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Contributing editors
Will Pearce and John Bick

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GETTING THE DEAL THROUGH

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Contributing editors

Will Pearce and John Bick

Davis Polk & Wardwell LLP

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

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France

Christophe Perchet, Juliette Loget and Jean-Christophe Devouge
Davis Polk & Wardwell LLP

Structure and process, legal regulation and consents

1 How are acquisitions and disposals of privately owned companies, businesses or assets structured in your jurisdiction? What might a typical transaction process involve and how long does it usually take?

In most cases and unless there is a natural choice (eg, joint venture partner, majority shareholder), the seller would seek to promote competition between different bidders through a competitive sale process, whose conduct is not subject to specific rules apart from the requirement of good faith (see question 10).

In such a configuration, the typical process would start with the seller soliciting offers – possibly with the support of a financial adviser or accountant (see question 9) – by providing a short presentation about the target (teaser or information memorandum). After having signed a non-disclosure agreement, interested bidders will gain access to confidential information through a data room (now almost always virtual) to make firm offers. Selected bidders may also be granted access to the management of the target (management presentations).

The time period for achieving the transaction varies depending on the circumstances, but it usually takes three to five months to execute an agreement once the process has started.

2 Which laws regulate private acquisitions and disposals in your jurisdiction? Must the acquisition of shares in a company, a business or assets be governed by local law?

Unlike the US (among other jurisdictions), France is not a federal state, which means that, with the exception of some overseas territories, French law is uniformly applied. In addition, significant efforts are made by French authorities to make laws and regulations more accessible for the general public and foreign investors (see, for instance, the BusinessFrance website – en.businessfrance.fr – which provides comprehensive guides in English on key legal topics).

With regards to the laws applicable to private acquisitions and disposals, particular attention should be paid to the general contract law provisions included in the French Civil Code, which underwent a major reform in 2016 with the aim of modernising and simplifying the applicable rules, it being noted that contracts concluded before 1 October 2016 (the date on which the reform entered into force) remain governed by the previous rules. In addition, specific additional legislation may also be applicable depending on the nature of the assets being sold (securities law, IP law, sectoral legislation, etc).

Although it is possible to subject a transaction involving only a French target or asset to a foreign law (*lex contractus*) (except for certain specific assets like real estate), this is very unusual, and most sales of French targets and assets are governed by French law. In any event, French law would govern the legal transfer of ownership of the target's shares or assets.

3 What legal title to shares in a company, a business or assets does a buyer acquire? Is this legal title prescribed by law or can the level of assurance be negotiated by a buyer? Does legal title to shares in a company, a business or assets transfer automatically by operation of law? Is there a difference between legal and beneficial title?

In general, a buyer would acquire the title of ownership and all of the powers attached to it (ie, right to use, to collect the fruit or dispose), any such transfer being governed by the solo consensus rule meaning that, when ownership is acquired as a result of a contract, it occurs upon concluding such contract unless otherwise agreed or prescribed by laws. However, enforceability of such transfer may be subject to specific notification requirements or consents from third parties to be obtained, which depend on the nature of the transferred asset. As far as title to shares is concerned, such title is transferred by registration in the buyer's account in the company's register.

French law does not distinguish between legal and beneficial titles, but provides the single concept of ownership right. However, a few concepts under French law may be analogous to beneficial titles, such as:

- the '*fiducie*', whereby one or more persons may transfer assets, rights or guarantees, actual or future, to a third party, who in turn has the duty to administrate these on behalf on the beneficiary; and
- the division of shareholder rights between a bare owner and a beneficial owner that solely benefits from the right to use and receive the revenue from the assets.

4 Specifically in relation to the acquisition or disposal of shares in a company, where there are multiple sellers, must everyone agree to sell for the buyer to acquire all shares? If not, how can minority sellers that refuse to sell be squeezed out or dragged along by a buyer?

As a general principle, a buyer must obtain the consent of each shareholder to buy his or her shares. Moreover, and without excluding a possible reform on this point in the future, there is no squeeze-out mechanism under French law for non-listed companies allowing a buyer to force a minority shareholder to sell his or her shares unless he or she previously consented to (for instance, through a drag-along clause, an exclusion clause or a put, which can be stipulated in the by-laws or in a shareholders' agreement).

