohibited under French regulation, and they appear to have been used more and more in recent years. Break-up fees can take two forms depending on whether they are agreed with the core shareholders or with the target company itself.

If agreed with the core shareholders, they are included in the shareholders' irrevocable commitment to tender their shares. These agreements have been challenged by the French courts, when found to hinder the concept of the free play of offers and counteroffers. French law provides that, to make a counteroffer competitive with an initial one, a new bidder has to propose a share price that is at least 2% higher than the first price. In practice when there is an obligation under the agreement to tender shares that represent more than 50% of the capital or voting rights of the target the limit of 2% is respected.

If break-up fees are agreed with the target, care must be taken that they cannot be interpreted as contrary to the corporate interest of the company. If this is found to be the case agreement will not be authorized. Furthermore, break-up fees may prevent any counteroffer that would not be attractive for the shareholder – that is all offers that do not allow the

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fees to be absorbed, and which de facto automatically raise the minimum price of a counteroffer. For this reason, the AMF is very careful about break-up fees. Sometimes reverse break-up fees are contemplated to avoid the bidder leaving a deal.

There is an obligation to disclose any break-up fees and other deal protection measures taken by a listed company or its shareholders, to the public and to the AMF, when filing the offer.

Non-solicitation provisions are quite common between an offeror and the core shareholder – though not between the offeror and the board of the target. The action open to the board of a target is to search for a 'white knight' (friendly investor).

If a bidder does not seek 100% ownership of a target, what additional governance rights with respect to a target can the bidder seek other than its shareholdings?

Bidders have a formal obligation, when filing a tender offer, to apply for 100% of the share capital (apart from specific simplified offers, where they can seek only 10% of the capital).

As long as the bidder does not cross the 30% mandatory offer threshold, it has the option to enter into a range of agreements, (including shareholder agreements), that provide it with additional governance rights. The most common agreements are shareholder agreements on all kinds of subjects including to provide the bidder with specific rights with regard to the board.

Can shareholders vote by proxy in France?

French regulation allows shareholders to vote by proxy. A vote by proxy is only valid for one meeting except when a second ordinary meeting is convened with the same agenda – (when the quorum was not reached at the first meeting).

Shareholders can give their vote by proxy to any shareholder or any other natural person or legal entity who will have to vote in accordance with the choices made by the shareholder; or to the company, with no specific indication, in which case the shareholder expresses a favorable vote to all draft resolutions submitted by the board.

Please describe squeeze out mechanisms, short-form mergers or other mechanisms commonly employed to buy shareholders that have not tendered following a successful tender offer?

The mandatory acquisition of minority shareholdings, or squeeze-out mechanisms can take place in two distinct situations: either following a tender offer, in which case the squeeze-out procedure has to be implemented within three months; or following a buy-out offer addressed to minority shareholders.

To be entitled to carry out a squeeze-out connected to a tender offer, the offeror has to hold at least 95% of the share capital and voting rights of the target at the end of the offer. The AMF requires the offered price to be at least equal to the price offered in the previous offer if the offer was made in cash. This is the case whether the offer followed the normal offer procedure (without the intervention of an independent expert valuation), or followed the simplified procedure (in which case the AMF can review the price of the offer in light of an independent expert valuation for a squeeze-out). In the case of the latter, the AMF does not have to review the squeeze-out which is automatic. Otherwise, the squeeze out and its price has to be cleared by the AMF in a new decision.

The rules are quite similar for a squeeze-out after a buy-out offer. The shareholder wishing to launch a squeeze-out procedure must hold, alone or in concert, at least 95% of the share capital and voting rights at the end of the buy-out offer. If the bidder did not make it clear during the filing of the buy-out offer that it intends to start an automatic squeeze-out procedure after the buy-out, it must announce it to the AMF within ten trading days and the squeeze out and its price has to be cleared by the AMF in a new decision.

Is it common to obtain irrevocable commitments to tender by main shareholders of the target company? At what stage are negotiations usually undertaken? What is the nature of these undertakings, do they usually provide an out for the principal shareholder if a better offer is made?

French regulations allow the execution of irrevocable commitments to tender their shares by the target company ("engagements d'apport à l'offre"). However, the principle of the free play of offers and counteroffers is violated if the first bidder obtains advance commitments from shareholders, in the form of presentation promises or promises of sale, which ensure the success of its offer.

These commitments are strictly controlled by the AMF, which tends to interpret provisions contained in such agreements in favor of the shareholders…

Thus, these commitments are strictly controlled by the AMF, which tends to interpret provisions contained in such agreements in favor of the shareholders, for the purpose of offering them an exit if a better offer is made.

