

market intelligence

Private Equity

**Cautiousness prevails through
macroeconomic uncertainty**

*Global interview panel covering
key economies led by Bill Curbow*

Regulatory developments • Major cases • Big Data • 2016 trends
Europe • North America • Asia-Pacific • Latin America

market intelligence

Welcome to *GTDT: Market Intelligence*.

This is the third annual issue focusing on global private equity markets.

Getting the Deal Through invites leading practitioners to reflect on evolving legal and regulatory landscapes. Through engaging and analytical interviews, featuring a uniform set of questions to aid in jurisdictional comparison, *Market Intelligence* offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

Market Intelligence is available in print and online at www.gettingthedealthrough.com/intelligence

Getting the Deal Through

London

October 2016

Publisher: Gideon Robertson
Senior business development manager:
Adam Sargent
adam.sargent@gettingthedealthrough.com
Business Development Manager:
Dan Brennan
dan.brennan@gettingthedealthrough.com
Readership Development Manager:
Rosie Oliver
Rose.Oliver@gettingthedealthrough.com
Product marketing manager: Kieran Hansen
subscriptions@gettingthedealthrough.com

Head of production: Adam Myers
Editorial coordinator: Teya Humphris
Subeditor: Claire Ansell
Senior production editor: Simon Busby
Cover: iStock.com/leftandright

No photocopying. CLA and other agency licensing systems do not apply. For an authorised copy contact Adam Sargent, tel: +44 20 3780 4104

This publication is intended to provide general information on law and policy. The information and opinions which it contains are not intended to provide legal advice, and should not be treated as a substitute for specific advice concerning particular situations (where appropriate, from local advisers).

Published by

Law
Business
Research

Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4104
Fax: +44 20 7229 6910
©2016 Law Business Research Ltd
ISSN: 1746-5524



Strategic Research Sponsor of the
ABA Section of International Law



In this issue

Global Trends	2
Australia	5
Brazil	13
Cayman Islands	18
Denmark	22
France	27
Germany	32
India	36
Indonesia	41
Italy	48
Japan	53
Luxembourg	59
Mexico	65
Russia	70
Switzerland	77
United Kingdom	84
United States	91

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



PRIVATE EQUITY IN FRANCE

Charles Cardon practices in the areas of corporate and financial law, with a focus on takeovers, M&A, capital market and PE transactions. He has significant experience both in France and in the US, assisting public companies with large-scale, international projects.

Bruno Leroy advises French and international companies on corporate and international tax matters, including transfer pricing, restructuring, leveraged buyouts, domestic and international acquisitions, distribution patterns, development of international financings and optimisation of funds flow.

Olivier Dumas advises on fund formation in the private equity and alternative investment funds sectors. He has extensive experience with all legal and tax aspects of investment

fund formation and financial regulatory matters, as well as in the creation of management companies or investment advisers.

Antoine Sarailier focuses his practice on asset management law. He advises French and international financial institutions on the structure, documentation and creation of institutional and retail investment funds, as well as on a wide range of regulatory matters.

Anne-Charlotte Rivière focuses her practice on private equity and M&A transactions for public and private companies, with experience in both French and international matters including the emerging markets. She has extensive experience representing companies and managers or investment funds in PE and venture capital transactions.



Antoine Sarailler



Anne-Charlotte Rivière

What trends are you seeing in overall activity levels for private equity firm buyouts and investments in your country during the past year or so?

Charles Cardon, Bruno Leroy, Olivier Dumas, Antoine Sarailler & Anne-Charlotte Rivière:

Regarding buyouts, we have experienced very competitive bids with very aggressive buyers trying to pre-empt the process. By being so aggressive and offering management-attractive packages, investment funds have been able to compete with strategic players. In addition, the IPO track has been significantly reduced. Major IPOs (Oberthur and Deezer) have been postponed, and large sales such as Labco or Verralia that were initially structured as IPOs have been sold to PE funds.

