PRIVATE EQUITY (TRANSACTIONS)

France

LEXOLOGY
Getting The Deal Through

Consulting editor
Simpson Thacher & Bartlett LLP

Private Equity (Transactions)

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Atif Azher

Simpson Thacher & Bartlett LLP

Quick reference guide enabling side-by-side comparison of local insights, including into types of private equity transaction; corporate governance, disclosure and timing considerations; dissenting shareholder rights; key purchase agreement provisions; participation of target company management; tax; financing; shareholders' agreements; exit strategies (including IPOs); target sectors; cross-border considerations; club/group deals; and key recent developments.

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Contributors

France

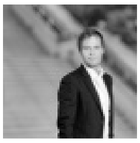
Saam Golshani
saam.golshani@whitecase.com
White & Case LLP

Alexis A Hojabr
alexis.hojabr@whitecase.com
White & Case LLP

Estelle Philippi
ephilippi@whitecase.com
White & Case LLP

Franck De Vita
fdevita@whitecase.com
White & Case LLP

Samir Berlat
sberlat@whitecase.com
White & Case LLP



Alexandre Balat
alexandre.balat@whitecase.com
White & Case LLP

TRANSACTION FORMALITIES, RULES AND PRACTICAL CONSIDERATIONS

Types of private equity transactions

What different types of private equity transactions occur in your jurisdiction? What structures are commonly used in private equity investments and acquisitions?

France has historically been Europe's second-largest private equity market after the United Kingdom. Private equity transactions in France typically include private equity buyouts, management buyouts and tender offers. Despite several primary equity buyouts in previous years, France is a very mature and sophisticated private equity market where a large part of the transactions are secondary or tertiary buyouts based on very competitive earnings before interest, taxes, depreciation, and amortisation (EBITDA) multiples. According to Mergermarket, 634 French-related private equity transactions (among them, 323 were private equity buy out deals) took place between January 2021 and December 2021 (compared with 395 transactions in 2020), representing a significant increase of 96 per cent. In terms of value, the total disclosed deal value in 2021 represents US$119,850 million (compared with US$39,174 million in 2020).

There are approximately 325 French private equity funds. The French private equity industry has become a must-have for international limited partnerships interested in the European market. European and French public institutions, such as the European Investment Fund and Bpifrance (a French public investment bank), are investing in French private equity funds on a regular basis, and institutional corporations are also investing in French funds.

Traditional structures, including Luxembourg or Netherlands holding vehicles, are still commonly used for transaction tax purposes by private equity funds.

Additionally, the regulatory framework offers a wide choice of suitable and rejuvenated investment vehicles, including:

- the FPCI, a French innovation-focused fund, which provides tax advantages to individuals;
- the SLP, a type of French company created by the Macron Law of 2015 to create a new category of alternative investment funds on the model of British partnerships; and
- the OFS, a specialised financing vehicle created in January 2018.

Law stated - 20 January 2022

Corporate governance rules

What are the implications of corporate governance rules for private equity transactions? Are there any advantages to going private in leveraged buyout or similar transactions? What are the effects of corporate governance rules on companies that, following a private equity transaction, remain or later become public companies?

Vehicles are usually incorporated as a French stock company (SAS) and the main governance rules are agreed by the parties in the by laws and a shareholders' agreement.

Even though French case law has admitted the existence of a fiduciary duty borne by the company legal representatives solely towards the company and its shareholders, there is no general fiduciary duty under French law. The main advantage of private equity transactions in terms of corporate governance is the inapplicability of the listed companies statutory rules set out in the Financial Market Authority General Regulation, certain rules of the Financial and Monetary Code or of the Commercial Code and AFEP-MEDEF Code (published by the principal French business confederations, the Association Française des Entreprises Privées (AFEP) and the Mouvement des Entreprises de France (MEDEF)). These listed company statutory rules relate mainly to mandatory market disclosure, mandatory tender offers rules, mandatory diversity rules applicable in the corporate bodies of the companies (eg, the application of a quota policy to ensure parity on the management boards of public companies) or protection against conflicts of interest for board members of a public company. Moreover, under French law, listed companies may only have the corporate form of a public limited company (SA) or publicly traded partnership (SCA). Such companies are heavily regulated by the Commercial Code, as opposed to the SAS.

The main effect of an initial public offering for former non-listed companies is the application of such governance and firm listing rules.

