Asset Acquisitions Documents: Private Acquisitions (France)

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An overview of the legal and practical considerations when acquiring the assets of a private company or a business as a going concern in France.

Scope of this Note

This note provides an overview of the various issues related to the acquisition of a business in France. It explains the main legal characteristics of business transfers in France by practice areas.

This note essentially focuses on transactions involving a bilateral sale, where the buyer and the seller negotiate and enter into a purchase agreement to record and implement the transaction (as opposed to an auction sale where several bidders compete to win the transaction).

While this note provides a general overview of relevant tax, employment, social security, competition, and regulatory implications in the context of an asset deal, it does not purport to provide an in-depth analysis on these topics.

Unless otherwise stated, a reference in this note to:

- Civil Code means the French Civil Code (*Code civil*).
- Commercial Code means the French Commercial Code (*Code de commerce*).
- Monetary and Financial Code means the French Monetary and Financial Code (*Code monétaire et financier*).
- Rural Code means the French Rural Code (*Code rural et de la pêche maritime*).
- Tax Code means the French Tax Code (*Code général des impôts*).
- Urban Planning Code means the French Urban Planning Code (*Code de l'urbanisme*).

Structure of the Deal: Asset or Share Purchase?

There are two principal methods of acquiring a business in France:

- **Share purchase.** This involves the buyer acquiring either the whole of the shares or a controlling interest (over 50% of the shares) in the target company that owns the business. This entails the transfer of the assets and liabilities of the company as a whole. The transaction is set up in a share purchase agreement, which usually contains representations and warranties to protect the buyer against unforeseen liabilities, as well as specific indemnities in respect of identified risks (if any). For more information on the sale of shares, see *Practice note, Acquisition Structures: Comparing Asset and Share Purchases (France): What is a Share Purchase?*

- **Asset purchase (referred to as business transfer (*fonds de commerce*)).** A business (*fonds de commerce*) is not defined by French law. Article L. 141-5 of the Commercial Code, which defines the extent of the seller's lien on the business, lists the elements that compose a business. This list has been further developed by case law and the opinions of legal scholars. These elements are divided into two categories: tangible and intangible assets. Tangible elements include real estate property, as well as the materials and merchandise, whereas intangible elements include intellectual creations, tenancy rights, receivables and payables, administrative licences and authorisations, regular clients (*clientèle*), occasional clients (*achalandage*), and distinctive signs such as trade name, logo, trade mark, and domain name. However, the definition of the business comprises more than the elements that compose it, and it is often defined as a "de facto universality," as the business continues to exist despite changes to its elements. For information on business transfers, see also *Practice note, Acquisition Structures: Comparing Asset and Share Purchases (France): What is a Fonds de Commerce?*

For information on the differences between share purchases and asset purchases, see *Practice note, Acquisition Structures: Comparing Asset and Share Purchases (France)*.

Key Features of French Business Transfers

Business transfers typically include the following phases:

- **Negotiations preceding the transfer.** During this phase, the elements that will be transferred, as well as the price of the business, will be determined. Financial, tax, legal, operational, and sometimes environmental due diligence is often carried out. Additionally, compliance due diligence is increasingly common.
- **Signing of a put option.** Through this document, the prospective buyer promises to purchase the business from the seller, the seller having the option to complete the transfer or not under certain conditions to enable the seller to comply with its information and sometimes consultation obligations regarding employees. The rationale for this somehow unusual approach is that French law does not authorise French sellers to sign a binding commitment to sell unless, when applicable, the relevant employee information or consultation process has been carried out. In return for the prospective buyer's commitment, the seller often grants an exclusivity undertaking, which provides that if the seller does not sell the business to the prospective buyer once the employee information or consultation process is completed, it cannot sell the business to anyone else during a specific period.
- **Signing and closing.** The transfer agreement (*acte de cession*) is signed. This agreement may provide that completion of the transaction is subject to certain conditions precedent, such as obtaining pre-emption right waivers, consent from key contractors, or implementation of remediation measures identified during the due diligence. For global transactions involving several jurisdictions, the signature of a local French transfer agreement is required as it will be recorded with the French tax authorities. Once these conditions precedent are satisfied, the transaction is closed. Signing other ancillary documents may be necessary depending on the specific characteristics of the transaction.
- **Post-closing formalities.** See *Post-Closing Formalities*.

The timeline of the transfer may be affected by the duration of the negotiations, fulfilment of the conditions precedent, financing of the transaction, as well as obtaining third-party consents for the transfer of key assets.

Main Documents

During the pre-contractual phase, the following documents will be prepared:

- A non-disclosure agreement.
- A letter of intent or memorandum of understanding.
- An exclusivity agreement.
- Virtual data room rules.
- A due diligence questionnaire.
- Due diligence reports.

