LOI PACTE

DECODED

GIDE

GIDE LOYRETTE NOUEL

CONTENTS

EDITORIAL

Xavier de Kergommeaux and Stéphane Puel

Law 2019-486 of 22 May 2019 on the growth and transformation of companies in France ("**Loi Pacte**") contains an Action Plan for the growth and transformation of businesses, the promise of a new pact between the French legislator and companies. Standing as a great economic law of President Macron's current five-year term, covering over 200 articles and 400 pages thick, the *Loi Pacte* promises from the outset to be an important source for business law in France. Its ambitions are high: transforming the place of companies in society by taking greater account of social and environmental issues, facilitating the sharing of value between shareholders and employees, strengthening ethics and parity in governance, making France the leader in crypto-assets, encouraging the financing of companies and, in the event of failure, their recovery... These are just some of the markers of France's new *Loi Pacte*.

Gide had a duty to quickly and thoroughly delve into this text, to decipher it for the community of economic players, legal practitioners at large and students alike. Such is the purpose of this Booklet, drafted under the supervision of Gide's Scientific Council. In the following pages, all interested parties will be able to read contributions on several major changes wrought by the *Loi Pacte*, organised into three main pillars: simplifying corporate life; changing the place of businesses in society; simplifying the financing and restructuring of companies.

We hope you will find it useful. Happy reading.

Pillar 1: simplifying corporate life

The first pillar of the Loi Pacte is that of simplifying corporate life.

To this end, the legislator intends to simplify administrative formalities for companies by, for instance, creating an online one-stop shop, relaxing the thresholds for appointing an auditor and staffing levels, and by introducing a new delegation of power and competence for mergers, divisions and partial contributions of assets.

Better protection of industrial property rights is also being considered through a reform of utility certificates, patents and the time limitation of invalidity actions.

SIMPLIFYING ADMINISTRATIVE RED TAPE FOR COMPANIES

Edmond Schlumberger

It is well known that the public authorities' recurrent and commendable objective is to reduce administrative burdens on businesses and promote the use of new technologies in order to reduce costs. Two provisions of the *Loi Pacte* are of particular note in this respect: one concerns the creation of an online one-stop shop to replace the current business administrative centres ("Centres de formalités des entreprises", or CFE) (1), while the other concerns the establishment of a sole paperless register to replace the various registers and records currently in existence (2).

1 The online one-stop shop

CFEs were created by a decree dated 18 March 1981, before the legislator strengthened their role through Art. 2 of Law no. 94-126 dated 11 February 1994 on initiative and individual enterprise. Under this system, any company could declare its establishment, changes to its situation and the cessation of its activity by submitting a single file to the CFE containing the various declarations required by the various bodies and administrations in accordance with its legal obligations. In other words, these centres already allowed companies to register all declarations, by post or online, (i) in a single place, and (ii) by means of a single document.

While the task of companies is therefore already simplified, the current organisation of CFEs is mired by a certain complexity, insofar as they are grouped into seven distinct networks, depending on the activity concerned, including chambers of commerce and industry, the registries of commercial courts and the French social security agency, URSSAF. This results in sometimes diverse practices and a poor understanding of the system for users. In addition, although currently underway, paperless options are still few and far between.

It is to remedy these ills that Article 1 of the *Loi Pacte* kills two birds with one stone, by organising the gradual abolition of these networks in favour of a single electronic portal. In concrete terms, companies will still be able to file a single application with a single body, the novelty being that this body is unique regardless of the nature and the location of the business, and the application is to be filed solely online.

It should simply be noted that the date of entry into force of this system will be established by decree at the latest on 1 January 2023, it being specified that the single filing body must be operational as from 1 January 2021, so that there will be a transitional period during which companies will be able to choose between this single body and the current CFEs to file their applications.

2 The paperless corporate register

With regard to registers, things appear simpler insofar as the trade and companies registers (TCR) held by the registries of the commercial courts now centralise information relating to most companies. But upon examination, companies will also have to deal with trade registers, agricultural registers, special registers for individual entrepreneurs with limited liability, and special registers for sales representatives.

This array of registers generates both unnecessary costs and a certain scattering of information that hinders its accessibility for third parties. Moreover, as already mentioned, resorting to paperless systems is still far from being systematic for most companies when they need to carry out these administrative formalities.

The legislator thus intended to act in this field as well, but according to procedures that have not yet been precisely defined. Article 2 of the *Loi Pacte* merely empowers the government to issue an order to create a general online register of companies for the collection, storage and dissemination of information concerning them. This register is also intended to replace the existing business registers and trade directories, with the exception of the national register of companies and their establishments maintained by the French national institute for statistical and economic studies (INSEE), known as the SIRENE register. Beyond this, the order may also simplify the reporting obligations of persons registered in existing registers and the procedures for monitoring the information reported, without the law saying anything more about the nature of the simplifications being considered.

This order shall come into force within 24 months of the publication of the *Loi Pacte*, i.e. by 23 May 2021

RELAXING THRESHOLDS FOR THE APPOINTMENT OF A STATUTORY AUDITOR

Edmond Schlumberger and Jean-Gabriel Flandrois

This is one of the first measures provided for by the *Loi Pacte*, and which was always upheld by the French Parliament when reviewing the text, with only a few adjustments.

Before the *Loi Pacte* came into force, companies were obliged to appoint a statutory auditor depending on the corporate form and under certain circumstances:

- For public limited companies ("sociétés anonymes", or SAs) and limited stock partnerships ("sociétés en commandite par actions", or SCAs), appointment was mandatory, regardless of the company' size
- For other corporate forms, and in particular limited liability companies ("sociétés à responsabilité limitée", or SARL) and simplified joint-stock companies ("sociétés par actions simplifiées", or SAS), appointment was mandatory only for companies of a certain size. Smaller companies were exempt.

Generally speaking, in order to reduce the constraints on companies and to not exceed the requirements laid down by European Union law, the legislator chose to introduce thresholds above which the appointment of a statutory auditor would become mandatory for SAs and SCAs.

According to Article 20 of the *Loi Pacte*, the existing model for limited liability companies and simplified joint-stock companies thus becomes applicable more widely, exempting smaller companies from the mandatory appointment of a statutory auditor.

Additionally, the thresholds set by regulation are intended to be both standardised and raised so that they are aligned with those required by the Accounting Directive 2013/34/EU of 26 June 2013, which makes the legal certification of accounts mandatory. As a result, pursuant to implementing decree No. 2019-514 of 24 May 2019, a statutory auditor must be appointed if two of the following three thresholds are exceeded at the end of the financial year:

- EUR 4 million of balance sheet total;
- EUR 8 million in turnover excluding taxes;
- 50 permanent employees on average during the financial year. According to the estimates provided by the impact study accompanying the draft law, 120,000 to 150,000 companies that were previously subject to the obligation to appoint a statutory auditor may now claim exemption.

With regard to the application over time of the new provisions, several clarifications are provided by the texts:

- this application will take place as from the first financial year ending after the publication of the aforementioned implementing decree no. 2019-514;
- however, those terms of office of statutory auditors in force on this date shall continue until they expire;
- lastly, when the functions of a statutory auditor expire after the deliberations of the general meeting or the competent body ruling on the accounts of the sixth financial year, that this financial year has been closed no more than six months before the publication of the aforementioned implementing decree, that this deliberation has not yet been held prior to the latter date, and that at the closing of these accounts, the company does not exceed two of the three previous thresholds defined by this decree, the company is exempted of the obligation to appoint an auditor, if it has not already made such appointment.

This major new regulation does however include several limitations:

- first, the appointment of an auditor could always be requested in court by one or more partners representing at least 10% of the capital, which was already an option for SARLs and SAS, but which will now extend to SAs and SCAs;
- secondly, public interest entities - essentially listed companies, credit institutions and insurance companies - will continue to be systematically required to appoint an auditor regardless of their size, it being specified that in almost all cases they would exceed the regulatory thresholds;
- lastly, in order to prevent certain companies from trying to avoid the obligation to have their accounts certified by "splitting" their activity into several small companies, the law provides for the compulsory appointment of an auditor in the case of a group of companies as follows:
  - a controlling company within the meaning of Article L. 233-3 of the French Commercial Code is required to appoint an auditor when the group it forms with its subsidiaries exceeds two of the three thresholds set by the aforementioned decree (in this case, 4 million euros in total assets, 8 million euros in turnover excluding tax, and 50 permanent employees), regardless of the obligation to prepare consolidated accounts;
  - controlled companies are also required to appoint their own auditor when, taken individually, they exceed two of the three thresholds set by the same decree (but which are, in this case, EUR 2 million in total assets, EUR 4 million in turnover excluding tax, and 25 employees);
  - the auditor's mandate may then be limited to a period of three financial years, and may only cover the missions provided for by law in the event of spontaneous appointment in small companies (see below).

All in all, the upheavals appear to be quite significant and reflect a clear political choice by the legislator in favour of reducing the weight of control mechanisms whenever their effective impact does not appear sufficiently established.

This development could be criticised as it correlates with the diminished role of corporate insolvency mechanisms, in which auditors play a key role.

Nevertheless, the companies concerned may then spontaneously appoint an auditor, which the new law encourages in several respects:

- this mandate could be limited to three financial years;
- the auditor's assignment would then be limited to the certification of the accounts, in addition to which the auditor would be required to prepare a report identifying the financial, accounting and management risks to which the company is exposed;
- the auditor would be exempted from a certain number of due diligence and reports not strictly related to the audit of the accounts, in particular the special report on related party transactions.

REFORM OF STAFFING THRESHOLDS

Foulques de Rostolan and Yan-Eric Logeais

The objective of Article 11 of the *Loi Pacte* is to reduce and simplify the obligations of companies related to employee thresholds, particularly considering that there are 199 obligations spread over 49 thresholds for SMEs. Additionally, the methods used to calculate such thresholds are just as numerous, with specific features specific to each legislation.

The *Loi Pacte* therefore has three main objectives:

- Harmonise the way in which a workforce is calculated,
- Streamline existing staffing thresholds, and
- Amend the length of time such thresholds are taken into account to assess whether they have been exceeded.

1 Harmonising the way in which a workforce is calculated

The *Loi Pacte* harmonises the methods used to calculate the number of employees by providing for a single rule set by reference to the French Social Security Code. To calculate the annual number of employees, it is necessary, in all cases, to take into account "the average number of persons employed during each month of the previous calendar year" (see new Article L. 130-1, I of the French Social Security Code).

The categories of persons included in the workforce and the methods used to count them will be defined by decree in the French Conseil d'Etat.

The French Labour Code is thus amended accordingly, by reference to the procedures provided for in new Article L. 130-1 of the French Social Security Code.

2 Streamlining existing staffing thresholds

Staffing thresholds are brought down to three distinct groups: 11, 20 and 250 employees.

The previous thresholds of 10, 25, 100, 150 and 200 employees are now a thing of the past. For the sake of legal stability, staffing thresholds resulting from the reform of the Labour Code are not impacted by these provisions.

The *Loi Pacte* modifies several employee thresholds (lunch vouchers issued by the company, or option regarding the status of collaborating spouse) and raises the threshold for a number of obligations, in particular:

- the staffing threshold used to determine the contribution rate of 0.50%, which will apply from 50 employees rather than 20 (see article L. 834-1, 1° of the French Social Security Code);
- employers' participation in the housing construction effort, which is triggered at 50 employees instead of 20 (see Articles L. 313-1 and L. 313- 2 of the French Construction and Housing Code);
- the obligation to establish internal regulations, which only becomes mandatory from 50 employees rather than 20, and only once this number has been reached for 12 months (new Article L. 1311-2 of the French Labour Code).

3 Amending the length of time it takes to reach the staffing thresholds

The *Loi Pacte* amends the existing freezing and smoothing systems to allow companies to prepare themselves:

- "The upward crossing of an employee threshold is taken into account when this threshold has been reached or exceeded for five consecutive calendar years";
- "The downward crossing of a staff threshold over a calendar year has the effect of re-initiating the rule set out above" (see new Article L. 130-1, II of the French Social Security Code).

From now on, obligations will therefore only be effective when the threshold is met for five consecutive calendar years. Dropping below the threshold triggers a new five-year period.

In concrete terms, this means that if a company reaches the 50-employee threshold, it is only after a period of 5 years, and provided its employee headcount has not dropped below this threshold in the meantime, that it will be required to set up a mandatory profit-sharing agreement for its employees.

