The Technology M&A Review

Third Edition

Editors

Michael J Kennedy and Dana Kromm

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THE TECHNOLOGY M&A REVIEW

THIRD EDITION

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PREFACE

Welcome to the third annual *Technology M&A Review*. As was the case in prior editions, much of the comparative data we use is based on a 'half-year' convention, with liberal reference to calendar year over calendar year data. Although certainly not by design or foresight, this 'half-year' convention better highlights the ups and downs caused by covid-19 in 2020, the incredible tech M&A bounce-back in 2021, and 2022's half-year bevy of negative factors – inflation, the Ukraine war, and their compounded effect on the supply chain and production and productivity.

Whereas 2021 demonstrated technology M&A's 'champions jog' around the M&A track, the first half of 2022 revealed some porosity in the tech armour and its slowed pace. After at least 20 years of accommodating monetary policy (i.e., cheap money), the Federal Reserve (the US central bank) has been forced to raise interest rates to combat the highest US inflation since the 1970s. The geopolitical power calculus also changed in an instant with Russia's invasion of Ukraine, China's quasi-alignment with Russia and its more aggressive posture on the world stage. In addition, we should not downplay covid's continuing effects on social and government relationships nor its and the invasion of Ukraine's impact on global trade and increasing the appetite for protectionism.

In the United States, the public markets continue to deal with these issues and their weight (with an overall downward value slope from their peak). Depending on when one measures during the first half of 2022, large technology companies such as Facebook and Google lost roughly US$1.5 trillion in value. This is from an all-time high base. However, by mid-August 2022, the Nasdaq had rallied and was up 20 per cent from its June 2022 low, and was 'only' down 16 per cent for the year.

Under the Biden administration, the US antitrust authorities have been and will continue to be aggressive in challenging M&A technology transactions under various theories, but other regulatory authorities, as well as individual states, also have technology in their cross hairs from a tax, content, 'buy America', privacy and patriotic perspective. For the first time since 2011, venture capitalists are cutting back on technology and growth investments. In addition to the publicly announced hiring freezes, it is common knowledge to those who practice in the technology area that other hiring freezes and lay-offs are underway. Despite these headwinds, technology still accounted for approximately 47 per cent of worldwide M&A value in the first half of 2022.

While the technology M&A sector shares its DNA with other sectors, it is a growth sector and is designed to be changeable. We all intuitively know one cannot change the design of a gas turbine on the fly, but one can change a lot in the technology space very quickly. For most technology applications that do not involve life or death functions, there is no competitive limit on the rate of change. There was, in effect, no social media industry in

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2000, and now it is quite difficult to actually describe it – and yet it is huge. There have been unbelievable advances in, inter alia, food production and power plants since 2000, but no one considers these growth industries. These industries' advances are considered, consciously or unconsciously, recipients of technology but not creators.

This book's goal is to both highlight the similarities and differences between technology M&A and 'normal' M&A, without taking too much time to try to define what technology and 'normal' M&A are. One of its unstated premises is that because of technology's importance, effective M&A technology lawyering necessarily involves and requires a broad set of legal skills across many practice disciplines; that requirement will likely increase as governments and interest groups from all areas focus on the sector. The sector is critical because it is 'where the money is', where the anticipated growth is and where, at least in the Western world, the political battles are and will be waged.

At least in August 2022, technology M&A in the United States is robust compared to other sectors. Despite any further changes in regulation or monetary policy, compared to other sectors its prospects are, and will continue to be, relatively better.

Michael J Kennedy and Dana Kromm
Paul Hastings LLP
San Francisco
August 2022

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Chapter 5

FRANCE

Olivier Deren, Sébastien Crepy, Allard de Waal and Camille Paulhac[1]

I OVERVIEW

The year 2021 was record-breaking for the French tech M&A market, with an increase of 112 per cent in global value, going from €4.8 billion in 2020 to €10.2 billion in 2021,[2] and approximately 320 deals during the year. Even if the effects of skyrocketing rates, global inflation and the correction of tech stocks – which impacts the valuation of companies – are noticeable in the French tech M&A market, some indicators are reassuring (e.g., the number of deals, which is two times higher than before the covid-19 pandemic).