However, in a case involving Accor, an Appeals Court decided that such irrevocable commitments are lawful if there is no decisive advantage contradicting the principle of free play of offers and counteroffers that is given to the first bidder.

Nevertheless, irrevocable commitments are not commonly implemented, since prospective offerors would rather obtain the control of a block of shares in the first place, bought from a core shareholder, which would allow much stronger security for the bidder and which may be a prerequisite for either making a voluntary offer or a mandatory offer.

Negotiations for an irrevocable commitment to tender the shares, or for the acquisition of a key shareholding, are mostly undertaken before the offer is filed.

How and when a bid is made public?

A tender offer can be made either under the voluntary procedure or under the mandatory procedure, if the bidder crosses one of the mandatory offer thresholds. If the offeror makes a voluntary tender offer, the bid is made public before the filing of the offer with the AMF. For this purpose, the bidder must post its draft offer on its website, and has the obligation to issue a press release, stating the main provisions of the offer and indicating that the offer is subject to the AMF's approval.

In the case of a mandatory tender offer, the bid must be made public immediately after the event triggering the mandatory offer occurs – most usually, the crossing of the 30% threshold, but also a 2% increase in holdings of between 30% and one half. In this situation, the announcement of the bid must be made by publication on the website and a press release.

In the case of a mandatory tender offer, the bid must be made public immediately after the event triggering the mandatory offer occurs.

What type of disclosure is required for the issuance of shares in a business combination?

The bidder has to produce an offer document ("note d'information") to be filed with the AMF as a draft, to which the target replies with a draft response document ("note de réponse").

The offer document must contain:

(i). the terms of its offer,
(ii). the proposed price or exchange ratio,
(iii). the number and type of securities that the offeror promises to acquire,
(iv). the number and type of securities of the target company that the offeror already holds (directly or indirectly, alone or in concert, or that it may hold on its own initiative), if applicable,
(v). the conditions to which the offer is subject,
(vi). the planned timeline for the offer, and
(vii). the terms of financing for the transaction and the impact of those terms on the assets, activities and results of the companies concerned.

The offeror's intentions for at least the coming twelve months are key and should cover in particular:

(i). the framework for the combination of the two companies (target markets, market shares, headcount, size of new group),
(ii). the ongoing operation of the target company and also of the offeror, to the extent that it is affected by the bid,

(iii). its employment policy,
(iv). the industrial organization of the new group and the structure of its decision-making bodies,
(v). the benefits of the transaction for the two companies and their shareholders,
(vi). any planned synergies, as well as the expected economic benefits of the transaction and when these are likely to be realized,
(vii). costs associated with the transaction,
(viii). whether a merger is contemplated, and
(ix). the possibility of a squeeze-out or of a buyout offer followed by a squeeze-out, in the event that the offeror obtains 95% or more of the equity securities or securities that give or could give access to capital or voting rights.

The response document must contain any restrictive clauses agreed by the parties concerned or their shareholders that could have an impact on the assessment of the bid or its outcome, a report mentioning elements such as the structure of the share capital of the company, the statutory restrictions of the exercise of voting rights and transfer of shares, all direct or indirect shareholding of the company of which it has knowledge, the list of holders of any securities with special control rights and their description, all agreements between shareholders that the company is aware of and which may result in restrictions of the transfer of shares and the exercise of voting rights, the rules governing the appointment and replacement of members of the board and the modification of the by-laws, the powers of the board particularly concerning the issuance or purchase of shares, etc.

The key points for the shareholders are the conditions under which the board reached a reasoned opinion regarding the merits or risks of the offer for the target company, its shareholders and its employees.

In most cases, the response document contains a report from an independent expert. The key points for the shareholders are the conditions under which the board reached a reasoned opinion regarding the merits or risks of the offer for the target company, its shareholders and its employees. Other elements are interesting, including, if they are available and different from the reasoned opinion of the board and comments by the works council, staff representatives or staff members, the intentions of the members of the board.

Do bidders need to produce financial statements (pro-forma or otherwise) in its disclosure documents?

Where all or part of the offer is to be settled in securities, no formal prospectus is required but disclosure "equivalent" to a prospectus is. The offeror must prepare a full presentation, with reference to Annex I of Regulation (EC) 809/2004 of 29 April 2004.

The impact of the offer on the offeror's main accounting results and consolidated accounts is most of the time presented if impact will be significant. The information is set out in a table that indicates the main parts of the financial statements or key financial parameters.

