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AVOCATS À LA COUR

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M&A: NOTHING TO DECLARE?
The Scope of the Duty to Inform in the Pre-Contractual Phase (*obligation précontractuelle d'information*)

Getting to a deal: transaction dynamics

During a M&A transaction, identifying the risks likely to affect the target company and its projected return is a key issue in terms of valuation and allocation of liability between the parties.

On one side, the seller seeks to make and maximise their gain while being released from any liability relating to the assets and liabilities of the target. On the other side, the purchaser aims to identify and assess the risks involved. If they agree to bear future risks, they will generally expect the seller[1] to provide a warranty for past risks, although such warranty is usually limited—except in cases where the risk relates to the very substance of the transaction (e.g. existence of the shares or the assets transferred).

From the outset of discussions, the seller and their counsel will seek to limit—or even exclude—their liability in connection with the information provided and the termination of negotiations, by leveraging competitive pressure arising from parallel discussions with multiple prospective purchasers.

If the negotiations succeed, the sale and purchase agreement is entered into. Nothing must be overlooked by the parties and their counsel during the drafting and negotiation of the share purchase agreement, which is intended to determine the purchase price, terms and conditions, specific undertakings, and warranties. The share purchase agreement memorialises the deal and becomes the law of the parties so that one may think all prior communications become legally irrelevant.

Civil law as a limit to contractual freedom

There are, however, limits to what an agreement may encompass and set forth. In particular, by definition, the so-called pre-contractual phase falls outside the bounds of the agreement.

As a cornerstone to civil law, the general theory of lack of consent (mistake (*erreur*), fraud (*dol*), duress (*violence*)) may render an agreement null and void.

In 2016, this framework was further strengthened by the introduction of a positive duty to inform prior to entering into an agreement.

Article 1112-1 of the French Civil Code imposes on a party who *"knows information of decisive importance for the other party's consent"* the obligation to disclose such information where *"the other party is legitimately unaware of it or relies on its co-contractor."* The article further provides that this duty may not be excluded or limited by mutual consent of the parties, and that a breach thereof may lead to annulment of the agreement if it constitutes an irregularity of consent.

First case law defining the scope of the duty to inform in the pre-contractual phase

Case law relating to Article 1112-1 of the French Civil Code remains scarce. Two recent court decisions[2] provide useful clarification of the scope of the duty to inform in the context of an M&A transaction, specifically regarding financial information.

[1] or a third party, such as an insurance company.
[2] *CA Paris*, 14 Sept. 2023, n°21/22491, SAS Havea group vs SARL Azimut: JurisData n°2023-018207; *Cass. Com.*, 26 Feb. 2025, n°23-18.119, F-D.

In both cases, the courts assessed whether a breach of the duty to inform in the pre-contractual phase (*obligation précontractuelle d'information*) had occurred by conducting a detailed review of all exchanges leading up to the entry into the share purchase agreement. Judges scrutinized the virtual data room, questions & answers (Q&A) correspondence, letters of intent, and binding offers.

➢ *All pre-contractual documentation and exchanges may be taken into account in post-closing litigation, even where the share purchase agreement states that it supersedes all prior agreements. The mandatory nature of the duty to inform renders ineffective any contractual clause whereby a party declares having received sufficient information. The burden of proof lies with the seller to evidence compliance with this duty.*

➢ *An item of information may be deemed decisive even if it is not mentioned in the share purchase agreement. It is therefore essential for the seller to identify any potentially decisive information disclosed in the documents he receives and to ensure that such information is addressed in a manner that is clear, comprehensive, and traceable[3].*

In the first case[4], 3I, the purchaser—a private equity fund—claimed that the seller had failed to disclose changes in accounting practices that impacted the target group's normalised consolidated EBITDA[5]. Non-recurring items[6] had been included in interim accounts that were used to project the 2016 year-end EBITDA for valuation purposes[7]. The purchaser sought EUR 34 million in damages based on fraud (*dol*) and breach of the duty to inform during the pre-contractual phase but did not seek annulment of the share purchase agreement as it had already sold its holding in the target group.

The court held that the seller had breached its duty to inform during the pre-contractual phase, noting that the purchaser's letter of intent and binding offer had expressly identified EBITDA determination as a key element. The court considered that the seller, who was aware of changes in accounting practices, should have explicitly drawn the purchaser's attention to them. The seller's mere provision of the relevant financial statements was deemed insufficient. Nevertheless, the court awarded only EUR 616,000 in damages—significantly less than the EUR 34 million claimed.