5 Specifically in relation to the acquisition or disposal of a business, are there any assets or liabilities that cannot be excluded from the transaction by agreement between the parties? Are there any consents commonly required to be obtained or notifications to be made in order to effect the transfer of assets or liabilities in a business transfer?

Since there is no automatic transfer of all the assets and liabilities pertaining to a transferred business, the parties may agree to exclude specific assets or liabilities, with the sole exception of the employment contracts, commercial leases and insurance policies pertaining to the business.

Furthermore, the transfer of contracts requires the approval of the relevant counterparties (unless such contracts provide that they are transferable without the consent of the other party), thus making the

prior identification of such contracts in the course of the due diligence an important matter for any prospective buyer.

Moreover, specific regulations may govern the transfer of certain assets, such as real estate, for which it may be necessary to obtain from local authorities the waiver of their pre-emption rights (if any).

6 Are there any legal, regulatory or governmental restrictions on the transfer of shares in a company, a business or assets in your jurisdiction? Do transactions in particular industries require consent from specific regulators or a governmental body? Are transactions commonly subject to any public or national interest considerations?

Generally speaking, there is no restriction on such transfers, including in relation to foreign investors, given that any barrier to free trade would be highly scrutinised by the European Commission.

That being said, French authorities may object to foreign investments in a few specified sectors, the list of which was expanded in 2014 following the takeover battle between Siemens and GE over Alstom's energy business. This has been significantly expanded to include activities that are essential to guarantee the country's interests in relation to public order, public security or national defence (supply of energy sources or of water, transport and electronic communications services, etc). However, in practice, French authorities seem to adopt a pragmatic approach when dealing with sensitive transactions, using such deterrent to impose, as the case may be, specific conditions to safeguard national interests. In any case, transactions in specific industries (banking, telecoms) may also require the green light from the competent regulatory bodies. Any such restrictions regarding EU investors would be more lenient, as they may benefit from lesser restrictions, than they would be for non-EU investors.

Unless the transaction is subject to the merger control of the European Union, particular attention should also be paid to French merger control regulations (in addition to merger control regulations of other EU member states) under which transactions meeting the two following conditions may be required to be filed with the French Competition Authority (ADLC): the gross worldwide total turnover of all the companies involved in the concentration exceeds €150 million; and the gross total turnover generated individually in France by each of at least two of the companies involved in the concentration exceeds €50 million.

Finally, it is worth noting that other legal or tax restrictions may also affect the ability of the sellers and the possibility of completing a transaction (eg, vesting periods applicable to free shares or stock options, tax schemes subject to lock-up commitments).

7 Are any other third-party consents commonly required?

Depending on the corporate form whose shares are being transferred (closely held companies such as partnerships (SNC or SCS) or private limited liability companies (SARL), for instance), the consent of the other shareholders (or the board of directors in a *société anonyme*) may be required for one shareholder to transfer his or her shares. Otherwise such consent is not necessary, unless stipulated otherwise in the by-laws.

In a situation where a corporate entity is the seller, the decision to sell is taken by the management. This position, however, ought to be qualified for some strategic decisions (eg, in the event of a sale of the majority of assets) for which, depending on the by-laws, the board of directors' or shareholders' prior approval may be necessary.

8 Must regulatory filings be made or registration fees paid to acquire shares in a company, a business or assets in your jurisdiction?

While the acquisition of shares generally involves limited formalities (tax filings and – for only some corporate forms (SNC, SARL, SCS) – additional filings with the Commercial Register), a transfer of a business or assets may involve specific disclosures to inform the seller's creditors of the sale or other formalities depending on the assets being sold (eg, the transfer of any real property involves a notarial deed and the waiver of any pre-emptive rights).

Advisers, negotiation and documentation

9 In addition to external lawyers, which advisers might a buyer or a seller customarily appoint to assist with a transaction? Are there any typical terms of appointment of such advisers?