In large-scale transactions, bidders now enter into consortium agreements due to the size of the transactions. For mid-scale and small-scale transactions, PE funds are looking for new investment opportunities, such as spin-off from strategic buyers (see for instance the acquisition of Babcock Wanson by FCDE from listed company CNIM).

Looking at types of investments and transactions, are private equity firms continuing to pursue straight buyouts or are other opportunities, such as minority-stake investments, partnerships or joint ventures, also being considered?

CC, BL, OD, AS & A-CR: Many companies under leveraged buyouts (LBOs) are looking to expand through external growth. As such, the ability of the investment fund to fund such growth is strongly

considered in the competitive process. Apart from that, there is no significant hotspot.

In addition, due to the high bidding process, the ability of the fund to follow an alternative path as a minority stake has proven successful in several matters.

As mentioned above, large-scale deals are now structured through partnerships between PE funds.

PE funds are now considering investment opportunities in fast-growing companies through minority-stake participations. For instance, KKR and TowerBrooks invested €250 million in OVH (the third largest host of internet sites) while Sagard and other French PE funds completed a minority investment in Grand Frais (undisclosed amounts).

What were the recent keynote deals? And what made them stand out?

CC, BL, OD, AS & A-CR: As mentioned above, the market has been very seller-friendly over the first half of 2016. Bidders have had to be flexible to address sellers' demands, in terms of price and certainty of completion. In particular, securing a fully financed offer, with equity commitment and debt commitment letters satisfactory to the sellers as soon as possible, has been a key advantage in several bid processes. In this competitive context, the management has played a key role. Management packages, with reinforced governance rights and incentive instruments, have been negotiated with a management-friendly approach.

We advised the sellers and the management in the sale, through a leverage buy out transaction, of Lafayette Group, the French leader in low-cost retail pharmacy business, to Five Arrows, the corporate private equity firm of Rothschild, which is focused



Bruno Leroy



Olivier Dumas

on investing in lower-middle-market companies in Western Europe. We also advised the sellers in their reinvestment in the Layette Group and the management in structuring and negotiating their management package.

This transaction highlights Dechert's ability to coordinate a cross-practice team that completes complex transactions for its clients in a very short period of time.

Does private equity M&A tend to be cross-border? What are some of the typical challenges legal advisers in your jurisdiction face in a multi-jurisdictional deal? Are those challenges evolving?

CC, BL, OD, AS & A-CR: Targets generally have multi-jurisdictional activities. This requires a close coordination at the due diligence and negotiation stage with local counsels of each jurisdiction, to understand and address local regulatory issues. In competitive bid processes, it is key to have reliable local counsels, with whom we have strong and long-term professional relationships, to identify and understand the key concerns and report and explain them to our clients.

What are the current themes and practices in financing for transactions? Have there been any notable developments in the availability of debt financing or the terms of financing for buyers over the past year or so?

CC, BL, OD, AS & A-CR: In our view, the main trends can be summarised as follows:

- leveraged loans and high yield in decline;
- re-emergence of bank lenders;

- convergence of terms between US and European term loans and high-yield (ie, loosening of financial covenants and lender protections, increase of flexibility for borrowers – in general the US-style provisions appear more and more frequently in European credit agreements); and
- covenant-lite terms available to strong credits in European deals.

How has the legal and policy landscape changed during the past few years in your country?

CC, BL, OD, AS & A-CR: A significant reform of French contract law will enter into force in October 2016. One of the goals of this reform is to improve the competitiveness of French law compared to other legal systems. The reform is globally recognised as a good one, in particular regarding its impact on M&A transactions, although some areas of uncertainty remain.

In 2012/2013, both an income tax and social charges reforms have been implemented, which significantly increased the effective taxation of capital gains under management package schemes. Nonetheless, a new favourable capital gain regime voted in 2014 and related to income tax now provides for a taxation of only 50 per cent of the capital gain if the shares are held for at least two years. Therefore, instruments such as warrants, which do not comply with this two-year holding period, are no longer used for management packages. Management packages are now generally structured through preferred shares with ratchet rights.

