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Corporate M&A

Contributed by

Orrick, Rambaud Martel

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Law & Practice

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CONTENTS

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Our M&A clients are principally in the industrial sector (energy, automotive, technology, construction and transportation) and the financial sector (banks, private equity and investment funds).
They benefit from the strong support of the teams for tax, competition, finance, public law, energy and infrastructure, technology, real estate, employment, etc in Paris and from the worldwide network.

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1. Trends

1.1 M&A Market

One major difference between 2014 and 2015 was that several significant transactions occurred in 2015 even though some of them were announced in 2014: the Lafarge and Holcim merger (EUR32 billion), the buyout of SFR by Numericable (EUR13.5 billion) and GE's acquisition of Alstom's energy businesses (EUR12.35 billion). Widely reported M&A transactions happened in 2014 but with lower amounts, such as L'Oréal's buy-back of 8% of its shares from Nestlé (EUR6.5 billion) combined with the sale of its stake in Galderma (EUR3.1 billion), and the capital increase of Peugeot SA (EUR1.95 billion).

If global M&A activity in 2015 saw a record year (EUR4.282 billion) due to the USA's dynamism, the French M&A market declined to USD160.8 billion (EUR147.21 billion), dropping by about 30% compared to 2014, according to Thomson Reuters. However, acquisitions of foreign companies by French groups increased in 2015 and are expected to grow until France ranks the third largest country in Europe in 2017, after the UK and Germany.

Currently, France is one of the preferred destinations for American, British, Italian and German investors. Since 2010, France has overtaken Germany in terms of the number of transactions. In 2015, 2,794 transactions were completed in France, closely followed by Germany, which recorded 2,648 transactions. According to the Banque de France, the USA was the leading foreign investor in France in 2015 with EUR114.3 billion.

Other figures illustrate the attraction of France's economy: Paris is still the world's second largest host to multinational headquarters and over 500 multinationals have their home office in Paris (such as Bouygues Telecom, LVMH and Total). Furthermore, France is 27th out of 189 countries in the 2016 Doing Business report (ranking first in Trading across Borders). France also continued to move up on the FDI Confidence Index in 2015 and ranked eighth out of 25 countries. On this basis, we can expect 2016 M&A activity in France to remain strong.

1.2 Key Trends

In 2015, M&A activity was marked by a series of particularly large deals rather than many small and medium-sized transactions. Large companies are being forced to combine forces

in order to face global competition, whereas medium-sized companies are not as anxious to merge. In 2015, deals were viewed as defensive deals. The above-cited Lafarge-Holcim and SFR-Numericable deals are considered to be illustrations of this trend, as is the aborted Orange-Bouygues Telecom deal.

The desire to secure deals has increasingly led market players to attach fixed-price conditions to their M&A transactions. Under these 'locked box' types of deal, earn-out provisions are ruled out and all risks are borne by the 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.

More generally, the French M&A market in 2015 and 2016 has shown multiple trends.

Firstly, foreigners' interest in French companies has grown. Indeed, US investors have been significant buyers and Asian investors are showing strong interest in French companies (eg Club Méditerranée, PSA and Toulouse-Blagnac Airport) and some negotiations with Qatari investors are ongoing (eg GFI Informatics).

Secondly, the CAC 40 companies were also very active in the M&A market. In April 2015, Capgemini acquired IGATE Corporation, a US IT services company (EUR3.7 billion). In November 2015, Air Liquid revealed the buyout of Airgas, a US distributor of industrial, medical and other gases (EUR12.5 billion). In December 2015, AccorHotels announced the acquisition of FRHI Hotel and Resorts, a Qatari luxury hotels group, including the Fairmont, Raffles and Swissôtel chains (EUR2.6 billion).

Finally, the 2016 H1 French M&A market was characterised by numerous abandoned transactions, as is also the case at a global level. The proposed merger between Orange and Bouygues Telecom which collapsed after lengthy negotiations is one example.

1.3 Key Industries

In 2015, M&A transactions were particularly important in certain sectors, in particular the telecommunications, industrial and chemical, business services, consumer goods, real estate and energy sectors. M&A activity has also taken off in construction (eg Lafarge-Holcim) and high-technology (eg Sopra-Steria).

Telecommunications remained one of the major M&A sectors in 2015. This resulted in the acquisition of Alcatel-Lucent by Nokia for EUR15.6 billion in April 2015. Moreover, Altice, the parent company of SFR-Numericable, acquired Cablevision, a US cable provider, for EUR15.7 billion in September 2015. But all sectors should be involved in 2016.

