

International Comparative Legal Guides



Mergers & Acquisitions 2020

A practical cross-border insight into mergers and acquisitions

14th Edition

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Abdulnasir Al Sohaibani Attorneys
and Counsellors
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Walkers
WBW Weremczuk Bobet & Partners Attorneys
at Law
White & Case LLP
Zhong Lun Law Firm

ICLG.com



ISBN 978-1-83918-026-2
ISSN 1752-3362

Published by

glg global legal group

59 Tanner Street

London SE1 3PL

United Kingdom

+44 207 367 0720

info@glgroup.co.uk

www.iclg.com

Group Publisher

Rory Smith

Senior Editors

Suzie Levy

Rachel Williams

Sub Editor

Jenna Feasey

Creative Director

Fraser Allan

Printed by

Stephens and George Print
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Cover image

www.istockphoto.com

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Contributing Editors:

Lorenzo Corte & Scott C. Hopkins

Skadden, Arps, Slate, Meagher & Flom (UK) LLP

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France

FTPA



Alexandre Omaggio



François-Xavier Beauvisage

1 Relevant Authorities and Legislation

1.1 What regulates M&A?

Public M&A in France is supervised by the French Financial Markets Authority (*Autorité des marchés financiers*, the “AMF”).

Public M&A is regulated by the French Monetary Code, French Commercial Code and General Regulation (*Règlement Général*) of the AMF.

The key principles applicable to tender offers are:

- free interplay of offers and counter-offers;
- equal treatment and equal information for all holders of targeted securities;
- market transparency and integrity; and
- fairness of transactions and free competition.

This chapter only deals with French companies listed on the regulated market of Euronext Paris. Different provisions may apply to companies listed on Euronext Growth (non-regulated market) and foreign companies.

1.2 Are there different rules for different types of company?

As for French companies, only those having the corporate form of *sociétés anonymes*, *sociétés européennes* and *sociétés en commandite par actions* are eligible to be listed on Euronext Paris.

French regulations on public M&A apply irrespective of the corporate form.

1.3 Are there special rules for foreign buyers?

No special public M&A rules apply to foreign buyers.

However, foreign investments in France are subject to prior authorisation of the French Ministry for Economy and Finance where:

- the investment results in either (i) the direct or indirect acquisition of the control of a company whose registered office is located in France, (ii) the acquisition of all or part of a line of business of a company whose registered office is in France, or (iii) the acquisition of more than 33.33% of the share capital or voting rights of a company whose registered office is in France (for non-EU investors); and
- the target company carries out (i) an activity which may affect public order, public safety or national defence interests, or (ii) an activity in the field of research, production or sale of arms, ammunition, powders and explosive substances.

The range of sectors subject to prior authorisation is detailed by the law and depends on whether the investor is an EU national or not. In some instances, only a declaration may be required.

Two statutory instruments amending the French foreign investment regime will become effective as of April 1, 2020 such that, for example:

- the threshold for controlled participation will be lowered to 25% (from 33%);
- the scope of sectors subject to prior authorisation will be extended to print and digital media, food safety, critical technologies sectors; and
- French companies will be able to consult the authorities in advance about the sensitive nature of their activities.

1.4 Are there any special sector-related rules?

In addition to the French foreign investment regime (see question 1.3 above), tender offers in certain sectors are subject to specific regulations, which apply regardless of the nationality of the bidder. For instance, takeover bids for banking and insurance companies are subject to prior approval by the *Autorité de Contrôle Prudentiel et de Résolution* (“ACPR”).

1.5 What are the principal sources of liability?

The principal sources of liability with respect to tender offers are:

- insider trading;
- market manipulation;
- dissemination of false or misleading information; all involved parties should exercise caution in their statements in order not to mislead the public or discredit the target or the bidder; and
- non-compliance with required disclosure information, for instance on the crossing of thresholds or intervention on the market.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

Alternative means to a straightforward tender offer are:

- Stakebuilding via the acquisition of shares (whether or not on the market), which can also occur before launching a tender offer. Disclosure obligations apply (see question 5.3). When an investor acquires more than 30% of the share capital or voting rights of the target, it must launch a tender offer on the balance of the shares it does not own.

- Acquisition of assets. Where the bidder is interested only in a portion of the target's assets/business, it may negotiate a sale of this portion only rather than launching a tender offer.
- A merger, but this requires a shareholders' vote of the target at a qualified 2/3 majority.

