Acquisition finance in France: overview
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MARKET OVERVIEW AND METHODS OF ACQUISITION

Acquisition finance market

1. What parties are involved in acquisition finance?

France's capital investment market (the second largest in Europe behind the UK) set new records in 2016, with leveraged buy-out (LBO) transactions totaling EUR14.7 billion. Notable LBO transactions in 2016 include the acquisition of:

- Morpho (Safran's affiliate) by Advent (Oberthur's affiliate) for EUR2.425 billion.
- Foncia by Partners Group for EUR1.9 billion.
- Ethypharm by Pal Partners for EUR725 million.

The leading mergers and acquisitions financial adviser in 2016 was Morgan Stanley, closely followed by Rothschild & Cie and Citi. The financial advisers that dominate the French LBO markets are US and EU banks. The three French banks ranked among the top ten financial advisers are Crédit Agricole CIB, Société Générale and BNP Paribas (Preliminary M&A & Capital Markets Review – France, Thomson Reuters).

Methods of acquisition

2. What are the main methods used for acquiring business entities in your jurisdiction?

Asset acquisition

Asset acquisitions are common in France and there is a wide range of funding options available, such as loans, leasing with a purchase option or asset-backed securities. Asset acquisition structures are usually used in the context of small, isolated transactions, in particular when either:

- Only part of a business is sold.
- The purpose of the transaction is focused on the acquisition of a particular asset (such as real estate) as opposed to a business.

In any other context, a share deal will be favoured.

The main advantage of asset acquisitions is that the seller's liabilities and most of the existing contracts (excepting employment contracts) do not transfer to the purchaser, therefore minimising the risk for the purchaser and its lenders.

However, the purchaser must pay registration duties (between 3% and 5% of the sale price, depending on the value of the ongoing business (fonds de commerce) or up to 6.4% for real estate, excluding notary fees), which may make this option less attractive than a share acquisition.

Share acquisition

Share acquisitions are the most common way of acquiring businesses in France. The filing obligations are minimal, only involving the:

- Registration of the share transfers in the company's books.
- Registration of the share acquisition with the relevant tax authorities.

Registration duties range from 0.1% for companies such as sociétés anonymes and sociétés par actions simplifiées (limited liability companies) to 3% for companies such as sociétés à responsabilité limitée (another type of limited liability company), sociétés en nom collectif (partnerships) and sociétés civiles (private companies). These registration duties are increased to 5% for non-listed companies predominantly invested in French real estate.

Lenders are very familiar with the structuring of share acquisition transactions. However, French rules relating to financial assistance and corporate interest may limit the overall security package available to the lenders in the context of share acquisition structures.

Merger

Mergers are also common in France, particularly in the context of acquisitions or build-ups between industrials where the seller intends to remain a shareholder of the new entity.

Statutory mergers require approval by two thirds of the shareholders of both companies. As it is a share deal, a merger does not require acquisition finance. However, in practice, the financing of the absorbed company (and sometimes of the acquiring company too) will require a renegotiation so that it is consistent with the features of the new entity.

Other

Not applicable.

STRUCTURE AND PROCEDURE

Procedure

3. What procedures are typically used for gaining acquisition finance in your jurisdiction?

Private sales

Corporate borrowers raising funds to finance an acquisition generally rely on their relationship banks to arrange (and sometimes underwrite) the financing. The financing will usually be in the form of a club deal, where a small group of arrangers act as lenders, or a full syndication involving a wider group of lenders, depending on the size of the transaction. In addition, the syndication arrangement can be combined with a bridge loan, generally provided by the arrangers. In these cases, the arrangers are usually close relationship banks, which are authorised as arrangers as a reward for providing the bridge financing.
Investment fund borrowers will organise bid auctions to select their financing providers, especially for mid to large capitalisation transactions. In this case, the mandate documents (commitment letter and term sheet) are prepared by the borrowers and their advisers and banks will be asked to bid on the basis of the documentation.

Stapled financing (that is, a form of pre-arranged financing package offered by the seller to potential bidders during an acquisition) is also frequently seen in jumbo deals. The documentation is not always negotiated in detail by the seller and buyers are more likely to negotiate their own documentation. However, stapled financing allows banks to carry out their due diligence and become familiar with the assets in advance of the auction sale, therefore speeding and facilitating the structuring and negotiation process with the buyers.

Financing commitments are generally negotiated in parallel to the preparation of a purchase offer, so that the buyer can submit a binding offer with no or very limited conditions. The seller will then analyse the certainty of the commitments received by the various bidders.

Although bids are won on the basis of commitment letters only, funding is usually granted on the basis of full documentation, even in the case of bridge loans.