Capgemini realised a major acquisition with IGATE Corporation in April 2015. This significant M&A operation is viewed as a wish by the French company, firstly, to strengthen synergies (IGATE Corporation is a prominent USA-listed IT company which also provides outsourcing) and, secondly, to gain market share of the US market.

Addition, in 2015, French technology represented around 40 deals in the French M&A market. The transactions included Showroomprive's IPO with a valuation of EUR660 million valuation and Dailymotion's acquisition by Vivendi for EUR217 million. Thirty-four per cent of the French M&A market in 2015 involved venture capital-funded companies: the USA and the UK were the main buyers of French start-ups.

Also, the hotel sector was highlighted with the buyout of FRHI Hotels and Resorts by the French-listed hotel company AccorHotels. This transaction was interpreted as an opportunity for the French company to add prestigious brands to its portfolio and to step forward in the luxury hotels segment.

Lastly, Air Liquide's acquisition of Airgas was the main deal in the gas distribution and welding equipment sector.

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 in particular, 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 that is triggered pursuant to Article 234-2 of the General Regulation of the French Financial Markets Authority (AMF) when any person, acting alone or in concert, crosses the threshold of 30% of the share capital or voting rights of a listed company.

A France-listed company may also be acquired by a merger transaction, defined in France as an agreement between two companies according to which all of 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.

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.

2.2 Primary Regulators

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), broadcasting communication (CSA, Independent Authority to Protect Audio-visual Communication Freedom) and data privacy (CNIL, Independent Authority on French Data Protection). 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 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 IPOs, capital increases and rights issues, public cash offers, exchange offers, buyout offers, squeeze-outs, mergers and demergers.

2.3 Restrictions on Foreign Investment

Foreign investments are defined as:

- The creation of a new business in France by a foreign business or a non-resident person;
- The acquisition of all or part of a branch activity of a French business by a foreign business or a non-resident person; or
- 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 the foreign business or non-resident person exceed one-third 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 listed strategic business sectors. Until May 2014, these strategic business sectors focused primarily on military and defence-related activities. Following GE's offer to acquire Alstom's energy businesses, the French government has broadened the scope of foreign investment to include six other sectors: energy (electricity, oil and gas), water, transport, telecoms and health, as well as installations and infrastructure of 'vital importance' (as defined in the French Defence Code).

Examples of strategic business sectors are:

- Businesses involved in the gambling industry;
- Regulated businesses providing private security services;
- Research and development into 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
- Since the 'Alstom decree' of 14 May 2014, all activities linked to equipment, products or services, including activities ensuring the safety and proper functioning of such installations or equipment, which are essential to the preservation of the national interest in terms of public policy, public safety or national security in the six sectors listed.

It should be noted that the Minister for the Economy may subject authorisation of a foreign investment to certain conditions, including the sale of activities carried out in one of the listed strategic business sectors.

For statistical purposes only, foreign investors must file a 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.

2.4 Antitrust Regulations

French antitrust law applies when certain turnover thresholds are exceeded and European merger control does not take precedence.

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 result in a notification to the French Competition Authority if:

- The parties' worldwide pre-tax turnover is greater than EUR150 million; and
- The pre-tax turnover achieved by at least two of the parties in France is greater than EUR50 million.

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.

If a business combination has a European Community dimension, then French regulations recede and are replaced by the European Merger Regulation (Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings).

2.5 Labour Law Regulations

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 Labour Code provides that the council has to be informed and consulted about modifications to the economic or legal organisation of the company, particularly in the event of a merger, sale, acquisition or sale of subsidiaries or investment in a company, etc. The works council must have sufficient time and information provided by the legal representatives during this consultation period.

However, in tender offers the information provision and consultation procedure by the bidder follows the public announcement of the deal. On the target side, it is similar and the works council must state whether it recommends the offer within one month of its publication.

A new law adopted on 29 March 2014 increased the powers of the works council in public M&A deals for offers filed under the normal procedure (that is, as opposed to the simplified procedure). The information provision and consultation procedure is now as follows:

Right after an offer in the normal procedure has been filed, the board of the target must inform the works council of the offer and convene a works council meeting. Furthermore, the offer document provided by the bidder must be sent to the works council.

During the first meeting, the council can decide to hear the bidder at a subsequent meeting and designate an expert to deliver a report within three weeks of the filing of the offer. The expert's report will evaluate the offer's industrial and financial policy, the strategic plan for the target company, and the impact of the offer on all interests at stake, employment and the location of centres of activity and decision-making centres. These prerogatives must be closely respected by the bidder otherwise the works council may go to court.