➢ *Any exceptional event or deviation from target's historical practices must be disclosed in a clear, precise, and unambiguous manner.*

In the second case[8], negotiations were terminated due to a disagreement over the depreciation rate of doubtful receivables. The prospective purchaser, who was advised by KPMG during its due diligence, challenged the rate applied in target's certified financial statements.

➢ *To exclude any breach of the pre-contractual duty to inform, the French Supreme Court (Cour de Cassation) found that the method used to calculate the depreciation rate had not changed, and it underlined the sellers' transparency during pre-contractual exchanges. Therefore, a mere difference in interpretation may not, in and as of itself, constitute a breach of the duty to inform in the pre-contractual phase and justify damages.*

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[3] However, it should be noted that a recent court ruling (Cass. Com., 14 May 2025, n°23-17-948) confirmed that the buyer bears the burden of proving the decisive nature of the information.

[4] *CA Paris*, 14 Sept. 2023, n°21/22491, SAS Havea group vs SARL Azimut: JurisData n°2023-018207.

[5] *Earnings Before Interest*, *Taxes*, *Depreciation*, and *Amortization*, i.e., profit before deduction of interest, taxes, depreciation and amortization. It is a financial measure calculated at group level intended to reflect recurring operating profitability, excluding exceptional items or non-recurring elements unrelated to the core business activity.

[6] The target had notably (i) reversed provisions relating to three financial years, whereas under its previous practice such provisions were reversed on a year-by-year basis with a ten-year lag, (ii) allocated the territorial economic contribution to the holding company instead of apportioning it among the group entities, and (iii) included an exceptional tax relief without recording it as non-recurring income.

[7] In its firm and binding offer, 3i set the enterprise value of the target at €310 million. This valuation was based on the projected normalised consolidated EBITDA as at year-end 2016 of €23.2 million, applying a multiple of 13.4.

[8] *Cass. Com.*, 26 Feb. 2025, n°23-18.119, F-D.

Sell-side takeaway: a delicate balancing act

Sellers naturally seek to present the target in the best possible light to raise interest and maximise valuation. Such positioning, during pre-contractual negotiations, is acceptable as long as it remains sincere and based on verifiable, objective facts.

However, as the first case shows, the pre-contractual duty to inform (*obligation précontractuelle d'information*) now requires sellers to exercise increased caution regarding any element likely to influence the purchaser's consent. The judges noted that the change in accounting practices resulted from a positive act of the seller that ought to have been explicitly disclosed. The mere communication of financial statements was deemed insufficient, considering the impact on target's valuation.

> ➢ *This ruling illustrates the imperative for sellers to adopt a transparent and proactive approach—while still highlighting the strengths of the target—requiring a subtle balance between negotiation strategy and pre-contractual transparency.*

Buy-side takeaway: a mixed remedy

The duty to inform during the pre-contractual phase may serve as an alternative legal ground for a disgruntled buyer—particularly where key information, although technically available, was not clearly brought to their attention, and where standard contractual remedies are inadequate.

However, the practical scope of this legal ground should be nuanced, as the remedy —civil liability entitling to damages—is far from a challenge to the validity of the contract or a material reduction in the purchase price. The contract may be declared null and void if fraud (*dol*) is established, subject to evidence of manoeuvres or lies[9]. Damages are assessed based on the purchaser's loss of opportunity to negotiate a more favourable purchase price. To compute the amount of this loss, the court applied the following method:

- determination of the amount by which the purchase price could have been reduced in the absence of the breach of the duty to inform during the pre-contractual phase;
- assessment of the likelihood of success of such renegotiation; and
- multiplication of these two elements to determine the amount of compensation.

In the 3I case, the Court of Appeals awarded the purchaser EUR 616,000—only 2% of the amount claimed.

According to the Court, this conservative approach is justified by the sellers' reluctance to any reduction of the price as highlighted in the pre-contractual documents, and the purchaser's longstanding intention—expressed over thirteen years—to acquire control of the target.

> ➢ *Establishing a floor valuation in pre-contractual documents (e.g. LOI, binding offer, Q&A) may serve as a protective tool for sellers, limiting price negotiation and exposure to damages.*

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[9] *Cass. 1ère civ*. 20 Dec. 2023, n°22-18.928; *CA Versailles*, 6 Jan. 2022 n°20/00380; *CA Poitiers*, 20 June 2023 n°21/03401.