2.2 What advisers do the parties need?

The bidder must appoint at least a financial services provider, acting as the presenting bank, which guarantees the irrevocability of the bidder's commitments.

In some cases, for instance if there are conflicts of interest or if the bidder wants to execute a squeeze-out following the tender offer, the target company must appoint an independent expert to issue a fairness opinion on the deal terms.

In addition, the bidder and the target usually appoint their own legal advisors, financial advisors (for the bidder, usually the presenting bank) and communication advisors.

2.3 How long does it take?

The duration of the tender offer is set, in each case, by the AMF.

This will depend on the relevant procedure, which will in turn depend on whether the offer is voluntary or mandatory.

Generally, a tender offer of reasonable complexity can be completed within three to four months, subject to antitrust review or litigation issues.

The main steps of a tender offer are:

- preparation of the offer;
- filing of the offer with the AMF whereupon the transaction is made public and the bidder is committed;
- review of the offer by the AMF;
- issuance by the AMF of a statement of compliance (*décision de conformité*) and approval (*visa*) of the offer documents;
- opening of the offer;
- closing of the offer followed by its settlement (if the offer is successful); and
- potentially, re-opening of the offer.

The target must also file a response document to the offer (*note en réponse*) either after issuance of the *décision de conformité* in case of a hostile tender offer and before where an independent expert is to be appointed (see question 2.2 above).

2.4 What are the main hurdles?

The main hurdles that a bidder has to face to complete its transaction are the following:

- preparing its offer well, in case of a hostile offer, especially having analysed the potential target's defences;
- financing its offer if it has a cash component. The offer cannot be conditional upon obtaining sufficient funding;
- in case of a hostile offer, securing the support of the target's board of directors, which can be crucial to the success of the offer since minority shareholders would take into account the board's recommendation;
- having its offer accepted by the market to reach the 50% mandatory minimum acceptance threshold (see question 2.15); and
- obtaining antitrust or required authorisations as the case may be (see questions 1.3 and 1.4).

2.5 How much flexibility is there over deal terms and price?

Subject to the restrictions below, the consideration (type and price) of the offer is freely fixed by the bidder.

In principle, the bidder may offer: cash; shares; other securities; or a combination of any of these.

Restrictions apply to the nature of the consideration in the following cases:

- if the bidder has acquired in cash during the 12-month period preceding the filing of the offer more than 5% of the target's shares or voting rights, the offer must be in cash or include a cash alternative; and
- if the securities offered (exchange offer) are not listed on a regulated market, the offer must include a cash alternative.

Restrictions also apply to the price in the following cases:

- in a mandatory offer, the proposed price must be at least equivalent to the highest price paid by the bidder in the 12-month period preceding the crossing of the relevant mandatory tender offer threshold;
- where the bidder already owns more than 50% of the target's share capital and voting rights, the offer price may not be lower than the average trading price weighted by trading volume for 60 trading days preceding the filing of the offer;
- in case of an alternative or improved all-cash offer, the offered price must be at least 2% higher than the price of the previous bid; and
- in a squeeze-out, the offer price cannot be lower than the price offered in the prior public buyout offer and must be based on a valuation of the securities of the target using a multi-criteria methodology.

2.6 What differences are there between offering cash and other consideration?

When the bidder offers securities as consideration, it is required to provide more detailed information of its company. Where securities are to be issued, corporate approvals would be required (e.g., approval by the bidder's shareholders).

An exchange offer (*offre publique d'échange*) must include a cash alternative in the circumstances set out under question 2.5 above.

2.7 Do the same terms have to be offered to all shareholders?

Equal treatment of shareholders is one of the overriding principles in French regulations.

This principle implies the obligation for the bidder to offer the same consideration to all of the target's shareholders.

However, such principle does not preclude the bidder from offering different consideration to holders of different instruments, provided that the difference of the valuation is justified. When there is doubt over compliance with this principle, an independent expert must be appointed.

2.8 Are there obligations to purchase other classes of target securities?

In principle, a bidder must target all shares and equity-linked securities of the target.

With respect to stock options, the bidder usually offers liquidity arrangements and, in cases where the bidder's shares are listed, equivalent plans in the bidder.

2.9 Are there any limits on agreeing terms with employees?

There are no limits on agreeing terms with employees, provided such agreements comply with the principle of equal treatment of shareholders.