Both the seller and the buyer usually appoint financial advisers to help them throughout the course of the transaction. Facing the great diversity of such financial advisers (from highly regulated investment banks to non-regulated players), in early 2017 the French financial regulatory authority (AMF) launched a public consultation to determine whether it would be appropriate for the AMF to intervene in the oversight of such advisers. Although such proposal was not finally retained, the AMF has expressed its readiness to support initiatives aimed at improving the industry's practices.

For large-scale transactions, the terms of appointments of such advisers are typically standardised, with smaller transactions allowing more flexibility. A financial adviser's engagement letters will typically provide limitation of liability clauses, indemnities and retainer and success fees.

Although not very common, there is also an increasing number of situations where third-party appraisers are used for private M&A deals. Third-party appraisals may be used – for instance – to mitigate the risk of fiscal reassessment of LBO management packages by providing evidence that managers are bearing a financial risk and that the transaction has been made at fair market value.

10 Is there a duty to negotiate in good faith? Are the parties subject to any other duties when negotiating a transaction?

As part of the reform of the Civil Code (see question 2), the duty of good faith has been expressly extended to the negotiation phase – in addition to the conclusion and execution phases – as an 'imperative' duty. Since good faith is a generic concept, it is naturally difficult to fully identify what this requirement actually means in practice beyond the general duty of loyalty it underlies. In the event of a sales process, for instance (see question 1), it might be thought that such requirement should be construed as entailing the necessity for any seller to treat alike prospective bidders in the same situation. More precise guidance, however, has been provided with respect to pre-contractual information (see question 14).

In a negotiation context, directors of a buyer or a seller must also pay attention to the specific duties that apply to them, such as the duty to act in the company's interest (which may differ from the shareholders' interests) or the duty of loyalty that prevents, for instance, directors from buying minority shareholders' shares at a price lower than that which could be offered by a third party thanks to the privileged information they hold because of their functions. This tighter framework may be considered as part of the explanation of the increased use of third-party appraisals (see question 9).

11 What documentation do buyers and sellers customarily enter into when acquiring shares or a business or assets? Are there differences between the documents used for acquiring shares as opposed to a business or assets?

In addition to prior agreements such as non-disclosure agreements or promises, definitive agreements will contain all the terms applicable to the transaction, including a description of the transferred assets, the price, the warranties granted by the seller, the conditions precedent, and non-compete or non-solicitation clauses, with asset purchase agreements being subject to a more rigid framework with some compulsory statements (such as the name of the previous owners, details about the turnover) in the absence of which the invalidity of the sale may be claimed by the buyer.

12 Are there formalities for executing documents? Are digital signatures enforceable?

Except for transactions involving the sale of real estate, no seal or notary public involvement is generally needed. Documents executed under private signatures may be countersigned by the parties' lawyers, which would enhance the enforceability of such documents, but it is not common practice for M&A transactions. Initialising each page can still be seen, except when using certified devices preventing page changes. Digital signatures are generally enforceable provided the process is reliable (rules in this respect are provided by both the Civil Code

and the EU eIDAS Regulation No. 910/2014), but this is not common practice for M&A transactions. In addition, specific attention should be paid to the rules about multiple representation that have been enacted as part of the reform of the Civil Code and that may prevent one representative to act on behalf of several parties.

Due diligence and disclosure

13 What is the typical scope of due diligence in your jurisdiction? Do sellers usually provide due diligence reports to prospective buyers? Can buyers usually rely on due diligence reports produced for the seller?

The scope of due diligence typically varies depending on the size of the contemplated acquisition (ie, whether the buyer intends to acquire a minority interest or 100 per cent of the share capital of the target). Due diligence usually includes corporate documentation, commercial contracts, employment, taxation, intellectual property, IT, regulatory, litigation, environment, accounting and financials. Compliance matters are also increasingly becoming a key issue for due diligence, particularly following the new requirements enacted by the 2016 French anti-corruption law ('Sapin 2' bill).

When the seller – usually a private equity fund or an industrial group – sets an auction process for the sale of a significant asset or a business unit, it is common to have a vendor due diligence report to ensure better control of the offer timeline. It is also usual to have a reliance letter to the benefit of the buyer.