Law stated - 20 January 2022

Issues facing public company boards

What are some of the issues facing boards of directors of public companies considering entering into a going-private or other private equity transaction? What procedural safeguards, if any, may boards of directors of public companies use when considering such a transaction? What is the role of a special committee in such a transaction where senior management, members of the board or significant shareholders are participating or have an interest in the transaction?

Company directors' main duty is to act in compliance with the corporate interest of the company. When examining a third-party offer, the board of directors must analyse pricing conditions and the general intention and strategy of such third-party offeror.

In the event of a takeover bid, the board of directors of a listed company must deliver a reasoned opinion regarding the benefits of the offer or the consequences of the offer for the target company, its shareholders and its employees and, where applicable, the measures it has implemented, or decided to implement, that are likely to cause the offer to fail.

In addition, French law provides that the target company of a takeover bid shall appoint an independent appraiser if the transaction is likely to cause conflicts of interest within its board of directors (or supervisory board) that could impair the objectivity of the reasoned opinion mentioned in article 231-19 of the Financial Market Authority General Regulation, or jeopardise the fair treatment of shareholders or bearers of the financial instruments targeted by the bid. The target company shall also appoint an independent appraiser before implementing a squeeze-out.

Ad hoc committees are usually established to assist the board in its mission. Such ad hoc committees only include independent directors and they may hire separate advisers to those of the company. The ad hoc committee will in particular oversee the work of the independent appraiser.

Law stated - 20 January 2022

Disclosure issues

Are there heightened disclosure issues in connection with going-private transactions or other private equity transactions?

Disclosure rules on takeover bids seek to ensure that offers proceed in an orderly fashion and comply with a number of key principles, including the interplay of bids and counter-bids, equal treatment and information for securities holders, market transparency and integrity, and fairness in trading and competition. The Financial Market Authority ensures that these principles and rules are duly respected.

Any shareholder of a listed company shall be subject to the disclosure rules applicable under the Financial and Monetary Code and the Financial Market Authority General Regulation concerning the crossing of certain thresholds in the shareholding of such listed company and especially the obligation to declare to the market its intentions towards the company for the next six months, or the obligation to propose a mandatory tender offer.

Tender offers can be either voluntary or mandatory (while crossing the 30 per cent of share capital and voting rights threshold or while increasing by 1 per cent in holdings of between 30 and 50 per cent of the share capital and voting rights).

While voluntary, the offeror shall issue a press release including the offer's main provisions and post the draft offer on its website as public disclosure.

Whether a voluntary or mandatory offer, the offeror shall file a draft offer document with the Financial Market Authority, including the offer price, the number of securities that the offeror is committed to acquiring and the number of securities already held by the offeror prior to the offer, the contemplated timeline of the offer and the financing conditions of the offer. The offeror shall also indicate its intentions towards the industrial and financial politics of the target for the next 12 months (and especially in the case of an intention to proceed with a squeeze-out). Special care is to be taken in respect of part of the draft offer document.

The target public company must reply with a draft offer response document. The draft offer response document usually includes the report from the independent appraiser and 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 shareholder of a listed company must comply with the disclosure rules applicable under the Financial and Monetary Code and the Financial Market Authority General Regulation and declare to the market its intentions towards the company for the next six months.

A specific procedure applies in connection with a going-private transaction, called the squeeze-out procedure. Following a public offering, such as a takeover bid, exchange offer or buyout, if the securities not tendered to the offer account for 10 per cent or less of the share capital and voting rights, the majority shareholder may carry out a squeeze-out on these securities, pursuant to which the securities are automatically transferred to the majority shareholder in return for market value consideration. The squeeze-out operation (including offered price) shall be cleared in a specific Financial Market Authority decision.

Law stated - 20 January 2022

Timing considerations

What are the timing considerations for negotiating and completing a going-private or other private equity transaction?

The process and timeline are regulated in going-private transactions or takeover bid transactions. The offeror shall file its offer with the Financial Market Authority, which will review it for a period lasting from 20 trading days from the filing to one month and two calendar days following the consultation of the works council. Once the offer has been approved by the Financial Market Authority, the Financial Market Authority will allow its opening for a period of a minimum of 10 trading days in simplified tender offers, or 25 trading days for voluntary tender offers.

The timing of large-cap private equity transactions is usually between two and six months from the date of signing of a put option to the completion date of the transaction.