Even in acquisitions that are not carried out by bid auctions, the seller will rarely commit to a sale if the purchaser does not have financing in place.

**Acquisitions of listed companies**

The financing of a public offer is more demanding, as the availability of the financing is a mandatory condition to the launch of the public offer. In these transactions, the setting up of the financing is generally the first step, before the M&A deal.

**Documentation**

The choice of law depends on various factors, such as:

- Whether the transaction is cross-border or purely domestic.
- The nationality of the buyer or sponsor.
- The type of financing used (bank loans, high yield bonds and so on).

The choice is generally between French, English or US law.

For bank financings, standard agreements provided by the Loan Market Association (LMA) commonly serve as the basis for discussions between the relevant parties. In the case of leveraged buy-outs, this will usually be the senior multicurrency term and a revolving facilities agreement for leveraged acquisition finance transactions.

In most cases, the documentation is commonly drafted in English. However, due to the LMA’s release of French agreements, the use of the French language is becoming more popular.

Despite the choice of foreign law applicable to a finance document, French law (and sometimes the French language) will apply to security interests granted over French assets.

**Vehicles**

**4. What vehicles are typically used in acquisition finance?**

Acquisitions finance transactions in France generally involve the incorporation of a French special purpose vehicle (SPV) to act as bidder, which raises the acquisition financing and acquires the assets. The choice of vehicle used is generally driven by legal and tax considerations, such as whether bidder will be in a position to form a tax consolidated group with the target group. Such a situation may allow for all or part of the financial expenses relating to the acquisition indebtedness against the target group’s profits to be offset.

The SPVs commonly used in France are limited liability companies (sociétés par actions simplifiées) (SAS), which offer flexibility in their management structure and their incorporation. SAS have a Président who holds the most extensive powers to act on behalf of the company. However, the shareholders can also adopt any other type of governance (board of directors, supervisory board and so on) if they so wish. An SAS can issue different classes of shares or bonds, thereby allowing various incentive schemes to be put in place for the investors.

The direct or indirect holding of the acquisition vehicle can depend on several considerations, whether factual (nationality of the investors for example), tax or legal considerations, in particular if lenders require a "double Luxco" structure to protect themselves against abusive use of safeguard proceedings available to French debtors.

However, the "double Luxco" structure, which had until a few years ago been put in place almost systematically, especially for large transactions, has been declining in popularity. This trend may be explained by the complexity of the structure and the significant related costs that it generates.

**EQUITY FINANCE**

**5. What equity financing structures are typically used in acquisition finance?**

The instruments used in French equity finance structures include:

- Straight equity (actions).
- Hybrid securities combining bonds and shares, such as:
  - bonds with equity warrants attached (obligations à bons de souscription d’actions);
  - bonds convertible into ordinary or preferred shares (obligations convertibles en actions ordinaires ou de préférence);
  - bonds redeemable in shares (obligations remboursables en actions);
  - straight contractually-subordinated loans.

In practice, equity financing in France generally consists of a combination of these various instruments, with most of them combining pure equity and subordinated debt.

**DEBT FINANCE**

**Structures and documentation**

**6. What debt financing structures are typically used in acquisition finance?**

**Debt financing structures**

As in most jurisdictions, debt financing structures in France vary depending on factors such as the:

- Timing and the size of the transaction.
- Management package.
- Types of investors.
- State of the market.

Debt structures can be:

- Simple (such as a single facility loan agreement).

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• Complex, involving different tranches of debt (such as senior, second lien and/or mezzanine debt), high yield bond issues or bridges to high yield bond issues, coupled or not with a senior secured revolving credit facility.

Over the past few years, most of the transactions were financed with senior debt divided into several tranches (senior and second lien) and junior debt composed of mezzanine financing. However, there is a growing trend for small to mid-cap acquisitions to finance the acquisition by way of “unitranche” facilities (that is, financing structured as single debt instruments, where the entirety of the debt is subject to the same terms, replacing both senior and mezzanine debt). “Unitranche” loans are attractive to borrowers as they limit the number of participants and allow for simpler documentation.

Multi-tranche syndicated facilities are the most common financing structure for large cap acquisitions. High yield bonds are also popular in France to finance or refinance acquisition term loans; however, second lien facilities are currently rare.

When a mezzanine facility is contemplated, it is almost systematically structured as a private bond issue. This is due to the French banking monopoly, whereby only authorised credit institutions can grant loans in France. As mezzanine lenders do not generally have that authorisation, the funding of the mezzanine tranche is structured by way of bonds issued by the borrower and subscribed for by the mezzanine lenders.

Payment-in-kind can be found in mezzanine financing. However, this is not automatic and is generally only for part of the interest.

