The Private Equity Review

Fifth Edition

Editor
Stephen L Ritchie

Law Business Research

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EDITOR'S PREFACE

The fifth edition of *The Private Equity Review* comes on the heels of a solid but at times uneven 2015 for private equity. Deal activity and fundraising were strong in North America, Europe and Asia, but the year ended with uncertainty in the face of declining growth in China, Brazil and other developing and emerging markets, increased volatility in commodity, stock, currency and other financial markets, and deflation concerns in developed countries. Nevertheless, we expect private equity will continue to play an important role in global financial markets, not only in North America and western Europe, but also in developing and emerging markets in Asia, South America, the Middle East and Africa. As large global private equity powerhouses extend their reach into new markets, home-grown private equity firms, many of whose principals learned the business working for those industry leaders, have sprung up in many jurisdictions to compete using their local know-how.

As the industry continues to become more geographically diverse, private equity professionals need guidance from local practitioners about how to raise money and close deals in multiple jurisdictions. This review has been prepared with this need in mind. It contains contributions from leading private equity practitioners in 29 different countries, with observations and advice on private equity deal-making and fundraising in their respective jurisdictions.

As private equity has grown, it has also faced increasing regulatory scrutiny throughout the world. Adding to this complexity, regulation of private equity is not uniform from country to country. As a result, the following chapters also include a brief discussion of these various regulatory regimes.

While no one can predict exactly how private equity will fare in 2016, it can confidently be said that it will continue to play an important role in the global economy. Private equity by its very nature continually seeks out new, profitable investment opportunities, so its further expansion into growing emerging markets is also inevitable. It remains to be seen how local markets and policymakers respond.

I want to thank everyone who contributed their time and labour to making this fifth edition of *The Private Equity Review* possible. Each of them is a leader in his or her respective market, so I appreciate that they have used their valuable and scarce time to share their expertise.

Stephen L Ritchie
Kirkland & Ellis LLP
Chicago, Illinois
March 2016

Chapter 7

FRANCE

Maud Manon, Xavier Norlain, Jeremy Scemama and Guillaume Valois[1]

I OVERVIEW

i Deal activity

The French private equity sector has been recovering other the past two years and has recently benefited from several favourable factors. The uncertainties arising out of the tax policy of the French government following François Hollande's election as French President in 2012 have finally disappeared, the availability of financing sources associated with a positive global outlook have generally benefited to the private equity sector in France over the past couple of years.

Large transactions have been rare in recent years in France (only 8 transactions above €1 billion over the last three years). The aggregate number of LBO transactions stands at 236 for 2015 against 219 in 2014 (+8 per cent) and 180 in 2013, which corresponded to the lowest year in the cycle. The private equity industry has also been very active in terms of build-up transactions, with 165 build-ups in 2015 against 109 in 2014 (+51 per cent).[2]

Regarding sale processes, the general trend is longer duration, less competition and an increase in bilateral transactions in lieu of auctions.

1 Maud Manon, Xavier Norlain, Jeremy Scemama and Guillaume Valois are partners at DLA Piper France LLP. The authors would like to thank Bertrand Levy, who is of counsel, as well as Matthieu Lampel and Charles-Antoine del Valle, who are senior associates, for their assistance with this chapter.

2 CF News, '236 LBO tricolores en 2015', 5 January 2016.

ii Operation of the market

Management equity incentive arrangements

Management packages in the French market tend to be quite similar to those existing in other markets but have certain specificities. Management is most of the time offered the opportunity to participate in the transaction through one or several special purpose vehicles (management companies). The level of financial involvement will be personal for each manager, and will depend on whether the target group has already been acquired under a LBO and whether the manager is reinvesting his or her proceeds.

Stock options plans can also be proposed, although amendments to the tax legislation have reduced the incentive to set up such plans. In a nutshell, the gain derived by the beneficiaries from the exercise of the options (as opposed to the gain upon disposal of the shares if any) is now treated as remuneration for income tax purposes (i.e., with no tax advantage compared with a mere bonus scheme). Under certain conditions, these plans remain an efficient alternative as far as social contributions are concerned.