In addition, the purchaser needs to bear in mind that a purchase agreement cannot be executed by the parties without a prior consultation of the works council of the target, if any. This prior consultation of the works council procedure may last from one month to four months. Once the works council has validly rendered its opinion on the transaction, the parties will be in a position to execute the purchase agreement (should such opinion be favourable or not).

Once signed, completion may be conditional upon the satisfaction of the conditions precedent set out in the purchase agreement. Certain conditions precedent are negotiated between the parties, while others are compulsory, such as merger control clearance (the timing of which may vary depending on the jurisdiction) and the foreign investment

Minister of Economy and Finance's authorisation finally when the contemplated investment is made by a foreign investor in a French target and may raise issues in terms of public order or national defence.

Law stated - 20 January 2022

Dissenting shareholders' rights

What rights do shareholders of a target have to dissent or object to a going-private transaction? How do acquirers address the risks associated with shareholder dissent?

While launching a mandatory or voluntary public tender offer, the bidder will propose a price for the securities of the target company to all the shareholders of such target. However, unless the majority shareholder holds 90 per cent of the share capital and voting rights of the company and decides to implement a squeeze-out procedure, a shareholder cannot be required to tender its shares to the offer.

If the 90 per cent of the share capital and voting rights threshold applicable to the squeeze-out procedure is not reached, the tender offer will be considered null and void.

Even though no explicit restrictions on the ability of the offeror exist under French law, the Financial Market Authority will usually require a minimum cooling-off period to be respected prior to the launching of a new tender offer; such cooling-off period usually lasts one year.

Law stated - 20 January 2022

Purchase agreements

What notable purchase agreement provisions are specific to private equity transactions?

Current French market practice in terms of a purchase agreement pricing mechanism is a locked box mechanism based either on the target's last audited accounts or management accounts in the case where the contemplated completion date would be too far from the closing date of the previous fiscal year (in which case the purchaser may also ask the seller and the target for reassurance by providing a locked box memorandum from the target statutory auditors).

Traditionally, investment funds' sellers are reluctant to give business representations in purchase agreements. Sellers only give fundamental representations (ie, existence, authority, capacity, ownership of the target and its subsidiary's shares (ie, full perimeter)). No business representations are given, but specific indemnities may be negotiated to address specific topics flagged during the diligence process.

However, ever more business representations are given by sellers, to the extent these are covered by warranty and indemnity insurance – buyer insurance policy, the costs of which are usually borne by the buyer. But financial sellers still do not accept having financial exposure on business representations, and sellers' liability is usually capped at €1.

In terms of financing of the transaction, bidders in a private equity transaction must propose a fully financed offer to the seller based on debt commitment letters obtained from the lenders at the signing date. Frequently, the seller and the target company covenant to do their best effort to assist the purchaser with the lenders' requests prior to completion. However, notably, a purchaser financing condition precedent is off-market.

Law stated - 20 January 2022

Participation of target company management

How can management of the target company participate in a going-private transaction? What are the principal executive compensation issues? Are there timing considerations for when a private equity acquirer should discuss management participation following the completion of a going-private transaction?

Most of the time, the structure of a private equity transaction is based on an investment or a rollover of the management proceeds in the share capital of the purchasing structure set up by the investment fund either directly or via one or more special-purpose vehicles (management companies). The investment of the management usually represents 10 to 15 per cent of the share capital of the structure. Such investment or reinvestment is usually structured as a sweet equity package, composed of a mix of ratchet shares, fixed-rate instruments and ordinary shares. The management investment could consist of the subscription of ratchet-free preferred shares issued for a maximum amount representing up to 10 per cent of the share capital of the company. The fund itself subscribes to ordinary shares and fixed-rate instruments, including convertible bonds and preferred shares. The sweet equity scheme offers the management of the target group a higher portion of the share capital than what they would have received pro rata to their actual investment. In addition, the main management incentive derives from the value of the ratchet shares, which increases when two financial aggregates are met: a targeted multiple and an internal rate of return triggered by the group.

Specific care is taken in the structuring of the management packages regarding the compensation issues in the management package linked to the ratchet mechanism. Treatment of such management compensation packages has often been challenged by the French tax administration, considering that such package should qualify as part of a manager's salary and not products of the shareholdings. On 13 July 2021, the French Supreme Administrative Court confirmed the validity of such requalification as long as the gain realised by the manager on his or her package is essentially linked to his or her functions.