The widening of the scope of the French foreign investment control regulation to include the sensitive tech sector has generated an increase in the number of foreign direct investment notices to the French Treasury (a part of the French Ministry of Economy); nevertheless, foreign investors are continuously part of approximately one-third of the deals.[3]

II YEAR IN REVIEW

The top five private French tech M&A deals in 2021 were as follows:[4]

a the acquisition of TalentSoft, the French software publishing leader in cloud-based talent management solution, by Cegid, a leading software company in business management solutions;

b the acquisition of Photonis, a French leading, multinational, high-tech company specialised in the design and manufacture of high-precision sensors, by HLD Europe, a European private equity fund that invests without a pre-defined time horizon;

c the acquisition of IbanFirst, an online financial service platform that enables users to open international accounts, by Marlin Equity Partners, a global investment firm, which focuses on software technology;

d the acquisition of FinanceActive, a fintech company that provides solutions enhancing portfolio alert management, by Altus Group, a software and advice provider in the commercial real estate market; and

e the acquisition of Alsid, a software provider specialised in preventing business disruption (e.g., cyberattacks), by Tenable Networks Security, a cybersecurity company.

1 Olivier Deren, Sébastien Crepy, Allard de Waal and Camille Paulhac are partners at Paul Hastings (Europe) LLP.

2 VC/M&A Tech Trends – France 2021 – Avolta Partners, 2021.

3 ibid.

4 ibid.

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The top three private French tech M&A deals of the first semester of 2022 were as follows:[5]

a the acquisition of Leetchi, a group payment application that also offers an online money collection service, by Advent International, a US-based private equity fund active in the financial services sector;

b the merger of Adyoulike, a French technology platform leader in digital marketing, especially media monetisation, with Content Amp, an advertising technology company based in the UK; and

c the acquisition of Flink by Cajoo, two instant grocery services active in France.

The largest French tech public offer in 2021 was the initial public offering of OVHcloud on Euronext Paris, a cloud computing company offering virtual private servers, dedicated servers and other web services, for an enterprise value of €3.5 billion.

III LEGAL AND REGULATORY FRAMEWORK

i Overview

The general legal framework for any French share or asset tech deal is the French Commercial Code and the French Civil Code. In the context of any public takeover involving a tech target company that is either a French or a European Union (EU) public company whose securities are listed in France or a dual-listed company, rules governing public takeovers set out in the French Monetary and Financial Code and the General Regulation of the French Financial Markets Authority will apply.

The Commercial Code (Article L430-1 et seq.) also provides for French merger control rules applying to mergers (including tech M&A transactions) where they meet the relevant French merger control thresholds and have no EU dimension. Mergers with an EU dimension are instead subject to the review of the European Commission (as per Regulation 139/2004).

The European General Data Protection Regulation (GDPR) is now implemented under French law through Law No. 2018/493 of 20 June 2018 and Decree No. 2018/687 of 1 August 2018.

In the context of the French tech M&A transactions, the French Intellectual Property Code (IPC) provides the rules applicable to any intellectual and industrial property (IP) rights (see Section V).

ii Recent legal reforms

The PACTE Law, which entered into force on 23 May 2019, has facilitated squeeze-outs by reducing the threshold applying to all companies listed on Euronext and Euronext Growth from 95 to 90 per cent, aligning France with other major European markets such as the UK and Germany. Such reform should facilitate the completion of public-to-private transactions sponsored by private equity firms in France.

Regarding foreign investment control regulation, see Section I and Section IV.vi.

For more details about the DAC6 Directive, see Section IV.vi.

5 VC/M&A Tech Trends – France Q1-2022 – Avolta Partners, 2021 & VC/M&A Tech Trends – France D2-2022 – Avolta Partners, 2021.

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IV KEY TRANSACTIONAL ISSUES

i Company structures

The most common forms of French corporate entities involved in private tech transactions are the following:

a the joint-stock company (*société anonyme* (SA)) is an appropriate form for a public company and is mainly regulated by the Commercial Code;

b the simplified joint stock company (*société par actions simplifiée* (SAS)), which is the most common form for private companies, offering greater flexibility compared to the SA; and

c the private limited liability company (*société à responsabilité limitée* (SARL)), which is a very popular form among small and medium-sized firms.

ii Deal structures

Private tech M&A transactions

Share deals

Private tech deals are usually structured through a share deal. The main advantages of a share deal are that a buyer will acquire all the target company's assets, and there should be no need to obtain consent to assignments of contracts if there is no applicable change of control provision under the contracts entered into by the target company. However, and unless otherwise agreed by the parties, all the target company's liabilities will be transferred to the buyer. Thus, appropriate due diligence will have to be carried out by the buyer and, as the case may be, the seller's representations and warranties will have to be negotiated between the parties under the acquisition documentation.