The target's works council must be informed and consulted promptly after the filing on any tender offer. The position of the target's works council is purely informative and cannot result in interruption or suspension of the offer. The bidder's works council must be informed on the content of the offer and its potential impact on employment.

2.10 What role do employees, pension trustees and other stakeholders play?

In the context of a tender offer, employees play the following role:

- Through the target's works council (*comité social et économique*), which must be informed and consulted promptly after the filing on any tender offer, they can express their collective opinion. The position of the target's works council is purely informative and cannot lead to any interruption or suspension of the offer. The bidder's works council must be informed on the content of the offer and its potential impact on employment. During the meeting, the works council decides whether to hear the bidder and whether to appoint a chartered accountant (*expert comptable agréé*). The opinion issued by the works council is made available in the target's response document.
- Employees may have shares in the target. If so, they have a role to play as shareholders. The support from the target's employees may be an important factor for the success of the offer.

2.11 What documentation is needed?

The main documents to be prepared in the context of a tender offer are:

- The draft offer document (*projet de note d'information*), which is filed by the presenting bank(s) on behalf of the bidder. It must include, in particular: (i) the identity of the bidder; and (ii) the information relating to the terms and conditions of the offer (i.e. the proposed price or exchange ratio, any condition attached to the offer) and set out the bidder's intentions for at least the next 12-month period in relation to the relevant companies' financial and industrial strategy. Information to be disclosed in respect of the bidder is more burdensome and extensive when the offer does not consist in cash consideration only.
- The draft response document (*projet de note en réponse*). It must include a description of the target, the opinion of the target's works council, the reasoned opinion of the target's board on the benefits of the offer or its consequences for the target and, if applicable, a copy of the fairness opinion prepared by the independent expert.
- Other information documents (*Informations relatives aux caractéristiques, notamment juridiques, financières et comptables*) to be prepared respectively by the bidder and target. Such

documentation must contain a description of the bidder (or target) and provide information on the legal, financial and accounting characteristics of the bidder (or target).

2.12 Are there any special disclosure requirements?

The offer documentation (see question 2.11), and trading on the target's securities during the offer period (see questions 5.1 and 5.3) are subject to special disclosure requirements.

2.13 What are the key costs?

The key costs in connection with a takeover bid mainly consist in advisers' fees, which will depend on the size, complexity and hostile or friendly nature of the offer.

2.14 What consents are needed?

The main consents to be obtained are regulatory:

- declaration of conformity (*décision de conformité*) of the AMF;
- clearance from antitrust authorities, as the case may be; and
- prior authorisation of the French ministry for Economy and Finance, as the case may be (see question 1.3).

In addition, internal consents of the bidder may be required prior to filing a tender offer (i.e. board of directors' or shareholders' consent if securities are to be offered for consideration).

2.15 What levels of approval or acceptance are needed?

The bidder needs to acquire more than 50% of the share capital or voting rights of the target at the closing of the offer; otherwise the offer lapses automatically.

In case of voluntary offer, the bidder may set a higher minimum condition than 50%; this threshold can be set at $\frac{2}{3}$ in order to obtain the voting rights required to take all decisions at the target's shareholders' meetings.

If the bidder is considering carrying out a squeeze-out, it needs to acquire at least 90% of the share capital and voting rights of the target (see question 7.4).

2.16 When does cash consideration need to be committed and available?

The filing of the offer with the AMF renders the tender offer irrevocable. The certainty of funds is guaranteed by the presenting bank(s), which usually require(s) a cash collateral and a pledge in its favour.

The funds must be paid, and therefore available, (i) upon closure of the offer in case of normal procedure, or (ii) on a daily basis during the offer period in case the trade offer is made through the simplified procedure.

3 Friendly or Hostile

3.1 Is there a choice?

Any individual or legal entity can choose to launch a tender offer.

But in some instances, they are required to launch a tender offer (mandatory tender offers):

- where they come to hold more than 30% of the target's share capital or voting rights; and
- where they hold between 30% and one-half of the target's share capital or voting rights, and increase that holding by 1% or more within less than 12 consecutive months.

The AMF may grant an exemption to the launch of mandatory offers in limited cases set out in its General Regulation.

In addition, a 90% (or more) controlling shareholder may be required by the AMF to make a public buyout offer for the securities of the minority shareholders, if such minority shareholders are able to demonstrate, among others, that there is insufficient liquidity to sell securities on the market.

3.2 Are there rules about an approach to the target?

There are no specific rules applicable to an approach of the target. But a potential bidder should always exercise caution in ensuring confidentiality when initiating discussions with the target and/or its shareholders.