Equity kickers generally take the form of warrants attached to the bonds, granting an option to subscribe for equity or hybrid securities negotiable in equity. Equity kickers are often used in mezzanine financings to allow equity compensation plans for mezzanine lenders. Through equity kickers, the borrower can obtain better financial conditions when implementing mezzanine loans.

Documentation
See Question 3 for the documentation used in acquisition finance transactions.

Inter-creditor arrangements

7. What form do inter-creditor arrangements take in your jurisdiction?

Inter-creditor agreements are common practice in France.

Contractual subordination

Contractual subordination through inter-creditor agreements is typical in French acquisition financing transactions, which prescribe the ranking of the claims between the:

• Equity holders and intra-group lenders.

• Mezzanine lenders.

• Second lien creditors, if any.

• Senior creditors.

However, in the absence of any decision from the French Supreme Court (Cour de Cassation) on the validity or enforceability of inter-creditor agreements, it is not clear whether French courts would recognise these agreements without any restrictions.

In particular, in the case of bankruptcy proceedings of the borrower, the creditors are grouped in committees depending on the nature of their claim (bonds or loans) but without distinction between the senior and subordinated creditors within each committee. However, the French Commercial Code now provides that, in safeguard proceedings, the safeguard plan that is submitted to the creditors for approval must take into consideration the provisions of subordination agreements entered into between creditors before the opening of such proceedings.

Structural subordination

Structural subordination is also frequently used in French acquisition finance. In particular, the mezzanine bonds are often issued by a bidco (that is, the acquiring company), which itself will be the borrower under the senior debt.

Payment of principal

Payments of principal of the subordinated debt are traditionally prohibited until the senior debt is discharged. As a result, no repayment under the second lien facility (if any) and under the mezzanine facility (or bonds) can be made before the senior debt discharge date. In addition, turnover provisions oblige any subordinated lender who has received payment in violation of the above prohibition to pay it to the most senior creditors.

Interest

The payment of interest in inter-creditor agreements can vary from being strictly prohibited to being permitted in whole or in part, in cash. The capitalisation of interest is never prohibited by subordination arrangements.

Fees

Payment of fees is generally permitted, within certain limits.

Sharing arrangements

Sharing of security interests between lenders is typically governed by the inter-creditor agreement and the security documents.

Most French assets can be subject to several rankings of pledges. However, in some circumstances, the creation of a second ranking pledge requires the appointment of a third party holder (détenteur de saisie) to both:

• Hold the pledged assets for the benefit of the secured parties.

• Implement the secured parties’ retention right.

Difficulties can arise if on the date that French security interests are granted, hedging contracts have not yet been entered into. This is because French law requires that the secured creditor must be individually identified in the pledge agreement at the time the security is granted. Therefore, a pledge must be granted to the hedging banks at the time of entering into the hedging arrangement (so that a pledge granted later will mechanically rank the hedging banks lower than the senior creditors, who will be granted security at the beginning). The parties rely on the inter-creditor agreements and sharing arrangements to contractually organise pari passu ranking of the hedging banks with the senior lenders.

As in most jurisdictions, claw back provisions are typical in French law inter-creditor agreements.

Subordination of equity/quasi-equity

Equity or quasi-equity financing is typically subject to contractual subordination and, as the case may be, structural subordination. There is a full prohibition on payments and on other distributions, excepting very limited permitted payments (for example, certain operating/maintenance costs at the holding level).

Secured lending

8. What security and guarantees are generally entered into for an acquisition financing?

Extent of security

The security package mostly depends on the type of borrower, for example the security interest:
For a corporate borrower can be relatively limited, mainly limited to the shares of the acquired target.

For an average leveraged buy-out transaction, is very broad, comprising rights over all types of valuable assets (such as shares, the business, bank accounts, receivables and IP).

In principle, French security interests do not prevent the debtor from using pledged assets. Notifications and blocking notices issued by third parties (such as creditors) can be postponed and/or be subject to events of default.

Borrowers generally seek to exclude real estate from the security package, because of the heavy costs of mortgages in France.

Types of security

French companies must always act in their corporate interest (intérêt social). Therefore, when granting guarantees or security interests, companies must consider financial assistance rules (see Question 10) and corporate benefit rules.

The corporate interest of a company (which differs from the interest of its shareholders, creditors and employees) is not defined by French law. However, French judges will assess whether the decisions taken by the directors or the company itself are prejudicial to the company. Failure to act in the company’s corporate interest puts the relevant directors at risk of becoming:

- Liable for damages on the basis of their alleged mismanagement (faute de gestion).
- Criminally liable on the basis of abus de biens sociaux (that is, misuse of a company’s assets or credit). The penalties for individuals are five years’ imprisonment and a fine of up to EUR375,000.