Asset deals

Structures where a buyer acquires certain assets and liabilities of a target company or by way of the acquisition of a business as a going concern are less common. In an asset deal, most assets and liabilities are not transferred automatically. The asset purchase agreement, usually more complex than for a share deal, must include some compulsory statements set out in the Commercial Code, list precisely all the transferred assets and rights, and allocate the purchase price on a line-by-line basis. Creditors of the seller have also a 10-day opposition right under which they can file an opposition to the payment of the purchase price to the seller.

Public tech M&A transactions

Public tech M&A transactions are much more regulated. A bidder will have to appoint a presenting bank that will guarantee the bidder's undertakings and generally structure the transaction. Parties will also be subject to extensive disclosure duties: the presenting bank will have to file with the Financial Markets Authority an offer letter describing the terms and conditions of the offer, as well as a draft offer document (similar to a prospectus). The target company will be required to issue a note in response to an offer and the decision of its board to approve or disapprove the offer.

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Sale processes

Structuration

A sale of private companies by auction is very common in the French tech M&A market. In most cases, the seller would seek to promote competition between different bidders through a competitive auction process whose conduct is not subject to specific rules apart from the general good faith requirement in pre-contractual negotiations required by French law.[6]

With the assistance of a financial adviser, the seller will solicit offers from bidders by providing a short presentation about the target company (a teaser). After having signed a non-disclosure agreement and, as the case may be, a clean team agreement for antitrust-related issues, interested bidders will gain access to an information memorandum prepared by the financial adviser on the basis of which any interested buyer would provide a non-binding letter of interest. Selected bidders may also be granted access to confidential information with respect to the target company through a virtual data room and the target company's management through management presentations and possible site visits, to be in a position to make binding offers.

The timeline for achieving a transaction will vary depending on numerous circumstances, including the requirement to consult employee representative bodies of the target company and, as the case may be, of the other involved parties prior to the execution of any definitive acquisition agreement and, for smaller targets, the requirement to propose that employees make an offer for the business or company in the context of the sale. However, it takes usually three to six months to execute an acquisition agreement once the auction process has started.

Advisers' role within the sale processes

Even if it is more usual for parties' CEOs to initiate the preliminary contacts, parties are usually communicating through financial advisers or lawyers, especially in large tech M&A transactions. Contact through counsel may enable parties to structure the deal at an early stage of negotiations. Using channels of communication between legal counsel also helps to maintain the confidentiality of the discussions between the parties. Legal privilege does not exist in France for in-house lawyers, and the protection of correspondence can only be guaranteed by virtue of lawyers' professional secrecy rules under which lawyers are required to keep communications with other lawyers confidential.

iii Acquisition agreement terms

Usual structures

After the buyer's issuance of a non-binding letter of interest, parties usually start negotiating a definitive long-form acquisition agreement that is typically a share purchase agreement tailored to the specific circumstances of the tech M&A transaction in question. Where a transaction is structured through an asset deal that is quite uncommon in the French tech M&A market, the asset purchase agreement would comply with a more complex framework (see Section IV.ii). Under French law no share purchase agreement can be executed until the employees' representatives' bodies' information and consultation process of the target company and, as the case may be, of the other involved parties, have been completed (see

6 Article 1104 of the French Civil Code.

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Section IV.ii). Thus, there is a common practice in the French tech M&A market to secure the terms of transactions through the put-option agreement with the draft share purchase agreement (in agreed form) attached thereto.

Main terms of the share purchase agreement

Purchase price

The locked-box structure is very often used in the context of an auction process. Otherwise, the purchase price is usually determined with potential adjustment mechanisms with respect to net debt and working capital based on actual closing accounts. Cash remains the most common form of consideration, and it is very rare to see shares used as a means of payment for a private tech M&A transaction. A decision to provide earn-outs, deposits and escrows is made on a case-by-case basis and will depend on the circumstances of each transaction. However, in the context of the current covid-19 pandemic crisis, parties might use earn-out mechanisms more frequently.