Following recent changes (French Law No. 2015-990 for economic growth and activity, known as the 'Macron Law' entered into force on 7 August 2015) to the legal and tax treatment of qualified free shares plans, the use of such plans to structure management packages can be considered if properly structured. Under the new rules:

a mandatory vesting and lock-up periods have been reduced from two years to one year;

b all gains derived from the free shares are now eligible to capital gains tax treatment (i.e., with allowances up to 85 per cent depending on the length of the holding period);

c reduction from 30 to 20 per cent of the employer's social contribution and deferral of payment until vesting; and

d removal of the 10 per cent employee social contribution.

Under qualified free shares plans, it is in principle possible to issue preferred shares or ordinary shares. However, qualified free shares plans do not fit all situations of management equity incentive arrangements.

The managers may invest on a *pari passu* basis with the financial sponsor, which means that they are invited to invest through the same securities as the financial sponsor (i.e., shares, bonds, convertible bonds or other financial instruments). Should this be the case, the managers will receive the same return as the financial sponsor.

In order to reinforce management's involvement in the transaction, financial sponsors most of the time offer to the managers the opportunity, subject to conditions, of a higher investment return than their own return. To achieve this goal, the managers can invest in shares only, whereas the financial sponsors invest in shares and interest-bearing debt instruments. In such a case, the risk profile for the managers is higher than the financial sponsor's since debt instruments and interest accrued on such debt are senior to share capital. On the other hand, if the global investment return exceeds the hurdle of interest accrued on the debt instruments, the equity advantage of the managers is higher than that of the financial sponsors.

In addition, or alternatively, the managers can invest in preferred equity instruments (e.g., preferred shares), the return of which is higher than ordinary shares but contingent on a certain level of global return (e.g., internal revenue rate or multiple achieved by the financial sponsors).

From a tax standpoint, it is crucial that the managers act and be treated as ordinary co-investors, which implies in particular that their investment be material and at risk. Indeed, if not the case, this would significantly increase the risk that the French authorities try and recharacterise the gain recognised by the managers at exit into a remuneration treated as such for tax and social charges purposes. In this respect, it is important to note that management packages have been lately under a high degree of scrutiny by the French authorities, who have set up a specialised unit to examine them.[3]

Recent legislative changes have impacted on the tax environment of management packages, including:

a the amendment of the tax regime of capital gains on securities. Such gains are now subject to individual income tax at a progressive rate (together with social taxes, up to 62 per cent) with, under certain conditions, a progressive allowance depending on the length of the holding period; and

b amendments to individual equity schemes (PEAs), according to which preferred shares and stock warrants are no longer eligible for PEAs.

Sales process

There is no specific duration for a sale process in France as many different factors may influence the duration. The first factor depends on whether the sellers want to prepare vendor due diligence reports, which has become more and more frequent in auction processes in France, even for mid-cap transactions. The preparation of a comprehensive set of due diligence reports (finance, legal, tax, strategic, environmental, etc.) can take up to two or three months depending on the thoroughness of the reports and the availability of management. Once the process is launched, the due diligence exercise for a standard transaction usually varies between six and eight weeks, which is followed by the negotiation of the share purchase agreement and the signing of the transaction. Assuming no specific regulatory clearance outside antitrust clearance is required and that only antitrust clearance in France is necessary (as opposed to EU antitrust clearance), the closing of the transaction can be anticipated at the latest 25 business days after the filing is carried out, provided that the transaction does not raise any specific issues from an antitrust perspective (Phase I).[4] In the end, once the decision to start a process is made, the target can in theory be transferred within six to nine months.

3 In January 2015, the French Tax Authorities (FTA) decided to publish on their website the schemes that they consider to be abusive, among which are unconventional incentive schemes. This reflects the FTA's determination to fight abusive management packages. The FTA may feel encouraged by a decision of the Supreme Court dated 26 September 2014.

4 In the event that the transaction raises antitrust issues, the duration of a Phase II process in France is up to 65 business days; see Section IV, *infra*.

In practice, the general trend regarding sale processes that has been observed in France over the past few years is an increased duration and less stringent competition. Valuation gaps between buyers and sellers remained significant, resulting in many processes being postponed or cancelled after rounds of negotiations. More and more transactions were carried out without recourse to an auction process and were the result of direct negotiations between the parties on the basis of unsolicited offers.