For more information on the purpose, scope, and practical aspects of a legal due diligence investigation in France, see *Practice note, Due Diligence for Private Acquisitions (France)*.

During the signing phase and the interim period, the following documents will be executed:

- Put option (usually including employee information requirement).
- Asset transfer agreement (usually including conditions precedent).
- Transitional services agreements.
- Escrow agreements.
- Declaration informing the municipality of the business transfer project (*déclaration d'intention d'aliéner*).
- Letter informing employees of the contemplated business transfer project (see *Employment Issues*).
- Public instruments and liens evidence certificates.
- Corporate documents authorising the transaction, if applicable.

For information on documents to be signed in acquisitions of real estate assets, see *Practice note, Acquisition of Real Estate Assets in Share and Asset Purchase Transactions (France)*.

During the closing phase, the following documents will be executed (although these will depend on the nature of the transferred assets):

- Notarial deed transferring real estate assets (if any).
- Proof of the assignment of commercial agreements (when required).
- Intellectual property transfer agreements.

For further information on documents executed before a notary public in France, see *Practice note, The Role of the Notary in Corporate and Commercial Transactions (France)*. For further information on transferring real estate assets, see *Practice note, Acquisition of Real Estate Assets in Share and Asset Purchase Transactions (France)*.

Mandatory Content of a Business Transfer Agreement

The formalities applicable to business transfer have been simplified since 2019. Before this date, the deed of transfer of a business had to include the following mandatory information:

- Name of the previous owner of the business.
- Date and nature of the previous deed of transfer.
- Price of acquisition for intangible elements, goods, and equipment.
- Liens and pledges on the business.
- Turnover and business results for the last three financial years.
- Lease, its duration, and name and address of the lessor and the seller.

Law no 2019-744 of 19 July 2019 (*Loi Soilihi*) (Soilihi Law) abrogated Article L. 141-1 of the Commercial Code , which imposed these mandatory provisions.

Following the entry into force of the Soilihi Law, the only remaining formality is the disclosure of the monthly turnover between the end of the last financial year and the month preceding the transfer (Article L. 141-2, Commercial Code). Once the business has been transferred, the buyer must provide the seller with the accounting books of the last three financial years.

Guarantees

Representations and Warranties

It is common practice to include representations and warranties in the transfer agreement. These are given by both parties, who undertake to compensate the other party if certain claims inducing the other party to enter into the agreement prove to be inaccurate. In some cases, when signing and closing are separate, the warranties also provide the possibility for the other party to terminate or refuse to close the transaction in the case of material inaccuracy at closing. The content of representations and warranties depends on the:

- Due diligence findings.
- Characteristics of the transaction.
- Target assets or business.
- Parties' relative bargaining power.
- Sector in which the business operates and underlying value drivers.
- Outcome of negotiations.

The seller's representations and warranties tend to be relatively extensive and generally include both fundamental and business warranties.

Fundamental warranties typically relate to the seller's capacity to enter into the agreement and its valid ownership of the assets or business (free of liens, encumbrances, or third-party rights).

Business warranties relate to more factual information regarding assets and liabilities, inventories, real estate (ownership and/or lease agreements), receivables and agreements (with banks, suppliers, and customers), employment, tax, regulatory, licences and permits, environment, insurance, litigation, industrial and intellectual property, and data protection.

In addition, in certain cases, the seller may grant specific indemnities, particularly in relation to tax, employment, or other specific risks identified during the due diligence.

These representations and warranties can be granted in the transfer agreement. At closing, the parties may agree to sign a document stating that these remain true. Alternatively, the transfer agreement may provide that if during the interim period between signing and closing, the seller becomes aware of a fact or circumstances that constitutes or could be reasonably expected to constitute a breach of a warranty, or could cause a representation to be inaccurate, false, or misleading, it must promptly inform the buyer and use reasonable endeavours to prevent or remedy the notified or anticipated breach.

Disclosure

Representations and warranties are drafted by reference to matters disclosed to the buyer. The seller will draw the buyer's attention to certain matters that the buyer accepts. Often, the buyer will therefore not be able to make a claim based on matters that have been disclosed.

Disclosures may be general, including information available on public registers or in the data room, or specific, regarding certain issues identified during the due diligence and in specific warranties.

Therefore, disclosures bring relevant facts to the buyer's attention and limit the seller's liability in respect of known issues. If the buyer's previous knowledge of the basis of the claim can be proved, this will usually prevent the buyer from claiming breach of the relevant warranty.

Additionally, a "buyer's knowledge" clause is sometimes included, under which the parties exclude the buyer's right to claim on the grounds of circumstances or omissions of which it is aware at the date of the agreement. These circumstances or omissions do not constitute an inaccuracy of the seller's warranties and, therefore, the seller will not incur any liability in connection with them.