Parties' covenants

Share purchase agreements will generally include a series of covenants applicable between signing and closing. Some of these are affirmative in nature (the seller is required to take the identified actions), but most of them are negative in nature (prohibitions on taking certain actions, even if they would normally have been in the ordinary course of the target company's business).

Conditions precedent

French tech M&A transactions are generally subject to conditions precedent with respect to the merger control regulations and the foreign investment control regulations (see Section IV.vi). The buyer may also decide, in particular in the context of the current covid-19 pandemic crisis, to introduce the concept of the absence of material adverse change in a target company's business between signing and closing.

Closing deliveries

The tech buyer may insist on certain closing deliveries, including the following items:

a obtaining consent that may be required from third parties (such as licensers or customers) under key contracts that may be terminable, or subject to renegotiation, if the seller fails to obtain a counterparty's approval of a change of control of the target company; and

b the execution of non-compete and non-solicitation agreements by the most significant shareholders.

Seller's representations and warranties

Under French law, the seller's representations and warranties (R&W) are usually included in the share purchase agreement with the disclosure schedules attached to it. It is customary for the seller to give R&W and less frequently specific indemnities. The seller's R&W are split into two main categories – fundamental R&W and business R&W – with different conditions for indemnification. The minimum fundamental R&W include the following items:

a the authority and capacity of the seller;

b valid title and absence of encumbrance on the shares;

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c the validity of issued and fully paid-up shares; and
d the scope of the transaction.

In the context of a tech M&A transaction, IP R&W are among the most significant seller's business R&W: the buyer will want to get comfort from the seller that the target company is the sole and exclusive owner of each item of IP purported to be owned by it, and that such IP is not subject to any encumbrances or limitations that unduly restrict the target company's ability to develop such IP or give third parties rights to such IP.

The seller's liability will depend on the type of R&W. Fundamental R&W are often carved out from any limitations other than the seller's aggregate liability cap that is, in most cases, the purchase price, whereas business R&W are typically subject to:

a deductible or tipping baskets;
b *de minimis* deductible, specific conditions regarding the calculation of claims (net of taxes or insurance proceeds);
c limited survival periods (18 to 24 months, with specific adjustments for tax or labour law R&W to follow the applicable legal statute of limitations); and
d a specific liability cap (typically 15 per cent or less of the purchase price).

R&W insurance policies

The practice of subscribing to insurance policies against R&W claims has been rapidly developing in France during recent years and is becoming a more common practice on the French tech M&A market. Such mechanism was initially developed by private equity funds that, in principle, do not grant R&W other than the fundamental R&W.

iv Financing

Tech M&A transactions are usually financed with a mix of debt and equity when the buyer does not purchase the target company with the use of its own cash or treasury.

Debt financing

The tech buyer uses different types of debt financing structures to finance its acquisitions, from single facility loan agreements to more complex financing structures with several tranches of debt. Lenders may be either banks or private debt funds. To get further comfort on this matter, the seller will usually require from the buyer a duly executed debt facilities agreement or binding financing term sheets before executing any definitive acquisition documentation. In addition, if the buyer has minimal financial substance (i.e., a special purpose vehicle), the seller may also seek guarantees from directly enforceable equity commitment letters issued by the main special purpose vehicle's direct or indirect shareholders, or both, to cover the equity financing.

More than one of every two deals in the French tech M&A market uses unitranche debt financing and, according to the Aether FS index[7], the use of unitranche debt financing rose by 50 per cent between 2020 and 2021.

7 Indice Aether FS Unitrance France - Bilan 2021, Aether Financial Services.

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Equity financing

In many tech M&A transactions, equity financing comes from private equity funds or private shareholders. If the equity financing is structured through the capital markets, an issue of shares, under French law, is generally structured either as an offer to the public or as a private placement (if shares are offered to qualified investors or fewer than 150 investors, or if the aggregate principal amount per investor is at least €100,000). Each structure follows a different legal framework. Under French corporate law, shareholders' consent is generally required to authorise corporate officers or, as the case may be, the board of directors to proceed with any share capital increase. If the offering qualifies as a public offering, the issuer must prepare a prospectus containing all information enabling investors to assess the issuer's assets and liabilities, financial position, profit and losses and prospects, and have it approved by the Financial Markets Authority. If the offering is structured as a private placement, no prospectus is required.

v Tax and accounting

Registration duties

If the buyer realises a share deal, the acquisition is subject to registration duties at a rate of 0.1 per cent if the company whose shares are bought is an SA or an SAS. Such rate is 3 per cent when the acquired company is a SARL. If the buyer realises an asset deal, the purchase of know-how or patents may benefit from a reduction of registration duties (fixed rate of €125 instead of a percentage of the value). If the buyer purchases a going concern, such transaction may be subject to more significant registration duties (marginal rate of 5 per cent).