A second meeting must be convened for formal consultation regarding the offer. During the meeting, the information note of the offeror has to be appraised and, if so decided during the first meeting, the expert's report is examined and the offeror's representative is heard – usually the CEO. If the representative does not attend, the penalty is severe: the voting rights attached to the shares the bidder already owns, or is meant to own, are suspended until the day after an actual meeting between the representative and the council takes place.

Moreover, the works council may seek an interim order of the court requesting the communication by the bidder of any missing elements it considers essential for the making of its recommendation. The court must render its decision within eight days. The one-month time limit for the rendering of the works council opinion may be postponed in the event of difficulties arising in relation to the recovery of any requested missing information.

Finally, the offeror must regularly inform the works council of the implementation of its commitments with regard to employment after the closing of the offer.

Since the introduction of the 29 March 2014 law, works councils have been given greater prerogatives. Nonetheless, their role is merely advisory and a works council does not have any actual means to influence the decision of either the shareholders of the target or the bidder.

2.6 National Security Review

Please see **2.3 Restrictions on Foreign Investments**.

3. Recent Legal Developments

3.1 Significant Court Decisions or Legal Developments

Significant court decisions in the last three years

A recent decision of the French Court of Appeal seems to favour a smoother process for initiators of takeover bids. On 10 April 2014, the Paris Court of Appeal dismissed the request of minority shareholders of Société de la Tour Eiffel (STE), a French company for which the insurance group SMABTP had launched a takeover bid, aiming at postponing the completion of the takeover to a later date. The AMF decision that authorised the offer was challenged by minority shareholders of STE, who requested that the court postpone the AMF's approval decision until a judgment on the merits of their claim before the Court of Appeal was rendered. In fact, the mere challenging of a decision of the AMF does not, per se, suspend such a decision. The court rejected the claimants' request, stating that the minority shareholders did not bring sufficient evidence to prove that the consequences of an immediate realisation of the takeover would be irreversible or irreparable. Such postponement requests from minority shareholders had commonly been granted by the AMF and thus the Court of Appeal till then, causing significant delays in takeover procedures.

On 29 September 2015, the Commercial Chamber of the Supreme Court ruled on the validity of a 'buy or sell' clause in a case where only one bidder offered a price for the purchase of the shares owned by the other bidder. As a matter of fact,

the two shareholders agreed that, on a specific date, each of them would have to provide a third party with an offer to purchase the shares held by the other shareholder, and that the offer of the highest price would be automatically accepted while the other one would be discarded. One shareholder wrote 'nothing' on its offer. Therefore, the offer submitted by the other bidder was successful. The court decided that the price had not been unilaterally determined since the bidding procedure had been agreed between the parties and respected by them. Therefore, if parties have entered into a put and call accepting in advance that the shares' price will be the highest proposed, without overbid, the price is considered as determined and the sale is automatically concluded to the benefit of the party that has proposed the highest price, although the other party has proposed nothing.

Recent legal developments

Reform of law of contract, of the general scheme and of proof of obligations

Ordinance No 2016-131 dated 10 February 2016 reforming the law of contract, the general scheme and the proof of obligations was published in the Official Journal dated 11 February 2016. Subject to ratification by parliament, the ordinance will apply to contracts concluded after 1 October 2016, while contracts entered into before this date will remain governed by the previous law.

The ordinance, which codifies a certain amount of adopted case law, aims at bringing simplification, clarification, balance and predictability to the life of a contract. Each of the three phases (pre-contractual phase, contractual phase and execution phase) has been changed in a way which may affect M&A transactions.

Legal developments regarding the pre-contractual phase

The ordinance provides legal certainty to the economic players during the pre-contractual phase by introducing a general obligation to negotiate in good faith. To this end, it has incorporated established jurisprudential solutions or, on the contrary, reversed them.

On the one hand, the ordinance provides for a pre-contractual information requirement which commits the parties to transfer any relevant information to the other party. The ordinance also sets out a pre-contractual obligation of confidentiality pursuant to which the negotiators cannot personally exploit or divulge the information received during the discussion. The sanction for violation of these provisions is a tort action. Despite these new principles, it is likely that the practice will still be to include such requirements in agreements since the conditions of their application may be adapted.

On the other hand, the ordinance restores the binding force of a unilateral promise. Indeed, since a 1993 decision by the Supreme Court, in case of revocation of a promise by the promisor during the period granted to the beneficiary in order to exercise the option, no agreement could be entered into and the promisor could only be liable for tort damages. The ordinance reverses this rule by stating that such revocation of a promise does not prevent the contract being entered into if the beneficiary exercises the option in due time (ie during the period initially granted without taking into account the revocation). As a consequence, the ordinance provides for the forced execution of the promise.

