THE ORGANISATION OF NEGOTIATIONS IN CORPORATE ACQUISITIONS

September 2024

Taking their cue from their Anglo-Saxon brethren, French lawyers in corporate acquisitions commonly propose contractual frameworks for negotiations. Often refered to by their English titles, Letters of intent (LOI), Heads of Agreement, Memoranda of Understanding (MOU), Term Sheets and Process Letters have varying scopes and disparate aims. Such negotiation agreements - let's call them that - if properly drafted, are not binding in terms of the acquisition itself, but they can set the tempo for the transaction process, introduce binding obligations and/or establish essential parameters of the transaction.

In contrast to the almost completely unfettered freedom to negotiate in Anglo-Saxon countries, articles 1104 and 1112 of the French Civil Code impose an obligation of good faith on parties to a negotiation. The freedom to enter into negotiations, to break off negotiations, to negotiate in parallel with a third party, although fundamental, is thus limited by the requirement to act in good faith, from which there can be no deviation. In such a legal context, one might question the need for preliminary agreements. In reality, however, such agreements prove very useful in the context of corporate acquisitions.

Set a *tempo*

The first objective of negotiation agreements may be to set the pace of negotiations, by envisaging their timetable, duration and stages, with the aim of reaching a (binding) purchase agreement within a specific - and if possible short - timeframe.

The principal phase to be completed, which will impact the entire timetable, consists of the potential buyer's due diligence reviews on the target company. The negotiation agreements generally define the scope, deadlines and conditions of such due diligence reviews. Frequently, the potential buyer also provides its own list of documentation that it wishes to review in order to define - or not – the terms of its proposal or offer.

Even more detailed is the framework of auction procedures applied by investment banks for competitive sales of companies (several candidates for the purchase of a company are kept in competition with the undisguised aim of obtaining the best terms for the seller). The auction procedure is then governed by one or more so-called Process Letters, which specify: (i) the opening and closing dates of the Electronic Data Room (VDR or EDR), in which documentation on the target company is made available to the authorized representatives of the bidders; (ii) the opening and closing dates of the question and answer session with/by the seller (Q&A); and (iii) the deadline for submitting a firm offer (together with the prescribed contents of such offer). This procedure, even if it is generally longer than in a one-on-one negotiation, maintains a clear sequence of steps and thus makes it possible to impose the same timetable on all potential buyers and generate comparable offers.

Admittedly, these timetables and stages are indicative and non-binding. The process letters issued by sellers (or their advisers) are very standard and take care to point out, using tried and tested language, that the sales process can be interrupted by the seller at any time without justification. Even though they are non-binding, process letters generally include a deadline for reaching a final agreement, making it quite easy for either party to throw in the towel without concern if the deadline has passed.

Imposing obligations in the negotiation process

Before even entering into the details of the transaction, negotiation agreements can also impose obligations over and above that of good faith. For example, it is not uncommon to find the following obligations or constraints, which parties consider useful:

- An **exclusivity undertaking** by a seller not to contact, negotiate and/or conclude an agreement with another buyer for the purchase of the company for the duration of the negotiations agreed between the parties. Such an obligation, which does not exist in the Civil Code, makes it more palatable for a potential buyer of a company to incur significant costs during the negotiation phase.
- A **confidentiality undertaking** by all parties (this is the principal purpose of Non-disclosure Agreements (NDAs). Although article 1112-2 of the French Civil Code stipulates that anyone who uses or discloses confidential information obtained during negotiations without authorization is liable, it does not define what confidential information is, nor does it impose confidentiality on the existence of the negotiations themselves, which are nonetheless essential in corporate takeover negotiations.
- The potential buyer which may during this period may have access to employees of the target company or the seller (or to information about them), may also undertake **not to poach and/or solicit** such employees.
- An **allocation of costs** incurred during the negotiation period (including break-up fees), which may vary depending on the nature of the costs (legal fees, travel expenses, etc.), the outcome of the negotiations and the party initiating the break-up.
- An **applicable law and jurisdiction** clause.

Of course, a party that does not act in good faith (for example, by abruptly breaking off advanced negotiations or leaving the impression that it wishes to reach an agreement, even though it has no intention of doing so) or that does not respect the specific obligations contained in the negotiation agreements may be sued by the other party for damages.

Agreeing parameters of a future transaction

Another aim of negotiating agreements is to draw the outlines of a future transaction. Such outlines remain simple bases for negotiation, subject to change in the light of the due diligence reviews and mutual concessions made by each party. Nevertheless, they allow parties to enter into serious negotiations on grounds which are broadly in line with their expectations.

As is usually the case in letters of intent, it may be sufficient to state:

- A price range or indicative price and payment terms,
- The possibility of an earn-out payment,
- Some characteristics of the seller's warranties and indemnities (generally, scope, ceiling, duration and security for the undertakings),
- The principal conditions of the acquisition: necessary conditions precedent (administrative approval) or desired conditions precedent (obtaining financing), conditions relating to the seller's ongoing support.

However, the parties can also go further and define the terms of future purchase agreements in more detail. The most suitable tool for this, and one that has been adopted in practice, is the Term Sheet, which summarizes briefly in table format the principal terms of the agreements that will be more precisely and legally formulated in the final agreements. If they are to remain simple negotiating agreements, it is essential to make it clear that they only reflect the parties' intentions at the time they are drawn up and that, in order to be binding, they must be incorporated into the final agreements.

Whatever the instrument used to frame the negotiations and whatever the objectives pursued, negotiation agreements will have to be drafted in such a way as to ensure the proper balance between freedom of negotiations on the one hand and the binding nature of certain important clauses and details of purchase terms on the other. Maintaining this balance in the careful drafting of these agreements will provide a sound basis for balanced and well-managed negotiations.

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