However, French case law provides that abus de biens sociaux is not committed where a subsidiary guarantees the debts of its parent company, provided that the following conditions are met:

- There must be a bona fide group, with structural ties and a common strategy.
- The loan and the guarantee must exhibit a common interest for the group as a whole (and not for the parent company alone).
- There must be an adequate benefit for the subsidiary in entering into the guarantee, and its commitment must not exceed its financial resources.

In the case of upstream or cross-stream guarantees, it is advisable to limit the guarantee to the amounts borrowed by the parent (or sister company) and actually loaned to the guarantor.

Shares. Depending on the corporate form of the company whose shares are pledged, the pledge can take the form of either a pledge over shares or a pledge over a security account.

A pledge over shares is relevant for shares issued by certain limited and unlimited liability partnerships, including a société à responsabilité limitée (that is, a limited liability company), a société en nom collectif (that is, a partnership) and sociétés civiles (private companies). Whether created by a notariated deed or a private deed, the pledge must be registered with the registrar (greffe) of the relevant commercial court.

Pledges relating to securities issued by a société anonyme or a société par actions simplifiée (that is, limited liability companies) are granted over a securities account opened in the name of the debtor to which the shares owned by the debtor are credited. The pledge is in respect of both:

- A securities account registering the pledged shares.
- A special proceeds account opened in the name of the debtor in the books of a bank, where all dividends pertaining to the shares are to be paid.

Inventory. There are two different sets of rules to create a pledge over inventory. A civil law pledge over inventory requires either of the following to occur:

- The secured creditor is effectively transferred possession of and control over the pledged inventory (an effective but costly way to achieve this transfer is to appoint a third party holder who will segregate the debtor’s assets for the account of the creditor).
- The pledge is registered with the registrar (greffe) of the commercial court where the French company is incorporated, so that the pledgor can dispose of the pledged assets.

A commercial law pledge over inventory was introduced in 2006 subject to statutory limitations. Beneficiaries of these pledges can only be the credit institutions that provided the financing secured by the respective security interest. In addition, to be enforceable against third parties the pledge must be registered with the registrar of the relevant commercial court.

Although the requirements of the commercial pledge have been eased in early 2016 to increase flexibility, in practice, pledges over inventory are not the most commonly used security interests in acquisition finance.

Receivables. A pledge over receivables (nantissement de créances) is perfected and enforceable against third parties at the date of its execution. To be enforceable against a debtor, the debtor must either:

- Be notified of the pledge.
- Become a party to the pledge agreement.

In addition, the notification of the pledge to the debtor also entitled the secured creditor to require that the pledged receivables be paid directly to it.

A daily law pledge or assignment applies when both the:

- Beneficiary of the pledge or assignment is a credit institution, which has extended the financing secured by the respective security interest.
- Receivables arise out of the borrower’s professional activity.

Contrary to the rule applying to a non-daily law pledge over receivables, a daily law pledge or assignment is perfected on execution by the borrower (which pledges or assigns the receivables) of a bordelereau (that is, a statement that sets out certain mandatory information). In addition, on receipt of a notification by the secured creditor, the assigned debtor can be instructed to pay directly to the bank the pledged or assigned receivables. However, this notification is not a requirement for the perfection of the daily law pledge or assignment as the mere signature of the bordelereau is sufficient. The assignment becomes effective between the parties and enforceable against third parties on the date specified in the bordelereau daily.

Bank accounts. A pledge over a bank account is a form of a pledge over receivables. The pledge is in respect of the amount of credit in the bank account at the date of the enforcement of the pledge (after taking into account debits and credits previously initiated but not yet completed). Therefore, unless otherwise stated in the pledge agreement, the debtor can use the monies in the pledged bank account until the time that the pledge is enforced (see above, Receivables) or on receipt of a blocking notice by the bank in the books of which the account is opened.

IP rights. Pledges can be issued over IP rights, such as patents, software, trade marks, designs and models. To be perfected, the pledge must be registered with the national trade marks and patent authority (Institut national de la propriété industrielle) and published in the official bulletin of industrial properties (Bulletin officiel de la propriété industrielle). Secured creditors will usually
require debtors to renew and exploit their IP rights to maintain their value.

**Real property.** The most common form of security interest over land and buildings is the mortgage (hypothèque), which must be executed before a public notary and registered with the Land Registry (Conservation des Hypothèques). Its registration, (after the payment of various costs including real estate registration duties), makes the mortgage enforceable against third parties. The registration remains effective for one year after expiry of the corresponding loan agreement. Due to the high costs generated by the registration, mortgages are not commonly used in acquisition finance.

