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Corporate M&A

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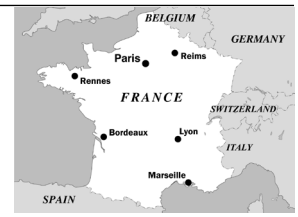

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1. Trends

1.1 M&A Market

In 2019, as in 2018, M&A activity was mainly driven by acquisitions. It was reported that 877 transactions implying a French target were announced in 2019 (compared to 955 in 2018) while 1,106 transactions implied a French bidder (compared to 1,161 in 2018). Deal value remains almost constant, at about EUR61 billion, ie, a variation of 1% between 2018 and 2019.

While there were more tender offers in 2019 (30 compared to the 22 in 2018), this number remains lower than the average over the past ten years. In addition, their volume was lower (EUR925 million compared to EUR2.6 billion in 2018). Three transactions alone represent 70% of the EUR925 million euros of shares acquired in 2019. However, these figures do not consider Iliad's buy-back offer for 19.7 % of the company's share capital (EUR1.4 billion) and Capgemini's offer for Altran Technologies (EUR3.6 billion), two significant transactions launched in 2019 and closed in early 2020. The last tender offer, the price of which was challenged by minority shareholders, reopened during the COVID-19 crisis and was, thus, a success, allowing Capgemini to implement a squeeze-out.

The Paris stock exchange recorded eight IPOs in 2019 (compared to 17 in 2018) and two of them were among the top ten in Europe. Moreover, the success of the IPO of *la Française des Jeux* (EUR1.84 billion) - a company with a monopoly on gaming and betting. The privatisation of Paris airport, which could have happened in 2020, has been postponed due to COVID-19. Financing transactions and issuance os securities should be active in 2020, as many companies will have to finance their needs in the current period.

Several geopolitical risks that weighed on cross-border M&A in 2019 and started to dissipate in 2020 (eg, "phase one" trade agreement between the USA and PRC or the final adoption of Brexit), but the COVID-19 crisis has led to a total absence of visibility on the M&A market for 2020-21.

1.2 Key Trends

The increasing efforts to ensure that stakeholder's interests and public interest are considered led to the adoption of several emblematic measures by the French legislator in 2019. After the introduction of a duty of vigilance for major companies with regard to the activities of their subsidiaries and subcontractors, French law now expressively requires that each company be managed in its best interests, "taking into consideration the social and environmental stakes of its activity". French companies can also adopt a sense of purpose (*raison d'être*) to define a purpose beyond profits. According to the new law, a corporation can specify in its by-laws or publicly announce a sense of purpose - the principles it gives to itself to guide its business and strategic decisions.

Activism developed in France as US investors returned after the 2008 crisis. It remained strongly in evidence in 2019, a year of intense debates on activism. The *Autorité des Marchés Financiers* - the French markets Authority (AMF) - stated that the authority will make public its position on shareholder activism in 2020 and make proposal of new law to regulate activism.

In addition, it is particularly noteworthy that the AMF sent a letter to Muddy Waters, stating that its market communications regarding Casino had to be considered as investment recommendations and recalling "the importance of complying with the principles of probity, fairness and impartiality that apply to all persons issuing investment recommendations, even from abroad, when the recommendations relate to securities admitted to trading on a regulated market and are accessible from France".

The events of the COVID-19 lead to extraordinary measures which significantly impacted the legal environment. On 18 March 2020, the French government published a legislative package of emergency measures aimed at tackling the COVID-19 crisis. This had consequences in all areas of law.

Before the rise of COVID-19, the desire to secure deals has increasingly led market players to attach fixed-price conditions to their M&A transactions. Under these "locked box" type of deals, earn-out provisions are ruled out and all risks are borne by an acquirer between the date of the reference accounts and the closing date. Market trends seem to show that investment funds particularly value fixed-price transactions for reasons of time efficiency and risk control. When auction processes are organised, "locked box" financial terms become the rule. The French market appeared very seller-friendly. Following the rise of COVID-19, the market has turned buyer-friendly and seen strong R&W, MAC and earn-out come back in many deals.

1.3 Key Industries

Most M&A French transactions implying a French target were in the Technologies, Media & Telecommunication sector (170 transactions, 20% of the deal volume in 2019).

Other popular sectors were Industrials & Chemicals (153 transactions, 17% of the deal volume), Consumer and Business Services (respectively 143 and 142 transactions, 16% of the deal volume each) and Pharma & Biotech (62 transactions, 7% of the deal volume).

2. Overview of Regulatory Field

2.1 Acquiring a Company

The most common means of acquiring a company in private M&A transactions is the use of a share deal, although asset deals also represent a significant proportion of private business combinations. 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 company is not closely held, or when there is no controlling shareholder. Voluntary takeovers are also employed in the case of hostile bids. Otherwise, because many French-listed companies are closely-held, many investors prefer to acquire a controlling interest first, resulting in a mandatory offer. A French listed company may also be acquired by a merger transaction.

