FRANKLIN
ATTORNEYS AT LAW

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Corporate Finance

EDITORIAL

From time to time Franklin issues corporate law bulletins on aspects of French business law that may be of interest to our clients and colleagues.

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On October 22, 2010, the French Parliament passed a new law on banking and financial regulation (*loi no. 2010-1249 de régulation bancaire et financière*) in response to the financial, economic and political crisis that broke out in the first half of 2007. This crisis has prompted France to strengthen the regulations for its financial systems and markets. In this issue, we outline some of the most significant changes introduced by the law, which will impact financial markets and stakeholders.

We also cover other reforms and recent case law that will impact corporate governance in French companies, whether listed or not.

Law on Banking and Financial Regulation

Significant increase in the AMF's powers

The law on banking and financial regulation has considerably increased the powers of the French stock market regulator (*Autorité des marchés financiers - "AMF"*), primarily by introducing more dissuasive monetary penalties and an administrative settlement procedure.

- Sterner monetary penalties

The maximum monetary penalties that the AMF may impose have been increased tenfold. Professionals and entities that are regulated and controlled by the AMF, and other individuals or legal entities that engage or attempt to engage in illegal market practices, may now face fines of up to €100 million instead of €10 million, as was the case previously. The maximum amount of the penalties that can be assessed against individuals who act under the authority or on behalf of a professional controlled by the AMF has been raised from €1.5 million to €15 million.

Public disclosure of these penalties, which used to be at the discretion of the AMF, is now mandatory, unless the disclosure is likely to cause serious stock market disruption or is disproportionately detrimental to the parties concerned.

- Settlement procedure

A settlement procedure (*composition administrative*), which can only be initiated by the AMF board (*collège*), is now available for only non-material breaches of professional duties committed by financial intermediaries, which rules out illegal practices such as insider trading, spreading false information and market manipulation.

The purpose of this procedure is to reach a settlement that is first submitted to the AMF board (*collège*) then, if validated, to the enforcement committee (*commission des sanctions*) for ratification. Once ratified by the enforcement committee, the settlement agreement is made public.

Decisions by the AMF board and enforcement committee can be appealed.

This settlement procedure will be available after publication of a decree.

Amended rules for mandatory public takeover bids

The main changes introduced by the law on mandatory takeover bids include: a lower threshold for mandatory public takeover bids, additional types of securities that are taken into account when determining whether this threshold has been reached and an amended definition of "acting in concert" ("*action de concert*"). The new provisions concern both regulated and organized markets.

- Lowered threshold for mandatory public takeover bids on Eurolist

On Eurolist, the threshold that triggers the obligation to launch a public takeover bid has been lowered from 33.33% to 30% of the target company's share capital or voting rights (on Alternext this threshold is 50%).

- New definition of a "fair price" ("*prix équitable*")

Previously, the price proposed by a bidder in a mandatory takeover bid had to be at least equal to the highest price paid by said bidder in the 12 months prior to the bid filing date. This date has now been replaced with the date on which the obligation to launch the bid was triggered. Moreover "price at least equivalent to" has been replaced by "price at least equal to".

- New definition of "parties acting in concert"

The concept of "acting in concert", which is used in determining the ownership interest held by several investors who are required to be treated as a group, has been amended to include situations where investors have entered into an agreement with a view to taking control of an issuer. Following the Eiffage vs. Sacyr (Paris Court of Appeals, April 2, 2008) and the Gecina (Court of Cassation – France's highest appellate court – October 27, 2009) cases, the law has broadened the definition of "acting in concert" to include agreements that provide for a common policy, as well as agreements to gain control of a company.

- Extension of the public buyout offer regime to Alternext

Prior to the new law, a shareholder who held at least 95% of the voting rights of an Alternext-listed company could only launch a public takeover bid (*offre publique de rachat*) and apply for delisting without any legal means to force minority shareholders to sell their shares. The new law extends the procedures used on Eurolist to Alternext for public buyout offers and squeeze-outs (*offre publique de retrait et retrait obligatoire*). The terms and conditions of these procedures are detailed in the AMF General Regulations.

Elimination of the standing market offer (SMO) procedure on Eurolist and Alternext

Under the standing market offer procedure (*procédure de garantie de cours*) the purchaser (acting alone or in concert) of a block of shares that conferred a majority interest in the share capital or voting rights of a listed company was required to offer to acquire, through the SMO, all the securities tendered in a period of at least 10 trading days, at the price at which the block of shares was sold.

The elimination of this procedure from Eurolist and Alternext was predictable since it was unanimously regarded as obsolete. On Alternext, the SMO will be replaced by the procedure for mandatory public takeover bids (the trigger threshold is the direct or indirect ownership of more than 50% of the target company's share capital or voting rights).

Bankruptcy law: French legislator inspired by US "Prepack"

As from March 1, 2011, French companies that are unable to pay their financial debts and have successfully pre-negotiated a restructuring plan with the vast majority – but not all – of their institutional lenders, with the help of a court appointed conciliator (*conciliateur*) will be eligible to file for fast-track prepackaged bankruptcy (*sauvegarde financière accélérée - SFA*).

Under this new bankruptcy procedure, introduced by the law on banking and financial regulation, debtors will submit their restructuring plan to the bankruptcy court. If the institutional lenders that hold more than two-thirds of a debtor's total financial debts approve the plan within a maximum period of two months, the bankruptcy court will confirm the plan, which will become enforceable against all financial creditors, including those that voted against it.