Law stated - 20 January 2022

Tax issues

What are some of the basic tax issues involved in private equity transactions? Give details regarding the tax status of a target, deductibility of interest based on the form of financing and tax issues related to executive compensation. Can share acquisitions be classified as asset acquisitions for tax purposes?

The typical points of attention in a French private equity transaction follow that tax-deductibility of interest is a key element in private equity transactions since it may deeply impact the returns on the deals. The tax-deductibility of interest is subject to various rules that must be taken into account when modelling the expected return:

- the partial roll-over by the prior controlling shareholder may trigger the application of the 'Charasse amendment', which impacts the deductibility of interest on any debt (not only the acquisition debt) during nine fiscal years;
- the general limitation to €3 million or 30 per cent of the tax EBITDA, transposed in French law on the basis of Directive (EU) 2016/1164 (Anti-Tax Avoidance Directive I (ATAD I)), impacts the tax-deductibility of the interest accrued on all (related or third-party) debt;
- the financing of the acquisition by the controlling shareholder through shareholder loans, payment-in-kind (PIK) bonds issued by the holding company, etc, may, if the ratio between debt and equity is not carefully monitored, entail a decrease of the above thresholds to €1 million or 10 per cent of the EBITDA (thin-cap issue);

- the interest rate applicable on financing extended by related parties (including shareholder loans and PIK bonds subscribed by the controlling investor) must be at arm's length and supporting documentation must be available to justify this rate, otherwise, the deductibility could be limited to the rate provided by the French tax authorities on a regular basis (1.18 per cent for fiscal years closed on 31 December 2020); and
- the anti-hybrid provisions transposed into French tax law on the basis of Directive (EU) 2017/952
- (ATAD II) deny the right for holding company to deduct interest when the interest is incurred in France in the frame of a hybrid mismatch arrangement (eg, no inclusion of the interest in the taxable income in the residence country of the beneficiary as a result of a hybrid mismatch concerning the instrument, the underlying payment, the lending entity or double deduction of the same payment in two countries).

Another key driver is the possibility to immediately set up a French tax consolidation group to ensure that the acquisition costs, financing fees and tax-deductible interest can be effectively and immediately offset against the taxable profits of the target group. All these constraints significantly impact the decision to issue preference shares, bonds or loan notes.

It is also crucial to anticipate any French withholding tax at exit and on the distribution of proceeds, including on dividend recap, to investors, to avoid or mitigate any tax leakage that could derive from the structure or the cycle of the investment.

The value added tax (VAT) recovery ratio of the holding company must be carefully reviewed to minimise irrecoverable VAT. New opportunities could be considered to set up a VAT group (a new provision, enacted in December 2020). It is possible, based on an election to be made by the group companies, to consider as a single taxable person, entities established in France who are legally independent, but closely linked to each other financially, economically and from an organisational point of view. This option may be formulated, for the first time, as of 1 January 2022 for an effective date of 1 January 2023.

Debt push-down could be considered when there is no room for interest deduction in France but opportunities in foreign countries where the target group is established.

As mentioned above, given the importance of management teams, the structure of tax-efficient management incentives is also a key component of deals.

After a decade of examples in which management incentive packages have been challenged by the French tax authorities, on 13 July 2021, the Supreme Administrative Court ruled that there are three instances in which the gain derived from incentives' instruments (eg, warrants but also probably ratchet shares) must be taxed as salary if and when this gain is essentially linked to the functions of the beneficiary as manager. Such a link exists when certain criteria are met, among which the presence of:

- lock-up periods;
- good or bad leavers' clauses;
- variable financial rights of the shares depending on the IRR; and
- exclusivity and non-compete clauses, etc.

Such qualification as salary rather than capital gains leads to an increased tax and social security burden for the managers but it also triggers social security impacts for the holding company, which may become liable for French employer social security contributions.

While the market is expecting the French parliament to enact a specific tax regime to secure the tax treatment of the management incentive packages, the preference is, for now, frequently given to incentives that benefit from a specific legal regime, such as free shares.

Law stated - 20 January 2022

DEBT FINANCING

Debt financing structures

What types of debt financing are typically used to fund going-private or other private equity transactions? What issues are raised by existing indebtedness of a potential target of a private equity transaction? Are there any financial assistance, margin loan or other restrictions in your jurisdiction on the use of debt financing or granting of security interests?