**Movable assets.** Pledge over a business (fonds de commerce) includes a very large scope of assets, including the:
- Trade name.
- Leasehold rights.
- Fixed assets such as machinery, goodwill and IP rights.

A pledge over movable assets must be registered with the tax authorities and with the registrar of the relevant commercial court within 30 days of execution. The same formalities apply to pledges over machinery and equipment, which must be registered with the registrar of the relevant commercial court within 15 days of execution.

**Guarantees.** Subject to corporate interest issues (see Question 9) and financial assistance restrictions (see Question 10), guarantees are very common in acquisition financings.

There are two main types of personal guarantees under French law. The most commonly used guarantee in acquisition finance is the cautionnement (that is, an undertaking to pay the borrower’s debt to the creditor if the borrower fails to do so). In practice, a joint and several guarantee (cautionnement solidaire) authorising the creditor to enforce its claim indifferently against the guarantor or the borrower is preferred over a simple cautionnement.

Where the guarantee is a primary obligation (such as an autonomous on demand guarantee (garantie autonome à première demande)), the guarantor’s undertaking requires a separate agreement that both:
- Is independent from any obligation of the borrower under the credit agreement.
- Consists of a promise to pay the beneficiary at first demand.

**Security trustee**

The French fiducie (that enables a security provider to transfer present or future goods and rights to a trustee acting on behalf of the secured creditor) was introduced under French law in 2007. The assets held by the trustee are segregated from the debtor’s own assets.

However, fiducie is rarely used in practice, largely due to the cumbersome formalities required to create a security trust (such as mandatory information to be provided in the security trust agreement for validity purposes and registration with the local tax authorities) and the costs and fees of the trustee, which must be borne by the borrower.

Although the appointment of a security agent is very common in French transactions, its role in France is not as broad as in other jurisdictions. All creditors benefiting from the security interest must be identified at the time the security is granted so the security agent cannot be the sole beneficiary of the security interest on behalf of the lenders.

In 2009, Article 2329-1 of the French Civil code was enacted to attempt to clarify the status of the security agent by allowing it to manage security interests on behalf of the other creditors.

This security trustee’s status has been further improved and clarified by an order dated 4 May 2017 which will enter into force on 1 October 2017. This new regime provides that the security agent:
- Holds the security interests in its own name and can take certain legal actions in bankruptcy proceedings without special powers granted by the creditors.
- Benefits from any type of guarantees (whether personal in rem or personal guarantees).
- Can be appointed in any written agreement (that is, it is no longer required that the security agent is appointed in the secured documents).
- Will dispose from a segregated patrimony (assets or valuable rights that are passed on are distinct from its own assets) into which the proceeds of the security will be credited, offering protection to the creditors in case of the security agent’s insolvency.

 Practitioners also use English trusts or parallel debt structures in cross-border deals involving French security aspects. On 13 September 2011, the French Supreme Court (Cour de cassation) ruled (in the context of safeguard proceedings opened in France) that the concept of parallel debt was held not to be incompatible with the French law concept of international public policy. However, this decision cannot be considered as a general recognition of the enforceability in France of the rights of a security agent or trustee benefiting from a parallel debt obligation created under foreign law.

**RESTRICTIONS**

9. Are there thin capitalisation rules in your jurisdiction? If so, what is their impact on an acquisition finance transaction?

All references to “related parties” below mean two companies where either:
- One company controls (directly or indirectly) the other.
- They are controlled by a company that directly or indirectly controls them.

A company is considered as controlling another company if either:
- It holds the majority of the share capital of that company.
- It de facto manages that company.

The French rules limiting the deductibility of interest expenses paid to shareholders or related parties (including thin capitalisation rules) are:
- Interest paid by a French company to its shareholders who do not qualify as related parties is only deductible within the limit of the average annual interest rate for certain loans granted by banks (2.03% for fiscal year 2016), provided that the borrower’s share capital is fully paid up.
- Interest paid by a French company on loans granted by related parties is only deductible within the limit of the interest rate defined above, or, if higher, the rate that independent financial institutions would have applied under similar circumstances.
- The “anti-hybrid limitation” provides that interest paid by a French company to related parties is only deductible if the borrower can demonstrate that, for the same fiscal year, the lender is subject to income tax on this interest for an amount at least equal to 25% of the French corporate income tax as determined under standard rules.
- Interest on loans granted by related parties that is deductible under the above-mentioned limitations will only be fully deductible if it does not exceed the following limits:
- the amount of such interest multiplied by one and a half times the company's net equity and divided by the average amount of related parties’ indebtedness over the relevant fiscal year;
- 25% of the company's adjusted earnings before tax and exceptional items; and
- the amount of interest received from related parties.