Capital gains

A disposal results in capital gains that are taxable in France for the seller, whether under an asset deal or a share deal.[8] As regards capital gains realised upon the disposal of shares, they are taxed in the hands of individuals at an overall tax rate of 30 per cent (12.8 per cent of personal income tax and 17.2 per cent of social contributions) where the seller is a French individual. If the seller is a French entity subject to corporate income tax (CIT), and provided that some specific conditions are met (e.g., the seller has been holding the shares for a continuous two-year period and has been holding more than 5 per cent of the share capital of the sold company), only 12 per cent of the capital gain is included in its taxable basis and is taxed at the ordinary rate of 25 per cent (for financial years beginning on or after 1 January 2022).

Carry-forward of losses

Technology companies may incur many expenses or losses before being profitable (e.g., research and development (R&D) expenses). In this context, the possibility to use the losses of the acquired company is a strategic issue for the buyer. In France, losses can be carried forward for an unlimited time, but their utilisation is subject to a yearly amount of €1 million increased by 50 per cent of the taxable annual result exceeding €1 million.

8 The disposal can also trigger taxable capital gains in the state of the source. However, double tax treaties generally provide for the sole taxation in the state of residence.

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Accounting and valuation standards

According to the French generally accepted accounting principles, IP rights are in principle recorded, for accounting purposes, at their acquisition cost[9] in the balance sheet of the buyer. However, the valuation of IP rights can be highly uncertain, which, in the event of a tax audit, can trigger adverse tax risks on stakeholders to intra-group transactions (see Section IV.vi). In any event, IP rights will benefit from a quick depreciation (e.g., generally over a five-year period depending on the asset) to take into account the acceleration of technological changes.

Structuring of the management package within private equity transactions involving French tech companies

In three decisions on 13 July 2021, the French Administrative Supreme Court (*Conseil d'Etat*) ruled on the tax treatment of gains realised by managers in relation to non-statutory share subscription warrants and share purchase options acquired by such managers in the context of a management package, and has followed the position held by the French Supreme Court (*Cour de cassation*), competent in social security matters. In this respect, such a gain is, in principle, taxable as ordinary employment income – and not as the French flat tax as any capital gain – if various indicators reveal that the acquisition of the instruments (warrants, options or shares) has linked to the management functions of the concerned managers. Those decisions of the French Administrative Supreme Court have a material impact on the structuring of the management package within private equity transactions involving French tech companies and have increased the use of statutory regimes.

vi Cross-border issues

Merger control regulation

Parties must check whether a transaction meets certain merger control thresholds, in particular European and French ones. Under French merger control laws, any tech M&A transaction resulting in a change of control and meeting the three following conditions is required to be filed with the French Competition Authority (ADLC) before being implemented:

a the gross worldwide turnover of all of the companies involved in the concentration exceeds €150 million;

b the gross total turnover generated individually in France by each of at least two of the companies involved in the concentration exceeds €50 million; and

c the transaction does not fall within the scope of the EU Merger Regulation.[10] There is no filing fee.

After long debates on how to reinforce merger control rules, in particular in relation to tech M&A transactions, after some companies have advocated that tech firms tend to acquire targets solely to discontinue their innovation projects and pre-empt future competition ('killer acquisitions'), the ADLC decided not to change French merger control rules. Instead, it has embraced the European Commission's new approach to referrals. In 2020, Margrethe Vestager, the Executive Vice President in charge of competition, announced that the EC would start reviewing transactions referred by national competition authorities, on the basis

9 The price of the IP is generally set upon an estimation of the future cash flows, but many methods are accepted by the French tax authorities.

10 Lower thresholds would apply in the French overseas departments.

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of a novel interpretation of Article 22 of the EU Merger Regulation, by mid-2021. France was the first one to send a referral request to the European Commission, in March 2021, even before the European Commission issued guidelines to explain the application of the new mechanism. While this first referral is not in the tech sector, it shows the willingness of the French ADLC to be active in this field, and tech M&A deals are identified as ideal candidates. This new referral mechanism will notably add significant delays to M&A deals, and companies will therefore have to factor this in when drafting conditions precedent.