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.

2.2 Primary Regulators

Numerous regulators supervise M&A activity in specific sectors, such as banking and insurance (the Prudential Supervisory Authority – ACPR), energy (the Commission for Energy Regulation – CRE), telecommunications (the Regulatory Authority for Electronic Communications and Postal Services – ARCEP), broadcasting communication (the Independent Authority to Protect Audio-visual Communication Freedom – CSA) and data privacy (the Independent Authority on French Data Protection – CNIL).

More generally, the Competition Authority (*Autorité de la Concurrence*) is responsible for merger control and works to prevent illegal economic practices.

Public M&As are regulated by the AMF with approval (visa) of the public documentation filed by a bidder. The AMF regulates corporate finance transactions by listed companies and checks documents issued by such companies when they make transactions such as IPOs, capital increases and rights issues, public cash offers, exchange offers, buyout offers, squeeze-outs, mergers and demergers.

2.3 Restrictions on Foreign Investments

French administration controls certain foreign investments in strategic sectors. This control has been strengthened in recent years, including in 2019.

A foreign investment is either:

- the takeover of a French entity by a foreign investor (ie, a foreign or non-resident player, including French entities controlled by a foreign entity);
- the acquisition of a branch of activity of a French entity by a foreign investor; or
- the crossing of the threshold of 25% of the capital and voting rights of a French entity, directly or indirectly, alone or in concert, by a foreign investor (it being specified that this case does not apply to investors from a Member State of the European Union or a State party to the Agreement on the European Economic Area).

Foreign investments are subject to prior approval by the Ministry of Economy if falling in one of the enumerated strategic business sectors, including but not limited to: national defence; water or energy supply; transportation networks and services; space operations; electronic communications networks; health protection; research and development in cybersecurity, artificial intelligence, robotics, additive manufacturing and semiconductors; hosting of certain sensitive data; and gambling.

Since 2019, either of the foreign investor or the target company can file the request for authorisation with the Ministry.

The Ministry of Economy may authorise the foreign investment subject to certain conditions, including the carve out of strategic activity.

2.4 Antitrust Regulations

Where a concentration has a EU dimension, it will be governed by EU law and controlled by the European Commission; otherwise, French law will apply, under the control of the French Competition Authority. The concept of concentration is defined in the same way in European and French law (merger, takeover or creation of a joint-venture) and appraised in the same way by the Competition Authority and the European Commission.

If the concentration exceeds certain turnover thresholds, it will either be notified to the Competition Authority, or to the European Commission, or will not be notified. The calculation of turnover is made in the same way as for European merger control. Some sectors (banking, insurance, retail, etc) are subject to special regulations.

Authorities closely monitor practices that could lead to gun-jumping. In November 2016, the French Competition Authority jointly fined Altice and SFR EUR80 million for the premature completion of two mergers declared in 2014.

2.5 Labour Law Regulations

French Labour Code provides that the works council of a company has to be informed and consulted about modifications to the economic or legal organisation of a company, including notably merger, sale, acquisition or sale of subsidiaries or investment in a company. The works council of companies taking part in a private M&A transaction must be informed and consulted in advance of the transaction.

Acquirers shall keep in mind that the works council must have sufficient time and information provided by legal representatives during this consultation period. In tender offers the information and consultation procedure by a bidder follows the public announcement of a deal. On the target side, the works council must state whether it recommends the offer within one month of its publication.

Nonetheless, works council's role is merely advisory and it does not have any actual means to influence the decision of either the shareholders of the target or the bidder.

In the context of an asset deal with a sale of a business (*fonds de commerce*) or a share deal relating to the majority of a company's shares, employees must be informed of the possibility of making an offer. In companies with less than 50 employees, the transaction shall not occur prior to the end of a two month period during which the employees may present an offer; in companies with between 50 and 250 employees, this right to present and offer is in parallel of the information and consultation procedure set out above.

The seller does not have to accept the employees' offer - if any - but the procedure must be followed, on pain of a fine of up to 2% of the sale price.

2.6 National Security Review

See **2.3 Restrictions on Foreign Investments**.

3. Recent Legal Developments

3.1 Significant Court Decisions or Legal Developments

PACTE Act

The 'PACTE' Act (for *Plan d'Action pour la Croissance et la Transformation de l'Entreprise* or Action Plan for Growth & Transformation of Businesses) was introduced by the French Government & Legislator as an emblematic law for the business world. It is a potpourri which deals with subjects as varied as privatisation, ICOs and self-driving cars, which is of direct or indirect interest to M&A.

French law now expressively requires that each company be "managed in its best interests, taking into consideration the social and environmental impact of its activity", ie, in the companies best interest. It was agreed for long that French company directors have to act in the company's best interests. It is now explicitly provided by the law. In addition, while directors were already bound by mandatory rules for the protection of stakeholders (labour and environmental laws, of consumer interests, etc) they must now consider the social and environmental impact of the company's activity in each of their decisions.