In that respect, 2015 stood out with the return on the French market of 'hot' assets (i.e., mature assets on promising markets), for which competition among private equity players was fierce. This resulted in their level of risk adversity being significantly reduced and marked the return of pre-emptive offers, limited due diligence and share purchase agreements entered into with little to no representations and warranties. It should, however, be stated that this only applied to a limited number of assets and the general trend described above remained accurate for most others.

As a consequence, sellers still tend to carefully review the opportunity to launch auction processes as the risk of going through such process is to jeopardise the value of the asset if the auction process turns out to be less successful than expected, hampering an exit for the financial sponsor for a certain period of time following the failed process. Such risk is mitigated in the case of a direct negotiation between the sellers and one purchaser if confidentiality is respected. The drawback lies in negotiations being longer than expected as momentum can be more difficult to gather on a straight one-to-one negotiation than on the occasion of an auction process.

II LEGAL FRAMEWORK

i Acquisition of control and minority interests

When structuring a private equity transaction, the joint investors and future shareholders of the acquisition vehicle (i.e., the sponsor, the managers, any minority shareholders or mezzanine lenders) will need to determine the rules that will apply to them in their capacity as security holders of such vehicle.

These rules, which mainly relate to corporate governance matters and security transfers, are generally set out in a shareholders' agreement and reiterated to a certain extent in the acquisition vehicle's by-laws, especially if incorporated in France under the form of a *société par actions simplifiée*, which offers great flexibility to tailor its by-laws to the shareholders' needs.

The main reason for such duplication is that the breach of some of the provisions of the by-laws can result in compulsory enforcement of the breached undertaking, whereas the breach of a security holders' undertaking under a shareholders' agreement can generally only result in damages. However, as the by-laws of the acquisition vehicle must be filed with the commercial court register and are therefore public, private equity players generally decide to reproduce in the by-laws only those rules provided in the shareholders' agreement they do not consider confidential.

ii Corporate governance rules

The corporate governance rules usually relate to the organisation of the group companies' management bodies and to the level of financial reporting that will be granted to the sponsor on a regular basis throughout its investment. In order to limit its exposure to legal liability with regard to the management of the group, the sponsor's role in the acquisition vehicle is generally of a restricted nature and limited to exerting its rights as a shareholder, without interfering with the management of the company, which remains the prerogative of the management team.

However, the sponsor is generally represented in the acquisition vehicle through corporate bodies deprived of any day-to-day management powers (such as supervisory boards), the role of which mainly consists in supervising the management of the company and authorising some extraordinary management decisions that are listed in a limited manner in its by-laws or in the shareholders' agreement (e.g., obtaining new bank loans, realising external growth acquisitions and issuing new securities). In addition, and unless the sponsor is a minority shareholder in the transaction, it will in all circumstances retain the power to dismiss all or part of the members of the corporate bodies, including the managers.

iii Share transfer rules

The rules relating to the transfer of securities are well established in France and generally include the following:

a standstill undertakings from all security holders (or from at least the managers), by which they undertake not to transfer their securities for a certain period of time;

b right of first refusal allowing a security holder to acquire the securities of another security holder if the latter wants to transfer them to a third party or another security holder pursuant to a *bona fide* offer;

c tag-along right allowing a security holder to sell its securities at the same time and under the same conditions as another security holders if the latter wish to transfer them to a third party or another security holder pursuant to a *bona fide* offer; and

d drag-along right allowing one or several security holders representing a certain percentage of the share capital to force all the other security holders to sell their securities if they wish to sell the group.

In addition, the shareholders' agreement will usually include a set of rules to organise an exit, including the provision of triggering events, rules relating to the appointment of an investment bank to conduct the sale or IPO process, provisions in relation to the pricing of the securities issued by the acquisition vehicle and whether representations and warranties shall be granted in the context of an exit.

Whether the sponsor's investment is of a controlling nature or consists of the acquisition of a minority interest will have an impact on the rights it will be entitled to in the by-laws or the shareholders' agreement. The main considerations with respect to a minority shareholding will be to secure the sponsor's investment by providing anti-dilution clauses, having the possibility to trigger an exit and, as the case may be, being granted certain veto rights within the supervisory board with respect to extraordinary management decisions.

iv Fiduciary duties and liabilities

Fiduciary duties and liabilities of the sponsor's representatives

As stated above, sponsors in private equity transactions are usually represented within the acquisition vehicle through corporate bodies deprived of day-to-day management powers, which role mainly consists of supervising the managers, and authorising in advance some management decisions that are listed in a limited manner in the by-laws or the shareholders' agreement of the acquisition vehicle.