3.3 How relevant is the target board?

The target's board is required to issue a reasoned opinion (*avis motivé*) on the merits of the offer for the target, its shareholders and its employees, which is reproduced in the target's response document.

In case of a hostile tender offer, the target's board of directors may take measures to frustrate the bid.

3.4 Does the choice affect process?

A friendly offer is more advantageous than a hostile bid for the bidder for the following reasons:

- the bidder may access the target's non-public information, and due diligence is facilitated (see question 4.1); and
- timing is usually shorter, since both parties can jointly prepare all necessary documentation before the offer is made public and may, under certain conditions, file a joint offer document.

4 Information

4.1 What information is available to a buyer?

During the preparation of the tender offer, information available to the bidder and its advisers is limited to publicly available information disclosed by the target, such as corporate documents (by-laws, minutes of shareholders' meetings) or stock exchange filings, press releases and analysts' reports.

In a friendly offer, the bidder may have access to certain non-public information made available in a dedicated data room, subject to signing a non-disclosure agreement and a letter of intent. For competitive bids, similar access is to be granted to other bidders.

4.2 Is negotiation confidential and is access restricted?

In principle, negotiations between the potential bidder and the target or its shareholders will be deemed confidential only where steps are taken to ensure such confidentiality.

The parties must, however, be prepared to communicate promptly in the event of a leak.

The General Regulation of the AMF further provides that, in the event of rumours or unusual trades on the target security, the AMF may require a potential bidder to disclose its intentions (the "put up or shut up rule"):

- if the potential bidder declares that it intends to make an offer, a press release setting out the terms of the offer must be issued; and
- if the potential bidder denies any such intentions, it cannot make an offer during a six-month period following its declaration.

Making a public announcement, whether voluntarily or at the request of the AMF, prior to filing the offer with the AMF, does not constitute an offer, but opens a pre-offer period during which certain restrictions apply (prohibition for the bidder to intervene on the target's shares).

4.3 When is an announcement required and what will become public?

See questions 2.11 and 4.2 above.

4.4 What if the information is wrong or changes?

If, following the filing of the offer, any material information, disclosed by the bidder and the target in the offer documents, is inaccurate, the AMF may require the bidder and/or the target to amend the offer documents accordingly. Depending on the importance of the amendment, the AMF may decide to revise the offer timetable and postpone the closing date in order to allow the market to assess the new information.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Prior to the pre-offer period (which runs from the date of announcement of the offer to the date of filing the offer with the AMF), the bidder may acquire shares of the target, within the limits of compliance with insider trading regulation, disclosure of shareholding and mandatory bids (see question 5.3).

During the pre-offer period, the bidder may not acquire shares of the target.

During the offer period (which runs from the date of the filing of the offer to the publication of the results of the offer by the AMF), the bidder may acquire up to a maximum of 30% of the shares of the target, provided that the offer is a full cash offer and is not conditional on antitrust clearance or on the success of another tender offer (see question 7.1).

5.2 Can derivatives be bought outside the offer process?

During the offer period, if the tender offer is an exchange offer, the bidder may not acquire derivatives linked to the shares of the target.

The acquisition of derivatives is not dealt with by the regulation for full cash offer, and should therefore be carefully reviewed beforehand, in particular to avoid breaching disclosure requirements (see question 5.3).

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

At any time, the target and the AMF must be informed by a shareholder who either:

- exceeds or falls below thresholds of 5%, 10%, 15%, 20%, 25%, 30%, $\frac{1}{3}$, 50%, $\frac{2}{3}$, 90% and 95% of the share capital or voting rights of a listed company. The target's by-laws may provide additional thresholds; and
- exceeds thresholds of 10%, 15%, 20% or 25%, in which cases it must also disclose its intentions in respect of the target for the next six-month period, including whether it wants to take control or not of the target.

Existing shares of the target that a person is entitled to acquire on its own initiative under an agreement or a financial instrument must be taken into account when calculating such thresholds, including forward contracts and cash-settled derivatives which have an economic effect similar to the ownership of the underlying shares.

Moreover, a public takeover is mandatory where a shareholder:

- exceeds the threshold of 30% of the share capital or voting rights; or
- holds between 30% and 50% of the share capital or voting rights, and increases its holding by 1% or more over a 12-month period.