Other Legal and Contractual Guarantees

The legal guarantees available to the buyer are the guarantee against eviction and the guarantee against hidden defects (Articles 1625, 1644, and 1645, Civil Code).

The guarantee against eviction protects the buyer against any disturbances, arising from actions of the seller or third parties, which are likely to hinder their peaceful possession of the thing sold. There are two types of guarantees against eviction:

- The guarantee against eviction due to personal fault (*garantie d'éviction du fait personnel*).
- The guarantee against eviction due to the fault of third parties (*garantie d'éviction du fait d'un tiers*).

For more information see *Practice note, Acquisition of Real Estate Assets in Share and Asset Purchase Transactions (France): Warranty Against Eviction (Articles 1626 to Article 1640, Civil Code)*.

Under the guarantee against hidden defects (*garantie des vices cachés*), the seller is liable where a defect, which was not apparent at the time of the sale, renders the thing sold unfit for its intended use or reduces its usefulness to such an extent that the buyer would not have acquired it or would not have paid the same price had they been aware of the defect (Article 1641, Civil Code).

For more information see *Practice note, Acquisition of Real Estate Assets in Share and Asset Purchase Transactions (France): Warranty Covering Hidden Defects (Articles 1641 et seq., Civil Code)*. To claim under this guarantee, the buyer must prove that the inaccuracy determined its consent (*Cassation Court, Commercial Chamber, 6 May 2008, 07-14.321*) and caused damage (*Cassation Court, Commercial Chamber, 13 January 1998, 95-13.470*).

Common Limitations to the Seller's Liability

Sellers usually limit their contractual liability through three types of mechanisms:

- Time limitations: the seller may limit the period within which the buyer can make a claim. This period tends to be between 12 and 24 months, with a longer period for employment, tax matters, and fundamental warranties (usually the relevant statute of limitation).
- Financial limitations:
    - maximum value: the seller may cap any claim made by the buyer to the purchase price or a lower amount (fundamental warranties are usually capped at the purchase price, while operational warranties are often capped at between 10% and 15% of the purchase price, sometimes 20%);
    - *de minimis* and threshold: the seller may seek to impose a minimum threshold for an individual claim (*de minimis*) and for aggregate claims (threshold) to prevent trivial matters to be the basis of a claim. Sometimes, the threshold is expressed as a deductible.
- Procedural limitations:
    - procedural limitations regarding the content and timing of a claim, as well specific wording regarding the determination of loss that can be compensated;
    - disclosure and buyer's knowledge: the seller may seek to qualify identified issues as being part of disclosed matters or matters the buyer has knowledge of, so that the latter is unable to base their claim on these matters.

Warranty and Indemnity Insurance Coverage

Instead of indemnifying the buyer for damage arising for breach of warranties, it is increasingly common (although still far from becoming the standard) for the seller to take out insurance against warranty claims. For more information, see *Practice note, Warranty and Indemnity Insurance (France)*.

Securing Representations, Warranties, and Indemnities

Depending on the nature of the seller, buyers often request that first demand bank guarantees or specific escrow be put in place for a certain duration after closing. The purpose of these mechanisms is to protect the buyer against the risk of the seller defaulting on its compensation or indemnification undertakings.

Closing

Generally, the deed of transfer is the core document for transferring the business. However, additional acts or documents may be needed depending on the transferred asset or category of assets. For example:

- Real estate must be transferred by public deed granted before a notary public and is subject to registration with the competent land register. See *Practice note, Acquisition of Real Estate Assets in Share and Asset Purchase Transactions (France)* and *Practice note, The Role of the Notary in Corporate and Commercial Transactions (France)*.
- The consent or notification of counterparties may be required to transfer certain agreements. Reviewing the agreements is necessary to determine whether they were entered into *intuitu personae* (that is, based on the essential and specific characteristics of the parties), or on the contrary, if one of the parties can be replaced. See *Practice note, Acquisition Structures: Comparing Asset and Share Purchases (France): Obtain Relevant Third-Party Consents*.
- Intellectual property transfer agreements are subject to specific formalities (see Intellectual Property).
- Shareholders or board decisions from the seller and/or the buyer may be needed to transfer significant assets such as a business.

For further information on the mechanics of signing and closing in French acquisitions, see *Practice note, Signing and closing: private acquisitions (France)*.

Terminology Preferences

The following terminology is commonly used in a transfer agreement:

- **Signing**: the signing of the transfer agreement. In the case of a share purchase, a letter of intent and/or a "term sheet" are often signed before signing a share purchase agreement. The transfer is completed after satisfaction of the conditions precedent set out in these documents. (See *Closing*.)
- **Closing:** the closing of the sale and purchase of the business in accordance with the transfer agreement, after satisfaction of the conditions precedent and transfer or the funds.
- **Disclosure schedule or disclosure letter**: the contents of the documents referred to in this schedule are deemed to be disclosed. The French practice is not to prepare a specific and separate disclosure letter, but instead to provide a disclosure schedule referred to in the representations and warranties. (See *Disclosure*.)