Any company can now specify its sense of purpose (*raison d'être*), distinct from its corporate purpose, "consisting of the principles with which the company is endowed and for the observance of which it intends to allocate resources in the conduct of its business". This provision appears to allow a company to assert and pursue a not exclusively profit-oriented goal. We will simply point out that the specificity of a *raison d'être* is far from being neutral in terms of management and the potential liability of managers and the company, and that such *raison d'être* may be used either by activist shareholders but also by any interested person, including non-profit organisations "fighting for a better world".

A shareholder may now initiate a squeeze-out if minority shareholders represent less than 10% of the share capital and voting rights (compared to 5% prior PACTE Act), which aims at making more difficult investment strategies designed to prevent squeeze-out.

Prospectus 3 and Offer of Securities to the Public

European Regulation 2017/1129 ("Prospectus 3") extends the concept of public offer of securities to private placements and equity financing.

The French Legislator amended French law to allow private placements and public offers to continue, while ensuring that the extension of the European definition of public offer does not entail additional requirements for offers that were not previously considered as public offers of financial securities.

No Hardship for Transactions on Securities or Financial Contracts in Case of Unforeseeable Changes (Imprévision)

Article 1195 of the French Civil Code grants the judge with the power to amend a contract if unforeseeable circumstances arise and render performance of the contract commercially too excessive (*imprévision*). To avoid that it be applicable to transactions on securities and financial contracts, the law expressly excluded them from the scope of the *imprévision*.

Civil Sanctions Incurred for Failure to Declare Crossing of Thresholds
Noting the absence of successive disclosures of threshold-crossing by a group of shareholders acting in concert, the shareholders' meeting of a company listed on Euronext decided to deprive these shareholders of voting rights attached to the shares they held exceeding the undeclared thresholds. As ruled in the Sacyr Eiffage case in 2012, the French Commercial Court decided in 2018 that, in the absence of any challenge arising from companies acting in concert during the shareholders' meeting, the bureau of the shareholders' meeting can act as the "judge of the obvious" to establish the existence of the concerted action.

3.2 Significant Changes to Takeover Law
Most takeover law rules have not changed since 2014.

Following a public consultation on proposed changes to its regulations, the AMF published, in January to February 2020, amendments to its General Regulations, Instructions and Recommendations with the aim to enhance the protection of minority shareholders and better ensuring the independence and transparency of fairness opinions.

The amendments changed the timetable of the tender offers, providing a process with more time for minority shareholders to comment and discuss with the board of the target after the offer is filed and before the board of the target takes its reasoned opinion on the offer. In addition, it increased the information published by the offeror and the target, for more transparency and a better understanding of the interest to tender or not in the offer, through the fairness opinion of the independent expert which provides its views on the financial terms of the offer.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies
Stakebuilding prior to launching an offer is not common, given the narrow markets with low trading volumes and the immediate impact on share prices; moreover, stakebuilding by cash-settled derivatives has to be disclosed.

In stake building strategies, AMF powers have to be taken into account in particular in case of rumours about a potential tender offer (eg, with "put up and shut up" procedure)

4.2 Material Shareholding Disclosure Threshold
Any natural person or legal entity, acting alone or jointly, that 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 with 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;
- companies controlling that person;
- a third party with whom that person acts jointly; or
- a third party with whom the person has entered into a temporary transfer agreement covering those shares or voting rights,

must be taken into account (assimilated securities) when calculating the ownership of the shares, together with shares granting the use (usufruct) of shares lodged with the person (provided that he or she may exercise the voting rights attached as he or she chooses in the absence of specific instructions from the shareholders), and voting rights which that person may freely exercise by virtue of a Power of Attorney in the absence of specific instructions from the shareholders concerned.

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

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

Additionally, other hurdles to stakebuilding are implemented by French law in connection with special regulations regarding specific sectors, especially investing in credit institutions and insurance institutions. With regard to credit institutions, a number of elements need to be taken into account, including:

- any person or group of persons acting together must obtain the authorisation of the Prudential Supervisory Authority (ACPR) 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 10%, 20%, one-third or 50% of the voting rights; and
- any transaction whose effect is to enable a person or a group of persons acting together to acquire 5% of the voting rights must be immediately reported to the ACPR.

Regulations concerning insurance institutions provides a control procedure establishing different levels including prior

authorisation from the ACPR when the 50%, one-third, 20% or 10% threshold is crossed by a shareholder, and a simple prior declaration in the case of transactions that pass the 5% threshold of share capital or voting rights.

4.4 Dealings in Derivatives

Dealing in derivatives is allowed but must 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). 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 gives a long position on the shares of the person required to make the notification. In particular, this applies to contracts for difference 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 considered when calculating the mandatory offer threshold.