Do you have to disclose any of the transaction documents in full?

There are no transaction documents that have to be disclosed in full. Only the main provisions of the transaction documents have to be disclosed.

What are the principal directors' duties in a business combination? Are director duties owed only to company shareholders or to all stakeholders?

The director's main duty is to act in the corporate interest of the company. This duty is not only to the owners of the company, (shareholders) – but all stakeholders, in particular the company per se, considered as a legal entity, the shareholders, and all employees (and in addition, accessorily, creditors and other interested parties). Directors are thus not necessarily compelled to look for an offer at a higher price, when facing a potential offeror wishing to obtain the control of the company.

Since directors have to take into account all the different stakeholders, whose interests may sometimes be contradictory, they have to keep in mind the fact that the quality of an offer is not always entirely linked to the price offered per share. The intention of the bidder must be analyzed, and quite often its intent towards strategy is crucial when deciding whether to accept or reject its offer.

Is it common for boards of directors to establish special or ad hoc committees in business combinations?

In France, even if an ad hoc committee is created, it is always the board that keeps all its powers and liabilities before the shareholders.

There is no obligation in France to establish ad hoc committees to analyze business combinations. However, they are very common in cases of conflicts of interests that arise when the board faces an offer. In these situations, an ad hoc committee is organized, to investigate from an independent point of view, the benefits of the transaction.

Unlike in other jurisdictions where the power and responsibility that is usually born by boards is transferred to the committee, in France, even if an ad hoc committee is created, it is always the board that keeps all its powers and liabilities before the shareholders.

The ad hoc committee's duty is to prepare the work of the board and bring clarifications to the board, which still bears all liability and takes decisions. Most of the time, a member of the Board of a French company has the right to vote during a meeting of the board – even in cases of conflicts of interests, French law does not prohibit voting by a director, even if an ad hoc committee is set up.

Do courts in France defer to the judgment of the board of directors in takeover situations (in the U.S., this is referred as the business judgment rule)?

The passivity rule prevents directors from taking measures that would frustrate the offer without the consent of shareholders in the case of a takeover, thus Courts are not faced with situations where actions by the board are questioned. For these reasons, French Courts are not used to interpreting managerial decisions. The most important element to remember is that directors must preserve the corporate interest of the company – which is the one point that a Court could rely on and possibly condemn in case of litigation.

The most important element to remember is that directors must preserve the corporate interest of the company.

What form of independent, outside advice is common to be given to directors in a business combination in France?

It is common to have lawyers and financial advisors appointed by each party involved, by the target company and by the ad hoc committee of the board in case of a risk of conflict of interests. It is also common in France to appoint an independent expert to assess the fairness of the terms offered to the shareholders of the target company (this can even be mandatory, for instance in the case of a conflict of interest in the board of the target). The report produced by the expert usually contains a description of the research done by the expert and a fairness opinion which has to conclude on the fairness of the price and possible contradictions with the offeror and its financial advisors.

Is shareholder activism an important force?

In general terms, shareholder activism is not an important force on the French M&A market. However, it is quite common for it to pop back in force first in squeeze-outs, in which case minority shareholders will do everything in their power to block the process and avoid the purchase of their shares; and secondly, through annual general meetings if the share capital is not controlled.

Are hostile tender offers permitted and/or common in France?

Hostile takeovers are permitted in France, but unsolicited tender offers are the exception rather than the rule on the French public M&A market. In correlation, defensive measures are rare. This is partly in connection with the fact that under the stock exchange regulations, directors have to be objective when facing a tender offer, and must not try to prevent it.

However, preventive defense mechanisms are quite sometimes implemented to avoid or lower the risk of an unsolicited tender offer. One widely used preventive defense is the concentration of power among specific – friendly – shareholders and the use of shareholders agreements. Some of the techniques employed in accordance with these mechanisms, are limitations of voting rights after the crossing of a threshold in the share capital (though this is more usual in listed companies having a spread shareholder base without a core shareholding); the use of double voting rights; shareholders' agreements such as pre-emption agreements (allowing existing shareholders to acquire in priority the shares that are being sold) and consultation agreements in the event of a hostile tender offer.

One widely used preventive defense is the concentration of power among specific – friendly – shareholders and the use of shareholders agreements.

Identification mechanisms are also considered to be preventive defense measures, since they allow companies to learn about third parties to the share capital. The most frequent identification mechanisms are:

(i). the implementation in the company's by-laws of additional reporting thresholds to the company that cannot be below 0.5% of the share capital or voting rights, other than the legal mandatory shareholding disclosure thresholds or

(ii). forcing the persons or entities wishing to acquire shares in the company to disclose their identity, either by keeping the shares held in the registered form, or by getting the depositary to identify the owners of bearer shares.