14 Can a seller be liable for pre-contractual or misleading statements? Can any such liability be excluded by agreement between the parties?

As a direct consequence of the good faith requirement for pre-contractual negotiations (see question 10), the Civil Code now provides specifically that any party having knowledge of a fact that is key for the consent of the other party must inform the latter, provided, however, such other party is legitimately unaware of such information or relies on the first party. This pre-contractual information duty is likely to have an important impact on M&A negotiations, especially since it cannot be excluded or limited by the parties. In addition, it may lead in the case of a breach to the contract being null and void. It should be noted that specific regulations (real estate, environment) may also impose specific disclosure obligations.

Except for this important caveat, the liability of the seller for any pre-contractual or misleading statements may be limited or extended depending on the terms and conditions of the contract. Any limitations on such liability would, however, be disregarded in cases of fraudulent intent.

15 What information is publicly available on private companies and their assets? What searches of such information might a buyer customarily carry out before entering into an agreement?

Commercial court registers are the main source of information regarding French privately held companies, making available, inter alia, the 'K-Bis extract' (which certifies the legal existence of a company and provides information about its management), the articles of association, annual financial statements, information about insolvency proceedings, and specific pledges or encumbrances. In practice, such documents may be consulted online on the infogreffe website (www.infogreffe.com (available in English)) for very limited fees.

It may be also useful to check other sources of information, depending on the circumstances or the assets, such as patent and trademark databases held by the French National Institute of Industrial Property (bases-brevets.inpi.fr and bases-marques.inpi.fr), land registers or other sectoral authorities' websites in the event the target is subject to any specific regulation given the nature of its business (eg, information about portfolio management companies may be found on the AMF's website).

Finally, in the event that the target is a subsidiary of a listed company, useful information may also be found on such listed company's website (eg, through its annual report).

16 What impact might a buyer's actual or deemed knowledge have on claims it may seek to bring against a seller relating to a transaction?

The explicit acknowledgement of a general duty of pre-contractual information from seller to buyer (see question 14) does not mean, however, that buyers are not subject to a duty to inquire themselves, which scope naturally depends on the parties concerned. Hence, unless otherwise provided in the transaction document, if the buyer was aware or should have been aware of any fact or event giving rise to a claim, French courts would take into account such failure to reduce the amount of the claim or to exclude it.

Pricing, consideration and financing

17 How is pricing customarily determined? Is the use of closing accounts or a locked-box structure more common?

Pricing is usually determined by using the discounted cash flow method set on the basis of a business plan with post-closing adjustment mechanisms (net debt and working capital) derived from closing accounts. Naturally, other valuation methods can be used depending on the industry (eg, the revalued net asset method is favoured for real estate companies). Locked-box structures are increasingly used in the context of auction processes involving significant – and highly sought-after – assets.

18 What form does consideration normally take? Is there any overriding obligation to pay multiple sellers the same consideration?

Cash remains the most common form of consideration, and it is very rare to see shares used as a means of payment for private M&A deals unless the transaction is structured as a combination through a merger or a contribution. Vender notes are not frequently used except for a limited portion of the price or intra-group transactions.

There is no obligation to pay multiple sellers the same consideration, but this would be generally the case for the buyer to obtain the consent of each shareholder (see question 4). In contrast, in the event the transaction involves corporate operations such as a merger, all shareholders should be treated in the same way and receive the same consideration.

19 Are earn-outs, deposits and escrows used?

As far as asset sales are concerned, it is market practice to put into escrow the purchase price to protect the buyer against claims made by the seller's creditors that may be triggered following mandatory disclosure formalities (see question 8).

Otherwise the use of earn-outs, deposits and escrows will depend on the circumstances: earn-out mechanisms are most commonly found for companies under significant growth to reflect such value in the price; deposits and escrows are commonly seen for small cap and mid-cap transactions when some uncertainty remains about the buyer's ability to proceed to completion or to secure important risks identified (eg, environment issues).