The *Loi Pacte* has thus extended this method of counting staffing thresholds as set forth by the French Social Security Code (defined in Article L.130-1, I thereof) to certain provisions of the French Labour Code and other legislations.

However, numerous other thresholds set out in the French Labour Code remain subject to the rules thereof regarding the terms and conditions of headcount calculation. Hence, as regards staff representation for instance, the staffing thresholds and terms and conditions of headcount calculation remain unchanged and subject to the rules of the French Labour Code.

Subject to certain conditions, the reform will enter into force on 1 January 2020.

INDUSTRIAL PROPERTY: THE REFORM OF CERTIFICATES OF UTILITY, PATENTS AND STATUTE OF LIMITATION

Jean-Hyacinthe de Mitry

The industrial property component of the *Loi Pacte* was originally based on two main proposals: to boost the attractiveness of utility certificates, and to improve the quality of French patents. During their discussions, French parliamentarians added to these two proposals a reform of the statute of limitation for actions relating to industrial property titles, and in particular actions to invalidate said titles.

1 Changes pertaining to utility certificates (article 118)

Considering that there is little take up of utility certificates in France by comparison with other countries that have equivalent "simplified patent" systems, such as Germany, the legislator wished to boost their use.

From now on, utility certificates will be issued for a period of ten years - instead of the current six years - from the filing of the application (new Article L. 611-2 of the French Intellectual Property Code), and the applicant will be able to turn this utility certificate application into a patent application (new Article L. 612-15 of the same Code).

The terms of this change will be set by decree to be issued no later than one year after the publication of the *Loi Pacte*.

2 Changes pertaining to patents (articles 121 and 122)

The creation of a patent opposition procedure (Article 121)

The *Loi Pacte* empowers the government to take, via orders, measures to create a right of opposition to patents granted by the national institute of intellectual property (Institut National de la Propriété Intellectuelle, INPI). Similarly to the procedure before the European Patent Office, any third party may request the INPI to revoke or amend a patent after it is granted.

This procedure is intended to strengthen the solidity and economic value of French patents and to provide a simpler, faster and less costly alternative to legal action for invalidity.

The forthcoming order will have to settle many important questions concerning the organisation of this new procedure. For instance: what will be the time limit for filing an opposition? Will the INPI rule within a given period of time, as in the case for trademarks? Will the procedure be written and/or oral? What grounds for invalidity may be invoked? What means will be used to prevent and/or punish abusive oppositions against which the *Loi Pacte* expressly intends to fight? Will appeals against INPI decisions be brought before an *ad hoc* INPI board of appeal or before the Paris Court of Appeal? In this latter case, will the Court have a power of evocation or will it be bound by the argumentation and documents exchanged by the parties before the INPI? How will an opposition filed with the INPI and a legal action for invalidity of a same French patent, or an opposition before the EPO on its European equivalent, be articulated?

This procedure will also create an additional workload for the INPI, which will add to that resulting from the creation of administrative procedures for the revocation and invalidity of trademarks when the "EU Trademark Package" is transposed. The question of the additional human and financial resources made available to the INPI, and their quality, will therefore be essential to ensure the proper functioning of this new system.

Amendments to the patent examination procedure (article 122)

Up until now, the INPI's procedure for examining a patent application was limited. Only an "obvious" lack of novelty in the invention for which the application was filed could justify its rejection by the INPI. From now on, the new article L. 612-12 of the Intellectual Property Code provides that the INPI may reject a patent application:
1- For lack of novelty (the term "obvious" having been removed);
2- For lack of inventive activity; and
3- Because its object cannot be considered as an "invention" within the meaning of Article L. 611-10 2° of the French Intellectual Property Code.

This change was resisted by some Parliamentarians for whom such a thorough examination would lengthen the time required for delivery and increase the costs borne by applicants, which they considered contrary to the very objective of simplification advocated by the draft *Loi Pacte*.

However, the objective of strengthening the quality of French patents ultimately prevailed.

Again, the success of this further substantial change in patent law will depend very much on the importance and quality of additional resources made available to the INPI.

3 Changes pertaining to statute of limitation applicable to actions for infringement and invalidity of industrial property titles (article 124)

Statute of limitation applicable to infringement actions

The *Loi Pacte* amends the statute of limitation applicable to actions for infringement of industrial property rights (patents, plant variety certificates, trademarks, designs and models) by aligning the starting point of the time limitation period with that of Article 2224 of the French Civil Code. From now on, actions for infringement are

time-barred after five years "from the day on which the holder of a right has become aware or should have become aware of the last fact allowing the holder to exercise said right". However, this alignment is not complete since article 2224 does not mention the word "last".

The provisions of the French commercial code are amended in the same way regarding infringements of trade secrets.

Statute of limitation applicable to invalidity actions

The *Loi Pacte* also provides that invalidity actions pertaining an industrial property title "are not subject to any time limitation". In doing so, it departs from the recently developed patent case law. Indeed, since the adoption in 2008 of a five-year time limitation period under common law (previously thirty years), the courts have made these actions subject to this new five-year time limitation period, which has created considerable debate both on its application and initial time of application.

French senators initiated this amendment and justified it as a means to "clean up competition by allowing a title that occupies the public domain without right to be removed at any time".

It should be noted that:

- on the one hand, in matters of trademarks, this absence of time limitation is provided for "without prejudice" in Articles L 714-3 paragraph 3 and L 714-4, which in certain cases render the action for invalidity subject to time limitation, and
- on the other hand, the provisions of Order no. 2018-341 of 9 May 2018 on the European patent with unitary effect and the unified patent law, which already provided that patent invalidity actions were not subject to time limitation, are repealed and replaced by those of the *Loi Pacte*. However, this repeal does not change anything in practice since these provisions had not yet entered into force: their entry into force is subject to the ratification of the agreement on unified patent court.

INTRODUCTNG A DELEGATION OF POWER AND COMPETENCE FOR MERGERS, DIVISIONS AND PARTIAL CONTRIBUTIONS OF ASSETS

Edmond Schlumberger

Although initially absent from the bill before its sneak introduction during parliamentary proceedings, and thus going relatively unnoticed, this measure is nevertheless of considerable practical importance, the genesis of which must be explained.

On the one hand, the Legal High Committee for Financial Markets of Paris (HCJP) had issued a report dated 13 December 2017 on the modernisation of French merger law, in which it put forward a number of proposals to renew the regime and alleviate constraints that were disruptive to practice. In particular, it had suggested that, at least in listed companies, the extraordinary general meeting of the acquiring company should be able to delegate to the governing bodies its competence or powers to carry out a merger. This proposal was mainly the result of the acknowledgement of the existence of such a delegation in public exchange offers, and the subsequent use of such a procedure even though the merger remained the transaction targeted by the parties.

On the other hand, considering that French law tends to transpose European directives through national measures that are more restrictive than those that would result from their strict application, the government tabled a bill before the Senate on 3 October 2018 abolishing a number of these "over-transpositions" in several areas. Among the various measures proposed, the draft law thus provided for the introduction of such delegation of competence and power, but in accordance with procedures that were significantly different from those initially considered by the HCJP, since the fundamental aim was to transpose to restructuring operations the possibilities opened up in terms of capital increases, while avoiding that the final completion of the operation be compromised by a refusal of approval from the general meeting of the acquiring company.

It is this second initiative that has finally been brought into being, by transferring the measure directly within the *Loi Pacte* (see article 102 of the law), several points of which deserve to be highlighted.

Firstly, the scope of the measure is extremely broad. With regard to the companies concerned, unlike what the HCJP considered, the delegation of authority and power is not solely for listed companies but is open to all companies, including simplified joint stock companies, pursuant to Article L. 227-1 of the French Commercial Code, which then gives the Chairman or the management body designated by the Articles of Association the power to decide on the very principle of the transaction or its terms. In the case of the transactions covered, this delegation may be granted not only as part of a merger, but also as part of a division or partial contribution of assets subject to the regime of divisions, as a result of the text references made by the French Commercial Code. As a result, the delegation of powers already possible today in terms of capital increases by contributions in kind, but capped at 10% of the capital and open only in listed companies, is likely to have swift competition from this new generic form of delegations.

Secondly, the framework set by the new law is just as open. As mentioned above, the legislator took as a reference the rules applicable to capital increases, presumably based on the fact that merger-absorptions most often go hand-in-hand with a capital increase for the acquiring company. Thus, the delegation of authority may be granted for a period set by the general meeting, which may not exceed 26 months. Similarly, the delegation of power to determine the final terms of the proposed transaction is granted for a period determined by the general meeting, which may not exceed five years.

It should be noted that no other limits are set by the legislator in this context. Thus, the delegation does not depend on the completion of a capital increase of the company receiving the universal transfer of assets, and may therefore cover cases where treasury shares are allocated to the shareholders of the transferring company. Above all, it may be accompanied by an unlimited capital increase other than that set by the general meeting, in accordance with the general rules governing delegations of authority for capital increases. By comparison, the HCJP offered to limit the delegation of authority to an issue of equity securities representing 10% of the capital of the beneficiary company. However, normal practice may be to have a ceiling set by the general meeting, the question remaining as to whether this ceiling will occasionally exceed this unofficial threshold of 10%.

The newly opened latitudes in this field are therefore considerable, subject however to two constraints. The first naturally means the board has to draw up a written report made available to shareholders at the time it requests the delegation. The second is based on the applicable European texts (see Article 94 of EU Directive 2017/1132 of 14 June 2017), and allows one or more shareholders of the beneficiary company holding at least 5% of the share capital to apply to the courts for the appointment of a representative for the purpose of convening its extraordinary general meeting to decide on the approval of the transaction or proposed transaction. This is therefore the resumption of a mechanism already provided for in the field of simplified mergers.

Pillar 2: changing the place of businesses in society

A second cardinal pillar of the Loi Pacte is the legislator's desire to initiate a paradigm shift in two ways.

Firstly, by strengthening companies' social and environmental responsibility: from now on, they will have to take social and environmental issues into account in all their decisions.

Secondly, by encouraging a fairer gender balance and a fairer sharing of value, to the benefit of employees in particular, with greater sharing in the wealth created (profit-sharing, sharing of capital gains on disposals, pension plans/retirement savings) and better corporate representation.

Conversely, the remuneration of executives, related party transactions and strategic companies are subject to increased monitoring.

CONSIDERATION OF SOCIAL AND ENVIRONMENTAL STAKES BY COMPANIES

Philippe Dupichot and Didier G. Martin

The *Loi Pacte* aims to "rethink the place of companies in society" so that France can build and create "fairer" companies. This major change is part of a profound movement with three roots:

- firstly, putting some distance between French companies and an economic model based on what President Macron termed, in his New Year's address, "ultraliberal and financial capitalism that is too often set on the short term";
- secondly, the willingness shown by French Home Affairs minister Bruno Le Maire for companies to assume social responsibility and to play their full part in contributing to the common good;
- lastly, the idea that it is possible to reconcile long-term economic profitability with consideration of social and environmental objectives.

With a new model for sustainable growth thus becoming possible, the *Loi Pacte* amends article 1833 of the French Civil Code (1), and introduces the concepts of "raison d'être" (2) and "corporate mission" (3), thus instituting a possible steady increase in the consideration of CSR issues.

1 Changes to article 1833 of the French Civil Code

First of all, we welcome the restraint of the legislator, who has not touched Article 1832 of the French Civil Code: its first paragraph still stipulates that a company is established "with a view to sharing the profit or benefiting from the economy that may result from it".

Instead, it chose to amend Article 1833 of the Civil Code by applying a recommendation of the Notat-Senard report of 9 March 2018 on companies and the society's general interest. A second paragraph now provides that "a company is managed bearing in mind its social interest, taking into consideration the social and environmental issues of its activity".

This text, which is immediately applicable to all companies, even those incorporated before its entry into force (no survival of the ancient law on current contracts...), will require that the corporate management be in accordance with corporate interest.