Legal developments regarding the conclusion of a contract

Firstly, the notion of 'causation' is removed from the Civil Code. Henceforth, the former requirements of a 'subject matter that is certain' and of a 'licit causation' are replaced by a 'content that is licit and certain'. Therefore, the contractual balance will be ensured by the prohibition of an 'illusory' or 'derisory' counterparty. Moreover, any clause which deprives an essential obligation of the debtor of its substance is deemed not to be effective.

Secondly, without serious change to the case law, a service provider may unilaterally determine the price of its services. Even if service agreements, such as transitional service agreements, are customary in M&A transactions and despite some interest in these provisions, practitioners aiming to mitigate the risk of litigation will still fix a mechanism in the service agreement which allows them to determine the price before the execution of the relevant services.

Legal developments regarding contract execution

Since an 1876 decision by the Supreme Court called 'Canal de Craponne', if the initial contractual balance decided by the parties is seriously upset by unforeseen circumstances, the judge cannot reform the contract. The ordinance reverses this decision by providing that if an important change of circumstances, which was unforeseeable at the time of conclusion of the contract, makes performance due by one party excessively onerous and if said party has not accepted the risk of the change, this party may ask the other party to renegotiate the contract. If the renegotiation fails, parties may decide to terminate the contract, or one of them may ask a judge to do so or to reform the contract. During the renegotiation, both parties still have to perform their obligations under the contract. This new provision can be compared to a legal MAC clause that can nevertheless be excluded by the parties.

The ordinance also provides for major changes in the assignment of receivables and debt:

- So far, the assignment of receivables is enforceable against third parties if the debtor has been notified by a judicial officer or if the debtor has accepted the transfer in an authentic instrument. With the ordinance, the assignment of

receivables will be enforceable against third parties with a simple notification to the assigned debtor, or alternatively if the debtor receives notice of the transfer.
- The ordinance provides for a legal regime for the transfer of debt which did not previously exist. Henceforth, a debtor may assign its debt to another person with the consent of its creditor. But, the assignor will only be discharged if the creditor expressly consents to it. Therefore, if the creditor has accepted the transfer but not the discharge of its debtor, the assignor becomes merely a guarantor of the assignee's debt.

Furthermore, the ordinance implements the following provisions related to contractual non-performance:

- Firstly, the ordinance provides that a creditor of an obligation may, after giving its debtor a notice to perform said obligation, seek performance in kind, unless performance is impossible or its cost is manifestly unreasonable. Thus, the enforced performance in kind becomes, in some cases, an alternative to reparation by equivalent in case of contractual non-performance.
- Secondly, in accordance with established case law, the ordinance states that in case of serious contractual non-performance by one party, the other party may stop performing its obligations. Moreover, the ordinance innovates by providing that a party may take preventive action by suspending its performance as long as it has become clear that the other party will not perform its own obligations.
- Thirdly, in order to restrict the number of judicial proceedings or avoid rescinding a contract, the ordinance introduces the possibility of reduction in price. Pursuant to this provision, a creditor may accept a contractual performance which does not fully satisfy the terms of the agreement and reduce the price accordingly.
- Finally, whereas Article 1148 of the French Civil Code provided for the effects of force majeure, it did not provide for its definition. Now, force majeure is defined as an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures. In this case, the contract may be suspended or terminated by operation of law and the parties are discharged from their obligations.

AMF recommendation regarding the disposal of significant assets
Under Position-Recommendation AMF DOC 2015-05, the AMF recommends that the intended disposal of significant assets by a listed company gives rise to a need for the prior consultation of the transferor's shareholders at a shareholders' meeting. According to the recommendation, the assets transferred will be considered significant if at least two out of the five following ratios are equal to, or above, 50% on average over the past two financial periods:

- Turnover generated by assets within the scope of the transaction compared to the consolidated turnover of the group;
- Transfer price of the assets within the scope of the transaction compared to the market capitalisation of the group;
- Net value of the assets within the scope of the transaction (taking into account only those liabilities associated with the assets transferred (as opposed to the entire liabilities of the group)) compared to the group's consolidated balance sheet;
- Operating income before tax generated by the assets within the scope of the transaction compared to the consolidated operating income before tax of the group; and
- Number of employees within the scope of the disposal compared to the number of employees of the group worldwide.

The AMF recommends that consultation of the general meeting should be done with the quorum and majority of the ordinary general meeting (ie 50% of the voting rights), unless the board decides otherwise in view of the circumstances, specifically the configuration of the shareholding.