Recitals

It is common to include recitals at the beginning of business transfer agreements. Recitals are not mandatory (the Civil Code does not mention them), and the practice is variable and subject to contractual freedom. The aim of recitals is to clarify retrospectively the circumstances under which the agreement was entered into, as well as prospectively, setting out the conditions under which the parties wish the agreement to be performed. They can be used by the judge to resolve ambiguities or gaps in the text of the agreement, or to assess the lawfulness of its contents (*Cassation Court, Commercial Chamber, 6 September 2017, 16-13.242*).

Conditions Precedent

The content of the conditions precedent depends on the circumstances of each transaction and the results of the due diligence process. They commonly include the following:

- Regulatory clearances.

- Contractual consents.
- Foreign investment approval.
- Corporate reorganisations.
- Corporate approvals.
- Material adverse change.
- Acquisition of certain assets or payment of certain debts.
- Remediation of certain issues identified in the context of the due diligence.
- Waiver of pre-emption rights.

Non-Compete Undertakings

The standard duration of a non-compete undertaking is two or three years depending on whether only goodwill is transferred (two years) or goodwill and know-how is transferred (three years). However, the duration may vary on a case-by-case basis.

Failure to comply with the non-compete obligation is often difficult to claim damages. It is therefore recommended to include a penalty clause in the agreement in the case of breach.

Shareholder Approvals

A share transfer may be subject to the approval of other shareholders if required by the company's article of association or a shareholders' agreement.

A company can validly transfer a business through the intermediary of its legal representative or a duly authorised person. The power of the legal representative to transfer the business depends on the corporate form of the company.

In limited companies, the corporate officer is usually vested with the broadest powers to act on behalf of the company, subject to powers expressly conferred on shareholders by law (Article L. 223-18, Commercial Code). The transfer of a business does not constitute an act within the powers reserved by law to the shareholders. As a result, the corporate officer may validly proceed without shareholder approval.

For a simplified company limited by shares (*société par actions simplifiée* (SAS)), the law only reserves a few decisions to the exclusive powers of shareholders. These powers do not include the modification of the corporate purpose that may result from a transfer of the business (Article L. 227-9, Commercial Code). Consequently, if the articles of association authorise a legal representative (president or managing director) to decide on such a modification, it can carry out the business transfer on its own. For more information on the SAS, see *Practice note, Main characteristics of an SAS (France)*.

Even if the articles of association limit the corporate officers' powers, any transaction carried out in breach of such a clause, or any transaction that exceeds the company's corporate purpose, will be enforceable against the company. This is unless the company proves that the third party with whom the transaction was entered knew that the transaction exceeded the corporate purpose or could not have been unaware of it given the circumstances (Article L. 223-18, Commercial Code (for SARLs); Articles L. 225-35, L. 225-56, I, and L. 225-64, Commercial Code (for SAs); Article L. 226-7, Commercial Code (for *sociétés en commandite*); Article L. 227-5, Commercial Code (for SASs)). The corporate officer who carried out the transaction in violation of the corporate purpose as described in the articles of association will be liable to the shareholders for the consequences of their misconduct.

A corporate officer can sell the company's business if the business being sold is not the only or main activity included in the company's corporate purpose (*Cassation Court, Commercial Chamber, 29 January 1979, 77-11.302*). If the transfer of the business deprives the corporate purpose of its substance, then either:

- The corporate purpose needs to be amended to carry out the transaction. This amendment falls within the exclusive powers of the shareholders' extraordinary general meeting (*assemblée générale extraordinaire*) (AGE).
- The transfer requires prior approval of the shareholders' extraordinary general meeting. The transfer will be void if it is carried out by the corporate officer without shareholders' approval, even if the corporate officer was authorised by the board of directors (*Cassation Court, Commercial Chamber, 24 June 1997, 94-21.425*).

For other corporate forms (*sociétés en nom collectif* and *sociétés en commandite simple*), the corporate officer can only validly transfer the business if this transfer falls within the company's purpose, as only the acts of the corporate officer falling within this purpose bind the company with respect to third parties. Clauses in the articles of association limiting the corporate officer's powers are not enforceable against third parties, regardless of whether these third parties were aware of the existence of the clause (Article L. 221-5, Commercial Code; Article 1849, Civil Code).

Governing Law

Under the *Rome I Regulation* (593/2008), a contract is governed by the law chosen by the parties (subject to restrictions set out in Article 1 of Rome I). Article 2 of the Regulation also provides that any law specified is applied, regardless of whether it is the law of an EU member state.