The text highlights the significance of the concept of social interest without ever defining it, in order to preserve the flexibility of this famous "society moral compass", used in matters of abuse of majority, interim administration or even securities granted to secure third party debts. It follows that the company cannot be managed solely in the common interest of the shareholders referred to in paragraph 1 (contractual reading at the incorporation stage), but in accordance with the legal person's own interest, which may be distinct from that of its shareholders (institutional reading at the stage of the company's life). More innovative still, it encourages managers to take into consideration the social and environmental issues of a company's activity, without them however taking precedence over the social interest of a company. It does, nonetheless, require that managers at least examine them before taking a decision. It could also require them to adopt the most socially and environmentally favourable decision when two decisions are equivalent in terms of economic profitability: a decision that is more costly in social or environmental terms must be justified as being in the best interests of the company. Companies will have to adapt their processes and records of deliberations and decisions of their corporate bodies, and pre-constitute proof of this review.

What sanctions can be applied in the event this provision is violated? Nullity is expressly excluded by law, which amends Article 1844-10 of the French Civil Code in order to preserve legal certainty. However, an executive could be dismissed (for just cause if necessary), or have his liability incurred by the company, if the failure or insufficient consideration of social or environmental issues has harmed the company's social interest, for instance by damaging the company's image. Nonetheless, the provision does offer a certain amount of protection to managers who take these issues into consideration, to the detriment of their company's short-term profitability. As for a company's civil liability towards third parties, this is a controversial subject that case-law will have to decide: the conditions for implementing such liability should, however, be difficult to establish.

2 Introducing a "*raison d'être*" in a company's articles of association

Article 1835 of the French Civil Code, another provision of common corporate law, is amended to provide for the possibility of adding a "raison d'être", or purpose, to a company's articles of association. This purpose is made up of "the company's principles to which it intends to allocate resources in the realisation of its activity": the corporate purpose is therefore not limited to the mere pursuit of profit. A new law was maybe not necessary in this regard. The real legislative contribution lies in the amendment of Articles L. 225-35 and L. 225-64 of the French Commercial Code applicable to public limited companies: they provide that the Board of Directors and the Management Board must take into account the purpose of the Articles of Association when determining the direction of a company's activity. The inclusion of a raison d'être in the articles of association therefore increases the risk of dismissal or even liability claims by the company for managers who do not take it into account. It also legitimises the action of those management bodies that comply with it, particularly as regards the assessment of the social interest or, for listed companies, in the context of activist campaigns. The risk seems small that failure to comply with the purpose, even if it is statutory, may give rise to an action for annulment or civil liability of the company towards third parties, although it cannot be ruled out that this may depend on the wording of the purpose.

3 Qualification as an *entreprise à mission*

In recent years, under the impetus of researchers and a few pioneering companies, the concept of *entreprise à mission*, a company with a mission, has been developing in France. Companies are to have a social mission, with is embodied in various commitments, and is at the heart of their activity, with a governance organised in such a way that it monitors the social mission's implementation and provides for its assessment. They draw inspiration from statuses of "benefit", "public benefit" and "special purpose corporations" that appeared in the United States around ten years ago. To encourage their emergence and establishment, the *Loi Pacte* creates the term société à mission, which may be publicly used by a commercial companies, regardless of its form, which meet the following conditions:

(i) To have a statutory purpose,

(ii) To have set out in its articles of association one or more social and environmental objectives (the "mission"),

(iii) To have set out in its articles of association the procedures for carrying out and monitoring the mission and set up a body dedicated to this monitoring, which includes at least one employee and draws up a report that is appended to the management report, and

(iv) To be declared as an entreprise à mission with the registry of the Commercial Court. A third party expert is appointed to verify the execution of the objectives and issue an opinion that is appended to the above-mentioned report.

A company may be forced by a decision of the judge to stop publicly mentioning it is a société an *entreprise à mission* if these conditions are not met, or if the third party expert finds that the company does not meet its statutory objectives. Similar rules apply to mutual funds and cooperatives.

An *entreprise à mission* is in no way a specific form of company, rather a quality (interesting in terms of image) that can be claimed by any commercial company meeting the above-mentioned conditions. No specific tax or legal regime applies to it. In this respect, entreprises à mission differ from the aforementioned corporate forms in place in the United States, since they are designed to expressly enable executives to manage a company according to purposes that are not limited to the pursuit of profit and to protect them against the risks of liability so long as they respect a reasonable balance between the pursuit of profit and the other purposes assigned to the company in its mission. In France, and taking into account the amendments to Articles 1833 and 1835 of the French Civil Code, the introduction of a specific liability regime was not considered necessary.

The creation of the designation *entreprise à mission* by law has the merit of defining a clear and unique framework for such companies, and of giving real acknowledgement to the concept. How successful will it be? Companies that consider themselves as having a mission will, in any case, have an interest in being part of this framework: presenting themselves as an entreprise à mission without actually having a mission could be a source of confusion, and even - if push comes to shove - of liability.

ESTABLISHMENT OF SUSTAINABILITY FUNDS

Christian Nouel

Expected for many years, Article 177 of the *Loi Pacte* creates the "sustainability fund", equivalent to "shareholders' foundations" that exist in many countries, into which all or part of a company's capital can be freely contributed to carry out or finance missions of general interest.

Sustainability funds are autonomous legal structures, distinct from endowment funds and foundations. Sustainability funds are subject to commercial taxes (corporate income tax, VAT, etc.) under common law conditions, and none of the favourable tax provisions applicable to donors of endowment funds or foundations apply to those of sustainability funds. It is likely that the attractiveness of sustainability funds may suffer from this.

1 Endowment of sustainability funds consists of corporate shares in order to ensure their sustainability

Sustainability funds:
- are made up of the free and irrevocable contribution of shares or equity securities, of one or more companies conducting an industrial, commercial, craft or agricultural activity, or directly or indirectly holding shares in one or more companies conducting such an activity, carried out by one or more founders,
- may manage these securities or shares, exercise the related rights and use their resources to contribute to the economic sustainability of this/these company/companies, and can carry out or finance missions of public interest.

The purpose of sustainability funds must take into account the principles and objectives applied to the management of the shares of companies it holds, the exercise of the related rights and the use of its resources, as well as an indication of the actions considered in this context, and, where applicable, an indication of the tasks or projects in the public interest that it intends to carry out or finance.

The endowment of the fund may also consist of property and rights of any kind that may be contributed to it irrevocably and free of charge. No public money may be paid into the fund.

Any shares of companies that are contributed free of charge to the sustainability fund are inalienable. However, where the latter controls, as per Article L. 233-3 of the French Commercial Code, one or more companies, the contributor or the testator, in the event of a gift, or the Board of Directors, in the event of an acquisition, may decide that this unalienability does not affect all or part of the shares within the limit of the portion of the share capital that is not necessary for the exercise of this control. In addition, the sustainability fund may be legally authorised to dispose of the shares of companies subject to inalienability if the economic sustainability of the company so requires.

2 Governance similar to that of endowment funds

Sustainability funds are administered by a Board of Directors comprising at least three members appointed initially by the founder(s) or by the persons appointed by the testator.

The Board of Directors is vested with the broadest powers to act in all circumstances on behalf of the sustainability fund, within the limits of its purpose. The provisions of the articles of association limiting the powers of the Board of Directors may not be invoked against the third party.

The articles of association of the sustainability fund provide for the creation, with the board of directors, of a management committee that is made up of at least one member of the Board of Directors and two members who are not members of the Board.

The Management Committee is responsible for the permanent monitoring of the company or companies whose shares are (all or in part) held by the sustainability fund and for making recommendations to the Board of Directors on the financial management of the endowment, the exercise of the rights attached to the shares and units held and the shares and financial needs attached to them contributes to the economic sustainability of these companies.

3 Control measures similar to those of endowment funds

Sustainability funds draw up annual accounts that must be certified by a statutory auditor if such resources exceed EUR 10,000 at the end of the financial year.

Sustainability funds send an annual activity report to the administrative authority, together with the auditor's report and the annual accounts. This authority may suspend the activity of the sustainability fund if it notices serious malfunctions that impact the fulfilment of its purpose.

4 Missions of general interest can be carried out by the sustainability fund missions

The first version of the text stated that sustainability funds could only carry out or finance missions of general interest via a related endowment fund.

This obligation is not included in the final text adopted by the French Parliament, as the sustainability fund may directly carry out or finance such missions of public interest.

5 An unattractive tax regime

Subject to compliance with certain conditions, an endowment fund with a majority or minority shareholding may be deemed to not be engaged in a profitable activity. The endowment fund is then exempt from commercial taxes. In addition, donors can benefit from the tax reductions provided for in this respect and donations of company shares by natural persons can be exempt from duties on the free transfer of assets. In the absence of comments from the tax authorities, we understand that:
- Donations made to a sustainability fund by individuals are subject to a 60% transfer tax. They may be partially exempted from this tax up to 75% of the value of the securities transferred, subject to compliance with certain conditions. Fees calculated on the taxable portion of the donation will also be eligible for a 50% tax relief if the donor is under 70 years old. Consequently, the effective rate of transfer tax may be equal to 7.5%,
- No tax reduction is granted to donors, natural or legal persons,
- The income received by the sustainability funds is subject to corporate income tax under common law conditions,
- Donations granted to sustainability funds by corporate donors, equal to the value of the securities donated free of charge, are also subject to corporate income tax under common law conditions,
- The transfer of the net assets from the sustainability fund following its liquidation to the beneficiary, an individual as per designated in its articles of association, will entail the payment of duties on the free transfer of assets.

In view of the above, sustainability funds may be limited in their success, as shareholders or partners wishing to perpetuate the capital of their companies will prefer to contribute all or part of their capital, directly or indirectly, in an endowment fund or a foundation.

SHARING OF VALUE BY GENERALISING EMPLOYEE INCENTIVE AGREEMENTS

Foulques de Rostolan and Yan-Eric Logeais

The objective of Articles 155 to 157 of the *Loi Pacte* is to encourage the dissemination of incentive agreements in companies with fewer than 50 employees and to develop the conclusion of incentive agreements for companies with 50 to 250 employees.

To this end, the *Loi Pacte* implements several measures to encourage the establishment of incentive agreements or make their rules more flexible:
- Increasing the individual incentive ceiling that may be paid to a beneficiary within a same financial year: the *Loi Pacte* aligns this ceiling with that of profit-sharing schemes and increases it from 50% to 75% ("three quarters") of the average annual ceiling used for calculating social security contributions (see Article L.3314-8, paragraph 2 of the French Labour Code);
- Increasing the tax exemption ceiling when employees decide to allocate, within the time limit set by the regulations in force (15 days), their incentive bonuses in an employee savings plan: the *Loi Pacte* increases this exemption ceiling from 50% to 75% ("three quarters") of the average annual ceiling used to calculate social security contributions (see Article L.3315-2, paragraph 1 of the French Labour Code).

An identical measure applies also to self-employed beneficiaries, i.e. sole proprietors, shareholders of partnerships and similar persons who have not opted for their liability to corporation tax, and collaborating and partner spouses ("conjoint collaborateur" and "conjoint associé" in French, referring to spouses being employees or partners in the business) (see Article L.3315-3, paragraph 1 of the French Labour Code).

- Extension of the number of self-employed beneficiaries who may, in companies with a regular workforce of between 1 and 250 employees, benefit from the incentive agreement. In addition to spouses, the *Loi Pacte* adds "the partner bound by a civil solidarity pact" (see Article L. 3312-3, 3° of the French Labour Code);

- Strengthening the security of incentive agreements: the law supplements the existing system by giving the administration the possibility, up to the end of the sixth month following the filing of the incentive agreements, to formulate requests for amendments to provisions contrary to legal provisions, so that the company may comply for the financial years following that of the filing. If the administrative authority has not made such requests within this new period, the social and tax exemptions enjoyed by the incentive agreement are deemed to have been granted for the duration of the agreement (see Article L.3313-3 of the French Labour Code);

- Extension of the methods for calculating the incentive: prior to the *Loi Pacte*, the company's results or performance could only be taken into account during a year or an infra-annual period, expressed as an integer number of months equal to at least three.

The *Loi Pacte* provides that this formula for calculating incentives may be "supplemented by a multi-year objective linked to the company's results or performance" (see Article L.3314-2 of the French Labour Code).

- Broader conditions for setting up a project incentive: prior to the *Loi Pacte*, a project incentive agreement could be set up in companies or groups that had an incentive agreement and that contributed with other companies to a characterised and coordinated activity.

The *Loi Pacte* provides that the implementation of such project incentives for all or part of employees may now be decided within a company (see Article L.3312-6, paragraph 4 of the French Labour Code).