Should they comply with their statutory powers, members of a supervisory board would not face any of the civil or criminal sanctions to which the executive managers may be liable in the case of mismanagement of the company. They could only be held liable for acts or omissions committed in the exercise of their duty to supervise the management bodies, and failure to disclose to the shareholders any mismanagement committed by the managers of which they would have been aware. In addition, insurance policies are generally subscribed by the acquisition vehicle to protect the members of its supervisory board against civil liability.

However, members of a supervisory board could face the same civil and criminal sanctions as those reserved for the executive managers if they were to exceed their statutory powers and hold, in fact, an effective role in the management of the acquisition vehicle (i.e., becoming a *de facto* director). In the absence of a specific definition of such concept provided for by French law, the court's decisions refer to indications that prove, in fact, that a person has been performing the acts or duties of a *de jure* director.

Under French law, a *de facto* director faces the same liability as any other *de jure* director, without benefiting from the rights and privileges attached to such mandate. Principally, these are that in the case of mismanagement, the *de facto* director could suffer personal bankruptcy or a prohibition from managing other commercial companies or, most importantly, could be held financially liable for the company's debts that are due to insufficiency of assets resulting from such mismanagement. Second, in the case of legal violations or mistakes made by the *de facto* director, the provisions of the French Commercial Code relating to the criminal liability of directors are applicable to the *de facto* director; and third, a recent case law development shows that a parent company that has acted as the *de facto* director of its subsidiary might, under certain circumstances, be considered as the co-employer of the subsidiaries' employees, and thus be jointly responsible for its labour obligations.

Fiduciary duties and liabilities of the sponsor itself

As a shareholder, the sponsor is not subject to any fiduciary duties or liabilities, as its role mainly consists of securing its investment within the acquisition vehicle in accordance with its by-laws, without interfering in the day-to-day management of the group. In addition, as French acquisition vehicles are usually structured as limited liability companies, which set up a corporate veil between the shareholders and the acquisition vehicle's investments and liabilities, the sponsor's financial liability is limited to the amount of its initial contribution.

However, should the sponsor's role within the acquisition vehicle exceed that of a normal shareholder, it might face the risk of being considered as a *de facto* director, with the same consequences as those described above. It is therefore important to reserve to the acquisition vehicle's *de jure* directors the exclusivity of the management and the implementation of the commercial strategy of the group. In order to do so, the role of each party has to be clearly identified and separated. As such:

a the role of the shareholder, within the general assembly or through a supervisory board, has to be limited to the protection of its investment. In addition to the legally reserved matters, the list of decisions that require the prior approval of the shareholder should be limited to the major and exceptional decisions that might have an impact on the value of the investment;

b specific subcommittees might be created by the supervisory board in order to ensure scrutiny of the managers on some specific matters such as the reporting, the drafting of the annual budget and the investment plan. The members of such subcommittees can be appointed from within the investment team (whether or not such members are in the supervisory board) or externally. The role of these subcommittees should be limited to recommendations given to the managers who should feel free to follow them or not; and

c whenever the management requires further involvement from the investment team members in order to assist them on specific matters, such specific assistance should be limited over a specific period of time and be provided by the investment team members, not as representatives of the shareholder, nor as members of subcommittees, but as service providers acting as a third party. This business relationship is governed by a service agreement and the service provider is paid for the services requested by the management.

III YEAR IN REVIEW

i Recent deal activity

The vitality of the French private equity industry relies more on small and mid-cap transactions than on the large-cap transactions. The large-cap transactions remain rare in France. Only four transactions exceeded the €1 billion threshold in 2015: Verralia (packaging – €3 billion), Linxens (smart cards connectors – €1.5 billion), Labco (medical diagnostics – €1.2 billion) and Webhelp (call centres – €1 billion). It should be noted that the number of large-cap transactions has remained stable in 2014 compared to 2015 and that there were no large-cap transactions in 2013. The mid-cap segment (€100 million – €1 billion) has been very active in 2015, with a total of 34 transactions compared to 19 in 2014.[5] Major transactions in this segment are the acquisition of the hotel chain B&B by PAI partners for €830 million and the food industry supplier Solina by Ardian for €600 million.