As a result, clauses designating UK law continue to have effects in the EU after Brexit (although there has been a decrease in clauses designating UK law as the governing law). Clauses designating laws of an EU member state are also effective in the UK, as Rome I continued to apply during the transition period (which ended on 31 December 2020) and was subsequently incorporated into UK law with only minor amendments.

If there is no choice of governing law, Rome I sets out the following rules to determine the applicable law:

- Rome I determines the applicable law for specific types of contracts (for example, a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property is governed by the law of the country where the property is situated).
- If the contract does not fall within any defined type of contract or falls within the definition of multiple types, the contract is governed by the law of the country where the party required to effect the characteristic performance of the contract has its habitual residence, having regard to the contract's "centre of gravity."
- If the circumstances of the case show that the contract is manifestly more closely connected with a country other than that indicated in the previous two points, the law of that other country applies.
- If the applicable law cannot be determined based on the first two points, the contract is governed by the law of the country with which it is more closely connected.

Contracts Related to the Business

In principle, there is no automatic transfer of the contracts. Specific provisions must be included and agreement of the counterparties is required.

As an exception, commercial leases (subject to certain restrictions), insurance contracts, and employments contracts are automatically transferred to the buyer (see *Employees*).

Employees

Article L. 1224-1 of the Labour Code (*Code du Travail*) provides that employees attached to the business are transferred automatically to the buyer if the activity is continued after the transaction and its employees are assigned to the same economic activity in a stable and continuous way. In addition, all labour liabilities are automatically transferred. The Labour Inspection's (*Inspection du travail*) prior written authorisation is required for the transfer of protected employees (Article L. 2414-1, Labour Code).

Customary terms and conditions of employment are transferred to the buyer, who can alter them after transfer, provided that the buyer informs all its employee representatives and each employee individually in writing in advance, within a reasonable notice period whose duration depends on the type of benefit that is withdrawn or reduced.

The buyer must continue to apply the seller's collective bargaining agreements but has an obligation to commence good faith negotiation with a view to harmonise or amend their terms within three months from the date of the transaction. If an agreement is reached during the next 12 months, the new collective agreement will apply automatically to all staff. If no agreement is reached, the seller's collective bargaining agreements will cease to have effect 15 months after the transaction, and employees will keep a remuneration equivalent to the one received during the previous 12 months.

Staff representatives, if any, only remains in place if the sold activity remains autonomous in practice (in a separate location).

For more information on employee transfer and employment issues in a transfer, see *Country Q&A, Employment and Employee Benefits in France: Overview: Consequences of a Business Transfer*.

Intellectual Property

Asset acquisitions may involve the transfer of intellectual property rights (that is, trade marks, patents, designs, copyrights, and domain names). In this respect, specific formalities must be completed:

- The assignment of intellectual property rights must be made in a written agreement, including any relevant warranties.
- To be enforceable against third parties, assignments of patents, trade marks, and designs must be registered on the National Patents Register (*Registre national des brevets*), National Trade Marks Register (*Registre national des marques*), or National Designs Register (*Registre national des dessins et modèles*).
- For a transfer of domain names to be effective, certain formalities must be carried out at the registrar.

Real Estate

The transfer of a commercial lease agreement, as part of a business transfer, does not require the landlord's approval, although the landlord is sometimes authorised to be party to the transfer agreement. The landlord cannot prevent the tenant from transferring their business, which includes transfer of the commercial lease (Article L. 145-16, Commercial Code). However, this transfer may be subject to terms of the lease, which may provide that the tenant must be up to date with rent payments, the landlord can be a party to the transfer agreement, and the landlord can have a pre-emption right over the business.

Certain lease agreements also provide that the seller remains jointly and severally liable with the buyer. However, Law no 2014-626 of 18 June 2014 (*loi Pinel*) (Pinel Law), which entered into force on 1 September 2014, provides that the seller can only remain jointly and severally liable for three years after the transfer. This provision applies to leases entered into after the Pinel Law entered into force (*Cassation Court, Commercial Chamber, 11 April 2019, no 18-16.121*).

Real estate assets must be sold separately through a notarial deed. For more information, see *Practice note, Acquisition of Real Estate Assets in Share and Asset Purchase Transactions (France)* and *Practice note, The Role of the Notary in Corporate and Commercial Transactions (France)*.