- Changes to the terms and conditions applicable to the distribution of interest premiums among beneficiaries: prior to the *Loi Pacte*, sums that could not be distributed to beneficiaries (employees or self-employed) due to the application of rules pertaining to the distribution of incentives and the individual ceiling, were not distributed and kept "in reserve".

- Similarly to the existing profit-sharing mechanism, the *Loi Pacte* provides that the remainder of those sums that could not be distributed because of the rights ceiling could be immediately distributed among all employees and self-employed beneficiaries (company directors, managers, collaborating spouses or partner spouses) who have not reached their individual ceiling (see new Article L.3314-11 of the French Labour Code).

This ceiling may not, of course, be exceeded as a result of this additional distribution, carried out under the same conditions as the original distribution.

- Easier continuity of incentive agreements in the event of a breakdown in the establishment of staff representative bodies where a change occurs in a company's legal situation, in particular by merger, transfer or demerger.

The *Loi Pacte* provides that, when a change occurs in the legal situation of a company, in particular by merger, transfer or demerger, requiring the establishment of new staff representative bodies, the incentive agreement continues or may be renewed in accordance with one of the procedures provided for by the *Loi Pacte* (collective agreement, agreement between the employer and representatives of representative trade union organisations within the company, agree-

ment concluded within the social and economic council, referendum) (see Article L.3313-4 of the French Labour Code).

The previous principle remains the same: where this amendment makes it impossible to apply the incentive agreement, the agreement ceases to be in effect.

- Negotiation of "standard" branch incentive agreements: the *Loi Pacte* establishes the principle of collective bargaining within each professional branch, with a view to setting up an incentive scheme, concluded no later than 31 December 2020. This scheme, to which companies in the sector may refer, is tailored to the specifics of companies employing fewer than 50 employees in the sector.

Companies in such sector will be able to opt for the application of the agreement thus negotiated. In the absence of an initiative by the employer by 31 December 2019 at the latest, negotiations shall begin within fifteen days of the request.

SHARING WITH EMPLOYEES CAPITAL GAINS ON THE SALE OF SHARES

Christian Nouel

In order to enable a company's employees to benefit from a part of the capital gains realised on the sale of its shares, Article 162 of the *Loi Pacte* establishes a regime for "sharing with employees capital gains on the sale of shares", codified under Articles L. 23-11-1 et seq. of the French Commercial Code.

Under this regime, one or more shareholders or partners of a company may undertake to share with their employees and, where applicable, with those of the companies that control it or that are controlled by it, part of the capital gain realised following the sale or buy-back of its shares or units.

This sharing of the capital gain must be organised in a contract concluded between the investor and the company, which undertakes to transfer to its employees the amount resulting from the sale, from which it will deduct the social and tax duties related to the transfer of the capital gain. This contract must be concluded at least three years before the date of transfer of the shares.

This regime is subject to the condition that an employee savings plan (Plan Epargne Entreprise, or PEE) must first exist within the company.

This contract must define, in particular, the terms and conditions for distributing the capital gain allocated to employees, which may not exceed 10% of its amount. This allocation of capital gain, which must benefit all employees present on the date of transfer and members of the company's employee savings plan (PEE), may be either uniform or proportional either to the amount of time an employee has been present within the company whose shares are transferred, or to the amount of such employee's remuneration. The contract must provide for a minimum seniority condition of between 3 months and 2 years.

The portion of the capital gain allocated to the beneficiaries must be paid into the PEE, for each beneficiary, up to a maximum of either 30% of the annual social security ceiling (Plafond Annuel de la Sécurité Sociale, or PASS) which currently amounts to EUR 40,524, or an amount currently set at EUR 12,097.

A decree must specify the conditions for applying this payment into the PEE, which is subject to the same tax and social regime as that reserved for the employer's "traditional" PEE contributions, within the limit of 30% of the PASS. Amounts exceeding this limit are paid directly to the beneficiary and constitute for the latter an activity income subject as such to income tax, social security contributions, and other applicable duties.

The portion of the capital gain allocated to the beneficiaries pursuant to the sharing commitment is:

- exempt from capital gains tax and duties on the free transfer of assets when the sellers are individuals;
- deducted from the taxable capital gain of companies whose shares are included in their fixed assets and whose disposal is subject to the professional capital gains regime.

This capital gains sharing regime is expected to be a great success, as it aligns the interests of investors and employees who, together, can create more value and share it.

ALLOCATION OF COMPANY FOUNDER SHARE WARRANTS TO ADMINISTRATORS

Christian Nouel

Article 103 of the *Loi Pacte* now authorises (i) public limited companies to grant Company founder share warrants (Bons de Souscription de Parts de Créateur d'Entreprise, or BSPCE) to members of their boards of directors and supervisory boards, and (ii) simplified joint stock companies to members of any equivalent statutory body.

For many years, growth companies had been asking that these individuals should also be able to benefit from company founder share warrants, like their American counterparts. This measure will enable these companies to attract and retain the talent that is necessary for their development.

It should be noted that Article 103 of the *Loi Pacte* also modifies the provisions relating to the subscription price of the shares, which may be lower than the value of the share used for a capital increase carried out in the six months preceding the allocation of the company founder share warrants, provided that the company may justify the drop in value.

These measures apply to company founder share warrants granted as from the publication of the law, i.e. 23 May 2019.

RELAXING THE RETIREMENT SAVINGS REGIME

Foulques de Rostolan and Yan-Eric Logeais

Considering the following:

- the coexistence of four retirement savings products subject to complex and poorly transferrable rules:
  - Corporate products, such as a PERCO (Plan d'Epargne pour la Retraite Collective, or corporate retirement savings plan) and defined benefit plans under "article 83", group retirement products;
  - Individual products, such as the Madelin contract (intended solely for self-employed workers) and PERP (Plan d'Epargne Retraite Populaire, or popular retirement savings plan), accessible to all workers over 18 regardless of their profession.
- inflexible exit conditions and, except for certain strict exceptions, limited to a life annuity exit,

the purpose of Articles 71 and 197 of the *Loi Pacte* is to simplify the rules governing retirement savings, in particular by strengthening product portability and generalising the preferential tax regime for voluntary investor deposits.

All the rules relating to the age and terms for unlocking retirement savings, the information of savers as to their rights, and the financial management of these outstanding amounts, will be shared by three products:

- an individual product succeeding the PERP/Madelin contract (with the upholding of an adapted tax regime for self-employed workers);
- two corporate products (a universal product such as a PERCO, and a product that can be aimed at certain categories of employees, such as the "Article 83" defined contribution scheme).

Article 71 of the *Loi Pacte* thus supplements the French Monetary and Financial Code by inserting a definition of retirement savings plans, the purpose of which is "the acquisition and enjoyment of personal life rights or the payment of a capital sum, payable to the holder as from the date of liquidation of his/her pension in a compulsory old-age insurance scheme or the age mentioned in Article L. 161-17-2 of the French Social Security Code" (see new Article L.224-1 of the French Monetary and Financial Code), whichever comes first.

Article 71 of the *Loi Pacte*:

- improves the availability of savings by making it easier to exit the plan before retirement by broadening the scope of early capital liquidation cases that cover:
  - disability of the spouse, partner linked by a civil solidarity pact (pacte civil de solidarité, or PACS) or children (by reference to the French Social Security Code);
  - the allocation of the sums saved to the acquisition of the main residence, provided such sums concern the outstanding amount resulting from voluntary payments, profit-sharing or incentive agreements. The mandatory payments made by the subscriber or company may only be recovered as an annuity.
- provides that, with the exception of mandatory payments made by the subscriber or company, the corresponding rights will be issued, upon the holder's decision, in the form of capital, paid up at once or in instalments, or as a life annuity, except where the holder has expressly and irrevocably opted for the liquidation of all or part of his/her rights as a life annuity as from the opening of the plan;
- generalises, in the event of the death of the holder of the retirement savings product, the obligation to offer an exit as a life annuity, with a reversion option to a beneficiary;
- facilitates the portability of individual rights in the process of being established, which are transferable to any other retirement savings plan, without requiring any change to the conditions of their redemption or liquidation. The costs incurred in connection with such a transfer may not exceed 1% of the vested rights and are nil at the end of a period of five years from the first payment into the plan, or when the transfer takes place after retirement;
- reinforces the duty to advise investors, who must be provided with regular and detailed information on their rights, especially at significant stages in the life of the contract, in particular at the time of exit, to help them choose their exit option according to their situation.

In addition, Article 71 of the *Loi Pacte* empowers the government to transpose by ordinance:

- the European portability directive in order to organise its impacts on supplementary pension plans and modernise them;
- the European directive on institutions for occupational retirement provisions, which will help modernise their activity and increase their supervision.

Article 197 of the *Loi Pacte* specifies the measures that the government shall be authorised to take by ordinance, within six months of the promulgation of the text as regards supplementary pension rights, which shall require coordination measures within the French Insurance Code, the Social Security Code, the Mutual Insurance Code, the Labour Code, the Commercial Code and the General Tax Code.

Article 197 of the *Loi Pacte* thus empowers the government to transpose by ordinance Directive 2014/50/EU of the European Parliament and of the Council of 16 April 2014 on minimum requirements for increasing the mobility of workers between Member States by improving the acquisition and preservation of supplementary pension rights. The European text provides that such rights must be considered vested beyond a period of no more than three years. The Directive also specifies that where the employment relationship ends before pension rights are acquired, the pension scheme must refund the contributions paid by or on behalf of the outgoing worker (or the value of the assets representing these contributions).

The transposition of the Directive therefore requires the termination of pension schemes whose rights are conditional on the employee's presence in the company, beyond this three-year period, and whose financing by the employer cannot be individualised per employee, i.e. defined benefit schemes or "Article 39" defined benefit plans, currently governed by Article L.137-11 of the French Social Security Code.

While respecting the rights being established prior to the entry into force of the Ordinance, this will involve removing the random nature of pension rights. In particular, the text should therefore specify:

- provisions guaranteeing that beneficiaries are informed of their rights and the consequences of their career choices on them;
- the social regime applicable to employer payments in order to bring it into line with that applicable to other supplementary pension schemes and, for beneficiaries, the tax and social regime applicable to annuities paid and employer payments under these schemes;
- the conditions under which the implementation of these plans is subject to the existence or implementation of a supplementary pension scheme benefiting all employees;
- the arrangements under which entitlement to benefits may be subject to conditions linked to the beneficiary's professional performance, or any other criterion that can be individualised.

To implement these measures, a ratification bill must be submitted to the French Parliament within three months of the publication of the abovementioned ordinance.

PLACE OF EMPLOYEES AND GENDER PARITY IN MANAGEMENT BODIES

Edmond Schlumberger and Axelle Toulemonde

The new law confirms the increasing presence of employees (1) and aims to achieve an even more balanced representation of each gender within corporate management bodies (2).

1 Employee representation

A major trend in corporate law, the rise of employees within the management bodies of public limited companies and private companies limited by shares of a certain size is further confirmed by the new law, in accordance with a "small steps" policy. It concerns both employee representation in general and shareholding employee representation.

Representation of employees in general

On this specific point, it should be recalled that the movement was initiated by the law of 14 June 2013 on job security, then extended by the law of 17 August 2015 on social dialogue and employment, which had the effect of requiring the presence of directors or members of the supervisory board representing employees, according to the following:

- on the one hand, when the board numbered more than twelve non-employee members, it had to include at least two members representing employees;
- on the other hand, when the board had a number less than or equal to twelve non-employee members, it had to include at least one member representing employees.

Article 184 of the *Loi Pacte* lowers this pivotal threshold from twelve to eight. In other words, from now on, when a Board of those companies concerned comprises more than eight members, it must include at least two members representing employees, and at least one if not.

The scope of companies concerned has been very slightly amended:

- the companies concerned remain public limited liability companies and private companies limited by shares which, for two consecutive financial years, employ (i) at least one thousand permanent employees in the company and its direct or indirect subsidiaries, and whose registered office is exclusively in France, or (ii) at least five thousand permanent employees in the company and its direct or indirect subsidiaries, whose registered office is located in France and abroad;
- direct or indirect subsidiaries of companies subject to such mandatory representation continue to not be concerned by such an obligation;
- lastly, pure holding companies not required to set up a social and economic joint committee (workers' union) also continue to not be concerned by such obligation when they directly or indirectly control one or more subsidiaries subject to this obligation, but the law now only opens this exemption if (i) they are not listed or if (ii) at least four-fifths of its shares are held, directly or indirectly, by a natural or legal person acting alone or in concert.