If the board of directors decides to take into account different criteria from the above-mentioned ratios or not to consult its shareholders, the board has to explain the reasons for this decision to its shareholders in light of the corporate interest of the company.

Law relating to social and solidarity economy dated 31 July 2014
The 2014 law relating to social and solidarity economy provides, in companies of fewer than 250 employees, that the employees have to be informed of (i) the contemplated sale of the company for which they work and (ii) the possibility for them to present an offer to purchase it.

Once the employees have been told about the projected sale of the company, the sale may not be completed during a two-month period unless each employee has made known his or her decision to present an offer or not.

Since the so-called Macron law which was adopted on 6 August 2015, the sanction for violation of these provisions is no longer the nullity of the sale but a fine of 2% of the sale price.

3.2 Significant Changes to Takeover Law
Takeover law was modified by the 29 March 2014 law. The legislator left the AMF with the task of setting conditions of application of the new rules and its General Regulations accordingly. Those regulations were amended at the end of July 2014 and the main amendments are as follows:

- Following the Seloger.com case, pursuant to which a voluntary offer was filed at a low price thus allowing the bidder to acquire a significant stake, the new law has introduced a new obsolescence threshold in takeover bids (whether

voluntary or compulsory). According to this, an offer becomes null and void at the expiry of the offer period in the event that the bidder has failed to acquire at least 50% plus one share of the shares or voting rights tendered in the offer. This might operate as a guarantee of better articulated financial conditions and of reinforced transparency in connection with the control of the target. If a bidder has acquired more than 30% of the shares of the target company, but has failed to reach the 50% plus one share threshold, the bidder may not acquire any more shares without informing the AMF and launching another takeover bid on the totality of the remaining shares.

- The 2014 takeover law has lowered the maximum threshold for the acquisitions over a year of new shares in a target company by a bidder who holds between 30% and 50% of the shares or voting rights of the target (also known as the speed acquisition limit) from 2% to 1%.

Finally, the scope of the board passivity rule has been drastically reduced. The board of directors of a target company now have 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'. It should, however, be noted that the board of directors must continue to act in accordance with the interest of their company, even in adopting defence measures in the context of a takeover. Moreover, companies who wish to opt out of this new regulation can continue to refer to the old board passivity rule subject to reciprocity in their articles of incorporation.

In June 2014, the AMF implemented several amendments to the AMF General Regulations necessary for the application of the new takeover rules set out in the 29 March 2014 law.

Concerning the new obsolescence threshold of 50% plus one share, the AMF has reserved the right in certain situations to set it aside or lower it, up until five days before the closing of the offer period. More specifically, the AMF can exercise such a right when: the target company is controlled by a third party, when non-selling agreements or an agreement not to tender exists between shareholders, when there are competing offers, or when acquiring majority control of the target company is rendered impossible by law. The possibility for the bidder to set out a voluntary waiver threshold is maintained.

Concerning the modification of the works council consultation procedure, it should be noted that the AMF has modified the deadlines in the public takeover process accordingly.

Given the new reduced scope of the board passivity rule in the new legislation, the AMF has made takeover offers revocable in circumstances where the defence measures adopted by the board of the target company would inevitably lead to substantial modifications of the terms of the offer. According to the AMF, the legalisation of such defence measures cancels the prohibition on the target company or on any person acting in concert with the target company to buy its own stock. However, directors will be required to communicate to the AMF any defence measures before their implementation.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies

Stakebuilding prior to launching an offer is not common given narrow markets with low trading volumes and the immediate impact on share prices.

In October 2010, LVMH disclosed that 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. In the same month, 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 regulations following this transaction, laws currently allow stakebuilding by cash-settled options, but now these have to be disclosed.

In stakebuilding strategies, AMF powers have to be taken into account. In 2013, an official takeover of holiday operator Club Méditerranée was launched by Chinese and French investors. In 2014, an investor, Strategic Holdings, made an acquisition of more than 10% of the shares of Club Méditerranée to frustrate the offer, which had a 50% minimum threshold. In that case, the 'put up and shut up' procedure was used by the AMF to prevent any distortion of the share price due to rumours in the press. The AMF used its prerogatives to force Strategic Holdings to declare its intentions regarding the acquisition of shares of Club Méditerranée. Although Strategic Holdings confirmed its lack of intention to acquire Club Méditerranée alone, it finally entered into an agreement in concert with Investindustrial and filed a counter-offer for Club Méditerranée.