Escrow

The purchase agreement sometimes stipulates that the price must be held in escrow for a mandatory maximum period of 105 days, and in some circumstances 165 days. This escrow is not mandatory but is important for the following reasons:

- **To protect private creditors.** The regulations governing business transfers require that third parties, and in particular the seller's creditors, be informed of the transfer and be able to recover the amount of their claims from the price received by the seller. This is the reason behind the publications required post-closing (see Post-Closing Formalities). However, the effectiveness of this mechanism presupposes that the transfer price is not immediately cashed by the seller. Therefore, the price is unavailable until the end of the creditor's objection period (for about 25 days from the sale: 15 days during which the advertisement formalities are carried out, and ten days for the creditors to object). Any payment made to the seller before the expiry of the objection period is not enforceable against creditors (Article L. 141-17, Commercial Code).
- **To pay off tax debts.** Tax authorities can demand payment by the buyer of income tax or corporate tax due by the seller for the financial year of the transfer and/or the previous financial year. This tax debt can be paid from the price held in escrow. This joint fiscal liability lasts for up to five and a half months (165 days) from the transfer. If payment is not requested by the tax authorities during this period, the buyer is released from joint liability.
- **To protect the buyer.** Depending on the nature of the seller it may be in the buyer's interest to keep the price in escrow during the period when it is jointly and severally liable with the seller for certain tax payments due by the seller, and when the seller's creditors may object to payment of the transfer price. The buyer would otherwise be exposed to the risk of having to pay more than the transfer price to pay off creditors. The escrow mechanism guarantees that there will be no additional cost resulting from claims made by the tax authorities or the seller's creditors.

If the seller wishes to receive the transfer price immediately, another option is to sell the company's shares instead of transferring the business. However, the sale of shares would result in a transfer of the company's liabilities (the share purchase agreement often provides for a liability guarantee).

For more information on escrow letters, see *Standard document, Escrow Letter: Cross-Border*.

Employment Issues

Hamon Law

To facilitate the purchase of a company by its employees, French law provides that they must be informed in advance of a change of control. This obligation was introduced by Law no 2014-344 of 17 March 2014 (*Hamon Law*) and has been codified at Articles L. 23-10-1 and L. 141-23 of the Commercial Code. It applies in the event of a business transfer or transfer of the majority shareholding of a company (that is, a shareholding representing more than 50% of the shares or securities giving access to the capital of a private limited company (SARL) or public limited company (SA)).

This obligation applies when either:

- The company is not required to have a social and economic committee (that is, when it has fewer than 50 employees).
- The company has fewer than 250 employees, annual sales of less than EUR50 million, and/or an annual balance sheet total not exceeding EUR43 million.

The employees must be notified as follows:

- If the company has no social and economic committee, at least two months before the date of transfer the transfer cannot occur before the expiry of the two-month period if each employee did not inform the seller of his/her decision not to make an offer.
- If the company has a social and economic committee, at the same time the company informs the social and economic committee at the latest.

Social and Economic Committee

In companies with more than 50 employees, the Social and Economic Committee must be informed and consulted on the contemplated sale of assets (seller) or the contemplated acquisition (buyer). The social and economic committee's opinion must be obtained before entering into any binding agreement. Unless the consultation process is subject to specific time limits under internal agreements (in any case at least 15 days), the social and economic committee has one month to issue its opinion. This period starts from communication by the employer of the information required by the Labour Code. A longer period applies if a chartered accountant is appointed to advise the social and economic committee (two months), but this is rare in practice. If the social and economic committee does not issue an opinion within the applicable time frame, the committee will be deemed to have issued a negative opinion and the employer can implement its project (the opinion of the committee is not binding). Written information regarding the transaction must be communicated to the social and economic committee's members sufficiently in advance (at least three days before the date set for the meeting) to allow them to consider the documents and issue an opinion.

For more information on the consultation procedure with the social and economic committee, see *Practice note, Employees: Cross-border Private Acquisitions (France): Consultation Procedure*.

Environmental Issues

Administrative environmental liabilities are attached to the operator of the business. In practice, the relevant environmental authorities are officially notified on the day of the transfer of the business, to ensure that environmental liabilities are actually transferred to the new site operator on that date.

In addition to general information duty under French contract law, the seller is legally required to inform the buyer of the following:

- Classified installations for environmental protection (*installations classées pour la protection de l'environnement*) (IPCE) currently or previously operated on site.
- Dangers and important inconveniences resulting from exploitation.
- Any handling or storing of chemical or radioactive substances.

Certain bank guarantees may be required for sensitive sites (sites recognised as "SEVESO").

For more information on environmental issues, see *Practice note, Environmental Issues in Corporate Transactions (France)*.

Regulatory Controls and Approvals

Competition Approvals

Competition approvals are required when a concentration meets the relevant thresholds, regardless of whether the transaction is structured as an asset purchase or as a share purchase. If the target is only active in France, the transaction may be reportable at the EU or national level. A transaction reportable at the EU level does not need to be notified to individual member states.

There are two alternative sets of thresholds for notification to the European Commission:

- The first threshold is met when:
  - the combined worldwide turnover of all the merging parties exceeds EUR5 billion; and
  - the EU-wide turnover of each of at least two of the parties to the transaction exceeds EUR250 million.
- The alternative threshold is met when:
  - the combined worldwide turnover of all the merging parties exceeds EUR2.5 billion;
  - the combined turnover of all the merging parties exceeds EUR100 million in each of at least three member states;
  - the turnover of each of at least two of the parties exceeds EUR25 million in each of the three member states above; and
  - the EU-wide turnover of each of at least two of the parties exceeds EUR100 million.