THE INSIDE TRACK

What factors make private equity practice in your jurisdiction unique?

- The role of management and particularly their expectations in terms of financial incentives. The management generally hires, at the purchaser's cost, a financial and a legal counsel.
- The impact of tax regulations on the structuring of the deal and on the management package. In particular, several tax reforms have been implemented since 2012 that significantly changed the taxation of capital gain under the management package scheme.
- The expectations of the sellers, who are not ready to grant operational representations and warranties other than capacity and ownership of the transferred securities. In case of reinvestment, sellers usually ask for very favourable minority rights, in terms of governance (veto rights) and liquidity (exit mechanism).

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

- The experience and track record of the legal counsels. Our lawyers are 'solution-oriented' to address clients' concerns arising from due diligence or in the negotiation. This requires excellent legal skills, to find innovative solutions, and a good knowledge of the practice market.
- The reactivity and involvement of the counsel. Our team is fully dedicated to our clients' requests, in order to be able to offer a high-value service to optimise the success of the transaction.

- The various practices and international network of the law firm. Our PE&A, tax and antitrust/regulatory departments work very closely together on LBO deals. Regulatory and antitrust matters are more and more complex and potential concerns must be identified and addressed very quickly in the deal. On regulated sectors, such as life science and antitrust, for instance, the counsel must have a deep knowledge of complex regulations.

What is the most interesting or unusual matter you have recently worked on, and why?

Dechert advised the sellers and the management on the sale, through a leverage buyout transaction, of Lafayette Group, the French leader in low cost retail pharmacy business, to Five Arrows, the corporate private equity firm of Rothschild, which is focused on investing in lower-middle-market companies in Western Europe. We also advised the sellers on their reinvestment in the Lafayette Group and the management on structuring and negotiating their management package.

This transaction highlights Dechert's ability to coordinate a cross-practice team that completes complex transactions for its clients in a very short period of time.

Charles Cardon, Bruno Leroy, Olivier Dumas, Antoine Sarailier and Anne-Charlotte Rivière
Dechert LLP
Paris
www.dechert.com

What are the attitudes to private equity among policymakers and the public? Has there been any noteworthy resistance to private equity buyouts by target boards or shareholders? Does shareholder activism play a significant role in your country, and if so, how has it impacted private equity M&A?

CC, BL, OD, AS & A-CR: In our view, the image of PE funds has improved among policymakers and the public. Large French companies have been sold to PE funds over the past years, and PE funds have been key to initiate a new development strategy. They have been instrumental in providing new money and have led the renegotiation of debt in distressed M&A deals, such as Latécoère or Solocal (formerly known as PagesJaunes). In addition, they have been a steady partner to the development of strategic players, which have subsequently been listed on Euronext Paris, such as Elis, Elior, Tarkett or Maisons du Monde for instance.

Shareholder activism plays a significant role in the squeeze-out process. Under French stock exchange rules, in order to complete a squeeze-out following a tender offer, minority shareholders must not hold more than 5 per cent of the share capital and voting rights following the offer. In several public-to-private deals, funds have acquired minority shareholding

participation following the announcement of the offer to impede the squeeze-out and to force the bidder to offer a higher price. This was the case in the takeover of Club Méditerranée by Fosun in 2013-2014.

What levels of exit activity have you been seeing? Which exit route is the most common? Which exits have caught your eye recently, and why?

CC, BL, OD, AS & A-CR: Dual-track processes have significantly increased over the past three years, for two reasons. First, markets reopened in 2013, after several years during which very few IPOs took place. Second, due to the value of targets, IPO generally appears to be the best exit route for liquidity. Nevertheless, the 'IPO window' has narrowed since 2015, especially during the first half of 2016 due to the volatility of the markets, with uncertainty due to the Brexit risk. Significant transactions such as the sale of Morpho by Safran, are expected to take place via a trade sale, in other words, without a dual track with simultaneous IPO process.