Regarding sale processes, and except as stated above, the general trend is longer duration, less competition and an increase in bilateral transactions in lieu of auctions. As an example, Tractel was sold by Cinven to LBO France in a few weeks. In this context, private equity players face a fierce competition which results in increased valuation for targets (for instance, Linxens was valued by CVC on the basis of a 11.5 x multiple).

5 CF News, '236 LBO tricolores en 2015', 5 January 2016.

ii Recent amendments to tax legislation impacting LBO transactions

In the recent years, the French parliament introduced a number of anti-abuse mechanisms and limitations on the deductibility of interest, especially on related party loans.

Despite these new restrictions, it is fair to say that the French tax consolidation regime, which allows the offset of the transaction costs and financial charges incurred by the acquisition vehicle against the operation profits of the target group, still creates a favourable (and competitive compared to the other jurisdictions) tax environment for LBO transactions.

Following a decision recently rendered by the Court of Justice of the European Union (CJEU) in the *Steria* case[6] the Amended Finance Act for 2015 introduced some changes to the tax treatment of certain dividend distributions to be received by French companies.

For fiscal years starting on or after 1 January 2016, the 100 per cent exemption applicable to dividends distributed within a French tax consolidated group is repealed (subject to exceptions). Such dividends will now be subject to tax for a portion of 1 per cent (i.e., 99 per cent exempt from tax, hence an effective rate of taxation of 0.34 per cent).

On the other hand, distributions received by a French parent company member of a tax consolidated group from a subsidiary established in a state belonging to the European Union (EU) or the European Economic Area (EEA) which would have met the conditions to be a member of the tax group to which the parent company belongs if it had been established in France, will now be 99 per cent exempt from tax as opposed to 95 per cent exempt previously.

iii Financing

The trend observed during the last few years is still accurate (i.e., the decrease of the global share occupied by traditional banks in financings, except for upper mid-cap and large deals). Such a trend is the result of various factors: changes recently made to French banking monopoly rules broadening the type of entities able to lend to a French borrower; constraints imposed on banks by Basel III rules; and the arrival on the market of many senior debt funds, some of them now real players with a serious track record in financings.

As a brief reminder, the French banking monopoly rules are set out in the French Monetary and Financial Code and prohibit entities other than authorised institutions from carrying out credit operations in France on a regular basis.

As a consequence, the granting of loans to a borrower located in France (i.e., a French entity or the French branch of a foreign entity) and the purchase of non-matured loans from an entity located in France (i.e., a French entity or the French branch of a foreign entity) constitute credit operations that fall within the scope of the banking monopoly rules.

Although there are some exceptions to these mandatory rules, it is vital when structuring a financing package in France to check that no member of the lender pool

6 CJEU, 2 September 2015, No. C-386/14, Groupe Steria SCA.

is in breach of the French banking monopoly rules. Although the Supreme Court ruled that a loan made available in breach of the French banking monopoly was not automatically void, it failed to give clear guidance regarding the applicable criteria for potential voidance and there is still a risk of imprisonment, a fine, or both.

The banking monopoly rules have always had a key impact in France when structuring, for instance, a mezzanine or 'unitranche' financing package for a French acquisition vehicle. If the mezzanine or unitranche lenders (at the time of funding the acquisition) are not authorised credit institutions under the relevant French or European regulations, it is not possible to structure the mezzanine or unitranche financing under the form of a credit facility. This is the key reason why mezzanine, second lien or unitranche financings in France are mostly construed under the form of warranted or warrantless mezzanine bonds (i.e., bonds issued by the French acquisition vehicle and subscribed for by the mezzanine or unitranche debt providers) since the debt providers of such type of financings are in general not traditional banks.

Because bonds issued by a French company are securities governed by certain French corporate law rules, the process of obtaining, for example, a waiver from the bondholders will differ from the process that applies to the senior pool of lenders. Approval of the waiver request is obtained by a decision of a bondholders' meeting convened for such purpose. In practice, for the waiver request to be approved by such creditors, it is insufficient to obtain the countersignature of the waiver request by the bondholders' representative, as is the case for the senior agent after obtaining the relevant majority from the syndicate members. In relation to bonds issued by a French company, the majority rule for any changes to the terms and conditions of such bonds is, under the law and with very few exceptions, set at two-thirds.