Other important developments are to be expected soon at EU level that will impact France, including a revised approach to market definition in merger control cases.

Foreign investment control regulation

Except for specific statutory provisions that may be provided under a target company's by-laws, French law does not provide any particular restriction on the transfer of shares in a company, a business or assets, including in relation to foreign investors. Nonetheless, foreign investments occurring in sensitive business sectors in France may be subject to prior authorisation by the Ministry of Economy. This list of sensitive business sectors, which has been expanded several times – and even recently in spring 2020 during the current covid-19 pandemic crisis – now includes all activities related to electronic and IT systems that are required for the performance of police or customs duties, activities related to cybersecurity, artificial intelligence, robotics, additive manufacturing (3-D printing), semiconductors and quantum technologies and semiconductors, and activities related to data hosting.

To obtain prior authorisation, foreign investors must send, with no filing fee, a written request (including information on the investor, the target of the investment and the investment itself) to the Ministry of Economy, which in turn must reply within 30 business days. Regarding conditional approval, the Ministry of Economy may condition its authorisation for various reasons. In the absence of an answer from the Ministry of Economy, the foreign investment is deemed to be rejected.

To better anticipate the analysis of any contemplated investment by the relevant French authorities, the target company or the investor (with the prior approval of the target company) can also solely file a written preliminary request with the Ministry of Economy to determine whether such contemplated investment is subject to prior approval. The Ministry of Economy must reply within two months. The Ministry takes a rather broad approach and tends to consider many activities in the tech field as strategic.

Penalties for the failure to comply with the French foreign investment control regulation have been considerably strengthened by the PACTE Law. Now, the Ministry of Economy can impose three cumulative sanctions upon foreign investors: administrative sanctions (including injunctions), provisional measures (including suspending the exercise of the voting rights or restricting the distribution of dividends) and financial penalties proportional to the seriousness of the infringement committed.

Transfer pricing

When transactions are realised between associated companies, pricing is essential because the conditions of their transactions must not differ from those that would have been established between independent stakeholders. Thus, when the French tax authorities consider –

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especially in a cross-border transaction[11] – that the French company did not benefit from a sufficient allocation of profit, the French tax authorities are entitled to adjust the results of the French entity (applying the corresponding penalties). However, in the context of IP acquisitions, the question of pricing particularly arises, as IP rights are sometimes considered as hard-to-value intangibles (HTVI).

Withholding taxes

Where a French company owns IP rights and grants them as a licence to a company located abroad, the royalties might be taxed in the state where the licensee is established by way of a withholding tax.[12] In France, such royalties may benefit from the IP Box (see Section VII).

DAC6 Directive

According to Council Directive (EU) 2018/822 of 25 May 2018 recently transposed into French tax law, intermediaries involved in the implementation of cross-border operations may declare to the tax authorities operations that present some hallmarks (i.e., an indication of a potential risk of tax avoidance). Due to their nature, tech M&A transactions could be targeted by the DAC6 Directive. Indeed, the following hallmarks of the DAC6 Directive should be carefully considered in the context of the tech M&A transactions:

a C.4: arrangements that include transfers of assets and where there is a material difference in the amount being treated as payable in consideration for the assets in those jurisdictions involved; and

b E.2: arrangements involving a transfer of HTVI.

V IP PROTECTION

i IP protections and international IP conventions

IP rights available in France include copyright and neighbouring rights,[13] database rights,[14] industrial designs,[15] patents[16] and trademarks.[17] In addition, other distinctive signs such as domain names, trade names and company names are protected by unfair competition provisions and free ridings under tort law[18] when there is a likelihood of confusion with prior rights. Business secrets and know-how are also protected under Law No. 2018-670 of 30 July 2018.

France has also signed and ratified several international conventions relating to the protection of IP rights, including, inter alia, the Paris Convention for the Protection of Industrial Property of 20 March 1883 and the Trade-Related Aspects of Intellectual Property Rights Agreement of 15 April 1994.

11 Note that the risk inherent in a valuation of IP also applies in national operations through the prism of an irregular management action.