Lastly, it should be noted that the *Loi Pacte* is considering new developments in the same direction, since the government is required to submit a report within a maximum period of three years on (i) the advisability of extending this representation to three members when these Boards have more than twelve members, and (ii) on the relevance of including in this panel a member representing the employees of subsidiaries located outside France, when said company carries out a significant part of its activity abroad.

Representation of shareholding employees

Another older system provided for the specific representation of employee shareholders within these same management bodies, whenever the shares held by the employees represented more than 3% of the share capital. This specific representation was ensured by one or more members elected by the general meeting (i) from among the employee shareholders or, where applicable, (ii) from among the employee members of the supervisory board of an investment trust (*fonds commun de placement d'entreprise or FCPE*) holding shares in the company.

Initially applicable to public limited companies and private companies limited by shares of a certain size, this system was then restricted to listed public limited companies (law no. 2006-1770 of 30 December 2006).

On this point, the new law takes a singular step back into the past, since it extends once again the application of this specific representation obligation to public limited companies of a certain size (see article 184 of the *Loi Pacte*), the thresholds here being strictly aligned with those provided for employee representation in general (see above).

In addition, to facilitate the achievement of the 3% threshold above which employee shareholders must have specific representatives, the new law extends the inclusion of free shares held in registered form by employees in the calculation of employee share ownership. The law of 6 August 2015 for growth, activity and equal economic opportunities introduced this measure, but only for free shares whose allocation had been authorised by a decision of the general meeting after the publication of this law. The new law partially corrects this restriction by offering those companies concerned the possibility of including in the articles of association bonus shares whose allocation had been authorised by a general meeting prior to the law of 6 August 2015 (see article 164 of the *Loi Pacte*).

With regard to these specific representatives, the new law finally provides a welcome clarification. While the text initially limited itself to excluding their consideration in determining the minimum and maximum number of Board members, it now also excludes their consideration for the application of the obligation of balanced representation of members of each gender on boards (see below).

Overall, employee representation in the management bodies of the largest companies therefore continues to increase. It should also be noted that, in recognition of the need to provide these representatives with the means to carry out their duties effectively, the new law provides for a doubling of their minimum training period from 20 to 40 hours, from 20 to 40 hours, for both employee representatives in general and employee shareholders (see article 186 of the *Loi Pacte*). Lastly, some of this training will have to be carried out within the company or its group.

2 Fair representation of each gender

On this point, the first steps taken by the legislator date back to a law of 27 January 2011, under which the proportion of directors or members of the supervisory boards of public limited companies and companies limited by shares of each gender may not be less than 40% in listed companies, as well as in companies exceeding certain thresholds for permanent employees (today, 250) and net turnover or balance sheet total (today, 50 million euros) for three consecutive years.

In addition, the above-mentioned law had set several deadlines, which expired on 1 January 2017, for the companies concerned to comply with the objective, with the sole exception of companies with 250 to 499 permanent employees for which the threshold overstepping must be recorded over at least three consecutive financial years as from 1 January 2017.

Today, the challenge seems to have been met to a large extent, since the proportion of women on boards of directors and supervisory boards of both CAC 40 and SBF 120 companies (major listed companies in France) ranges from 42% to 43%. However, this percentage is dropping with capitalisation amounts, and the percentage targeted by the legislator does not yet seem to be sufficiently achieved for non-listed companies that are nevertheless subject to these legal obligations.

Based on this observation, and despite the fact that the initiative did not enjoy the government's support, MPs intended to supplement the legal framework by providing for increased sanctions against companies that do not respect the representation thresholds set by the legal texts.

More specifically, whereas the penalty was limited to the nullity of those appointments made in violation of such an obligation, the express exclusion of the nullity of the deliberations in which the irregularly appointed members took part has been deleted in the *Loi Pacte* (Article 189).

In other words, these deliberations may be subject to invalidity, in accordance with the general rules provided for by corporate law on invalidity, which provide for such a sanction in the event of a breach of the mandatory provisions of Book II of the French Commercial Code. This results in a considerable risk for offending companies, considering that there are no specific limits. This sanction will not apply automatically, and the judge may use his discretion to pronounce it only occasionally.

In any event, care will therefore have to be exercised more forcefully by those companies concerned, in view of the danger of so-called "cascading " invalidity decisions that could result from decisions taken by an irregularly composed board.

Lastly, it should be noted that the new law also requires public limited companies - regardless of their size - to seek a balanced representation of each gender among deputy general managers or members of the management board, depending on the type of management in place, through a selection process intended to implement such an objective (see Article 188 of the *Loi Pacte*). Only the establishment of a selection process is therefore binding on those companies concerned, which seem to be free to determine its more precise outlines, provided that it guarantees the presence of at least one person of each gender among the candidates until the end of the selection process. Furthermore, the Chief Executive Officer, the Chairman of the Board of Directors, and more generally the members of the Executive Committee are not covered by the law and are therefore not affected by such an obligation.

CONTROLLING EXECUTIVE COMPENSATION

Edmond Schlumberger and Anne Tolila

This topic has already been the subject of recent legislative interventions, the main one being the law of 9 December 2016 on transparency, the combating corruption and the modernisation of economic life. Since this law, French listed public limited companies are required to set up a "say on pay" system, whereby they must submit to the general shareholders' meeting for approval both the overall remuneration policy for executive officers and the amount of remuneration actually paid to them.

Since then, the European legislator has in turn intervened, through EU Directive 2017/828 of 17 May 2017 amending Directive 2007/36/EC with a view to promoting long-term shareholder commitment. The principle of "say on pay" is also included in this directive, subject to the same double ex ante and ex post voting by shareholders, with the exception that Member States are free to give such a vote a purely advisory character.

For the most part, French law is thus now above the minimum level set by Europe. However, in some respects compliance is not always ensured, so that transposition of the Directive's requirements remains necessary on some points. In particular, in the report submitted to shareholders' vote, the Directive requires transparency on the individual compensation of directors or members of the supervisory board, which is not currently required under French law. However, the new law has limited itself to authorising the government to legislate by ordinance in this respect (see Article 198 of the *Loi Pacte*), which in theory must take place before 10 June 2019 in order to comply with the transposition deadline set by the Directive.

However, some of the changes dictated by the Directive have been directly incorporated by the new law, albeit in an incomplete way.

The first concerns the determination of the variable compensation allocated to executives. The Directive was very demanding on this point, stating that the remuneration policy should establish clear, detailed and varied criteria for the allocation of variable remuneration, and more particularly indicate the financial and non-financial performance criteria to be taken into account. The new law takes a first step in this direction, by stating that the corporate governance report should describe, where applicable, the variable elements of remuneration determined on the basis of the application of non-financial performance criteria (see article 175 of the law). It is worth noting here that, on the one hand, the setting of non-financial performance criteria does not seem to be binding, and on the other hand, this information does not appear in the elements of the remuneration policy submitted to the ex ante vote of the shareholders. The expected order (see above) will therefore necessarily have to complete this first evolution to ensure that French law complies with the Directive. The corporate governance report must also be prepared in private companies limited by shares, which extends the scope of this new obligation to listed limited stock partnerships ("société en commandite par actions", or SCAs), , in addition to listed public limited companies ("société anonyme", or SAs).

The second concerns the disclosure of pay gaps between managers and employees. Here again, the Directive has been a significant innovation. As part of the shareholders' ex post vote on individual executive compensation, it thus requires changes made to executive compensation to be stated alongside those made to the average full-time equivalent compensation of the company's employees over at least the most recent five financial years. The new law incorporates this requirement, by providing that the corporate governance report must mention the level of compensation of executive officers in re lation to the average full-time equivalent compensation of the company's employees (other than corporate officers) and the change in this ratio over at least the most recent five financial years, presented together and in a manner that allows comparison. The *Loi Pacte* has in fact gone even further, by extending this comparison to the median compensation of employees and corporate officers (see Article 187 of the *Loi Pacte*), which was not required by the Directive.

CONTROLLING RELATED PARTY TRANSACTIONS

Edmond Schlumberger and Anne Tolila

Subject to regular legislative amendments, the control procedure for related party transactions is once again subject to a number of adjustments, mainly as a result of EU Directive 2017/828 of 17 May 2017 amending Directive 2007/36/EC in order to promote long-term shareholder commitment. In this text, the European legislator intended to strengthen the control over these transactions entered into with "related parties", to use its own terminology, bearing in mind that the requirements laid down only applied to listed companies. A first innovation is the mandatory disclosure of the signing of related party transactions by these listed companies. More precisely, the new law provides that these companies must publish on their website information on such agreements at the latest at the time of their conclusion (see article 198 of the law). This is a radical change, insofar as the AMF General Regulation only required the disclosure ex post, in the company's half-yearly activity report, of agreements having a material impact on its financial position or results. The information covered by the law will subsequently be specified by a decree, bearing in mind that the rective requires that the announcement contain at least information on the nature of the relationship with the related party, the name of such related party, the date and value of the transaction, and any other information necessary to assess whether the transaction is fair and reasonable.

A second innovation concerns the creation of an internal control procedure for agreements relating to current transactions concluded under normal conditions. In the wake of the Directive, the new law requires the board of directors and supervisory board of listed companies to set up a procedure to regularly assess whether agreements continue to fulfil these two types of conditions, it being specified that persons interested in these agreements may not take part in this assessment (see Article 198 of the *Loi Pacte*). If the terms of the Directive are used, it will therefore be necessary to verify that these transactions (i) are part of the company's ordinary business and (ii) meet normal market conditions.

Lastly, regardless of the Directive's requirements, the French legislator has decided to offer clarifications for those agreements indirectly concerning a person related to the company by virtue of his status as director, or significant direct or indirect shareholder of the latter, in order to assimilate more clearly this indirectly interested person to the direct person (see Article 198 of the *Loi Pacte*). The new law leads to the exclusion of these directly or indirectly interested parties from the deliberations and vote within the board called upon to authorise the agreement, as well as from the vote of the general meeting called upon to approve the agreement. Additionally, it indicates that the shares of the person concerned by the agreement, whether directly or indirectly, will now be taken into account for the calculation of the quorum, even if this person cannot then take part in the vote itself. The purpose of the measure is to facilitate a useful vote of the meeting from the first summons, which can save a considerable amount of time. Please note that these final amendments are of interest to all public limited companies and private companies limited by shares, including unlisted companies.

STRENGTHENING STATE CONTROL OVER STRATEGIC COMPANIES

Jean-Gabriel Flandrois and Nadège Nguyen

Obtaining prior authorisation for foreign investments is a key element in the French legal landscape. Created by law no. 66-1008 of 28 December 1966 alongside foreign exchange controls, its regime expanded regularly until decree no. 2018-1057 of 29 November 2018. Articles 152 and 153 of the *Loi Pacte* further increase State control over strategic companies by strengthening control over foreign investment, without however changing its scope.

1 Authorisation procedure and definition of investment

In general, foreign investments in (i) activities likely to harm public order, public security, national defence interests, or in (ii) activities related to the research, production or marketing of weapons, munitions, powders and explosive substances, are subject to prior authorisation by the French Minister for economic affairs.

However, the definition of an investment and the precise nature of the activities subject to prior authorisation depend on the origin of the investment.

If the investment comes from a country outside the European Union and the European Economic Area, investments are deemed as:
1 - the acquisition of control, within the meaning of Article L. 233-3 of the French Commercial Code;
2 - the acquisition of all or part of a branch of activity;
3 - exceeding the 33.33% threshold for holding capital or voting rights.

In these cases, activities subject to prior authorisation are those listed in paragraphs 1 to 14 of Article R. 153-2 of the French Monetary and Financial Code[1].

If the investment comes from a Member State of the European Union or the European Economic Area, then the definition of investment covers only the two first cases mentioned above. In these cases, the activities subject to authorisation are those listed in paragraphs 8 to 14 of Article R. 153-2, and those listed in Article R. 153-5 of the French Monetary and Financial Code.

Lastly, if the investment is made by a company governed by French law controlled by a foreign person, then the concept of investment covers only the case mentioned in the second case above. In this case, activities subject to authorisation are those listed in paragraphs 8 to 14 of Article R. 153-2[2] of the French Monetary and Financial Code[3].