4.2 Material Shareholding Disclosure Thresholds

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, by companies controlling that person, by a third party with which that person acts jointly, or by a third party with which 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) of shares lodged with the person (provided that it may exercise the voting rights attached to them as it 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 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, 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 regulation regarding specific sectors, especially investing in credit institutions and insurance institutions. With regard to credit institutions, a number of elements should be taken into account, including:

- Any person or group of persons acting together must obtain the authorisation 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 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 ACP.

The regulation concerning insurance institutions provides a control procedure establishing different levels including prior authorisation from the ACP 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 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). 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 threshold.

4.5 Filing/Reporting Obligations

Since 2012, a European Regulation on over-the-counter (OTC) derivatives, the European Market Infrastructure Regulation (EMIR) requires transparency regarding derivatives contracts negotiated on the regulated markets or OTC. In particular, EMIR has created an obligation to report all transactions in derivatives to trade repositories. This obligation, which has been in application since 12 February 2014, also obliges the reporting of new contracts with a trade repository registered with the European Securities and Markets Authority (ESMA).

In addition, a European Regulation on short selling aimed at establishing a new European-level harmonised framework and greater transparency came into force on 1 November 2012. Pursuant to this European Regulation, any person holding a short position equal to or higher than 0.2% of the share capital of a company admitted to trading on a French regulated market must notify the AMF of this position within one trading day. Then, such 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 declaration of intent within five trading days, specifying in particular:

- The means of financing the acquisition;
- Whether the buyer is acting alone or in concert;
- Whether the buyer contemplates making further share acquisitions;
- The strategy that the buyer intends to adopt with regard to the issuer, and the operations in order to implement it;
- Any temporary transfer agreement concerning the shares and voting rights;
- Its intention concerning the settlement of any equity derivatives it may own; and
- Whether the buyer is seeking to appoint new board members in the target.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal

The 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 press articles. The request for disclosure by the AMF may lead to two eventualities: either the suspected bidder confirms its 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 has 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.

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 are able to 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 the new EU regulations on publication of privileged/price-sensitive information, which significantly reinforce 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: (i) immediate disclosure is likely to prejudice the legitimate interest of the issuer; (ii) delay of disclosure is not likely to mislead the public; and (iii) the issuer is able to ensure the confidentiality of that information. However, the issuer must then inform the AMF that disclosure of privileged/price-sensitive information was 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, ESMA shall issue guidelines to establish non-exhaustive indicative lists of:

- Information which 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 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 the company's website (which usually discloses the accounts for the last five years). The Register of Commerce and Companies (RCS) for the location of the registered offices of the company holds information relating to by-laws and patents. Trade marks and real estate owned by the company are recorded by other registers, which are disclosed to the public.

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

Regarding the scope of information disclosed in data room procedures in connection with takeover situations, potential buyers can access details 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 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 in order 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, 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.

5.4 Standstills or Exclusivity

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 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. 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 the 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. Two situations can arise from this offer:

- Either the control company is indeed acquired by the 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).

Where the target company is not controlled, the target can enter into agreements with the bidder, such as merger agreements.

6. Structuring

6.1 Length of Process for Acquisition/Sale

In private M&A, the length of the process is determined by 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 generally lasts from either 20 trading days after the filing of the offer or up until one month and two days after consultation of the works council, can approve the offer and 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. It 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 the AMF decision on compliance of the 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: firstly, 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; and secondly, where any person 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 1% 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 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 the following ten situations:

- Transmission by way of gift between natural persons, or distribution of assets by a legal person in proportion to the rights of its members;
- Subscription to a capital increase by a company in recognised financial difficulty, subject to the approval of a general meeting of its shareholders;
- Merger or asset contribution subject to the approval of a general meeting of shareholders;
- Merger or asset contribution subject to the approval of a general meeting of shareholders, combined with an agreement between shareholders of the companies concerned establishing a concert party;
- Reduction in the total number of equity securities or voting rights in the target company;
- Holding of a majority of the company's voting rights by the applicant or by a third party, acting alone or in concert;
- Holding of a majority of the company's share capital by the applicant or by a third party, acting alone or in concert, further to an offer made following the normal procedure;
- Resale or other comparable disposal of equity securities or voting rights between companies or persons belonging to the same group;
- Acquisition of control, within the meaning of applicable laws and regulations, of a company which directly or indirectly holds more than 30% of the capital or voting rights of another company whose equity securities are admitted

to trading on a regulated market in a Member State of the EU or a state that is party to the EEA agreement, including France, and which does not constitute an essential asset of the company over which control has been acquired; and
- Merger or contribution of a company which directly or indirectly holds more than 30% of the capital or voting rights of a company under French law whose equity securities are admitted to trading on a regulated market in a member state of the EU or a state that is party to the EEA agreement, including France, and which does not constitute an essential asset of the merged or contributed company.