12 The rate can be reduced by double tax treaties.

13 Articles L111-1 et seq. and Articles L.211-1 et seq. of the IPC.

14 Article L112-3 and Articles L.341-1 et seq. of the IPC.

15 Articles L511-1 et seq. of the IPC.

16 Articles L611-1 et seq. of the IPC.

17 Articles L711-1 et seq. of the IPC.

18 Article 1240 of the French Civil Code.

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ii Recent cases and rulings affecting the ownership or validity of IP rights

There are no recent rulings that affect the ownership or validity of IP rights. Nevertheless, Law No. 2019-486 of 22 May 2019 has stated new provisions that may affect their management and validity. Actions relating to the invalidity and revocation of trademarks have been transferred to the jurisdiction of the French Intellectual Property Office (INPI), where it was previously within the jurisdiction of the French courts. The number of actions relating to invalidity and revocation of trademarks could increase, as litigating before the INPI is cheaper than before the courts.

iii IP specificity attached to tech M&A transactions

Tech M&A transactions differ from general M&A transactions in that their financial value depends on IP rights held by a target company and on the know-how held by key employees. It is important to ensure that the target company owns all the IP rights used in its business. Therefore, the following should be checked:

a the ownership of the IP rights: some IP rights created by employees are not automatically transferred to the target company (see Section VI);
b IP rights filings: it should be ascertained that the IP rights created are well-protected by a regular filing, when such filing is available; and
c the measures taken by the target company to preserve its know-how.

VI EMPLOYMENT ISSUES

i Employee non-competition agreements

Under French employment law, any employee shall comply with a non-compete obligation during the performance of his or her employment contract. After the term of his or her employment contract, the employee shall remain loyal to his or her former employer but will not be bound by any non-compete obligation, unless otherwise provided under the employment contract. To be valid under French employment law, any non-compete clause must be justified by the legitimate interests of the company, be limited in time and place, and provide for financial compensation.[19] Some collective bargaining agreements also have these requirements, including, for example, the level of any financial compensation and the duration of the clause. Should the non-compete be invalidated by a judge, the relevant employee is free to work for any competing company and is also entitled to damages for any losses suffered.

ii Creations of employees

In the event of creations of employees, all IP rights are not automatically transferred to the employer.

19 French Supreme Court, Employment Law Chamber, 10 July 2002, No. 00-45.135.

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Copyright

As a matter of principle, copyright created by employees is not automatically transferred to their employer.[20] An assignment agreement must be signed with the employee. As an exception, copyright is automatically transferred to the employer for the following employee creations: software and their documentation,[21] journalistic works[22] and collective works (i.e., design creations, databases).[23]

Patents[24]

Inventions made by an employee during the performance of an employment contract with an inventive mission belong to the employer subject to the employer paying an additional remuneration. Inventions made by an employee during the performance of his or her functions, or in the field of activity of the company or by reason of knowledge or use of technologies or specific means of the company or of data acquired by the company, shall belong to the employer subject to the payment of a fair price. All other inventions made by the employee belong to the employee.

VII DATA PROTECTION

Personal data is protected under the GDPR. Under such laws, personal data, including employee personal data, may only be shared provided certain steps are implemented, including that data subjects are informed of the sharing, and if they have consented to it; and data shared is limited to what is necessary for a transaction.

The disclosure step of any tech M&A transaction needs to be carefully anticipated, especially in light of the GDPR. Indeed, the opening of a data room may be considered in itself a processing and transfer of personal data (very frequently the case given the scope of what constitutes personal data). Thus, all implicated parties will have to make sure that their involvement in this disclosure process complies with the GDPR, including obtaining the prior approval of the individuals whose data is concerned before disclosing it. A way to avoid such issue is to redact all the personal data contained in the disclosed documents, although this process may be lengthy and costly.

VIII SUBSIDIES

i R&D tax credit

Provided that certain conditions are met, a tax credit equal to 30 per cent of research expenditure up to €100 million and 5 per cent of research expenditure exceeding €100 million can be granted to technology companies.

20 Article L111-1 of the IPC.
21 Article L113-9 of the IPC.
22 Article L132-36 of the IPC.
23 Article L113-5 of the IPC.
24 Article L611-7 of the IPC.