20 How are acquisitions financed? How is assurance provided that financing will be available?

Debt financing structures are frequently used to finance acquisitions, from single facility loan agreements to more complex structures involving different tranches of debt. To get assurance on this matter, the seller would usually require being provided with a duly executed debt facilities agreement (or binding term sheets) before entering into definitive documentation with the buyer. In addition, should the buyer have minimal financial substance (ie, it is an SPV), the seller may also seek guarantees from creditworthy entities or directly enforceable equity commitment letters to cover equity financing.

21 Are there any limitations that impact the financing structure? Is a seller restricted from giving financial assistance to a buyer in connection with a transaction?

French corporate law prohibits financial assistance schemes whereby a company would advance or lend money or grant a security interest – directly or indirectly – to a third party in view of the subscription or acquisition of its own shares. Similarly, any company must refrain from

Update and trends

With the election of centrist President Emmanuel Macron in May 2017 followed by his party's success in parliamentary elections, important labour market and tax system reforms are expected to be implemented in the coming months, with particular measures having been also announced to reinforce France's attractiveness and to support innovation. All these are positive signals that may have a positive impact on transaction activity.

committing a misuse of its corporate assets or acting in contradiction of its best interests. Thin capitalisation rules may also have an impact on acquisition finance transactions.

Conditions, pre-closing covenants and termination rights

22 Are transactions normally subject to closing conditions? Describe those closing conditions that are customarily acceptable to a seller and any other conditions a buyer may seek to include in the agreement.

Signing and closing of a transaction can occur simultaneously. It is market practice, however, to see closing conditions, the most common being antitrust and other regulatory clearances or accuracy of the seller's material warranties at closing. Of course, any buyer will seek to extend such conditions so as to include, for instance, the availability of financing, and the absence of any material adverse change between signing and closing.

23 What typical obligations are placed on a buyer or a seller to satisfy closing conditions? Does the strength of these obligations customarily vary depending on the subject matter of the condition?

Both the seller and the buyer are expected to take any reasonable actions that are necessary to satisfy the closing conditions that have been agreed upon. Besides, the Civil Code expressly provides that any condition precedent shall be deemed to have been fulfilled if the party who is interested in its failing has obstructed its fulfilment, which in practice would encourage (to say the least) the parties to make reasonable efforts to ensure adequate fulfilment of the closing conditions.

24 Are pre-closing covenants normally agreed by parties? If so, what is the usual scope of those covenants and the remedy for any breach?

It is a common feature to have pre-closing covenants whereby the seller undertakes to operate its business in the ordinary course of business in line with past practice by using the French legal standard of a reasonable person. Any unusual operations, such as modifications to the share capital, acquisitions or sales of significant assets, and the creation of encumbrances, will generally require prior information from or even the prior consent of the buyer, keeping in mind in this respect that information exchanges and restrictions on the target's business operations must be analysed carefully to avoid any gun-jumping qualification when the transaction is deemed implemented before receiving antitrust clearance (see, for instance, the €80 million record fine imposed in 2016 on telecom operator Altice by the ADLC).

Remedies will vary depending on the nature of the breach of such pre-closing covenants and the terms and conditions of the contract, but would generally result in damages rather than permitting a buyer to terminate the transaction.

25 Can the parties typically terminate the transaction after signing? If so, in what circumstances?

Typically, parties cannot terminate after signing a transaction in advance of a negotiated long-stop date, except to the extent that any condition is, or becomes, incapable of satisfaction. That being said, the reform of the Civil Code has made room for hardship by allowing the amendment or rescindment of the contract – either if agreed by the parties or decided by a judge – in the event that, following an unforeseeable change in circumstances, the performance of such contract becomes excessively onerous for one party. The contract may also be rescinded in the case of a force majeure event with definitive adverse effects.

26 Are break-up fees and reverse break-up fees common in your jurisdiction? If so, what are the typical terms? Are there any applicable restrictions on paying break-up fees?

Break-up fees are not a common feature in the French market in the acquisition of private companies, businesses and assets (even if there are no particular restrictions). It is, however, common practice to see withdrawal clauses in real estate transactions.

Representations, warranties, indemnities and post-closing covenants

27 Does a seller typically give representations, warranties and indemnities to a buyer? If so, what is the usual scope of those representations, warranties and indemnities? Are there legal distinctions between representations, warranties and indemnities?