Following the 2015 so-called Macron law, the AMF added another case of exemption for persons crossing a threshold due to the acquisition of double-voting rights from 3 April 2014 to 31 December 2018. As a matter of fact, unless the articles of association provide for the contrary, a shareholder of a company with its registered office in France and admitted to trading on a regulated market will acquire double-voting rights after a two-year period of holding of its shares if such shares are registered.

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 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.

6.4 Common Conditions for a Takeover Offer

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

The 29 March 2014 reform on takeover law has 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 the offer period in the event that the bidder has failed to acquire at least 50% plus one share of the shares or voting rights tendered in the offer. However, the AMF has proposed to adopt a list of situations where the application of the obsolescence threshold will be waived. Moreover, 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 condition is a waiver threshold, which can apply only in voluntary offers: the offer made by the 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 the share capital or voting rights of the target. The application of the waiver threshold can be waived until 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, 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 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, authorisation 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 of 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 meeting (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, changing the name of the company, the transfer of registered offices and, most importantly, the decision to increase or decrease the capital. For all of these operations, a shareholder must own at least two-thirds of the voting rights, subsequently giving it control of both OGM and EGM.

The 90% threshold of voting rights is also relevant since the market rules of Euronext Paris as well as Alternext Paris provide for a case of simple delisting. According to such rules, a controlling shareholder may request the delisting of the shares of the controlled issuer from the stock exchange following a simplified tender offer if the following requirements are met: (i) the offeror holds at least 90% of the voting rights; (ii) within the last twelve months prior to the delisting request, the total amount of the trades over the shares of the issuer was less than 0.5% of its market value; (iii) no public offer has been launched over the shares of the issuer during the last 180 days; (iv) the offeror undertakes to purchase any of the issuer's shares at the price offered in the frame of the simplified tender offer for a three-month period from the closing date of such offer; and (v) the offeror undertakes to report any crossing of the 95% threshold of share capital or voting rights, either upwards or downwards, which may occur during the financial year following the delisting and not to turn the issuer into a simplified joint stock company (société par actions simplifiée).

The 95% threshold of share capital and voting rights should also be noted, mainly for two reasons. Firstly, 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 itself of tax consolidation and to gain a strong advantage in the tax field. However, the AMF does not currently allow 95% to be the minimum acceptance condition of an offer, but only lower thresholds.

6.6 Requirement to Obtain 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 service providers (banking institutions) authorised 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. It 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.

6.7 Types of Deal Security Measures

Break-up fees are not prohibited under French regulation, and they appear to have been used more and more frequently in recent years, in particular in private deals. For example, in the recent battle between Numericable and Bouygues for the sale of SFR, Bouygues had offered to pay a break-up fee of EUR500 million if the regulatory authorities did not approve the merger, or if regulatory conditions were too onerous.

In tender offers, 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 counter-offers. French law provides that, to make a counter-offer competitive with an initial one, 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, 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 then the agreement will not be authorised. Furthermore, break-up fees may prevent any counter-offer that would not be attractive for the shareholders – that is, 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 leaving 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 the core shareholders – although 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).

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 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 providing the bidder with specific rights with regard 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: either 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, 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 latter case, 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 buyout 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 buyout offer. If the bidder did not make it clear during the filing of the buyout offer that it intends to start an automatic squeeze-out procedure after the buyout, 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.

6.11 Irrevocable Commitments

French regulations allow the execution of irrevocable commitments to tender the shares of the target company (engagements d'apport à l'offre). 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 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 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 the bidder and which may be a prerequisite for making either 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.

7. Disclosure

7.1 Making a Bid 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 is obliged 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 1% increase in holdings of between 30% and 50%. In this situation, the announcement of the bid must be made by publication on the website and a press release.

7.2 Types of Disclosure

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: the terms of its offer; the proposed price or exchange ratio; the number and type of securities that the offeror promises to acquire; 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; the conditions to which the offer is subject; the planned timeline for the offer; 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:

- The framework for the combination of the two companies (target markets, market shares, head count and the size of the new group);
- The ongoing operation of the target company and also of the offeror, to the extent that it is affected by the bid;
- Its employment policy;
- The industrial organisation of the new group and the structure of its decision-making bodies;
- The benefits of the transaction for the two companies and their shareholders;
- Any planned synergies, as well as the expected economic benefits of the transaction and when these are likely to be realised;
- Costs associated with the transaction;
- Whether a merger is contemplated; and
- 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; and the powers of the board particularly concerning the issuance or purchase of shares etc.