During the offer period, the bidder or the target (or their respective directors or managers) must disclose to the AMF, on a daily basis, any purchase or sale of the target's securities. This duty also applies to:

- any person holding in excess of 5% of the capital or voting rights of the target; or
- any person having acquired, since the announcement of the offer period, in excess of 1% of the target's securities.

Any person who increases their shareholding level by more than 2% since the beginning of the offer period may be required to publish their intentions in respect of the target.

5.4 What are the limitations and consequences?

Shareholders who are not complying with relevant disclosure obligations may be deprived of their voting rights attached to their securities. They may also be liable to additional financial penalties ordered by the AMF or relevant courts.

6 Deal Protection

6.1 Are break fees available?

Break fees are not prohibited *per se*.

However, they must comply with the key principles applicable to tender offers (see section 1). Specifically, they must comply with the principle of free interplay of offers and counteroffers and can be challenged if their amount is excessive.

Where granted by the target, they can raise issues in relation to compliance with the target's corporate interest.

Break fees must be disclosed to the AMF at the date of filing of the offer and in the offer document.

6.2 Can the target agree not to shop the company or its assets?

Prior to filing of the offer, the target and the proposed bidder may enter into an exclusivity agreement. Such agreement shall

be made public upon filing of the offer and shall not be too restrictive in order to preserve free interplay of offers and counter-offers, being specified that the board of directors has a duty to review any offer filed with the AMF by another bidder.

6.3 Can the target agree to issue shares or sell assets?

Following the *loi Florange* enacted in 2014, the board of directors of a French listed company, unless stated otherwise in its by-laws, is expressly authorised to take frustrating action without shareholder approval, provided that any frustrating measures:

- do not fall within the powers of the shareholders' meeting; and
- are not contrary to the corporate interests of the target.

The issuance of shares falls within the powers of the shareholders' meeting. However, a listed company may seek broad shareholder authorisations from annual shareholders' meetings, allowing them to issue shares during the tender offer, unless stated otherwise in the shareholders' resolution or by-laws.

The sale of assets falls within the powers of the board of directors provided that any such board decision is not contrary to the corporate interests of the company. However, the AMF recommends that listed companies consult their shareholders (in an ordinary general meeting) prior to the disposal of at least 50% of their assets. This threshold is to be calculated according to certain criteria such as turnover, net operating income before tax or number of employees.

6.4 What commitments are available to tie up a deal?

Bidders can approach the target's main shareholders to enter into agreements, pursuant to which they undertake to tender their shares to the offer (*engagements d'apport*).

Such undertakings may be incompatible with the principle of free interplay of offers and counteroffers. In this respect, bidders seeking such undertakings usually allow the concerned shareholders to tender their target securities to a competing bid in exchange for a reasonable break fee.

These agreements must be publicly disclosed.

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

A tender offer becomes unconditional once filed with the AMF, with the following exceptions:

- Corporate authorisation. If the tender offer involves a share component, it may be made conditional upon obtaining the approval of the issuance of the new shares by the bidder's extraordinary shareholders' meeting.
- Minimum acceptance threshold. French law provides for a mandatory minimum acceptance threshold under which a tender offer lapses automatically if the bidder does not reach at least 50% of the capital or voting rights of the target at the closing of the offer. If the offer is voluntary, the bidder may set a higher threshold, subject to the AMF's approval.
- Multiple offers. A bidder launching tender offers on two or more different companies can make each offer conditional upon the success of the other offer(s).
- Antitrust approvals. The tender offer can be conditional upon obtaining antitrust clearance from the relevant authorities from certain countries (including the EU).

If the relevant competition authorities decide to launch a Phase II investigation or equivalent type of in-depth antitrust examination, the offer will automatically lapse.

7.2 What control does the bidder have over the target during the process?

The bidder has no control over the target during the offer process. However, in a friendly offer, the bidder may have obtained some deal protection by the target through agreements.

7.3 When does control pass to the bidder?

Control passes to the bidder with the settlement of the offer.

However, for offers under the simplified procedure, shares are acquired on a daily basis.

In a hostile tender offer, acquisition of effective control may also require a shareholders' meeting to be held following the closure of the offer in order to remove the board member.

7.4 How can the bidder get 100% control?

Since the implementation of the *loi Pacte* (see question 10.1), if the bidder holds at least 90% of the shares and voting rights of the target following the tender offer, it may (within three months of the closure of the offer) implement a squeeze-out procedure in order to achieve 100% control and proceed with the delisting of the target.