As a consequence, even though structuring a financing via bonds can be at first glance a bit more complicated, these financings have a good future and we now very often see sponsors, when trying to raise their financing for a given operation, asking only alternative debt providers (instead of traditional banks) to make a proposal, in particular in the mid-cap market and in deals with a high leverage.

Due to the high number of debt funds acting in France and the fact that traditional banks are still real players too, sponsors have a real advantage in terms of pricing because of a very strong competition among all the debt providers. It should, however, be kept in mind that some of these debt funds are funds specialised in distressed situations, and it is in the group's interest to think about the pros and cons of letting such institutions lend to it. In the eventuality that the group one day faces financial difficulties, it may be more dangerous dealing with such creditors rather than a usual bank syndicate (which, almost by definition, is very slow in terms of decision-making and, at least in relation to French banks, very reluctant to become a shareholder).

It is worth mentioning a feature specific to France when raising an external debt financing via bond issues at the level of a French newco where part of the equity of the sponsor is construed (as is the generally the case) partially through convertible bonds. The French insolvency rules contain some provisions that have a direct impact on the usual subordination principles, the key one been the fact that acquisition of external debt will be senior to the subordinated debt injected by investors. In the event of an administration order being placed on the French newco or the newco entering receivership, in accordance with the relevant provisions of the Commercial Code, and provided some criteria defined by French law are met, an extraordinary general meeting of all bondholders could be convened to vote on the proposed restructuring plan. Note that in a French bondholders' assembly, as the vote requires the support of two-thirds of the bondholders, it will be crucial for external creditors to ensure that subordinated creditors are not able to impose conditions (such as debt-to-equity swap and debt abandonment). Therefore, some mechanisms have emerged in the French market, usually dealt with in the intercreditor agreement, to contractually organise such a situation (specific mandates to vote, conversion of a certain portion of convertible bonds by the sponsors or temporary sale of convertible bonds to the senior bondholders, call option and reverse call).

It should be noted in relation to bond financings that an important number of high-yield bonds issues have occurred over the past two years (even though this particular market seemed to be a bit less active at the beginning of 2016). Because of the complexity of the documentation, the costs and the time to organise this type of financing, it is really applicable only to large-cap deals when a very significant amount of financing is necessary (these bonds are usually governed by New York law and are listed).

Apart from these evolutions in terms of types of financings, it is useful to note some principles regarding security packages in France. One crucial detail of French law is that a security interest may be enforced only if the secured obligations are due and payable, meaning that a provision stating that the agent may enforce the security interest in the case of occurrence of an event of default is invalid under French law. The trigger event for enforcement of any kind of French-law security interest, usually defined as an 'enforcement event', is generally written as follows: '"Enforcement event" means any failure to pay on its due date any secured obligations or the service of any notice of acceleration in accordance with [clause X (acceleration and cancellation) of the [credit agreement/terms and conditions of the bonds]].'

This typical French rule, because of the French insolvency rule pursuant to which it is no longer possible to enforce against a French entity the security interests granted by it if it becomes insolvent, has led to 'double luxco structures'. The key objective for lenders has been to construct a security package that would enable to them to enforce their security interests without being prevented from doing so by, for instance, safeguard proceedings opened at the level of the French borrower. These structures, which are very complicated and expensive, are not at all adapted to the mid-market arena and, in the large-cap world, it should be kept in mind that it is not certain at all that such structures would really be positive for the lenders (let alone all the tax and corporate governance questions it may raise for the sponsors when structuring the deal, the life of the deal and the exit). We observe that double luxco structures are no longer as popular as they once were.

It is also interesting to note that there is no concept of partial enforcement in France; in general, the beneficiaries of a French pledge have no real economic interest in enforcing the French-law security interest in the event of a simple default on interest payments and indeed, if they decide to enforce the security interest, the enforcement proceeds to which they will be entitled will be limited to the amount of the unpaid interest, so they have no more security interest securing the principal amount of the secured obligations if the latter has not previously been declared immediately due and payable through the acceleration process provided for in the facilities agreement.