- If all of the above three limits are exceeded, the portion of interest exceeding the higher of these limits cannot be deducted from the relevant fiscal year's results (unless the portion of interest is lower than EUR150,000). However, it can be carried forward subject to certain conditions.

Thin capitalisation rules also apply to loans granted by non-related parties but guaranteed by related parties, subject to exceptions including:

- New loans replacing indebtedness having become payable as a result of a change of control of the borrower.

- When a security granted by a related party consists exclusively in a pledge of the shares and/or receivables of the borrower or in a pledge of the shares of a company holding directly or indirectly the borrower (when both companies are part of the same French tax consolidated group).

In the context of acquisition finance, the above thin capitalisation rules can limit the advantages of financing an acquisition through debt rather than equity by reducing the tax effect associated with a leveraged acquisition. In addition, the increased tax liability that can result from the non-deductibility of certain financial expenses can impact the acquirer's cash flows and can therefore affect its ability to service its debt.

Other rules in the context of financing arrangements are:

- A general clawback of 25% of all net financial charges borne by French companies which applies irrespective of thin capitalisation situations (robot).

- Anti-abuse rules may apply in specific acquisition scenarios where:
  - a French target is acquired and subsequently included in the tax consolidated group to which the acquirer belongs, if the seller, directly or indirectly controls the head of the tax consolidated group, or is controlled directly or indirectly by the persons who directly or indirectly control the head of the tax consolidated group.
  - a French company acquiring a target company cannot demonstrate that it effectively controls the target.

- Interest paid by French companies to entities located in low tax jurisdictions is only deductible if the borrower proves that the interest corresponds to real transactions and is not excessive. For interest due to entities located in a non-cooperative state or territory (NCST) (that is, states or territories that do not apply international standards with respect to exchanges of tax information and have not concluded with France and at least 12 other states or territories a convention on administrative assistance allowing the exchange of information necessary for the application of their respective tax laws), the borrower must further demonstrate that the main purpose and effect of the transaction is not to transfer income to the NCST.

**Financial assistance**

**10. What are the rules (if any) concerning the prohibition of financial assistance?**

Under French law, French sociétés anonymes, sociétés par actions simplifiées and sociétés en commandite par actions (that is, limited liability companies) are prohibited from lending money, giving guarantees or granting security interests over their assets with a view to the subscription for, or purchase of, their own shares by a third party.

This restriction on financial assistance is generally deemed to apply to loans/Securities granted directly or indirectly, therefore extending to financial assistance by any subsidiary of the target. However, it is not clear whether this prohibition applies to non-French subsidiaries of the target. It would be prudent to consider that non-French subsidiaries are subject to the prohibition where a "French connection" exists.

There is no whitewash procedure or its equivalent in France. However, there are two exceptions to the financial assistance prohibition (Article L. 225-216, French Commercial Code):

- Transactions by credit institutions in the ordinary course of their business.
- The acquisition by a company of its own shares for distribution to its employees or to employees of one of its subsidiaries.

Breach of the financial assistance prohibition is a criminal offence, exposing the directors of the company to a fine of up to EUR150,000. In addition, although it is not expressly stated in the law, French commentators consider that transactions that do not comply with the financial assistance provisions will be held null and void by French courts.

The financial assistance prohibition can also apply, depending on the circumstances, when:

- Refinancing acquisition debt.
- Merging the acquisition vehicle and the target.
- Implementing other forms of debt pushdown (in particular where the target group draws further new facilities, the proceeds of which are to be used as a dividend allowing the acquisition vehicle to repay the initial acquisition indebtedness).

**Regulated and listed targets**

**11. What industries are regulated in your jurisdiction? How can the fact that a target is a regulated entity affect an acquisition finance transaction?**

**Regulated industries**

A wide range of sectors are regulated in France, such as the banking, insurance, energy, audiovisual, press, air transport and national defence sectors. For example, the French Monetary and Financial Code creates the French "banking monopoly", whereby only licensed credit institutions (établissements de crédit) and finance companies (sociétés de financement) can grant loans on a regular basis.

**Effect on transaction**

As a general principle, financial relationships between France and other jurisdictions are not restricted. Depending on the investor's nationality, the contemplated sector of activity and the amount of the investment either:

- The acquisition must be submitted to the French Ministry of Economy for prior authorisation.
- The investor must file a declaration with the French Ministry or the Bank of France (for statistical purposes only).