Depending particularly on the amount of debt required to fund them, going-private and private equity transactions are typically funded through syndicated bank debt, high-yield note issues (generally accompanied by a multi-purpose super senior revolving credit facility), unitranche financings or junior financings (in the form of second lien debt and holding company payment-in-kind debt).

Depending on its size and the context of the transaction, the syndicated bank debt may take the form of either a club deal financing with relationship banks or a larger covenant-loose or covenant-light financing, including a multi-purpose revolving credit facility and a more widely syndicated term loan B.

The existing indebtedness of the target generally contains a change of control mandatory prepayment and is therefore generally refinanced at the closing of the transaction with the new debt raised by the purchaser to finance the acquisition. Indebtedness raised to finance the normal course of business operating needs (eg, finance leases, local overdrafts or bilateral facilities) may not need to be refinanced at the closing of the acquisition.

The incurrence of financial indebtedness or the granting of security interests or other forms of credit support by a stock company (SAS) (which is the typical form of company in this type of transaction) in the context of a private equity transaction shall not constitute financial assistance and must be in its corporate interest.

French law provides for an absolute prohibition (ie, without any possible whitewash procedure) of financial assistance for stock companies that cannot, therefore, advance funds, make loans, grant security or provide guarantees for the purpose of a third-party acquisition of their own shares. Violation of this prohibition may result in the security or guarantee being void or trigger civil and criminal liability for the directors of the company, their accomplices or persons benefiting from such transaction.

The incurrence of financial indebtedness and giving of downstream, upstream or cross-stream guarantees or security by an SAS must be:

- within the scope of the company's corporate purpose; and
- in the company's corporate interest.

Downstream credit support is generally in the corporate interest of the relevant credit support provider. Upstream guarantee and credit support granted by SASs must meet the following general criteria defined by French case law to be in their corporate interest:

- the SAS and the company in whose interest the assets or credit of the former are used belong to the same group and such group is a structured group with a common group strategy;
- the credit support is given to further a common group economic, corporate or financial interest in accordance with the policy that is defined for the group as a whole;
- the financial burden imposed on the SAS must not be without consideration, it must not upset the balance between the financial commitments of the respective companies; and

- the amount of the guarantee issued does not exceed the financial capacity of the guarantor.

As a result of such principles, it is customary to limit upstream or cross-stream credit support from SASs to the proceeds of the relevant debt financing borrowed by the guaranteed entity and lent to the company and its subsidiaries.

Law stated - 20 January 2022

Debt and equity financing provisions

What provisions relating to debt and equity financing are typically found in going-private transaction purchase agreements for private equity transactions? What other documents typically set out the financing arrangements?

Purchase agreements typically comprise:

- a financing cooperation covenant pursuant to which the seller shall cause the group companies to cooperate with and assist the purchaser for the purpose of facilitating the debt financing of the transaction; and
- provisions allowing the assignment, pledge or transfer, including by way of security, by the purchaser of all or part of its rights under the purchase agreement to any provider of finance.

Law stated - 20 January 2022

Fraudulent conveyance and other bankruptcy issues

Do private equity transactions involving debt financing raise ‘fraudulent conveyance’ or other bankruptcy issues? How are these issues typically handled in a going-private transaction?

Private equity financing transactions generally raise two generic bankruptcy issues.

The first issue relates to the hardening period with respect to certain transactions, including the granting of security interests or the making of payments, entered into by a company prior to the opening of insolvency proceedings. Under French bankruptcy law, such transactions are subject to (depending on the circumstances) automatic or potential avoidance if they are completed at a time when the relevant company was cash-flow insolvent (whose date of occurrence of cash flow insolvency will be determined by the court upon the opening of the relevant insolvency proceedings or at a later stage). This issue is generally unlikely to be relevant at the closing of the transaction.

The second issue relates to the rights the sponsor holding shareholder debt would have in insolvency proceedings, acting in such capacity. This issue was generally addressed by voting arrangements and other undertakings in the intercreditor agreement. Recent amendments of French bankruptcy laws – which are in force for insolvency proceedings commenced as from 1 October 2021 – have nevertheless dramatically changed the way creditors, but also equity holders, are involved in insolvency proceedings. Subject to the debtor company meeting certain thresholds, creditors and equity holders are now grouped in different classes of affected parties, each representing a sufficient commonality of economic interest, for the purpose of voting on the restructuring plan. French courts now have the ability to approve a restructuring plan even though certain classes may have rejected the proposed plan (cross-class cram down). These changes generally improve the position and protection of senior secured creditors over junior or unsecured creditors, including subordinated shareholder debt creditors, in an insolvency context. Equity holders are also now at risk of a restructuring solution affecting their equity rights being implemented against their will (whose possibility was previously strictly limited).