The concentration must have an EU dimension, which is not the case if each of the parties to the transaction achieves more than two thirds of its EU-wide turnover in one and the same member state.

For more information on EU merger control, see *Practice note, Corporate transactions and merger control: practical considerations* and *Practice note: overview, EU Competition law: overview*.

If the deal is not reportable to the European Commission, it is reportable in France if the French thresholds are met. The thresholds for notification to the French Competition Authority are as follows:

- All the undertakings that are party to the transaction achieved, during the previous financial year, a worldwide combined pre-tax turnover exceeding EUR150 million; and
- At least two of the undertakings concerned each achieved, during the previous financial year, a pre-tax turnover in France exceeding EUR50 million.

(Art. L. 430-2, Commercial Code.)

For more information on the French thresholds, see *Practice note, Competition: Private Acquisitions (France): Thresholds Triggering Notification*.

There are lower turnover thresholds for undertakings operating in French overseas territories and for undertakings engaged in retail.

In all cases, the parties' turnover must be geographically allocated based on the location of the customer. In an asset purchase, the target's turnover to be considered is the turnover attributable to the purchased assets only. The seller's turnover is not taken into account, unless the seller retains joint control over the target.

Foreign Investment Control

Prior approval of the French Ministry of the Economy may be required regardless of whether the transaction is an asset deal or a share deal, depending on the:

- **Presence of a foreign investor.** A foreign investor is any foreign natural person or any French natural person not resident in France for tax purposes. Any entity governed by foreign law, or any French entity controlled by an entity governed by foreign law or by an individual mentioned above, is included in the definition of foreign investor (Article R. 151-1, Monetary and Financial Code). All persons and entities belonging to the investor's chain of control also constitute investors within the meaning of the foreign investment control regime.
- **Nature of the intended transaction.** Investments that require prior authorisation are those that result in:
    - the acquisition of control, within the meaning of Article L. 233-3 of the Commercial Code, of an entity governed by French law;
    - the acquisition of all or part of a branch of activity of an entity governed by French law; or
    - the acquisition, directly or indirectly, alone or in concert, of over 25% of the voting rights of an entity governed by French law.

  (Article R. 151-2, Monetary and Financial Code.)
- **The nature of the transferred business.** Prior authorisation is required for investments made in strategic sectors, which are listed in Articles L. 151-3 and R. 151-3 of the Monetary and Financial Code. Strategic sectors are those related to the exercise of public authority or that could undermine public order, public security, or the interests of national defence. These include defence, production or marketing of weapons, ammunitions, and explosives, supply of vital products, cybersecurity, AI, energy storage, and biotechnologies.

The authorisation procedure consists of two phases:

- **First phase.** This lasts 30 working days from receipt of the application for authorisation, following which the Ministry may notify the investor that the investment is:
    - not subject to the authorisation procedure;
    - subject to the procedure and authorised unconditionally; or
    - subject to the procedure but further examination is required to determine the conditions under which the investment could be authorised.
- **Second phase.** This lasts 45 working days, following which the Ministry notifies investor of its refusal to grant the authorisation or of the conditions attached to the authorisation.

Violation of the foreign investment control requirements can result in the transaction being null and void. The Minister of Economy can also impose a fine up to the greater of:

- Twice the amount of the unauthorised investment.
- 10% of the target company's annual turnover.
- EUR1 million for an individual and EUR5 million for a legal entity.

For more information on foreign investment control procedures in France, see *Practice note, Foreign Investments in France*.

Public Pre-Emption Rights

Municipal Pre-Emption Right

The municipality where the business is operated has a pre-emption right on the business as a whole, as well as on the commercial lease being transferred. Before the transfer, the seller must file a declaration informing the municipality of its intention to transfer its business (*déclaration d'intention d'aliéner*) or the commercial lease (*Cerfa form no 13644*02*). The declaration must include the:

- Price and conditions of the intended transfer.
- Activity of the prospective buyer.
- Number of employees of the seller and nature of their employment contracts.
- Turnover of the seller.

If this declaration is not filed, the transfer can be declared void within five years.

After filing of a declaration, the municipality has two months to either use or waive its pre-emption right. If the municipality waives its pre-emption right, the seller can carry out the transfer initially intended at the price and conditions set out in the declaration. If the municipality decides to use its pre-emption right, it notifies the seller and the business or commercial lease will be transferred to the municipality within three months of this notification, at the price and conditions set out in the declaration.