Finally, it should also be noted that a security package cannot be properly construed without taking into account some specific French tax rules; indeed, depending on who is the grantor of security interests (related party or not) and the type of guarantee or security interests granted, part of the secured debt could fall into certain limitations of deductibility of debt at the level of the French borrower.

iv Key terms of recent control transactions

France's practice has evolved since the Lehman crisis as regards transaction terms, even though there are still some particularities applicable for French private equity transactions. Needless to say, SPAs are more frequently discussed nowadays then during the pre-Lehman boom years when purchasers sometimes just executed the sellers first draft SPA without negotiating the terms. These days are long gone for most of the transactions, but the three main items looked for by private equity sellers have remained the same: deal certainty; representations and warranties; and purchase price mechanics. On deal certainty, MAC clauses tend to be less frequent in French private equity transactions than in the US, for instance, but are more and more requested by potential purchasers again. Representations and warranties still tend to be very limited in French private equity transactions. Industrial players have not modified their practice to ask for wide representations and warranties. The scope of representations and warranties obviously depends on how competitive the process is, and sometimes private equity players tend to grant specific representations and warranties on certain precise and identified issues. Should this be the case, a portion of the purchase price may be put into an escrow account because once paid by the purchase price, the management company of the funds distributes the proceeds to their LPs, which results in the money being more difficult to be sought after by the purchaser. Price mechanics in French private equity transactions often take the form of a locked box, but post-closing adjustment mechanisms helped to reconcile the expectations of sellers relating to the purchase price and what the potential purchaser was prepared to offer in this respect. French private equity funds may prefer the certainty and simplicity of a straightforward figure they can present to their LPs over a purchase price adjustment, which may be complex and leaves the door open to being challenged.

v Exits

Increased competition amongst private equity players enabled favourable conditions for exists. The AFIC[7], the French Association of Investors for Growth, reported a total number of 161 exits in H1 2015, corresponding to an increase of 15 per cent compared to 2014.

The exit of Picard Surgelés was particularly noteworthy in 2015. Picard Surgelés was one of the largest companies controlled by a private equity player in France. Lion Capital chose to only partially exit from its investment by selling 49 per cent to Swiss industrial player Aryzta. This type of partial exits is likely to develop in the future for targets that have gone through several LBOs and that have reached a significant size.

7 Association Française des Investisseurs pour la Croissance.

IV REGULATORY DEVELOPMENTS

i Foreign investment procedures

In recent years, the authorities with jurisdiction to supervise foreign investments in France have tended to be more present on the market and have not hesitated to contact foreign investors or their advisers to verify that they were aware of the obligations imposed on them by French law.

Such obligations consist of a prior notification to the French Ministry of Economy, Finance and Industry (MEFI) in almost all cases where the acquisition is led by a foreign investor; and a notification to the Bank of France after completion of the transaction, mainly when the amount of the investment is in excess of €15 million.

In addition, in some limited areas of the French economy deemed sensitive for national security considerations (mainly gambling, private security, research of antidotes, interception and certification of information technologies and the defence sector, as well as since 2014,[8] activities relating to the supply in water, electricity, gas, hydrocarbon or other energy sources, and activities relating to public health), the prior authorisation of the MEFI will be required. In such case, the foreign investment review will be led by the MEFI, which, in determining whether to approve or to deny the investment, may seek input from various other ministries, including the Ministry of Defence and the Ministry of the Interior.

When it is deemed necessary, the MEFI may condition its authorisation on specific commitments from the foreign investor, such as the fulfilment of ongoing contracts or obligations of the target or the maintenance of its long-term operations. Failure on the part of the foreign investor to agree to such conditions may cause the application for investment to be denied. If accepted, the ministry having jurisdiction over the relevant industry will oversee the enforcement of such commitments by the foreign investor.

The MEFI has two months from the submission of a complete application by the foreign investor to complete its review and respond to the request. In the event of a failure to do so, the transaction will be deemed approved. Any agreement enforced before such decision is rendered will be deemed null and void. In addition, criminal and civil penalties may be pronounced against the foreign investor.

ii Merger control procedures

The French Competition Authority (FCA) issued revised merger guidelines in July 2013 based on the experience it had acquired during the past four years. These new guidelines aim to improve merger-control procedures at various levels. The guidelines first emphasise the importance of the pre-notification phase enabling both the parties and the FCA to informally discuss before the formal notification so as to anticipate and address competition issues.