Law stated - 20 January 2022

SHAREHOLDERS’ AGREEMENTS

Shareholders’ agreements and shareholder rights

What are the key provisions in shareholders’ agreements entered into in connection with minority investments or investments made by two or more private equity firms or other equity co-investors? Are there any statutory or other legal protections for minority shareholders?

The main key provisions in shareholders’ agreements in minority investment or co-investment private equity deals are:

- governance rights;
- share transfer restrictions;
- liquidity rights; and
- management package-specific rights.

Regarding governance rights, representation of the shareholders is usually made at a supervisory board level (so that the financial investors do not interfere in the day-to-day management of the group). Representation at the board level is usually pro rata to the various levels of shareholdings in the target; however, a strictly financial co-investor may not have board representatives or solely observers. Specific consent rights or veto rights may be granted to minority investors, either at the board level or as a shareholder, on selected and negotiated topics. Audit rights are frequently given to minority shareholders.

Further, French law provides for certain decisions that have to be passed unanimously by all shareholders, including votes to approve a change of registered office of the company or a change in the corporate form of the company.

Regarding share transfer restrictions, a 10-year lock-up is usual, subject to any permitted transfer under the agreement. Minority investors usually benefit from a total tag-along right (a proportional drag-along right may not always be obtained by the minority investor) and are submitted to a drag-along right exercisable by the majority investor in the case of exit. A pre-emption right may also be granted to the majority investor in the case of transfer of the minority investors’ securities.

Regarding management package-specific rights, shareholders’ agreements usually include call options (a put option in the case of a good leaver manager may be granted in certain cases). A specific reserve mechanism, consisting in a portion representing up to 10 to 15 per cent of the share capital of the target and subscribed at closing by the private equity investor, is also set up to be sold post-closing upon the decision of the sponsor or chief executive officer of the group to certain existing or new joining managers. Such reserve is usually allocated at cost value during the first 12 months following closing and fair market value after the 12 months following closing.

Law stated - 20 January 2022

ACQUISITION AND EXIT

Acquisitions of controlling stakes

Are there any legal requirements that may impact the ability of a private equity firm to acquire control of a public or private company?

Listed companies are subject to specific rules regarding the acquisition or disposal of their shareholding. Acquisition or sale by an investor of listed company securities if the investor crosses the thresholds of 5, 10, 15, 20, 25, 30, 33.33, 50, 66.66, 90 or 95 per cent of the share capital of such company shall be declared (together with a statement indicating the total number of shares and voting rights it holds in the company) to the Financial Market Authority and to the company within four trading days. Further, the articles of association of a listed company may impose the declaration to the company of certain crossing of thresholds that cannot be less than 0.5 per cent of the share capital and voting rights of the company. In addition, the investor shall declare its intentions towards the company for the next six months while crossing the thresholds of 10, 15, 20 and 25 per cent of the share capital or voting rights of a company.

Further, and subject to specific exemptions, the investor is required to propose a mandatory takeover offer to the other shareholders:

- if it becomes the holder of more than 30 per cent of a listed company's share capital or voting rights, either alone or in concert, and directly or indirectly; or
- if it holds between 30 and 50 per cent of a public company's share capital or voting rights, either alone or in concert, directly or indirectly, and increases that holding by at least 1 per cent within 12 months (ie, speed-limit acquisition).

For any tender offer (whether voluntary or mandatory), the investor shall file a tender offer for all the company shares as well as any securities giving access to the company's share capital or voting rights, the financing of such offer being secured as from the beginning.

A specific obsolescence threshold has been introduced, pursuant to which the tender offer shall become null at the expiry of the offer period if an offeror fails to acquire at least 50 per cent plus one share of the shares or voting rights tendered in the offer. In certain limited cases, the Financial Market Authority may, however, decide to waive the application of the obsolescence threshold.