4.5 Filing/Reporting Obligations

The European Market Infrastructure Regulation (EMIR) has required transparency regarding derivatives contracts negotiated on the regulated markets or over-the-counter. EMIR created an obligation to report all transactions in derivatives to trade repositories. This obliges the reporting of new contracts with a trade repository registered with the European Securities and Markets Authority.

In addition, a European regulation on short selling aimed at establishing a new European-level harmonised framework and greater transparency came into force in November 2012. Pursuant to this regulation, any person holding a short position equal to or higher than 0.2% of the share capital of a company admitted to trade on a French regulated market must notify the AMF of this position within one trading day. Then, this obligation applies when one of the successive supplementary thresholds set by 0.1% steps is crossed, either upwards or downwards. When the net short position is equal to or higher than 0.5% of the share capital, the AMF releases this information to the market.

4.6 Transparency

Any person or entity crossing the 10%, 15%, 20% and 25% thresholds of a company admitted to trading on a regulated market is required to file a detailed declaration of intent within five trading days.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal

French regulations contain a general disclosure obligation, which states 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 the 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 usually in the case of hostile bids.

A "put up and shut up" mechanism has also been implemented, which aims 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 and can occur, for instance, if there are large swings in the stocks of the target, market rumours or articles in the press.

The request for disclosure by the AMF may lead to two eventualities: either the suspected bidder confirms his or her 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 he or she has no such intent, which results in a six-month period during which he or she 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.

Legal requirements allow for deferring the disclosure of a deal under the parties' responsibility if confidentiality is temporarily needed to carry out the transaction and if persons can ensure such confidentiality. Practically, in an acquisition of a controlling stake, negotiations are disclosed at the time an exclusivity letter is signed between the seller and a potential buyer. This disclosure thus allows the information provision and consultation procedure with the works council to be started, which needs to be completed before the signing of the share purchase agreement.

5.2 Market Practice on Timing

Market practice on timing does not differ from legal requirements. Nevertheless, new EU regulations on the publication of privileged/price-sensitive information, which significantly rein-

force the level of information that an issuer has to disclose when it has decided to delay the relevant information, could lead to room for interpretation and thus specific market practice.

Under such regulations, an issuer may still, on its own responsibility, delay disclosure to the public of inside information provided that all of the following conditions are met:

- immediate disclosure is likely to prejudice the legitimate interest of the issuer;
- delay of disclosure is not likely to mislead the public; and
- the issuer is able to ensure the confidentiality of that information.

However, the issuer must then inform the AMF that the disclosure of privileged/price-sensitive information has been delayed and provide a written explanation of how the above-mentioned conditions were met, immediately after the information is disclosed to the public.

In addition, the European Securities and Markets Authority and AMF have respectively issued guidelines to establish non-exhaustive indicative lists of:

- information that is reasonably expected or is required to be disclosed in accordance with legal or regulatory provisions in EU or national law, market rules, contract, practice or custom, on the relevant commodity derivatives markets or sport markets; and
- legitimate interests of issuers and situations in which the delay of disclosure of inside information is likely to mislead the public.

5.3 Scope of Due Diligence

Basic and fundamental information (annual accounts and auditor reports) can usually be found on public websites or are available with other information directly on a company's website (which usually discloses the accounts for the last five years). Public registers hold basic information on bylaws, patents and trade marks or real estate.

However, in the context of private M&As, it may be difficult to obtain financial information about companies that refuse to disclose such information, since French regulations do not compel a company to do so.

Regarding the scope of information disclosed in data room procedures in connection with takeover situations, potential buyers may access details that could influence a company's share price. Thus, for public M&As, 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 the 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 is put in place for the purposes of the transaction. Additionally, a 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.

5.4 Standstills or Exclusivity

Exclusivity is more common than standstills in the French M&A market. Usually, French-listed companies are closely held, so that any potential acquirer wishing to engage in a friendly takeover will negotiate directly with the core shareholders, since the free float for trading is restricted. Thus, the few shareholders holding the company accept exclusivity. Although it is not a rule, it is usual practice. In the event that an open bid takes place, exclusivity is usual in the last step of the process after the selection of the final bidder.

5.5 Definitive Agreements

French regulation allows tender offers to be documented in a definitive agreement.

French listed companies are frequently owned by a small number of shareholders holding the majority of shares, so potential bidders wishing to obtain control of the targets get in touch with core shareholders to agree on a share purchase agreement, eventually resulting in a voluntary tender offer, intending to take control of the target company. Two situations can arise from this offer:

- either the control company is indeed acquired by a bidder through an SPA, making the bid successful; or
- the core shareholders find themselves obliged to tender the stake into the offer under a tender and support agreement (*engagement d'apport*).

To ensure success of an offer it is more and more common that a target company enters into an agreement with a bidder, such as a merger agreement.