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. 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 Requirement for Financial Statements

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 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 Disclosure of the Transaction Documents

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

8. Duties of Directors

8.1 Principal Directors' Duties

A 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 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 of 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 intentions of the 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.

Unlike in other jurisdictions, where the power and responsibility that is usually borne 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 assist 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 conflict of interest, French law does not prohibit voting by a director even if an ad hoc committee is set up.

8.3 Business Judgement Rule

Before the 29 March 2014 takeover law reform, a board passivity rule prevented directors from taking measures (other than seeking alternative bids) that would frustrate an offer without the consent of shareholders in the case of a takeover. Only if an authorisation from a general meeting of the shareholders was provided during the offer, could the management implement active defensive measures. Thus courts were not faced with situations where actions by the board were put into question. For these reasons, French courts are not used to interpreting managerial decisions.

However, since the recent takeover law reform, 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 that a court could rely on 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 the 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 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 within 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 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 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. Moreover, a soft law principle of the Code AFEP-MEDEF provides that board members of a publicly traded company have the obligation to inform the board of any actual or potential conflict of interest and must abstain from voting on the corresponding resolution. The interested party may not take part in the vote and the law specifies that the term 'agreement' should be understood to include not only agreements directly made with the interested party himself, 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. The board approval is motivated by justifying the interest of the agreement for the company, in particular in light of the financial conditions. 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.

Regarding independent experts, the Paris Court of Appeal has recently rendered a ruling concerning conflicts of interest with advisers. On 29 April 2014, the court rejected a challenge by minority shareholders of an AMF decision confirming a takeover offer over the shares of holiday operator Club Mediterranée by Ardian and Fosun, owners of 9.96% and 9.4%, respectively, of the French company. Among other allegations, the minority shareholders argued that, according to the AMF decision, the independent experts hired by the company's board to determine the benefits of the proposed takeover lacked independence, particularly from Ardian. However, the court rejected this argument on the basis that the firm's experts' previous assignments for Ardian represented less than 2% of its annual sales over the past 18 months and that none of the mandated experts of the firm had taken part in these previous assignments.

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 in the French public M&A market. Correlatively, defensive measures are rare. This is partly because of the fact that, under the 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 the company's by-laws 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 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.

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 (so-called 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 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 that 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; 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 combination does, however, compel the board to obtain authorisation from the shareholders, which may be lengthy and difficult to put in place in listed companies.

Negative statements regarding the strategy to be implemented by the offeror or regarding the consequences of this strategy, 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.

9.4 Directors' Duties

Directors have a permanent duty to act in the corporate interest of the company, irrespective of the fact that the board passivity rule has been abolished. 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 company.

Moreover, compelling takeover principles of free competition between offers continue 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 incorporation. 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"

What has been called the 'Nancy Reagan defence' is seldom used in practice in France. The management prefers to obtain support, either formal or informal, from key shareholders. A decision by the directors to coalesce and 'just say no' on their own initiative would be considered quite risky. To gain support from existing shareholders to push the hostile offer back, directors appoint advisers and independent experts with the aim of getting a precise valuation of the scope and the consequence of the 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 very 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, 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 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 the 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 dispute, 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&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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11. Activism

11.1 Shareholder Activism

In general terms, since the Anglo-Saxon hedge funds have brought such a practice into Europe, shareholder activism has started to be an important trend in the French M&A market (nine large transactions involving activists in 2015 have been identified against three in 2014). Even if it is still not a material factor in M&A transactions at the time of writing, it is becoming an increasingly relevant consideration for corporate boards to bear in mind, in particular regarding governance issues.

Shareholder activism is quite common, firstly when a takeover is on the horizon and when the activists anticipate that a squeeze-out based on an unfair price per share will be imposed on them after the completion of the takeover, 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, in particular if the share capital is not controlled. On that last point shareholders can threaten that an annual general meeting be convened by a representative appointed by the court or put a halt to proceedings to gain time to undertake public engagement practices (such as seeking media coverage) and convince passive shareholders to co-ordinate their proxy voting actions.

11.2 Aims of Activists

Activists sometimes encourage companies to enter into transactions or major divestitures. When they want to influence the strategy of the company, they request for board seats. But a current significant trend is to have shareholders requesting higher dividends or that a share buy-back programme be put in place when companies have available cash.

11.3 Interference with Completion

Most of the time, as soon as the transaction is announced, activists actively use the press to put pressure on a deal and seek to influence the transaction for their advantage. The aim is usually to gain time to try to find another offeror with better financial conditions or that offers a price in excess of the full value of the company.