Law stated - 20 January 2022

Exit strategies

What are the key limitations on the ability of a private equity firm to sell its stake in a portfolio company or conduct an IPO of a portfolio company? In connection with a sale of a portfolio company, how do private equity firms typically address any post-closing recourse for the benefit of a strategic or private equity acquirer?

Key limitations for private equity firms willing to conduct an IPO of one of their portfolio companies are financial markets conditions and movements. Many IPOs have not completed in the past two years owing to insufficient pricing conditions proposed by the banks. Special care should be given to financial market conditions, as once the IPO process has been launched and the draft prospectus has been communicated to the banks and the Financial Market Authority, confidential information about the group may not be ensured.

Post-IPO recourse of a shareholder against the company is usually dealt with by the disclosures contained in the prospectus. Any shareholder may ask for indemnification by the company in the case of misleading or false disclosures.

The post-closing recourse of an acquirer against a private equity seller is usually dealt with in the indemnification provisions of the purchase agreement. Indemnification of the leakages and the target and seller pre-closing covenants is usually made on a euro-to-euro basis without limitation, while indemnification of the breach of a seller representation is usually limited (eg, capped to the purchase price for the fundamental representations and capped to specific amounts for business representations).

Seller escrow is not frequent in private equity transactions, and financial sellers tend to resort more often to warranty and indemnity insurance for the indemnification of business representations.

Law stated - 20 January 2022

Portfolio company IPOs

What governance rights and other shareholders' rights and restrictions typically survive an IPO? What types of lock-up restrictions typically apply in connection with an IPO? What are common methods for private equity sponsors to dispose of their stock in a portfolio company following its IPO?

An IPO is an exit strategy used by private equity funds for large-cap value deals. There are various issues to be considered and dealt with for the private equity actors while considering an IPO exit.

A very limited number of governance rights and shareholders' rights and restrictions will survive the IPO as the former shareholders' agreement will terminate with the completion of such IPO. However, the private equity fund, while remaining a majority shareholder after the IPO, may keep specific board appointment rights. These specific board appointment rights may imply veto rights if the by laws of the company or a post-IPO shareholders' agreement specify that a certain decision may only be taken at the board level with a certain majority.

Regarding financial rights, pre-IPO specific rights will lapse at completion of the IPO and any shareholder will subscribe to new ordinary shares.

Regarding share transfer restrictions, specific rights and restrictions will not survive the completion of the IPO. However, the entrance into lock-up agreements that prohibit the main shareholders of the company subject of the IPO to sell their shares for a certain period is one of the key considerations. These lock-up agreements ensure a certain stability on the shareholding of the companies, ensuring that a certain number of the company's securities will not be sold directly after the IPO process is completed. If there is no specific market-defined lock-up agreement and the terms and duration may vary depending on the industries of the company or market conditions, the lock-up duration may not exceed six months.

Frequently, private equity sponsors will dispose of part of their stock in a portfolio company via a block share disposal following the expiry of the lock-up restriction.

Law stated - 20 January 2022

Target companies and industries

What types of companies or industries have typically been the targets of going-private transactions? Has there been any change in industry focus in recent years? Do industry-specific regulatory schemes limit the potential targets of private equity firms?

In 2018, 22 takeover bids were initiated and declared compliant by the Financial Market Authority.

There is no general limit on the capacity of a private equity firm to acquire the control of a private company. Specific regulatory limitations may apply to certain sectors (eg, limitation on the ability for a firm controlling companies whose main activity is to manage clinics or healthcare institutions to invest or acquire the control or companies whose main activity is to supply certain medical devices, or investments made in France by foreign investors and raising issues in terms of public order or of national defence requiring prior authorisation of the Minister of Economy and Finance). Specific regulatory and monitoring procedures may also apply to regulated sectors (eg, the monitoring procedure concerning insurance institutions establishing different levels including prior authorisation of the Prudential Control

Authority when the 10, 33.33 and 50 per cent thresholds are crossed by a shareholder, and a simple prior declaration in the case of crossing the 5 per cent threshold of share capital or voting rights of an insurance institution).

Recent transactions have shown a trend in the privatisation of French state-held companies exercising traditional public activities. These privatisations require the passing of a specific privatisation bill to allow the French state to dispose of the majority of the share capital and voting rights of a public company. The French government first started to engage in the divestment of its participation in the French airport operator Groupe ADP (formerly Aéroports de Paris), in which it holds a controlling 50.6 per cent stake. However, this operation failed to complete. A few months following the failure of the Groupe ADP privatisation, the French government completed the divestment of 52 per cent of the pubic lottery operator, Française des Jeux, in which the state held 72 per cent of the share capital, via an IPO of Française des Jeux.