It is customary to have the seller give representations, warranties and – less frequently – indemnities, the scope of which will of course be discussed with the buyer, keeping in mind in this respect that such provisions are typically the longest part of any purchase agreement. There is no legal distinction as such between representations and warranties on the one hand and indemnities on the other hand, but since such provisions are designed to address different concerns, different terms and conditions may be applicable.

In practice, representations and warranties will be used to cover any adverse unknown event whose origin predates the execution of the transaction document. Representations and warranties will be grouped into two main categories, fundamental warranties and business warranties, with different conditions for indemnification. The minimum set of (fundamental) representations and warranties should normally encompass the following items: capacity of the seller and authority, valid title of ownership of the assets being sold as well as the absence of any third-party rights.

Besides, the seller may also agree to specific indemnities, pursuant to which the seller undertakes to indemnify the buyer from precisely risks identified through due diligence or disclosure that have not yet occurred (as a buyer is typically precluded from bringing a warranty claim in relation to a matter it is aware of signing). Because indemnity provisions are usually about important risks (specific litigation, environmental issue, etc), they would entail different limitations (cap, thresholds, duration) from those applicable to representations and warranties.

28 What are the customary limitations on a seller's liability under a sale and purchase agreement?

Limitations on a seller's liability will typically depend on the types of representations and warranties (see question 27), with fundamental warranties often carved out from any limitations other than the seller's aggregate liability cap that may be agreed between the parties and that would be equal in most cases to the purchase price.

Business warranties will typically be subject to the following limitations:

- deductible or tipping baskets;
- de minimis deductible;
- specific conditions regarding the calculation of claims (net of taxes or insurance proceeds);
- limited survival periods (18 to 24 months, with specific adjustments for tax or labour law warranties to follow the applicable legal statute of limitations); and
- specific liability cap (typically 15 per cent or less of the purchase price).

29 Is transaction insurance in respect of representation, warranty and indemnity claims common in your jurisdiction? If so, does a buyer or a seller customarily put the insurance in place and what are the customary terms?

Transaction insurance is more the exception for French private M&A transactions rather than the rule. When used, transaction insurance policies will generally duplicate what has been agreed between the seller and the buyer with the exception of specific indemnities, facts known to the seller or uninsurable sanctions.

30 Do parties typically agree to post-closing covenants? If so, what is the usual scope of such covenants?

Post-closing covenants are typically agreed by the parties and set up for limited periods of time. The following post-closing covenants are customary:

- non-compete;
- non-solicitation;
- confidentiality; and
- access to information.

Tax

31 Are transfer taxes payable on the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

Transfers of shares in a company are typically subject to the following stamp duties: 0.1 per cent of the purchase price for shares in joint-stock companies; 3 per cent of the purchase price for shares in limited liability companies or partnerships; or 5 per cent of the purchase price for shares in real estate companies.

There is an exemption from the stamp duties for trading activities on the capital markets.

Transfers of a business are subject to higher stamp duties, ranging from zero to 5 per cent (for the fraction above €200,000) of the purchase price. Transfers of assets are generally not subject to any stamp duty unless they qualify as real property.

It is market practice for the buyer to pay for the stamp duties, although the seller and the buyer remain in all cases jointly liable to the tax authorities for the payment of such stamp duty.

32 Are corporate taxes or other taxes payable on transactions involving the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

Transfers of shares, businesses or assets may result in taxable capital gains for the seller.

If the seller is an individual or a tax-transparent company, such capital gains will be included in its taxable base and will be taxed as common profits in all cases from a French tax standpoint.

If the seller is a company subject to French corporate taxes and transfers shares, the tax rate pursuant to which the capital gains will be taxed depends on the qualification of the shares transferred. If they qualify as ownership interest (5 per cent interest, held for at least two years), the capital gains will be taxed at a preferred 12 per cent rate. Otherwise, they will be taxed at the corporate tax rate (33.3 per cent, expected to be reduced in stages to 25 per cent in 2022). If the seller is a French company subject to corporate taxes that transfers a business or assets, the capital gains on such transfer will be taxed at the corporate tax rate.