For mid-cap and small-cap LBOs, exits generally take place through secondary or tertiary LBOs as: (i) PE funds have financial capacities to make the deal alone, ie without any team-up with other sponsors; and (ii) management has a strong preference for a new private

investor, to enhance the development of the group and create significant value over a four-to-five-year period.

Looking at funds and fundraising, does the market currently favour investors or sponsors? What are fundraising levels like now relative to the past few years?

CC, BL, OD, AS & A-CR: It is our view that fundraising activities in France have been very dynamic over the past two years. In our experience, successful asset managers (ie, managers with a good track record) do not have any difficulties when raising capital – their funds are usually oversubscribed. In this respect, managers are currently favoured on the French market (it being understood that new managers, or managers with a poor track record, may have some difficulty in successfully raising new funds). However, limited partners have more leverage nowadays with respect to the fees charged by the managers.

Talk us through a typical fundraising. What are the timelines, structures, and the key contractual points? What are the most significant legal issues specific to your country?

CC, BL, OD, AS & A-CR: The timeline of fundraising in France depends on the success of the manager and its track record. French private equity funds with total commitments in excess of €1 billion have recently been raised in less than four months. However, some fundraisings can last up to 12 or 18 months, even in the current favourable market conditions. PE funds in France have, in the past, been structured as *fonds professionnel de capital investissement* or as *fonds professionnel spécialisé*, which are two forms of French regulated funds. More funds are now structured as *société de libre partenariat*, a newly established French form of limited partnership with a legal personality, which was introduced in France recently with the objective, among others, of attracting foreign investors.

The key contractual points discussed in France are linked to the following clauses: divorce (fault/no fault) clause, key person clause, fees, costs and expenses clause and clauses relating to the transparency (reporting, valuation, etc).

How closely are private equity sponsors supervised in your country? Does this supervision impact the day-to-day business?

CC, BL, OD, AS & A-CR: Private equity sponsors are unusual in France, with the exception of (i) banking or insurance companies that invest in management companies; or (ii) historic shareholders in management companies.

These entities are not supervised as sponsors of PE funds, but are usually subject to their own sets of regulations. As a result, French regulations (such as the *Loi de Séparation Bancaire*), European regulations (such as Solvency II or CRD IV) or US regulations (Dodd Frank Act or BHC Act) may have an impact on the day-to-day business of managers.



Charles Cardon

What effects has the AIFMD had on fundraising in your jurisdiction?

CC, BL, OD, AS & A-CR: The AIFM Directive did not have a material effect on fundraising in France, as PE funds were usually set up as regulated funds in France.

What are the major tax issues that private equity faces in your jurisdiction? How is carried interest taxed? Do you see the current treatment changing?

CC, BL, OD, AS & A-CR: Private equity faces an increasing challenge regarding the tax deductibility of the interest charges linked to related and unrelated acquisition indebtedness. However, in principle, interest charges deriving from the acquisition debt are still tax deductible, whereas the capital gains made by the acquisition company are almost fully tax exempt.

The carried interest is taxed as standard capital gains but may benefit from income tax rebates based on the shareholdings period. The current tax treatment was put in place few years ago and we do not see the current treatment changing.

Looking ahead, what can we expect? What will be the main themes in the next 12 months for both private equity M&A and fundraising?

CC, BL, OD, AS & A-CR: In our view, two major trends may have an impact over the next 12 months:

- decrease in PE funds' preferred return: from 8 per cent to 6/7 per cent; and
- the development of debt funds: as of 2016, French funds can directly originate loans, which results in an increase in the offer of debt funds on the French market.

Also available online



www.gettingthedealthrough.com



*Official Partner of the Latin American
Corporate Counsel Association*



*Strategic Research Sponsor of the
ABA Section of International Law*