The SFA is designed to have a relatively narrow scope, as it will be available only to companies that have either more than 150 employees on the filing date or revenues in excess of €20 million at the close of the past financial year. Only financial indebtedness is eligible for the SFA. It is more than likely that the SFA is aimed at holding companies with a complex debt structure that were set up as part of LBO financings.

Practitioners hope that the SFA will not be a mere theoretical addition to the bankruptcy toolbox, but rather an effective method of persuading reluctant minority institutional lenders to negotiate during the pre-bankruptcy conciliation stage and think twice before rejecting a restructuring plan that is otherwise approved by the majority of lenders. If this goal is achieved, the SFA should in fact lead to fewer bankruptcy filings.

Women's representation in governing bodies of French companies

A private members' bill to promote a balanced representation of women and men on boards of directors and supervisory boards, and gender equality in the workplace (*Proposition de loi n°592 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle*) was adopted by the French National Assembly on January 13, 2011 and published in the *Journal Officiel* on January 28, 2011.

The main purpose of the law, inspired by Norwegian policies, is for at least 40% of the directors to be women on single-tier/management boards and supervisory boards in companies that are listed on a regulated market (Euronext) and in companies with more than 500 employees and net revenues or total assets of at least €50 million over three successive years. Where the board of directors or supervisory board is composed of no more than eight members, one gender may not outnumber the other by more than 5 to 3.

At present, around 13% of board members in the largest French listed companies are women (on the basis of a sample of 30 companies; cf. AMF Recommendation no. 2010-15 dated December 7, 2010).

These new rules will come into force six years after the enactment of the law (January 1, 2017). However, two intermediate milestones have been scheduled for companies listed on a regulated market:

- (i) they are required to have at least 20% of female directors on their boards after the first ordinary shareholders' meeting held after January 1, 2014;
- (ii) companies where only one gender was represented in the boardroom at the time the law was enacted (January 28, 2011) must have at least one member of the other gender appointed (in practice, at least one female director) at the next ordinary shareholders' meeting convened for that purpose.

The standing representatives of legal entities that are appointed as board members will be taken into account in determining compliance with these requirements.

All board of directors or supervisory board appointments that are made in breach of the law will be null and void.

Payment of directors' fees to board members will be suspended until the 40% requirement is met.

Changes to the conditions for exercising shareholder rights

French law no. 2010-1511 of December 9, 2010, which came into force on January 1, 2011 and transposed EU Directive 2007/36/EC of July 11, 2007, aims mostly at facilitating the effective participation in general shareholders' meetings of listed companies by those shareholders who do not reside in the Member State where the meeting is held. The most significant changes to the French Commercial Code that result from this new law are as follows:

i. Proxy voting

Before the new law came into force, shareholders could only be represented at shareholders' meetings by another shareholder or their spouse. Now, any individual or entity can represent shareholders of listed companies, provided the proxy is given in writing and notified to the company (Article L.225-106 of the French Commercial Code).

However, anyone who actively solicits proxies from shareholders is now required to disclose their voting policy publicly (Article L.225-106-2 of the French Commercial Code). Also, all proxy holders are now under a duty to inform the relevant shareholders of any potential conflict of interest.

ii. Shareholder agenda items

Shareholders who hold at least 5% of the outstanding stock of companies with share capital of €750,000 or less (lower thresholds apply if the share capital exceeds €750,000), whether listed or not, may submit a substantiated request for additional agenda items. This is now possible, even if the proposed resolutions associated with the additional agenda items are not submitted to the shareholders' meeting for consideration (Articles L.225-105 and R.225-71 of the French Commercial Code).

iii. Written questions submitted by shareholders

Article L.225-108 of the French Commercial Code already allowed shareholders to submit written questions to the board in advance of a general meeting. The board is now allowed to provide a blanket answer to questions that have the same content. This answer can now take the form of a post on the dedicated section of the company's website.

EVENT
To celebrate its 10th anniversary (2000-2010), Franklin organized a private viewing of works by Claude Monet at the Grand Palais National Gallery in Paris.
More than 700 guests attended.

CEO's power to represent a French SAS

There are no statutory or regulatory provisions that define the scope of the powers conferred on the officers of a French SAS, other than the President. It is therefore up to the shareholders to define these powers (Article L.227-5 of the French Commercial Code).

In a ruling dated December 14, 2010, the Commercial Division of the Court of Cassation reaffirmed that precision is required when writing provisions that authorize chief executive officers (*directeurs généraux*) to represent the company.

The President is the only legally recognized representative of an SAS. Article L227-6 of the French Commercial Code provides that the shareholders may grant the CEO the same powers as the President, however the ruling of the Court of Cassation makes it clear that these powers will only be enforceable against third parties if they are clearly reflected in the company's by-laws and if these by-laws are correctly filed with the clerk of the Commercial Court. In the case in question, the Court of Cassation dismissed the claim filed by a CEO on behalf of an SAS on the grounds that, even though the shareholders had granted to the CEO the same powers as the President when they appointed him, they had failed to amend the by-laws accordingly. The Court therefore ruled that the CEO did not have authority to act on behalf of the company in dealings with third parties.

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