6. Structuring

6.1 Length of Process for Acquisition/Sale

In private M&As, the length of the process is determined by whether a 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&As, the tender offer process and timelines are regulated. In public M&As relating to a Paris stock exchange-listed target business, the AMF, after a period of review that generally lasts from either 20 trading days after the filing of an offer or up until one month and two days after consultation of the works council, can approve the offer. It can then allow its opening for a period of a minimum of ten trading days in simplified cash tender offers, or 25 trading days in voluntary tender offers.

The review period can be much longer when the transaction is suspended until it is approved by the antitrust authorities, and in the case of a judicial recourse filed against an AMF decision on compliance of an offer, when this challenged decision is suspended by a court decision.

6.2 Mandatory Offer Threshold

For the Euronext Paris market, the stock exchange market law requires the filing of a mandatory offer in two situations:

- Where any natural person or legal entity 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.
- Where any person previously held between 30% and 50% of a listed company's share capital or voting rights, either alone or in concert, directly or indirectly, and increases that holding by at least 1% within twelve months (also referred to as the speed-limit acquisition). In such cases, an 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 a target company holds 30% or more of the 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. However, the AMF may grant an exemption to a mandatory offer in certain situations listed in its General Regulations.

6.3 Consideration

On the French M&A market, cash is a more common form of consideration than shares. Exchange offers represent between 5% and 10% of the market depending on the year. It is important to note that if, in the twelve months before an offer is filed, the offeror (acting alone or in concert) has purchased cash securities giving it more than 5% of the shares or voting rights of a target company, the offer must 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.

6.4 Common Conditions for a Takeover Offer

A tender offer must generally be unconditional, although some exceptions exist.

The 2014 takeover law reforms introduced a new obsolescence threshold in takeover bids (whether voluntary or compulsory), according to which an offer becomes null and void at the expiry of an offer period if a bidder fails to acquire at least 50% plus one share of the shares or voting rights tendered in an offer.

However, the AMF has proposed to adopt a list of situations where the application of the obsolescence threshold may be waived, and it intends to reserve for itself the power to either lower the 50% plus one share threshold or exempt offerors from its application in certain cases.

Market participants may also introduce certain conditions into their takeover offers, the most frequent of which is a waiver threshold, which can apply only in voluntary offers; the offer made by a bidder can contain a clause making its 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 share capital or voting rights of a target. The application of the waiver threshold can be waived until five trading days before the end of the offer. Note that the minimum percentage may 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, although its implementation is extremely scarce: a person or company may launch an offer on numerous companies, where each offer is conditional on the success of the other offers.

6.5 Minimum Acceptance Conditions

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 a shareholder (whether acting alone or in concert), provides the majority during the ordinary general meetings, the decisions of which concern numerous aspects of the life of a company. An ordinary general meeting has the ability to vote on subjects, such as the approval of accounts, but also on decisions concerning common operations for a company (eg, agreements between a company and a director, authorisation prior to the conclusion of certain transactions by directors, purchase by a company of its own shares, etc).

Most importantly, the OGM is the assembly that can 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 management after a merger or an acquisition. In practice, depending on the shareholding structure of the capital, a percentage of less than 50% of voting rights can give control of a target.

Another essential control threshold relates to the majority necessary to control an extraordinary general meeting, for which purpose a shareholder must hold at least two thirds of voting rights. Indeed, the extraordinary general meeting can modify the bylaws of a company, which includes the modification of the corporate purpose, changing the name of the company, the transfer of registered offices and, most importantly, the decision to increase or decrease capital. For all these operations, a shareholder must own at least two thirds of voting rights, subsequently giving it control of both an OGM and an EGM.

The 90% threshold of voting rights is also relevant since the market rules of Euronext Paris as well as Euronext Growth provide for a case of simple delisting. According to such rules, a controlling shareholder may request the delisting of shares of a controlled issuer from the stock exchange following a simplified tender offer if certain specific requirements are met.

In addition, since 2019, this level allows core shareholders to launch a squeeze-out procedure and eventually to obtain control of 100% of the share capital.

The 95% threshold of share capital and voting rights should also be noted, as combined with other conditions, the ownership of 95% of the share capital of a subsidiary allows a holding company to avail itself of tax consolidation and to gain a strong advantage in the tax field.

6.6 Requirement to Obtain Financing

In a private M&A transaction, a financing condition can be implemented in an offer provided by a 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 a bidder obtaining financing. Indeed, a draft offer has to be filed with the AMF by one or more investment service providers (banking institutions) authorised to act as underwriter(s), and acting on behalf of an offeror.

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

6.7 Types of Deal Security Measures

Break-up fees are not prohibited under French regulation, and they appear to have been used increasingly frequently in recent years, in particular in private deals.

In tender offers, break-up fees can take two forms, depending on whether they are agreed to by the core shareholders or with a target company itself.