The Minister shall render his decisions within two months. Failing this, the authorisation shall be deemed to have been granted. The Minister may authorise the investment, attach conditions to its authorisation, or refuse it by a reasoned decision.

1. Including in particular gambling, information technology systems, weapons and ammunition, sectors vital to the country's interests and research and development activities in new technologies.
2. This excludes gambling and information technology systems in particular.
3. Covering in particular information technology systems.

2 The four major contributions of the Loi Pacte

Strengthening the Minister's power of injunction

The regime prior to the *Loi Pacte* granted the Minister the possibility of ordering a foreign investor who had made an investment without consideration of the legal requirements not to proceed with the transaction, to amend it or to have the previous situation restored at his own expense.

The *Loi Pacte* clarifies and strengthens the powers of injunction and penalty payment by distinguishing between:
- the case of an investment made without prior authorisation, where the Minister may not only order the investor to restore the previous situation at his own expense and modify the investment, but also to file an application for authorisation or appoint an agent responsible for ensuring the protection of national interests;
- the case of non-compliance with the conditions related to a prior authorisation, whereby the Minister may now (i) withdraw the authorisation, (ii) require the investor to comply with the conditions, or (iii) require the investor to perform other obligations in lieu of the conditions not performed.

These injunctions may also be subject to a penalty payment (with the exception of the appointment of an agent) and the Minister may take the following precautionary measures: (i) suspension of voting rights, (ii) prohibition or limitation of the distribution of dividends or remuneration, and (iii) suspension, restriction or temporary prohibition of the free disposal of all or part of the assets.

Strengthening the Minister's power of sanction

The regime prior to the *Loi Pacte* limited the amount of the sanction that may be imposed by the Minister in the event of irregular investment to twice the amount of the investment made.

The *Loi Pacte* clarifies the Minister's powers of sanction by setting out the failures of foreign investors that may be subject to sanction, namely: (i) an investment without prior authorisation, (ii) obtaining prior authorisation by fraud, (iii) non-compliance with the conditions attached to a prior authorisation, and (iv) total or partial failure to comply with decisions or injunctions taken by the Minister.

In addition, the *Loi Pacte* increases the amount of sanctions against defaulting investors. It can now reach a maximum of the highest of the following amounts:

- twice the amount of the irregular investment,
- 10% of the annual turnover excluding tax of the company carrying out the activities subject to prior authorisation,
- 5 million euros for corporate investors and 1 million euros for individual investors.

Strengthening the Minister's rights to information

The *Loi Pacte* introduces a right to information for the Minister in the exercise of deciding whether to authorise a foreign investment, to enable him/her to have access to the documents and information considered to be useful.

Thus, the investor must communicate to him/her, at his request, all the documents and information necessary for the execution of his/her task, without being able to refuse access to legally protected secrets.

This right to information is not unlike that of the French competition authority in the context of its investigative assignments (Article L. 450-3 of the French Commercial Code).

Strengthening the transparency obligations of the Government

Lastly, the *Loi Pacte* emphasises transparency requirements related to foreign investments. Thus, on an annual basis, the Government will:

- publish statistical data on the control of foreign investment in France;
- send a detailed report on its action in this field to the relevant parliamentary committees.

Pillar 3: Simplifying the financing and restructuring of companies

The third pillar of the Loi Pacte is in line with the desire to make the French economy and its companies more attractive and influential. Investment funds are rendered more attractive, with France striving to become a leading player in the crypto-assets sector.

A liberalisation of preference shares, mainly in non-listed companies, and a lowering of thresholds for mandatory squeeze-out and public squeeze-out procedures in listed companies are other significant markers of the Loi Pacte.

Financing, particularly bank financing, should be facilitated by the announced reform of the law on securities and guarantees in particular. More generally, a better articulation of securities and collective proceedings will be at the centre of upcoming orders, which will have to transpose the insolvency directive and guarantee a right to rebound for French and European entrepreneurs.

BOOSTING THE ATTRACTIVENESS OF INVESTMENT FUNDS

Stéphane Puel, Guillaume Goffin and Céline Curatola

The *Loi Pacte* addresses many issues of interest to investment funds and financial markets, with the main objectives of boosting investment and improving long-term financing for companies. The main developments are presented below.

1 Expansion of eligible unit-linked life insurance policies

Considering that unit-linked life insurance is an insufficiently used vehicle for investing in alternative asset classes (i.e. private equity), the *Loi Pacte* introduces new article L. 131-1-1-1 into the French Insurance Code specifying that units of account may now consist of units or shares of funds open to professional investors[4], such as professional real estate investment funds, specialised professional funds, professional private equity funds and free partnership companies. Nevertheless, conditions relating to the financial situation, knowledge and experience of the contractor in financial matters must be respected.

A decree must also be adopted to establish the final list of funds concerned and the eligibility conditions for these new units of account, the main issues relating to the limitation of the outstanding amount of commitments expressed in units of account in these underlying assets (i.e. introduction of specific ratios with regard to the outstanding amount of the contract).

4 - See article 72 of the *Loi Pacte*.

2 Revaluation of the payment ceiling and increased number of assets eligible to SME Equity Savings Plans[5]

The *Loi Pacte* raises the ceiling of payments that can be made into an SME Equity Savings Plan (plan d'épargne en actions, or PEA PME) to EUR 225,000, and extends the list of assets eligible to the SME Equity Savings Plan to equity securities and fixed-rate bonds offered or having been offered through an investment services provider or an equity investment advisor, via a website that meets the characteristics set out in the General Regulations of the French Financial Markets Authority (Autorité des marchés financiers, or AMF), as well as to mini-bonds[6].

5 - Equity savings plan to finance small and medium-sized companies and mid-cap companies.

6 - See article 89 of the *Loi Pacte*.

3 Extension of the list of eligible investments in venture capital funds

The following will now be eligible up to a limit of 20% of a given fund's assets, and within the 50 %[7] investment quotas of venture capital funds (fonds communs de placement à risque, or FCPR):

- debt securities issued by companies whose equity securities are not admitted to trading on such a market,
- debt securities issued by limited liability companies or companies with equivalent status in the state where they have their registered office, and
- claims held by the fund on such entities.

In addition, by allowing venture capital funds to provide a sufficient liquidity pocket of at least 5%, which helps to handle potential redemptions by holders, the *Loi Pacte* thus addresses the obstacle currently encountered by venture capital funds regarding the eligibility of their shares as unit-linked life insurance policy products due to the low liquidity of such vehicles.

7 - Article L. 214-28 of the current French Monetary and Financial Code provides that " At least 50% of the assets of a venture capital fund (fonds commun de placement à risques, FCPR) must consist of equity-like securities, equity securities or securities which give direct or indirect access to the capital of companies which are not admitted to trading on a French or foreign regulated market and whose operations are managed by a market undertaking, an investment service provider or any similar foreign entity, or, as an exception to Article L. 214-24-34, shares in limited liability companies or companies having an equivalent status in their State of residence ».

4 Extension of the list of assets from certain funds eligible to digital assets

Specialised professional funds, subject to compliance with the liquidity and valuation rules applicable to them, may invest in digital assets since the condition of ownership, one of the four criteria for eligibility for assets of such funds, will be deemed to be met for assets that are registered in a shared registration scheme. The *Loi Pacte* also provides for the possibility for professional private equity funds to invest in digital assets, up to a maximum of 20% of their assets[8].

These new possibilities aim to encourage the development of funding rounds in digital assets, and satisfy informed professionals looking for the best risk/return ratio.

8 - See article 88 of the *Loi Pacte*.

5 Enhancing the transparency of shareholders' commitment of asset management companies

Transposing Directive 2017/828 of the European Parliament and of the Council of 17 May 2017 on the long-term commitment of shareholders, portfolio management companies, referred to in the current Article L. 532-9 of the French Monetary and Financial Code[9], will now be required to develop and publish a shareholder commitment policy describing how they integrate their role as shareholders into their investment strategy[10].

Thus, each year, they must publish a report on the implementation of this policy in order to raise awareness and strengthen the long-term role of shareholders.

9 - With the exception of portfolio management companies that exclusively manage alternative investment funds falling within the scope of I of Article L. 214-167 of the French Monetary and Financial Code, alternative investment funds falling within the scope of section IV of Article L. 532-9 of the French Monetary and Financial Code, alternative investment funds falling within the scope of the second paragraph of III of Article L. 532-9 of the French Monetary and Financial Code or that manage other collective investments mentioned in Article L. 214-191 of the French Monetary and Financial Code.

10 - A decree will specify the content of the commitment policy. However, the content of this commitment policy should be structured in several sections already provided for in Directive 2014/828, such as monitoring strategy, financial and non-financial performance, risks, capital structure, social and environmental impact, corporate governance, voting rights and dialogue with the company, for example.

6 The reform of specialised financing undertakings

The conditions for subscribing to and redeeming the units, shares or debt securities of specialised financing undertakings (organismes de financement spécialisés, or OFS) will be specified in the General Regulations of the French Financial Markets Authority. When "exceptional circumstances so require and if the interests of investors or the public so require[11]", the redeeming by an OFS of its shares or debt securities, as well as the issue of new shares or debt securities, may be temporarily suspended.

OFSs may also reserve the subscription to or acquisition of their units, shares or debt securities to a maximum of twenty investors or to a category of investors. The terms and conditions for marketing these vehicles must be specified by the French Financial Markets Authority.

11- See article 206 of the *Loi Pacte*.

7 The removal of the requirement to hold a minimum share of 5% to grant shareholders loans[12]

Considering that this condition constitutes a barrier for start-ups, it is removed by the *Loi Pacte*, thus enabling companies to diversify their sources of financing and encourage investment within these companies.

12 - See article 76 of the *Loi Pacte*.

8 The extension of the French Financial Markets Authority's sanctioning power

The AMF (French Financial Markets Authority) Enforcement Committee may now hear facts dating back more than six years[13] if no action has been taken during this period to investigate, record or punish them[14]. The period shall run from the day on which the breach was committed.

If the breach is concealed, this period shall run from the day on which the breach became apparent and could be established under conditions allowing the AMF to carry out its investigation or control duties. In this latter case, the limitation period shall be twelve years.

13 - Up until now, this period had been set to three years.
14 - See article 81 of the *Loi Pacte*.

A NEW AND INNOVATIVE REGIME FOR DIGITAL ASSET MARKET PLAYERS

Jennifer D'hoir and Matthieu Lucchesi

In order to respond to the growth of the digital assets market and the need to clarify the applicable law, the legislator has introduced a new and innovative regime in articles 85 to 88 of the *Loi Pacte*.

New, because France is one of the first jurisdictions in Europe and in the world to include in its law a clear, precise and adapted framework for these new activities.

Innovative, because France has chosen to offer an optional regime (for the most part) in order to ensure the necessary flexibility for the development of this new market while proposing an appropriate level of legal security.

The new regulatory framework proposed in the *Loi Pacte* contains three major components: the first relates to funding rounds through the issuance of tokens (Initial Coin Offerings, or ICOs), the second to digital assets services providers (DASP), and the third to certain investment funds.

1 An optional visa for ICOs

The French legislator has sought to make the applicable framework more transparent by proposing a clear definition of these new types of assets. For the purposes of ICOs, the tokens concerned are defined as "digital assets not classified as financial instruments, giving rise to one or more rights and that may be issued, registered, stored or transferred using a distributed ledger technology (blockchain)"[15]. Issuers wishing to offer the public the possibility of subscribing to this type of token may, provided they are established or registered in France, apply for a visa with the *French Autorité des marchés financiers* (**AMF**). To make this request, the token issuer must provide the AMF with a document containing information on: the issuer's project; the purpose and characteristics of the offer; the rights attached to the tokens offered to the public; the risk factors and mitigation methods put in place; etc. Details regarding the content of this document will be specified in the AMF General Regulation ("**RGAMF**") and in an instruction.

The optional nature of this visa is unprecedented and constitutes **a real regulatory innovation**. The legislator is clearly looking to make regulation **a competitive advantage and not a constraint**, likely to represent an obstacle to the development of this new market, which is a vector for economic growth.

15 - Article L. 552-3 of the French Monetary and Financial Code.

2 Optional authorisation for DASPs

An optional system is also suggested for providers of services on digital assets, which the law has taken care to list. Article L. 54-10-2 of the French Monetary and Financial Code lists a series of new services on digital assets that will be specified in a decree and in the RGAMF. These services include:

- custody of digital assets on behalf of third parties;
- purchase or sale of digital assets against legal tender or other digital assets (broker/dealer); or
- operation of a digital assets trading platform (stock exchange).