In 2021, there were record-breaking numbers of IPOs in France – 212 companies were listed, representing €123 billion of market capitalisation.

European special purpose acquisition company (SPAC) IPO issuance totalled US$8.56 billion in 2021, with the market generating record levels of activity as momentum from the red-hot US SPAC scene carried into Europe. From 1 January 2019 to 31 December 2021, 48 SPAC IPOs were listed on European Stock Exchanges – six of which were listed in France.

Law stated - 20 January 2022

SPECIAL ISSUES

Cross-border transactions

What are the issues unique to structuring and financing a cross-border going-private or other private equity transaction?

Investments made in France by foreign investors and raising issues in terms of public order or of national defence require the prior authorisation of the Minister of Economy and Finance. The Minister of Economy and Finance may either authorise, authorise subject to certain conditions or reject the transaction.

Financial investors must conduct, at an early stage, their analysis on the application of such foreign investment restrictions and address as soon as possible the issue in close cooperation with the management of the target.

Regardless, completion of the transaction shall not occur prior to the earlier receipt of the Minister of Economy and Finance’s formal authorisation or expiry of the two-month period for the Minister to answer.

Law stated - 20 January 2022

Club and group deals

What are some of the key considerations when more than one private equity firm, or one or more private equity firms and a strategic partner or other equity co-investor is participating in a deal?

The main considerations in relation to club deals or co-investment are linked to the choice of equity co-investor. Co-investment is frequent on high-value transactions either via a co-investment process (often because of a reinvestment of the investment fund seller) or equity syndication by the main equity investor.

In the case of co-investment, the co-investors will seek a balance in terms of governance rights depending on their respective amounts of investment. In the case of equal shareholding, each of the investors may have an equal number of representatives at the board level and shall have the same rights in terms of transfer of securities. In the event of an investment realised by a majority investor and a minority investor, the minority investor may only seek certain limited veto rights at the board level and rights ensuring the liquidity of its investment, while the majority investor will have extended rights in terms of governance and transfer of securities.

Law stated - 20 January 2022

Issues related to certainty of closing

What are the key issues that arise between a seller and a private equity acquirer related to certainty of closing? How are these issues typically resolved?

As opposed to other European jurisdictions, the French market is to propose fully financed offers to private equity sellers. There is usually no financing condition precedent and a bidder shall, while submitting its offer, send to sellers equity and debt commitment letters covering the whole purchase price.

The main issues relating to the certainty of completion of a private equity transaction are usually reception of the merger control authorities' clearances and the Minister of Economy and Finance's authorisation in connection with foreign investment restrictions.

Reception of such authorisations are usually addressed as closing conditions stipulated to the benefit of both parties, and shall only be waived by the agreement of the parties.

Regarding merger control clearance, both French and EU antitrust laws may apply. The French competition authority will have jurisdiction to the extent that the EU antitrust authority does not take precedence, depending on specific turnover thresholds to be met. If the business combination has an EU dimension, French law shall be overridden and replaced by Council Regulation (EC) No. 139/2004) (the Merger Regulation) on merger control. The timing for the reception of both French and EU merger control clearance notification for phase 1 is one month.

Law stated - 20 January 2022

UPDATE AND TRENDS

Key developments of the past year

Have there been any recent developments or interesting trends relating to private equity transactions in your jurisdiction in the past year?

No updates at this time.

Law stated - 20 January 2022

Jurisdictions

Australia	Ashurst LLP
Austria	Schindler Attorneys
British Virgin Islands	Appleby
Cayman Islands	Stuarts Walker Hersant Humphries
France	White & Case LLP
Germany	POELLATH
India	Khaitan & Co
Japan	Nishimura & Asahi
Mexico	Deloitte Legal
Nigeria	Streamsowers & Köhn
Russia	Dechert LLP
South Korea	Bae, Kim & Lee LLC
Spain	Cases & Lacambra
Switzerland	Niederer Kraft Frey
Thailand	Nishimura & Asahi
Turkey	Turunç
United Kingdom	Simpson Thacher & Bartlett LLP
USA	Simpson Thacher & Bartlett LLP