If agreed to by core shareholders, they are included in the shareholders' irrevocable commitment to tender their shares. These agreements have been challenged by the French courts, when they have been found to hinder the concept of the free play of offers and counter-offers. French law provides that, to make a counter-offer competitive with an initial offer, a new bidder has to propose a share price that is at least 2% higher than the first price.

If break-up fees are agreed with the target business, care must be taken that they cannot be interpreted as contrary to the corporate interest of the company, as in this case the agreement will not be authorised. Furthermore, break-up fees may prevent any counter-offer that would not be attractive for the shareholders, ie, all offers that do not allow the fees to be absorbed, and which de facto automatically raise the minimum price of a counter-offer. For this reason, the AMF is very careful about break-up fees. Sometimes reverse break-up fees are contemplated to avoid the bidder quitting a deal.

When filing the offer, 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 the AMF.

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

6.8 Additional Governance Rights

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 a 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 providing a bidder with specific rights with regards to the board.

6.9 Voting by Proxy

Shareholder voting by proxy is allowed in France. The French Commercial Code provides that shareholders may be represented at shareholders' meetings either by another shareholder or by their spouse.

More generally, following a European directive, the French Commercial Code provides that in the case of publicly listed companies, or companies listed on an organised Multilateral Trading Facility, shareholders may be represented by any natural or legal person.

6.10 Squeeze-Out Mechanisms

The mandatory acquisition of minority shareholdings, or squeeze-out mechanisms, can take place in two distinct situations:

- following a tender offer, in which case the squeeze-out procedure has to be implemented within three months; or
- following a buyout offer addressed to minority shareholders.

To be entitled to carry out a squeeze-out connected to a tender offer, an offeror has to hold at least 90% of the share capital and voting rights of a target at the end of an 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 an 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 an offer considering an independent expert valuation for a squeeze-out).

Where an offer follows the normal procedure and is voluntary, the AMF does not have to review the subsequent squeeze-out, which is automatic. Otherwise, the squeeze-out and its price have to be cleared by the AMF in the original decision of compliance or in a new decision.

The rules are quite similar for a squeeze-out after a buyout offer. A shareholder wishing to launch a squeeze-out procedure must hold, alone or in concert, at least 90% of the share capital and voting rights at the end of the buyout offer.

If the bidder did not make it clear during the filing of a buyout offer that he or she intends to start an automatic squeeze-out procedure after the buyout, the AMF must be informed within ten trading days and the squeeze-out and its price have to be cleared by the AMF in a new decision.

6.11 Irrevocable Commitments

French regulations allow the execution of irrevocable commitments to tender the shares of a target company (*engagements d'apport*). However, the principle of the free play of offers and counter-offers 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. Thus, these commitments are strictly controlled by the AMF, which tends to interpret provisions contained in such agreements in favour of 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 were lawful if there was no decisive advantage contradicting the principle of free play of offers and counter-offers 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 a bidder and which may be a prerequisite for making either a voluntary 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 an offer is filed.

7. Disclosure

7.1 Making a Bid Public

A tender offer can be made either under a voluntary or a mandatory procedure if a bidder crosses one of the mandatory offer thresholds. If an offeror makes a voluntary tender offer, the bid is made public before the filing of an offer with the AMF. For this purpose, the bidder must post its draft offer on its website, and is obliged to issue a press release stating the main provisions of its 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 1% increase in holdings of between 30% and 50%. In this situation, the announcement of the bid must be made by publication on its website and in a press release.

7.2 Type of Disclosure Required

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

In most cases, the response document contains a report from an independent expert. The key points for shareholders are the conditions under which the board reached a reasoned opinion regarding the merits or risks of an offer for a target company, its shareholders and its employees. Any board member who disagrees with the board's opinion may request that the dissident opinion be disclosed.

In addition, the intentions of the members of the board to tender their shares or to keep them are also disclosed to the market. Further points of interest include, if they are available and different from the reasoned opinion of the board and comments by the works council, staff representatives or staff members including the report of the independent expert of the works council, if any.

7.3 Producing Financial Statements

Where all or part of an offer is to be settled in securities, no formal prospectus is required, but disclosure equivalent to a prospectus is needed. An offeror must prepare a full presentation, with reference to the relevant Annex of the EU Regulation.

The impact of the offer on the offeror's main accounting results and consolidated accounts is usually presented if this 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.

7.4 Transaction Documents

Currently, there are no transaction documents that have to be disclosed in full. Only their main provisions have to be disclosed.

8. Duties of Directors

8.1 Principal Directors' Duties

A director's main duty is to act in the company's best interest. Recent legal developments confirmed the prevailing conception that the "best interest" should be understood as that of the company itself, considered as an autonomous legal entity and pursuing its own ends, aimed to ensure the prosperity and continuity of the company.