The term "digital assets" here covers tokens issued in the context of an ICO (see above) and virtual currencies within the meaning of European law[16]. Financial instruments as defined in MiFID II[17] are excluded from this regime.

Players established in France will therefore have the option of applying to the AMF for **optional authorisation** to provide the services listed in Article L. 54-10-2 of the French Monetary and Financial Code. The service provider will have to meet a number of requirements to be approved, and then be placed under the supervision of the AMF. These requirements were largely inspired by the obligations applicable to traditional financial market participants: rules of good conduct and management of the conflicts of interest; the establishment of adequate security and internal control mechanisms; and the availability of professional civil insurance or own funds. Specific rules, adapted to each service, have also been defined in the law and will be specified in a decree and in the RGAMF. The legislator wished to offer a **sufficiently robust regime to guarantee the credibility of this new type of authorisation**. The optional nature of the rules ends when the service provider is actually approved, since it is then required to comply with the applicable regime. Any failure to comply with the related obligations is potentially subject to sanctions.

16 - Article 3 (18) of European directive 2018/843 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (AML/CFT Directive).
17 - Directive 2014/65 on financial instruments markets ("MiFID II directive").

3 Mandatory registration for certain service providers

In accordance with Articles L. 54-10-3 and L. 54-10-4 of the French Monetary and Financial Code, providers offering digital assets custody services on behalf of third parties and the purchase or sale of digital assets against legal tender are **subject to mandatory registration with the AMF**, after obtaining approval from the French Prudential Supervision and Resolution Authority (*Autorité de Contrôle Prudentiel et de Resolution, or ACPR*), to carry out their activity. This provision is a direct result of the European requirements imposed by the AML/CFTDirective.

To proceed with this registration, service providers must meet obligations in terms of fit and proper, and have put in place procedures to combat money laundering and terrorist financing. On the basis of the registrations made, the AMF will publish a list of registered service providers.

4 The possibility for certain investment funds to invest in digital assets

In addition, it should be recalled here[18] that the *Loi Pacte* allows certain types of investment funds to invest in digital assets (as defined above). This possibility is open to s**pecialised professional funds**, provided they comply with the liquidity and valuation rules applicable to them, and for **professional private equity funds** up to a limit of 20% of their assets.

With this innovative regulatory framework, the legislator intends to make France a reference jurisdiction in terms of regulating digital asset markets to attract project holders. This positioning seems particularly justified at a pivotal time for Europe, when European authorities are questioning the need to adapt existing rules and/or to innovate by defining new rules favouring the emergence of pan-European players.

18 - See above, "Boosting the attractiveness of investment funds".

5 A first legislative response to a changing market

This legislative change makes it possible to provide initial answers to a new segment of assets that is developing on various technological, legal and economic dimensions.

Indeed, digital assets are issued by various computer protocols, offer different advantages and are part of reinvented business models.

Depending on the manner in which they are issued, the prerogatives they offer and the objectives they pursue, they must be subject to a legal qualification necessary for the application of the rules relevant to their issue and use.

By dealing with "utility tokens"[19], the *Loi Pacte* provides a complementary and necessary legal response to the development of this market which, given its diversity, will also need to be the subject of regulatory work at European level.

For instance, the legal handling of "financial or security tokens" (digital assets qualified as financial instruments within the meaning of the MiFID II Directive) will require a number of clarifications in European law that may be made in ongoing work carried out by the European supervisory authorities.

19 - Utility tokens are assets that are not legally qualified as financial instruments such as defined under the MiFID II Directive.

LIBERALISATION OF PREFERENCE SHARES

Antoine Tézenas du Montcel and Edmond Schlumberger

While the new law does not completely reform the preference share regime, it does benefit from some significant changes. The focus here will be on two of the main changes, which are very useful for the private equity practice.

The first change concerns the voting rights that may be attached to the preference shares. Until now, these shares could come with specific rights of any kind, but had to comply with the principle of proportionality between the voting rights and the equity securities held and the limited exceptions provided for by law (see Articles L. 225-122 to 225-125 C. com.). As a result, it was not possible to issue preference shares with multiple voting rights within public limited companies ("société anonyme", or SAs) and limited stock partnerships ("sociétés en commandite par actions", or SCAs), and it remained uncertain whether or not this was possible within simplified joint-stock companies ("sociétés par actions simplifiées", or SAS), owing to the complex interweaving of the texts on SAs, SASs and preference shares respectively.

The new law dispels any difficulties in this respect as it provides that companies issuing preference shares are no longer required to respect the principle of proportionality previously mentioned (article 100 of the *Loi Pacte*), with regard to the rights attached to these shares. In other words, preference shares may be granted multiple voting rights in all joint stock companies, including SAS. It should be noted, however, that listed companies are still denied such right.

The second important change concerns the terms and conditions for the redeeming of preference shares. In some respects, it was unclear whether it would be possible to provide for, at the time of issue, the redemption of the shares upon the occurrence of a predefined term. In other respects, this redemption could only take place if initiated by the issuing company, which by definition excluded redemption initiated by the shareholder. The setting up of a redemption of preference shares process was not therefore very well secured from a legal standpoint.

The new law thus clarifies matters, giving a certain amount of long-awaited freedom to companies not listed on a regulated market (Article 100 of the *Loi Pacte*). Firstly, it removes any doubt as to the possibility of determining, prior to their subscription, the conditions and time limit for the redemption of preference shares in the Articles of Association. In other words, the precise terms of share redemption can be provided for in advance, so that any such redemption can take place automatically upon expiry of a term or the fulfilment of conditions previously set. Thus, when they enter a company's capital, investors will be able to negotiate the conditions of their future exit. The second important innovation was introduced during parliamentary discussions: the redemption of preference shares may take place at the exclusive initiative of the holder, a possibility that the legislator has until now always refused to accept. In other words, an investor holding preference shares will be able to negotiate the right to a real exit, which he will be able to use under the conditions provided for by law and the Articles of Association for such a redemption, i.e. a right that has hitherto been mainly provided for by shareholders' agreements. The only limit to such a withdrawal will traditionally be that of respecting the prohibition of leonine clauses, which will most probably prohibit the redemption of securities at the exclusive initiative of the investor at a minimum price corresponding to the subscription price.

LOWERING THE MANDATORY SQUEEZE-OUT THRESHOLD

Antoine Tézenas du Montcel

In its section on measures to promote the financing of companies by private actors, the text provides for a reduction from 95% to 90% of the holding threshold required to exercise a squeeze-out following a takeover bid. This consists in expropriating, for financial compensation, the minority shareholders of a listed issuer followed by a delisting of the company[20].

The legislator thus decided to apply a generalised threshold that did not follow the recommendations of certain market participants. They were in favour of a selective lowering of the mandatory squeeze-out threshold to 90% only when it could be exercised following a takeover bid for which the bidder held less than 50% of the target at the time the bid was made[21].

The stated objective of this legislative amendment is to strengthen the attractiveness of the Paris stock exchange and encourage initial public offerings, particularly of SMEs with high growth potential. It would send a reassuring signal to candidates for listing regarding the conditions for delisting (in 2018, seven IPOs were made on Euronext and 10 on Euronext Growth, compared with 13 on Eurolist and 25 on Alternext in 2007 in a pre-crisis context). However, it could have other effects.

First of all, we can hope for a rebound in the takeover bid market (22 transactions in 2018 compared with 67 in 2007) given the increased probability that an offeror will be able to delist the target. There are currently around 40 companies listed on Euronext with a market capitalization of over EUR50 million, with a reference shareholder (alone or in concert) holding at least 80% of its share capital.

Lowering the threshold to 90% should limit purely opportunistic equity investments by activist investment funds in companies under public offer (as we have seen with companies like Camaïeu, Buffalo Grill, APRR, Norbert Dentressangle and Radiall), in particular by making them more costly and risky for their promoters. Their aim would be to reach the threshold allowing the mandatory withdrawal to be blocked, and then negotiate their exit price on better terms.

By aligning the threshold with that required for the implementation of the simple delisting provided for since 2015 by the Euronext rules, this measure could also contain the temptation that some unsuccessful initiators in the implementation of a mandatory delisting may have by arbitrating in favour of the simple delisting which - not resulting in the expropriation of minority shareholders - leads to small holders ultimately owning shares in non-listed companies that are entirely illiquid.

Lastly, since most European Union Member States now retain a 90% threshold for mandatory squeeze-out, this amendment could also render irrelevant the practice sometimes observed of French issuers seeking more lenient European jurisdictions for mandatory squeeze-out (in particular via transformation into a European company, and transfer of registered office to one of these jurisdictions).

20 - Article 75 of the *Loi Pacte* modifying article L. 433-4 of the French Monetary and Financial Code
21 - Report of the Legal High Committee for Financial Markets of (HCJP) dated 26 March 2018 regarding the reform of mandatory delisting.

LOWERING THE THRESHOLD FOR A PUBLIC REPURCHASE OFFER FOR MAJORITY OWNERSHIP

Antoine Tézenas du Montcel

The legislator has set at 90% of the share capital or voting rights the minimum threshold for the public repurchase offer for majority ownership[22].

Until now, a threshold of 95% of the voting rights, set out in the General Regulations of the Financial Markets Authority, was required for the majority shareholder (alone or in concert) to voluntarily file, or be required by the stock exchange authority - following a minority shareholder's request - to file a public repurchase offer.

The objective stated by the promoters of this amendment is to ensure consistency with the lowering of the holding threshold necessary for mandatory squeeze-out (see above) and thus facilitate the exit of minority shareholders who, given their position in the company's capital, would find it impossible to sell their shares.

Since only one public repurchase offer at the request of a minority shareholder has been imposed by the stock exchange authority over the past twenty years, for reasons relating in particular to share illiquidity[23], it will be necessary to see, in practice, whether the French Financial Markets Authority changes its doctrine regarding the criteria used, to impose it.

22 - Article 75 of the law amending article L. 433-4 of the monetary and financial code.
23 - Public repurchase offer on Ivalis.

A FUTURE REFORM OF SECURITIES LAW

Philippe Dupichot and Laetitia Lemercier

A new reform of the law on securities is announced in article 60 of the *Loi Pacte*: it empowers the government, for a period of two years, to take by ordinance the necessary measures to simplify the law on securities and enhance its effectiveness, some 13 years after the major reform carried out by the ordinance of 23 March 2006.

This reform once again follows on from the work carried out under the aegis of the Association Henri Capitant, which submitted to the Chancellery a preliminary reform project in June 2017, which should inspire the upcoming ordinance.

There are three main reasons for such a "reform of the reform".

First, the 2006 reform was only partial and must be completed. Surety bonds were left by the wayside because the legislator refused at the time to authorise the government to legislate by ordinance on such a political matter; the current Republic of ordinances now allows such reform to be carried out otherwise than through parliamentary channels.

Second, the practice has identified some interpretation difficulties related to the 2006 reform that need to be clarified in the light of accumulated experience.

Third, the legislator wishes to ensure better coordination between the 2006 reform and certain subsequent reforms of private law (trusts, stock pledges, security agents, reform of contract law and the general regime of obligations) and, in particular, with the law of collective proceedings, while allowing real or personal securities to be concluded electronically in order to facilitate their use. The terms of the authorisation suggest three avenues for the evolution of security law in the future ordinance: a reform of suretyship law, the law on real security interests and better coordination with collective proceedings. However, it seems that the proposal to open Book IV of the Civil Code on security interests in guiding principles was not taken up.

1 Surety bond reform

The surety bond reform - which is currently in deep crisis - will be at the heart of the order. The texts applicable to this personal guarantee date for the most part still from 1804 and deserve to

be rewritten in contemporary French. They have been made even more illegible by the inappropriate insertion by the 2003 Dutreil law of important texts in the French Consumer Code, curiously applicable to business relations whenever a natural person provides a guarantee to a professional creditor.

The formalism of the Dutreil Act, the duty to warn and the requirement of proportionality have given rise to an inexhaustible dispute that undermines the efficiency of surety bonds. This plays in favour of reinstating the handwritten endorsement and proportionality in the Civil Code by extending the resulting protection to any natural person, regardless of the creditor's status, while simplifying the content of the notice and substituting the sanction of the reduction of the disproportionate guarantee for that of its forfeiture.