It is of particular importance that authorisation from the French Ministry of Economy is obtained prior to any investment being made in sensitive and strategic sectors, such as the national defence, transports, electronic communications and public health sectors. In addition, EU investors may benefit from lesser restrictions than non-EU investors.
In addition, specific rules apply to certain regulated entities, such as insurance companies, market operators or press companies. Very restrictive rules also apply to foreign investments in credit institutions or investment firms.

These restrictions to foreign investments in France can impact an acquisition financing as the enforcement of pledges granted on the shares of the target or on its business will be subject to the same restrictions and/or prior authorisations.

12. How does the fact that a target is listed impact on a transaction?

Specific regulatory rules
Acquisitions of French listed companies are regulated by the French Financial Markets Authority (Autorité des Marchés Financiers) (AMF), which can approve or reject the filing of a voluntary or mandatory public tender offer. Therefore, the main source of regulation in France is the AMF's General Regulations. Failure to comply with the General Regulations can result in the AMF rejecting the offer.

The rules on takeover bids seek to ensure that offers proceed in an orderly fashion and comply with a number of principles, including:
- The interplay of bids and counterbids.
- Equal treatment and information for securities holders.
- Market transparency and integrity.
- Fairness in trading and competition.

French takeover regulation governs all aspects of an offer if the target has its registered office in France and is admitted to trading on a regulated market in France. If the securities of the target company are not listed on a regulated market within the EEA, the AMF General Regulations do not apply, even if the target company is domiciled in France.

Methods of acquisition
The offer must be filed (by way of an offer letter) with the AMF by one or more sponsors on behalf of the offeror. Consideration for the offer can be in cash, shares, or a combination of the two.

The offer gives rise to the publication of a statement by the AMF presenting the main characteristics of the offer and opening an "offer period" of ten trading days during which the AMF determines whether the offer complies with applicable laws and regulations. If so, the AMF issues and makes public a declaration of conformity. The listed target must then respond with a memorandum in response to the offer document within five, 15 or 20 (depending on the specific circumstances of the offer) trading days from the publication of the declaration of conformity. This memorandum is public, and is reviewed by the AMF. Further to its review, the AMF can clear the offer and will make public the final version of the memorandum in response.

The acquisition of a French listed target can be implemented either through:
- A voluntary tender offer.
- A mandatory tender offer.

An offer can also be either hostile or recommended by the board of the target company.

Individuals or legal entities that come to hold (alone or in concert, directly or indirectly) more than 30% of a listed company's share capital or voting rights must file a mandatory tender offer. In addition, a party launching a tender offer for a French target must extend its offer to any subsidiary of the target that is listed either on a regulated market within the EEA or on an equivalent foreign market, if both the:
- Target holds more than 30% of capital or voting rights of the subsidiary.
- Relevant subsidiary constitutes an essential asset of the target.

Mandatory tender offers also apply to persons that come to hold (alone or in concert, directly or indirectly) between 30% and 50% of a listed company's share capital or voting rights and increase that holding by 1% or more within less than 12 consecutive months. Mandatory tender offer prices cannot be lower than the highest price paid by the offeror for securities of the target during the 12-month period preceding the event that triggers the mandatory offer.

Funding
Once filed, the offer is irrevocable and the announcement for a cash offer must include a confirmation by the offeror's financial adviser or another appropriate third party that sufficient funding is in place for the offeror to satisfy full acceptance of the offer (whether voluntarily or pursuant to any mandatory squeeze-out mechanism).

A description of how the offer is being financed and the source(s) of financing must be included in the offer document, which must also disclose details of the debt facilities or other instruments entered into in order to both:
- Finance the offer.
- Refinance the existing debt or working capital facilities of the target company.

In practice, the funding of a cash offer is ensured by a bank guarantee (generally issued by the offeror's sponsor) and covering the full amount of the offer. The bank issuing the guarantee is itself backed by the financing put in place by the offeror.

Squeeze-out procedures
An offeror can acquire minority shareholdings on a compulsory basis if he owns at least 95% of the listed target's share capital and voting rights.

When a buy-out offer is filed with the AMF, the offeror must specify whether either the:
- Squeeze-out procedure will be implemented automatically when the offer closes.
- Offeror reserves the right to elect whether or not to apply the procedure.

The indemnity paid to the expropriated shareholders must be at least equal to the offer price of the preceding offer and is in most cases strictly equal to the offer price. The expropriated shareholders must be offered a cash payment.

Financial transaction tax
In general, the purchase of shares in a French listed company is not subject to registration duties to the extent that the transaction is not evidenced by deed. However, a 0.3% financial transaction tax is applicable to the purchase of shares in French listed companies with a market capitalisation in excess of EUR1 billion. A list of the companies meeting the EUR1 billion threshold is published once a year by the French tax authorities.
13. What is the impact, if any, of pension schemes held by the target or purchaser on the acquisition?