Does France allow for directors to use defensive measures?

The Takeover Directive, establishes the "passivity rule" which prevents directors from undertaking any action that could frustrate the bid, other than seeking alternative bids (the search for a "white knight"). If an authorization from a general meeting of the shareholders is provided during the offer, the management will be able to implement active defensive measures.

However, even if the general meeting of the shareholders grants an authorization which would in theory allow the board to decide on any active measure meant to prevent the hostile offer, there are a few compelling takeover principles of free competition between offers, that in practice limit the management's capacity. The most significant of these principles are equality of treatment between shareholders of the target company, transparency and loyalty.

The passivity rule is trumped by the reciprocity rule, whenever the bidder, its holding company or the concert parties is not subject to equivalent provisions. The reciprocity rule is triggered if the regulations applicable to the offeror are not equivalent to those applicable to French companies, and if the target shareholders have approved, within 18 months before the offer is made, all the defensive decisions taken by the directors. The competent authority able to decide if a regulation is equivalent to the French one is the AMF. The target company has ten trading days after a bid is made to present its case to the AMF, which will answer within five trading days.

The most efficient active defense measure under French regulation is the use of free subscription warrants (so-called "Bons Breton"). An extraordinary general meeting, with special rules for voting, may decide to propose these subscription warrants at a strong discount to existing shareholders before the offer period ends, thus provoking a dilution of the bidder's shares in the total share capital. If such a decision is taken, the general regulations of the AMF could allow the offeror to withdraw its offer in the event the substance of the company is modified (this analysis, though commonly accepted, cannot be confirmed or refuted with certainty). In reality this defensive measure seems to be used as a threat against potential hostile offers: except few attempt to use this defense there is no precedent in which it has been actually implemented.

The most efficient active defense measure under French regulation is the use of free subscription warrants (so-called "Bons Breton").

What are the common defensive measures?

The most common defensive measure when facing a hostile offer is the search for an alternative bid or combination: it does not however, compel the board to obtain authorization from the shareholders, which may be long and difficult to put in place in listed companies. Negative statements made by the board of directors are also frequently used, encouraging the free float to resist the offer. More simply, French listed companies, since they are often closely held, rely on a friendly controlling shareholding – usually reinforced with shareholding agreements and double voting rights granted to long standing shareholders.

What duties do directors owe when enacting defensive measures?

The passivity rule is the main constraint faced by directors when facing a hostile offer. If they have not been granted an authorization from the general meeting of the shareholders, their available defensive measures are limited to making negative comments about the offer and searching for a better deal.

The other point to be kept in mind by the management is the corporate interest of the company. This concept is widely understood in France as the interest of the legal entity, pursuing its own ends in the common interest of shareholders, employees, creditors and other interested parties, to ensure the prosperity and continuity of the company. Corporate interest prevents directors from making decisions that would not be for the benefit of the stakeholders.

Can directors "just say no" and prevent a business combination?

What has been called the "Nancy Reagan defense" is seldom used in practice in France.

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Is litigation common in connection with M&A deals in France?

Except in hostile public offers, where litigation is a very substantive part of the process, neither litigation or arbitration related to M&A are common in France. The most frequent subject of M&A litigation lies in earn out provisions and warranty claims, mostly in private M&A. Additionally, due to the financial crisis, litigation linked to sales and acquisitions has sharply increased, and to a lesser extent litigation related to mergers. This can be partly explained by all the financial targets in distress.

It should also be mentioned that in France, litigation is much more common in private M&A than in public M&A. The most frequent lawsuits involving listed companies concern squeeze outs (which sometimes happen to be implemented after takeovers). The minority shareholders who underwent the squeeze-out procedure sometimes go to court to challenge the AMF decisions and obtain compensation for their shares.

The AMF can launch an investigation, either upon request from the minority shareholders, or at its own discretion, and make sure that the regulation was followed as is should be. In such cases, there are many different causes of dispute, including the avoidance of a mandatory offer after a threshold was crossed, and bid prices that are deemed to be too low.

If so, at what stage is it commonly brought?

Generally, litigation happens once private M&A transactions are completed, and usually concerns either earn out provisions or warranty claims. In public M&A, litigation is rare, except in hostile takeovers where litigation is a weapon generally used by all parties involved, and it usually involves court review after AMF approval.

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