As for the regime of exceptions enforceable by the guarantor against the creditor, it could be simplified by stating the principle that the guarantor may raise all the exceptions under the accessory rule, inherent in the debt as personal. The proposal for a framework for subrogation, which has recently increased to the detriment of the security of surety packages, will have to be discussed. Lastly, a clarification of the supplementary solutions in the event of modification or dissolution impacting the debtor, creditor or guarantor legal person, would be useful.

2 Expected improvements in the law of security interests

Preferential security interests

With respect to preferential security rights, which give the creditor a preferential right in the encumbered asset, improvements are first expected in the law on personal property security rights.

With regard to security rights in tangible movable property, the possibility of creating and maintaining a pledge on movable property immobilised by purpose will be recognised, the relative nature of the nullity of the pledge of another's property will be affirmed, and the realisation of the pledge constituted for professional purposes will be made more flexible. Obsolete movable (hotel) or warrants (industrial, war stocks) will be abolished, while both commercial and motor vehicle pledge should be more clearly linked to the common law pledge. This move will require harmonisation of the rules on the publication of personal property security interests, if necessary by centralising them in a single register.

With respect to security rights in intangible property, the debt pledge regime would be modernised, both by clarifying the fate of the sums paid by the debtor of the pledged receivable before maturity (deposited in an escrow account) and by probably affirming the exclusive right of the pledged creditor over the pledged receivable.

However, significant changes are also expected to affect preferential real estate securities. Firstly in terms of vocabulary, with the replacement of the current special real estate privileges subject to advertising by legal mortgages. Secondly in terms of content, with an extension of the derogations to the prohibition on the mortgage of future property and a maintenance of the mortgage coverage of the claim transmitted by subrogation for all accessories.

Exclusive security interests

In terms of exclusive security rights, which in principle excludes all other creditors, some improvements in the system of property rights used as securities are expected.

With regard to reserved ownership, the systematically ancillary nature of the retention of ownership, which ends when the claim is extinguished, whatever the cause, would be confirmed and the system of exceptions enforceable by the sub-purchaser in the event of the retention of ownership being transferred to the resale price claim would be specified.

With regard to the property transferred as collateral this time, the *Loi Pacte* innovations would be on a larger scale.

A relaxation of the rules for setting up and implementing the trust and security is on the agenda. It could proceed from a triple exemption provided for in the preliminary draft of the Association Henri Capitant: to have to value the property when the security is created, to have to record in a registered document the transfer of the rights resulting from the trust agreement to a new beneficiary, and to have to systematically call on an expert when the security is settled.

In addition, the authorisation provides the basis for the creation of new types of transfers by way of security, excluding any creation of a trust patrimony: on the one hand, an assignment of a receivable as a guarantee derived from the new regime of the assignment of a common law receivable; on the other hand, a transfer of a sum of money to the creditor as a guarantee which, although not provided for in the preliminary draft, will make it possible to secure the practice of cash pledges.

3 The articulation of security law and insolvency proceedings

The last expected course of action consists in a better articulation of the law of securities with the law of insolvency procedures. It implies respecting a difficult balance between the protection of the creditor on the one hand (which is the very purpose of any security) and that of the debtor and his guarantors on the other hand (whose rescue or even rebound is desired). In this respect, the preliminary draft had expressly suggested establishing the possibility for any mortgage creditor to apply for a judicial award (refused by the Court of Cassation), and even to avail himself of the statutory agreement (neutralised by Article L. 622-7 of the French Commercial Code) in the event of judicial liquidation. This controversial suggestion will be discussed.

The reform will at least aim to improve the drafting quality of certain texts relating to securities in Book VI of the French Commercial Code, in particular those relating to securities for prior

debts granted during suspicious periods. The rebound objective could involve allowing individual guarantors to take advantage of the adjustment of the interest rate suspension, the unenforceability of undeclared claims, and the deadlines and delivery of the recovery plan, in the same way as the solutions adopted in terms of safeguards.

It cannot be ruled out that the government may have higher ambitions, particularly in the context of the transposition of the insolvency directive. Reviewing the fate of security interests in insolvency proceedings is not completely out of the question.

We would like the legislator to improve readability of creditor ranking, which is particularly unintelligible today for economic players.

FACILITATING THE REBOUND OF COMPANIES UNDER FRENCH AND EUROPEAN LAW IN INSOLVENCY LAW

Jean-Gabriel Flandrois and Nadia Haddad

One of the main objectives of the *Loi Pacte* is to facilitate the rebound of entrepreneurs and companies subsequently to insolvency-related issues [24].

To this end, the *Loi Pacte* includes (i) a number of measures relevant to French law on insolvency proceedings, and (ii) empowers the government to transpose by government order the Insolvency Directive into French law[25].

1 French insolvency law

The main provisions of the *Loi Pacte* (articles 56, 57 and 64) affecting insolvency law are as follows:

Maintenance of the management's remuneration in reorganisation proceedings (unless otherwise requested by the trustee or the Public Prosecutor).[26]

Right to rebound:
a) strengthening the simplified judicial liquidation proceeding, which becomes mandatory when the thresholds currently provided for in the optional simplified judicial liquidation proceeding are reached.

(b) setting up a pathway from judicial reorganisation and judicial liquidation proceedings to professional recovery proceedings (proceeding which allows for a debt write-off of the claims filed).

In addition, the competent court must systematically verify, when (i) opening a judicial reorganisation or judicial liquidation proceeding and (ii) requested to terminate a safeguard or judicial reorganisation plan if the conditions for professional recovery are met and, if so, propose it (subject to the debtor's agreement).

Boosting the attractiveness of the prepack and sale plans by deeming unwritten the inverted solidarity clauses in commercial lease contracts. These clauses nevertheless remain applicable in the event of sale of isolated assets and their unenforceability is limited to commercial leases.

Possibility for the debtor to suggest the name of one or more trustees to the court in the event of judicial reorganisation proceeding[27].

The auditors' warning process, an important mechanism for anticipating corporate difficulties, will see its scope reduced due to the increase in the thresholds for the mandatory appointment of statutory auditors provided for by the *Loi Pacte* (article 20).

24 - Impact study of the *Loi Pacte*, 18 June 2018, p. 7.

25 - Directive Proposal of 22 November 2016 (2016/0359(COD)).

26 - As a reminder, the cumulative conditions are (i) the absence of real estate, (ii) no more than 5 employees over the 6 months preceding the receivership initiation, and (iii) an annual turnover not exceeding EUR 75,000 excluding VAT.

27 - Before the *Loi Pacte*, it was only possible to propose the name of a trustee in safeguard proceedings.

2 Harmonising pre-insolvency proceedings with European law (article 196 of the *Loi Pacte*)

The authorisation given to the government to transpose the Directive on preventive restructuring frameworks (from its adoption, probably in 2019[28]) will introduce the most important changes in relation to insolvency law.[29]

The objectives of the Directive are in particular (i) to harmonise preventive restructuring frameworks between Member States, (ii) to encourage a rapid turnaround of debtors in difficulty, and (iii) to promote second chances (right to rebound).

To this end, the draft directive provides for, in particular:

A replacement of creditors' committees by creditors' classes:

- creditors will now be divided into classes, according to the quality of their claim and their rank, each class forming a homogeneous group characterised by a community of interests[30],
- there shall be, at a minimum, one class of secured creditors and one class of unsecured creditors,
- only those creditors affected by the draft safeguard or judicial reorganisation plan would be called upon to vote on the plan.

The introduction of "cross-class cram-down"

Subject to strict conditions, it will be possible to adopt a plan (safeguard or reorganisation plan) without the agreement of all classes of creditors.

To date, only a "cram-down" between creditors of a same committee (and not between committees) exists under French law.

It should be noted that shareholders may not unreasonably prevent the adoption of a plan (safeguard or reorganisation plan). It will be possible to oblige them to form a class of creditors that may subsequently be subject to inter-class cram-down.

Boosting the "absolute priority rule":

One of the objectives of this rule is to strengthen subordination agreements by providing that a dissenting class of creditors must be fully paid off before a lower class can benefit from the distributions or retain a shareholding under the plan.

The draft Directive also contains other important provisions relating to debt write-offs, the reduction of the duration of the automatic stay, and the concept of the "best interest of creditors test".

Lastly, it should be noted that the government's authorisation to reform the law of securities by means of government order could, in addition to having a strong impact on insolvency law and its articulation with the law of securities, have a specific impact on the financing of restructurings[31].

Indeed, a mechanism similar to the "new money" privilege (now reserved for new cash contributions in the context of conciliation proceedings) could be extended to safeguard, judicial reorganisation and judicial liquidation proceedings. The scope of such a privilege remains to be defined.

28 - The text was adopted at first reading by the European Parliament on 28 March 2019.
29 - The scope of the Directive is uncertain because even if it covers pre-insolvency proceedings, all pre-insolvency and insolvency proceedings under French law will likely be affected.
30 - In contrast with the current distinction between (i) the main suppliers committee, (ii) the credit institutions and similar committee and (iii) other creditors.
31 - See above, "A future reform of securities law" and Article 60, 14° of the *Loi Pacte*;"[...] by providing conditions to encourage persons to make a new cash contribution to a debtor that is the subject of safeguard, receivership or liquidation proceedings with continued activity or that benefits from a safeguard or receivership plan decided by the court".

Authors

Xavier Chassin de Kergommeaux
Senior Partner
Banking & Finance
+33 (0)1 40 75 36 52
kergommeaux@gide.com

Céline Curatola
Legal consultant
+33 (0)1 40 75 85 40
celine.curatola@gide.com

Jennifer D'hoir
Innovation & FinTech
Banking & Finance
+33 (0)1 40 75 29 48
jennifer.dhoir@gide.com

Philippe Dupichot
Chair of Gide's Scientific Council
Lecturer at Paris 1 University
+33 (0)1 40 75 29 87
dupichot@gide.com

Jean-Gabriel Flandrois
Partner
Mergers & Acquisitions / Corporate
+33 (0)1 40 75 29 79
flandrois@gide.com

Guillaume Goffin
Partner
Banking & Finance
+33 (0)1 40 75 29 02
goffin@gide.com

Nadia Haddad
Associate
Mergers & Acquisitions / Corporate
+33 (0)1 40 75 36 50
nadia.haddad@gide.com

Laetitia Lemercier
Partner
Banking & Finance | Projects (Finance & Infrastructure)
+33 (0)1 40 75 22 18
laetitia.lemercier@gide.com

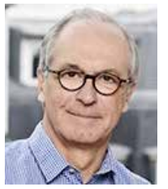
Yan-Eric Logeais
Counsel
Employment Law
+33 (0)1 40 75 94 43
logeais@gide.com

Matthieu Lucchesi
Innovation & FinTech
Banking & Finance
+33 (0)1 40 75 96 57
matthieu.lucchesi@gide.com

Didier G. Martin
Partner
Mergers & Acquisitions / Corporate
+33 (0)1 40 75 29 03
martin@gide.com

Jean-Hyacinthe de Mitry
Partner
Dispute Resolution / Intellectual Property, Telecommunications, Media & Technology
+33 (0)1 40 75 29 86
mitry@gide.com

Nadège Nguyen
Partner
Mergers & Acquisitions / Corporate
+33 (0)1 40 75 36 26
nguyen@gide.com



Christian Nouel
Partner
Tax
+33 (0)1 40 75 61 21
christian.nouel@gide.com

Stéphane Puel
Managing Partner
Banking & Finance
+33 (0)1 40 75 29 69
puel@gide.com

Foulques de Rostolan
Partner
Employment Law
+33 (0)1 40 75 22 25
rostolan@gide.com

Edmond Schlumberger
Member of Gide's Scientific Council
Lecturer at Paris 8 University
+33 (0)1 40 75 29 55
edmond.schlumberger@gide.com

Antoine Tézenas du Montcel
Partner
Mergers & Acquisitions / Corporate
+33 (0)1 40 75 22 45
tezenas-du-montcel@gide.com

Anne Tolila
Partner
Mergers & Acquisitions / Corporate
+33 (0)1 40 75 29 47
anne.tolila@gide.com

Axelle Toulemonde
Partner
Mergers & Acquisitions / Corporate
+33 (0)1 40 75 29 58
toulemonde@gide.com

gide.com

GIDE

GIDE LOYRETTE NOUEL