8 Target Defences

8.1 What can the target do to resist change of control?

The board of directors of a French listed company, unless stated otherwise in its by-laws, is expressly authorised to take frustrating measures without shareholder approval, provided that these measures:

- do not fall within the competence of the shareholders' meeting; and
- are not contrary to the corporate interest of the target.

Such measures may consist of:

- issuing warrants to existing shareholders, allowing them to subscribe for target shares at a discount price;
- disposing of significant assets ("crown jewels", see also question 6.3);
- acquiring new assets or businesses ("fatman defence"); and
- searching for an alternative bidder ("white knight").

8.2 Is it a fair fight?

The target must comply with the principles governing tender offers (see question 1.1 above), including:

- free interplay of offers and counteroffers;
- equality among shareholders; and
- fairness of transactions and free competition.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

The major influences would be:

- the attractiveness of the price;
- the position of the target's board of directors; and
- the reaction of minority shareholders. In the last few years, we have seen increasing pressure from activists for an increase of the price initially proposed by the bidder. That was the case recently with Elliot contesting the price offered by Capgemini on Altran, resulting in an increase of the price.

9.2 What happens if it fails?

If the applicable acceptance threshold is not reached (see question 2.15) or if the offer was subject to the satisfaction of certain conditions (see question 7.1) that are not satisfied, the offer is deemed automatically null and void.

An unsuccessful bidder can make another offer on the target following the publication of the results of the initial tender offer.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in your jurisdiction.

The Pacte law (*loi Pacte*), which entered into force on May 23, 2019, has facilitated squeeze-outs by reducing the threshold from 95% to 90%, aligning France with other major European markets such as the UK or Germany. At the closing of an offer, shares which have not been tendered are automatically transferred to the bidder at its request, against compensation if such shares do not represent more than 10% of the share capital and voting rights.

This measure applies to all companies listed on Euronext and Euronext Growth, whatever their size/market capitalisation and the allocation of their share capital.

This reform is expected to have two main impacts:

- Facilitating squeeze-outs, and as a result P-to-P (public to private) transactions sponsored by private equity firms. In particular, the possibility for a hedge fund to prevent a squeeze-out has become more costly and risky, as it needs to gather more than 10% of the share capital *vs.* 5% under the previous legal framework.
- Rendering the French stock market more attractive, in particular to candidates for IPOs (and their shareholders) for which exit rules may be taken into account in their decision to go public.

See also the revision to the French foreign investment regime summarised in question 1.3 above, which will be effective on April 1, 2020.



Alexandre Omaggio advises on mergers and acquisitions, stock exchange transactions and private equity deals. He has more than 15 years of experience in the public M&A field. He was involved in important cross-border transactions over this period, such as the tender offer of NYSE on Euronext, or of Alcan on Pechiney. More recently, he advised *Société Internationale de Plantations d'Hévéas* – SIPH in the buy-out offer initiated by Michelin, followed by a squeeze-out, and Salvepar on the tender offer by Tikeau Capital. He is ranked in the 2020 edition of *Best Lawyers* in "Mergers and Acquisitions law".

Alexandre is a member of the Paris Bar and New York Bar. He is a graduate of Paris II Panthéon-Assas (DJCE/DESS/Magistère Juriste d'affaires), of Paris I Panthéon-Sorbonne (DEA en Droit Privé) and of Columbia Law School (LL.M.). Before joining FTPA in 2011, Alexandre practised at Sullivan & Cromwell LLP during eight years, in New York and Paris.

FTPA

1 bis avenue Foch
75116 Paris
France

Tel: +33 1 4500 0221
Email: aomaggio@ftpa.fr
URL: www.ftpa.com



François-Xavier Beauvisage acts in mergers and acquisitions, securities laws (stock exchange transactions and corporate advice to listed companies) and private equity.

François-Xavier holds a Master's degree in Business Law from Paris Dauphine University and a Master's degree in Business Law specialised in Accounting and Finance from Catholic University of Lille in partnership with EDHEC Business School. He recently represented *Société Internationale de Plantations d'Hévéas* – SIPH in the buy-out offer initiated by Michelin, followed by a squeeze-out. He also represented Arcure in its initial public offering on the Euronext Growth market in Paris.

FTPA

1 bis avenue Foch
75116 Paris
France

Tel: +33 1 4500 8620
Email: fxbeauvisage@ftpa.fr
URL: www.ftpa.com

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