Agricultural Pre-Emption Right

A second pre-emption right may apply on a transfer of property for agricultural use. Land development and rural settlement companies (*sociétés d'aménagement foncier et d'etablissement rural*) (SAFER) are dependent on the Ministry of Agriculture and may have a pre-emption right in the event of the transfer of real estate or movable property for agricultural use (Article L. 143-1, Rural Code). SAFER only have this right if they have been granted it by the prefect through a decree for a specific period (generally five years) and within the limits determined by each prefect after consulting the regional agricultural guidance committee and the chamber of agriculture. The decree sets out:

- The areas where the pre-emption right can be exercised.
- The minimum surface area of undeveloped property that can be purchased by using this right, by area and type of crop.

An area for agricultural use is any of the following:

- Land located in a protected agricultural zone created in application of Article L. 112-2 of the Rural Code.
- Land located within a perimeter delimited in accordance with Article L. 113-16 of the Urban Planning Code.
- Zone designated by an urban planning document.
- Land located in non-urbanised areas of municipalities, excluding woods and forests.

Any plan to transfer agricultural property must be notified to the relevant SAFER at least two months before the transfer. The seller's notary must send the SAFER a declaration of intention to transfer the property (*déclaration d'intention d'aliéner*) by registered letter (*lettre recommandée avec accusé de reception*) or by bailiff's deed, specifying the nature and location of the property, the names and status of the seller and buyer, and the transfer price. The notary must also inform the town hall of the municipality where the land is located of the transfer plan, as the municipality's pre-emption right ranks higher than that of the SAFER.

While these pre-emption rights are often waived, the procedure to obtain waiver may impact the transaction calendar.

Tax

The transfer of a business may qualify as a termination of activity (*cessation d'activité*) and may lead to immediate taxation of profits generated during the current financial year and unrealised capital gains (*plus values latentes*).

The buyer may be held jointly and severally liable with the seller for the payment of income tax, corporate income tax, and apprenticeship tax (*taxe d’apprentissage*) on the profits made by the seller during the year or financial year of the transfer and those of the previous year, if these profits have not been declared by the seller before the transfer. However, the buyer's liability is limited to the purchase price.

Capital gains on a transfer of a business are subject to either:

- Income tax at:
  - the taxpayer's income tax rate for short-term capital gains, if the business is transferred less than two years following its acquisition;

    - a 30% tax rate for long-term capital gains, if the business is transferred more than two years following its acquisition.

- Corporate income tax at:
    - 25%; or
    - 15% for entities qualifying as SMEs (*petites et moyennes entreprises* (PME)), up to a maximum taxable profit of EUR38,120.

There are certain exemptions depending on the company's turnover (for companies subject to income tax) or the value of the items transferred (for companies subject to income tax and SMEs).

Registration taxes (*droits d'enregistrement*) are payable registration of the business transfer agreement with the tax administration at the following progressive rates:

- 0% for the portion of the purchase price under EUR23,000.
- 3% for the portion of the purchase price between EUR23,001 and EUR200,000.
- 5% for the portion of the purchase price that exceeds EUR200,000.

(Articles 719, 1584, 1595, and 1595 *bis*, Tax Code.)

Transfers of real estate are subject to registration duties at a rate comprised between 5.09% and 5.81%, depending on the department where the real estate assets are located (excluding notaries' fees) (Articles 719, 1584, 1595, and 1595 *bis*, Tax Code).

The buyer is in principle responsible for the payment of registration taxes.

For more information on tax on an asset sale, see *Practice note, Tax: private company acquisitions (France)*.

Post-Closing Formalities

If the purchase agreement is not signed through a notarial deed (a*cte authentiq*ue), it must be registered with the tax administration.

The buyer must, within 15 days following the sale, request publication of the sale in a journal entitled to publish legal notices in the area where the business operates. To be valid, the publication must include the following information:

- Date of the transfer.
- Names and addresses of the seller and buyer.
- Nature of the business and head office.
- Agreed price.
- Creditors' right to oppose the transfer within ten days following publication (see below).

- Address within the jurisdiction of the court where the business operates.
- Tax registration of the purchase agreement.

(Articles L. 141-12 and L. 141-13, Commercial Code.)

Within three days following the publication of the sale in a journal entitled to publish legal notices, the buyer must also request the publication of an extract or notice in the *Legal Gazette* (*Bulletin officiel des annonces civiles et commerciales*) (*BODACC*). This extract or notice must include the same information as listed above, as well as the title of the journal and the date of the previous publication (Articles L. 141-12, L. 141-13, R. 123-211 and R. 123-156, Commercial Code).

Creditors of the transferred business can exercise their opposition right within ten days following publication of the transfer in the *BODACC*. This enables them to request payment of a portion of the purchase price to cover their receivables against the business (subject to conditions).

Within a month following the transfer, the Commercial and Companies Register must be amended to reflect the change of ownership of the business.

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