In addition, since directors must consider stakeholders' interests, which may be contradictory at times, 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 intentions of a bidder must be analysed, and quite often its intent towards strategy is crucial when deciding whether to accept or reject its offer.

8.2 Special or Ad Hoc Committees

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

The ad hoc committee's duty is to assist the work of the board and bring clarifications to the board, which still bears all liability and makes 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 conflict of interest. French law does not prohibit voting by a director even if an ad hoc committee is established.

Unlike in other jurisdictions, the board keeps all its powers and liabilities towards the shareholders even if an ad hoc committee is created.

8.3 Business Judgement Rule

Since 2014, the scope of the board passivity rule has been reduced drastically as the board of directors of a target company now has the power to take all decisions likely to have the effect of making the bid fail, subject to the prerogatives explicitly reserved to shareholders in their general meetings limited to the interest of the company.

The board of directors must continue to act in accordance with the interest of the company, even in adopting defence measures in the context of a takeover. This is the one point upon which a court can rely and possibly condemn in the event of litigation.

Moreover, companies who wish to opt out of this new regulation can continue to refer to the old board passivity rule subject to reciprocity or not in their articles of incorporation.

8.4 Independent Outside Advice

It is common to have lawyers and financial advisers appointed by each party involved, by a target company and by the board and/or the ad hoc committee of the board in case of a risk of conflict of interest. It is also common in France to appoint an

independent expert to assess the fairness of terms offered to shareholders of a target company (this can even be mandatory, for instance in the case of a conflict of interest within the board of a target).

The report produced by the expert usually contains a description of the research carried out by that person and a fairness opinion, which has to conclude on the fairness of the price and possible disagreements with the offeror and its financial advisers. In some cases, strategic advisers are also used.

8.5 Conflicts of Interest

The French Commercial Code on related party transactions provides that any agreement between a company and one of its directors or executive directors, one of its managers, one of its shareholders holding a fraction of the voting rights exceeding 10%, or, in the case of a corporate shareholder, the controlling company, must be subject to the prior approval of the board.

Also subject to prior authorisation of the board is any agreement between two companies if a director, executive director or manager of the first company is an owner, partner with unlimited liability, manager, director or member of the supervisory board of the second company.

The control of related party transactions is carried out in six steps:

- Information of the board by the related party;
- Approval by board: in consideration of the company's interest, notably by specifying the financial terms and conditions of the transaction (as the case may be, the related party shall not participate either to the debate or the vote);
- Information on the company's website when the company is listed;
- Information of the company's auditors by the chairman of the board;
- Issuance by the auditors of a special report on the transactions; and
- Vote by the shareholders' meeting: the special report issued by the auditors is submitted to the shareholders' meeting for further approval (as the case may be, the related party shall not vote).

The law specifies that the term "agreement" should be understood to include not only agreements made directly with the interested party him or herself, but generally all agreements in which the director or shareholder is directly or indirectly interested, or which he or she makes with the company through an intermediary.

The courts have had a broad interpretation of what constitutes an interested transaction in this context: the prior approval requirement is triggered whenever a director or shareholder derives a benefit from a transaction with the company.

Failure to seek prior approval of an interested transaction or its approval by a subsequent ordinary shareholder meeting can have several consequences, depending on the nature of the company. Typically, the agreement can be declared null and void if it has caused prejudice to the company or if the interested party may be liable for any prejudice caused to the company.

9. Defensive Measures

9.1 Hostile Tender Offers

Hostile takeovers are permitted in France, but unsolicited tender offers are the exception rather than the rule. Likewise, defensive measures are rare. This is partly because under stock exchange regulations directors have to be objective when facing a tender offer and, until recently, they could not take any defensive measures.

However, in practice, preventive defence mechanisms were sometimes implemented to avoid or lower the risk of an unsolicited tender offer.

One widely used preventive defence is the concentration of power among specific – friendly – shareholders and the use of shareholder agreements. Some of the techniques employed in accordance with these mechanisms are limitation of voting rights after the crossing of a threshold in the share capital (although this is more usual in listed companies having a spread shareholder base without a core shareholding); shareholder 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.

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

- the implementation in a company's bylaws of additional reporting thresholds to the company, which cannot be below 0.5% of the share capital or voting rights, in addition to the legal, mandatory shareholding disclosure thresholds; or
- forcing the persons or entities wishing to acquire shares in a 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.

9.2 Directors' Use of Defensive Measures

France allows directors to use defensive measures as set forth in **9.3 Common Defensive Measures**.

9.3 Common Defensive Measures

So far, the most efficient active defence measure under French law has been the use of free subscription warrants ("Bons Breton"). An EGM with special rules for voting may decide to propose these subscription warrants giving access to equity at a strong discount to existing shareholders before the offer period ends, thus provoking a dilution of a bidder's shares in the total share capital.