In France, private pension schemes are rare as employees benefit from the state pension scheme. However, they can be set up by companies through a group savings plan.

In the event of a merger or demerger, which makes it impossible for the savings plans to continue, the personal representatives of the savings plans must be informed of this change and the sums allocated to it can then be transferred to the savings plan of the new company.

LENDER LIABILITY

14. What are potential liabilities of the lender on an acquisition?

When insolvency proceedings are issued against a debtor, lenders are exempted from liability, except in three specific situations (Article L. 650-1, French Commercial Code):

- Fraud of the lender.
- Improper interference by the lender with the company’s management.
- Where security interests granted by the borrower are disproportionate to the financing made available by the lender. Although disproportion is not clearly defined and may lead to subjective interpretations, recent developments in French case law reinforced the lender protection, by requiring the claimant to prove:
  - the disproportionate nature of the security interest; and
  - that the financing was wrongfully granted by the lender to the borrower.

When a new security interest is granted by a borrower to secure already existing indebtedness, there is a risk of claw back if the new security was granted during the claw back period (période suspecte) (that is, from the date at which the borrower is deemed to have become insolvent (en situation de cessation des paiements)). This date is determined retrospectively by the judge and can be fixed at up to 18 months before the commencement of bankruptcy proceedings. Any new security interest granted during the claw back period to secure existing indebtedness may be declared null and void.

French law does not provide for equitable subordination rights.

DEBT BUY-BACKS

15. Can a borrower or financial sponsor engage in a debt buy-back?

French law does not prohibit debt buy-backs by borrowers. However, loan agreements can sometimes prohibit or restrict debt buy-backs by borrowers and any member of their group. Debt repurchased by the borrower is immediately extinguished as the debtor becomes the debtor and the creditor at the same time. In addition, debt repurchased by the financial sponsor or another member of the borrower’s group becomes a related party debt, which can trigger thin capitalisation issues (see Question 9).

Regarding the buy-back of bonds, the following two cases must be noted:

- If the purchaser is the issuer of the bonds, it can hold up to 15% (for bonds) and up to 10% (for other marketable instruments (Titres de Créances Négociables)) of its own securities for a maximum period of one year, provided that the bonds or instruments are admitted to trading on a regulated market or equivalent. Beyond these limits, any bonds or instruments repurchased by the issuer must be immediately cancelled.
- If the purchaser is a company holding directly 10% of the share capital of the issuer, the company cannot vote in bondholders meetings but the bonds do not have to be cancelled.

POST-ACQUISITION RESTRUCTURING

16. What types of post-acquisition restructurings are common in your jurisdiction?

The most common form of post-acquisition restructurings (excluding distressed restructurings) in France is the merger of the target and the acquirer.

However, if debt has been raised to finance the acquisition and if the merger occurs too soon after the acquisition, it may contravene the financial assistance prohibition (see Question 10). The risk of contravention is even greater where the acquirer is a special purpose vehicle with no other assets and activity than the acquired target and the corresponding financing, as it becomes difficult to justify the merger for reasons other than purely financial or tax ones.

REFORM

17. Are there reforms or impending regulatory changes that are likely to affect acquisition finance transactions in your jurisdiction?

Several French reforms have taken place in 2016, such as the Sapin II law, enacted on 9 December 2016, which relates to the transparency, anti-corruption and modernisation of the economy. This law requires non-listed companies registered in France to disclose the identity of their beneficial owners to the relevant public register.

A reform has also been enacted by an order dated 10 May 2017, aiming to modernise French law with respect to the issuance of bonds governed by French law. In particular, this reform aims to simplify the process when the bonds are subscribed by qualified investors. The contemplated changes involve a simplification of the formalities required to issue bonds. This is particularly with regards to the corporate steps that the issuer needs to take, as well as the overall regime and operation of the bondholders who are grouped into a “masse” (which has its own legal personality).
ONLINE RESOURCES

Légifrance
W www.legifrance.gouv.fr/Traductions/en-English

Description. Légifrance is the French government entity responsible for publishing legal provisions online. The English translations have no legal force.

The Financial Markets Authority (Autorité des Marchés Financiers) (AMF)
W www.amf.org/en_US/

Description. AMF regulates participants and products in France's financial markets. The AMF General Regulation is available in English, but is provided for information only.

The Prudential Supervision Authority (Autorité de contrôle prudentiel et de résolution) (ACPR)

Description. The ACPR is responsible for supervising the banking and insurance sectors in France. Translations in English are provided for information only.

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