Value added taxes are not applicable to transfers of shares or businesses. However, value added taxes may be applicable to transfers of individual assets, depending on the nature of such assets.

Employees, pensions and benefits

33 Are the employees of a target company automatically transferred when a buyer acquires the shares in the target company? Is the same true when a buyer acquires a business or assets from the target company?

Employees of a company are automatically transferred to the buyer who acquires an 'autonomous economic entity'. An autonomous economic entity is an organised set of assets and persons facilitating the exercise of an economic activity that pursues a specific objective.

The transfer of an autonomous economic entity may be operated through an acquisition of shares in the target company or of all or part of its business or assets. However, an acquisition of individual assets in the target company does not always trigger the automatic transfer of employees. Hence, in the event of an assets sale, an analysis of the scope of the transaction with regard to such employee transfer rules shall be run to consider whether it would entail any such transfer.

Any dismissals implemented before the transfer for circumventing such automatic transfer rule are prohibited and may entail liability for both seller and buyer.

34 Are there obligations to notify or consult with employees or employee representatives in connection with an acquisition of shares in a company, a business or assets?

Employees' representatives of a target company must be notified, consulted, or both, prior to the acquisition of the shares or the business of such target company. The acquisition of assets will give rise to notification or consultation obligations to the extent that it results in the transfer of an autonomous economic entity (see question 33) or impacts on the production structures of the target company. The relevant notification and consultation process must be run prior to the signature of any binding agreement between the seller and the buyer. Notification or consultation obligations of employees' representatives may also concern the seller and buyer in cases where they are present in France.

Works councils of target companies – works councils are mandatory for companies having more than 50 employees for at least 12 months over the past three years – must be notified and consulted prior to any changes made to the target company's economic or legal organisation, including any merger, acquisition, changes to the production structure or on any acquisition or sale of a subsidiary. Works councils must also be notified of any stake acquired by a third party in the target company's capital to the extent and at the time that the target company becomes aware of such acquisition. In the context of takeover bids, a special notification and consultation process applies to the works council of the target company.

Small or medium-sized enterprises (ie, companies with less than 250 employees and an annual turnover or total assets not exceeding respectively €50 million or €43 million (SMEs)) are subject to specific obligations in terms of employees' information in the context of an acquisition so that such employees are given the ability to bid for the acquisition of the shares or business of the target company. Hence, in connection with the acquisition of a business or at least 50 per cent of

Davis Polk

Christophe Perchet **christophe.perchet@davispolk.com**
Juliette Loget **juliette.loget@davispolk.com**
Jean-Christophe Devouge **jc.devouge@davispolk.com**

121, avenue des Champs-Elysées
75008 Paris
France

Tel: +33 1 56 59 36 00
Fax: +33 1 56 59 37 00
www.davispolk.com

the shares of an SME, the employer must inform the employees at the latest two months before closing the transaction if the target company does not have a works council, or otherwise at the latest at the same time as the consultation with the works council. Breach of this obligation may result in penalties for the employer but does not trigger the nullity of the acquisition.

Infringements to the works council's notification and consultation processes constitute criminal offences on the part of the management of the target company and may be sentenced as such.

35 Do pensions and other benefits automatically transfer with the employees of a target company? Must filings be made or consent obtained relating to employee benefits where there is the acquisition of a company or business?

As a general principle, all contractual rights and obligations of employees are transferred to the buyer, pursuant to the automatic transfer rule (see question 33), without any filing. However, the automatic transfer rule does not apply to other benefits granted in accordance with collective agreements or customs.

Pension rights are divided into three different categories: the basic state pension scheme, compulsory complementary schemes and supplementary pension schemes. Employees' pension rights under the basic state pension scheme and supplementary pension schemes are automatically transferred to the buyer of the target company or of its business. Employees' pension rights under the supplementary pension schemes are also transferred, although such schemes may be carried on by another services provider and their terms and conditions may be amended as a result of the transfer.

Getting the Deal Through

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Aviation Liability
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Fund Management
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Healthcare Enforcement & Litigation
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Labour & Employment
Legal Privilege & Professional Secrecy
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