The FCA then further clarified the eligibility criteria to benefit from a simplified procedure. From now on, where the parties are not active on the same markets (upstream,

8 Decree No. 2014-479 dated 14 May 2014 relating to foreign investments subject to prior authorisation.

downstream or related markets) or where the transaction involves acquisitions of retail stores without a brand change, a simplified decision may be obtained within 15 working days. From a substantive stance, the FCA also clarified the applicable conceptual framework and the role of the analysis of relevant markets, notably in the food processing and supermarket sectors. In the same line, the former annex on the submission of economic studies has been revised and replaced by a general guide to mergers. Lastly, where either the parties or the FCA consider adopting structural remedies such as divestures, the guidelines provide templates for the transfer of assets and trustee mandates. These templates provide basic guarantees and can be adjusted on a case-by-case basis.

V OUTLOOK

The French private equity market is at a crucial point at the beginning of 2016. On the one hand, Chinese slowdown, the petrol crisis and the situation in the Middle East create strong uncertainty in stock exchanges that might affect the recovery of French private equity. On the other, private equity investors may wish to benefit from financing sources still available, stable French overall fundamentals and good opportunities that still exist in the French market in order to continue developing their activities in France. It therefore remains uncertain what will happen in 2016 but some good opportunities may be revealed for swift players. In 2017 the presidential elections are likely to lead to the return of political uncertainty in France, which in turn is likely to create a waiting period for investments in France.

Appendix 1

ABOUT THE AUTHORS

MAUD MANON

DLA Piper

Maud Manon is a finance partner at DLA Piper. She is also the finance and projects department location head of the Paris office.

She began her career in 1998 in the Paris office of White & Case before joining the finance team in the Paris office of Ashurst Morris Crisp. In 2001, Ms Manon joined the Paris office of Linklaters where she spent five years in the finance team, before becoming counsel at Latham & Watkins in Paris in 2006. She joined Frieh & Associés as a partner in September 2009 before joining DLA Piper in October 2012.

Ms Manon's practice primarily focuses on acquisition finance, representing financial institutions (senior (banks or debt funds) and mezzanine lenders) as well as sponsors.

Her expertise extends to the financing of the acquisition of listed companies (public offerings and block acquisitions) and corporate syndicated loans. She also advises debtors, creditors and sponsors in the context of debt restructuring operations.

XAVIER NORLAIN

DLA Piper

Xavier Norlain is a corporate partner at DLA Piper. He is also the corporate department location head of the Paris office.

He worked as an associate in the Paris and New York offices of Willkie Farr & Gallagher from 1999. He subsequently joined the firm of Latham & Watkins in 2005, where he was appointed counsel in January 2008. He joined Frieh & Associés as a partner in February 2008, before joining DLA Piper in October 2012.

Specialised in mergers and acquisitions, Mr Norlain advises numerous investment funds on leveraged buyouts, venture capital and development capital transactions, as well as industrial or service groups on their equity finance operations, restructuring and external growth transactions.

He also advises managers on the definition of their status and their remuneration, as well as in the context of operations associating them with investment funds. Finally, Mr Norlain advises fund management teams themselves on structuring and setting up of new investment vehicles.

JEREMY SCEMAMA

DLA Piper

Jeremy Scemama is a corporate partner at DLA Piper. He practised law between 2000 and 2008 at the Paris and New York offices of Willkie Farr & Gallagher where he mainly specialised in public M&A transactions. He joined Frieh & Associés as a partner in April 2008 before joining DLA Piper in October 2012.

He has notably advised industrial groups and investment funds on a large number of transfers, acquisitions and mergers of listed companies (by means of cash tender offers, exchange tender offers, buyout offers, squeeze-outs or standing market offers) or minority interest acquisitions.

Mr Scemama is also very active in private equity transactions.

GUILLAUME VALOIS

DLA Piper

Guillaume Valois is a tax partner at DLA Piper. He began his career in 1998 at Clifford Chance where he practised in Paris and London before joining Weil Gotshal & Manges' Paris office in 2005. He joined Frieh Bouhenic in July 2012 before joining DLA Piper in October 2012.

Mr Valois has strong expertise in domestic and cross-border M&A transactions and group reorganisations (in particular acquisitions, mergers, LBOs, joint ventures). He advises investment funds and companies as well as managers and individuals.

He has also expertise on the tax structuring of real estate investments and serves French REITS (SIIC) and management companies of real estate investment funds. He deals with dispute resolutions, tax structuring of distressed M&A transactions (debt and equity restructuring) and complex individual matters.

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