If such a decision is taken, the general regulations of the AMF could allow an offeror to withdraw his or her offer if the substance of a company is modified (this analysis, though commonly accepted, cannot be confirmed or refuted with certainty). This defensive measure seems to be used as a threat against potential hostile offers; there is no precedent in which it has actually been implemented.

Moreover, the most common defensive measure when facing a hostile offer is the search for an alternative bid or combination. Some combinations do, however, compel a board to obtain authorisation from shareholders, which may be lengthy and difficult to put in place in listed companies.

Negative statements regarding the strategy to be implemented by an offeror or regarding the consequences of this strategy, made by a board of directors are also frequently used, encouraging the free float to resist the offer. With this regard, the Pacte Act may give a new ground to the management of target companies.

Directors must not only act according to the best interests of society, but also take into consideration the social and environmental stakes of the company's activity (see **3.1 Significant Court Decisions or Legal Developments**). The management of a company targeted by a hostile tender offers could therefore try to defend itself by arguing that the bidder's offer is in contradiction with the company's or the stakeholder's interests, or even that the company's *raison d'être* is incompatible with 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.

9.4 Directors' Duties

Directors have a permanent duty to act in the company's best interest, irrespective of the fact that the board passivity rule has been abolished. Company's best interest prevents directors from making decisions that would not be for the benefit of the company.

Moreover, compelling takeover principles of free competition between offers continues to limit, in practice, a management's capacity. The most significant of these principles are equality of treatment between shareholders, transparency and loyalty.

Further, companies can choose to continue to apply the old board passivity rule by keeping it in their articles of association. It is practically unheard of for companies to adopt the board passivity rule.

It is, therefore, probable that, for now, companies will continue to use the same defence mechanisms as before and that these will remain moderate.

9.5 Directors' Ability to "Just Say No"

The so-called the "Nancy Reagan defence" is seldom used in practice in France. Management prefers to obtain support, either formal or informal, from key shareholders. A decision by directors to coalesce and "just say no" on their own initiative is considered risky.

To gain support from existing shareholders to push a hostile offer back, directors appoint advisers and independent experts with the aim of getting a precise valuation of the scope and the consequence of a transaction, and the potential entity that would result from the combination.

10. Litigation

10.1 Frequency of Litigation

Except in hostile public offers, where litigation is a substantive part of the process, neither litigation nor 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, litigation linked to sales and acquisitions has sharply increased and, to a lesser extent, litigation related to mergers. This can be partly explained by the high number of financial targets in distress.

In France, litigation is much more common in private M&A than in public M&A. The most frequent lawsuits involving listed companies concern the decision of the AMF to declare an offer compliant or to authorise a squeeze-out (which happens to be implemented after takeovers). The minority shareholders who underwent the squeeze-out procedure sometimes go to court to challenge AMF decisions and obtain compensation for their shares.

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

10.2 Stage of Deal

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

11. Activism

11.1 Shareholder Activism

Shareholder activism is now an important trend in the French M&A market, and an increasingly relevant consideration for corporate boards to bear in mind, notably regarding governance issues.

Activism is favoured in France by a tendency of pro-minority shareholder regulations (eg, the rise of the "say on pay"). Such activism tends to protect minority shareholders in disciplining management in order to implement value creation. Shareholder activism is expanding, especially for companies listed on a regulated market.

As well as the classic financial and political considerations (higher dividends and board seats notably), activists can also focus on environmental, social and governance issues and are now be in a position to use the company's *raison d'être* as a lever on management (see **3.1 Significant Court Decisions or Legal Developments**).

However, after several high-profile cases, the AMF Chairman announced that the AMF was "paying close attention to the smooth operation of markets, to which activism can contribute but to which it can also disrupt in some cases" and was going to change its doctrine on activism.

11.2 Aims of Activists

Activists sometimes encourage companies to enter either into transactions, reorganisations or major divestitures. They sometimes question the relevance of the management, the governance, the strategy or a transaction on its general or financial terms. The final aim is of course to have a better valuation of the stock of the company.

11.3 Interference with Completion

Most of the time, as soon as a transaction is announced, activists actively use the press to put pressure on a deal and seek to influence the transaction. The aim is usually to gain time to try to find a better offer, with better price/better financial conditions.

Orrick Rambaud Martel has nine partners, one senior counsel, two counsels and 12 associates in the corporate M&A practice of its Paris office. Orrick's key practice areas are mergers and acquisitions, joint ventures, strategic and corporate advice, legal and tax engineering, private equity, acquisition financing, commercial and corporate litigation and arbitration, securities litigation and technology companies. The team represents national and international businesses on purchases and disposals, alliances, capital market transactions and restructuring. Clients include both listed and non-listed companies, commercial and investment banks and investment funds. The service provided by the team is complemented by the firm's wider expertise and lawyers practising through an international structure across three continents. Its M&A clients are principally in the industrial sector (energy, infrastructure, technology, automotive, construction and transportation) and the financial sector (banks, private equity and investment funds).

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