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ii Other tax credits

Other special tax credits benefit investors in technology companies, depending on the particular sector, such as the video game tax credit, which is set at 30 per cent of expenses, up to €6 million per year.

iii IP Box

Provided that certain conditions are met, the net result of the disposal (capital gains), concession (royalties) or sub-concession (royalties) of IP rights may be subject to CIT at a reduced rate of 10 per cent.

IX DUE DILIGENCE

In addition to the usual issues covered by any M&A buyer in the context of its due diligence work, tech M&A buyers will carefully review certain specific issues attached to the nature of the target company's business:

a a review of the target company's rights portfolio: the trademark, patent and design portfolio owned by the target company, and the identification of pledges or other securities;
b a review of whether elements retained by third parties have been assigned to the target company;
c a review of licence agreements to identify third-party rights used by the target company;
d a check of whether third parties may claim rights to the target company's IP assets;
e a check of whether the software created by the target company integrates open-source elements, and whether the target company complies with the applicable open source licences;
f a check of the licence agreements granted by the target company to its clients to verify, among other things, the guarantees granted, the obligations undertaken and if a change of control clause has been provided for; and
g a check of the existence of litigation or pre-litigation relating to the use of IP rights.

The recent extension of the scope of French regulation on foreign investments to strategic R&D activities may also have a strong impact on the due diligence process in the context of tech M&A transactions, requiring particular attention to identifying potential sensitive activities conducted by tech target companies, which would require prior foreign investment approval from the Ministry of Economy.

X DISPUTE RESOLUTION

In the context of a tech M&A transaction, parties generally agree to defer the resolution of any disputes in connection with the acquisition agreement to the French courts. Depending on the identity of the parties, the Judicial Court (very rarely) or the Commercial Court (in most cases) will be the relevant courts for the judicial resolution of disputes. However, it may happen that certain buyers or sellers for various reasons may prefer to defer the resolution of any disputes to an exclusive confidential binding arbitration clause. Generally, such arbitration provides that any dispute will be finally settled under the Rules of Arbitration of the International Chamber of Commerce (with headquarters located in Paris) by one

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or several arbitrators appointed in accordance with the Rules. The parties may also provide under the acquisition agreement to negotiate in good faith for a determined period of time to try to resolve their differences amicably before turning to judicial resolution or arbitration.

Neither litigation nor arbitration related to M&A transactions (other than those relating to takeover bids) are common in France. Litigation generally occurs once private M&A transactions are completed, and usually concerns either earn-out provisions or warranty claims, mostly in private M&A.

XI OUTLOOK

i The end of the catch-up effect: French tech M&A transactions

The complications involved in the completion of M&A deals related to the covid-19 pandemic (e.g. additional due diligence, and inclusion or exclusion of pandemic-related effects into sellers' pre-closing covenants) are now quite common in the French tech M&A market.

After a real surge in the French tech M&A market in 2021, 2022 has seen the end of the catch-up effect with a certain decrease in the global value of the French tech M&A market owing to the global economic crisis (the inflation and the recession many economies are facing this year). However, French tech companies still benefited from a high deal volume and an increase in deal value during the past two quarters, and the French tech M&A market has experienced high demand throughout the value chain of infrastructure-enabling technologies.

ii Government support plan

In the context of the covid-19 pandemic, the French government had announced multiple measures to support French companies. Only a few are still active today, such as the possibility to delay tax payments or to be reimbursed of certain charges, but these schemes are reserved to companies that were affected by covid-related restrictions and suffered an important loss of turnover.

The French government plan to support technology companies is effective and consists of an investment fund managed by Bpifrance, the French sovereign fund, which helps cleantech companies to obtain better financing, with an increased envelope of €300 million (€150 million in 2020). Bpifrance also provides support and business advice to help with the maturation and incubation of technological start-ups: the French Tech Bridge, with a global envelope of €180 million, enables small start-ups to access to debt more easily by offering financing into the form of convertible bonds or bond with share warrants (OBSA) for up to 24 months. These measures boost the development of French technology companies, especially small and medium-sized French tech companies, which account for the vast majority of French tech companies.

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Appendix 1

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Olivier Deren is a partner in the corporate department of the Paris office of Paul Hastings. His practice focuses on private equity and on mergers and acquisitions. Recognised as a leading private equity lawyer in France by *Chambers Europe* (Band 1), Olivier Deren advises private equity funds and managers on their leveraged buyouts and capital development transactions as well as companies on their growth strategies or reorganisations.

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