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Securities Law in France: 9 Recent Legal Developments

In the last six months, various legal developments have taken place in the field of securities law in France.

1. The Law of 29 March 2014 introduced certain legal and regulatory provisions relating to takeover bids in order to protect minority shareholders against 'creeping' takeovers and to ensure that employees of the target company have the right to information regarding any such takeover. These rules entered into force in July 2014.

2. The Law of 29 March 2014 also provided for certain measures encouraging shareholders in public companies to hold their shares for long periods of time, in particular by granting double voting rights to loyal shareholders. These rules entered into force in July 2014.

3. French regulations have been reinforced to tighten control on foreign investment, and in parallel a bill has recently been introduced which, if passed, would require the mandatory filing of a tender offer in circumstances in which the main asset of a public company is to be sold.

4. A new EU Market Abuse Regulation was adopted in April 2014 dealing with market abuse and this regulation will enter into force in July 2016.

5. The European Court of Human Rights may challenge the dual-penalty system (comprising both criminal and financial penalties) for market abuse.

6. The French financial market Authority (*Autorité des marchés financiers*) (the AMF) and the Corporate Governance Supervisory Committee reports highlight issues and progress made in 2014 in corporate governance, including the outcome of the first application by the French public companies of the 'say-on-pay' rule.

7. Companies may now identify their shareholders and bondholders in order to provide for better communication of financial information to investors.

8. Following the issuance of the report of the AMF working group on IPO, new rules relating to IPOs were introduced in January 2015.

9. New rules governing crowdfunding were introduced in October 2014.

We describe each of these developments in more detail below.

New Provisions Relating To Takeover Bids In France

A minimum acquisition threshold of 50 percent of the target company's share capital or voting rights has been introduced

One of the aims of the Law of 29 March 2014, also referred to as the "Florange" Law, is to protect minority shareholders against 'creeping' takeover bids. In this respect, the law has introduced a minimum acquisition threshold of 50 percent of the target company's share capital or voting rights. If, at the closing of an offer (whether it be a voluntary or mandatory offer), the bidder has not acquired at least 50 percent of the share capital or the voting rights of the target company, then the offer will automatically be cancelled.

If the offer was mandatory and the 50 percent threshold has not been met, the bidder will also be deprived of its voting rights in relation to its shares in excess of the mandatory offer threshold — the crossing of which has triggered the requirement for a mandatory offer.[1]

During the period in which a bidder's voting rights are suspended, the bidder may not purchase further up to one percent shares in the target company without filing a new tender offer, except where the bidder has acquired 50 percent of the share capital but not 50 percent of the voting rights. In this scenario, if the bidder reaches the minimum acquisition threshold of 50 percent of the target company's voting rights, following the allocation of double voting rights in relation to the shares it holds, the bidder will be exempted from the obligation to launch a mandatory tender offer.[2]

The AMF may allow the minimum acquisition threshold to be decreased to less than 50 percent of the share capital or voting rights of the target company in circumstances in which the target company is already controlled by a person other than the bidder; or if the application of the 50 percent threshold would require the bidder to acquire at least two thirds of the securities concerned by the offer (*e.g.* if certain shareholders have already clarified that they do not intend to sell their shares). This discretionary power allows the AMF to lower the 50 percent threshold in circumstances in which the threshold cannot be met as a matter of fact.

One of the thresholds triggering a mandatory tender offer lowered

In order to limit 'creeping' takeovers, the Florange Law has also lowered the threshold for acquisitions of new shares in a target company by a shareholder, or a group of shareholders acting in concert, from two percent to one percent. If a bidder holds — directly or indirectly — between 30 percent and 50 percent of the target company's share capital or voting rights, the bidder may not acquire a portion of new shares in any 12-month period which amounts to more than one percent of the portion of shares that bidder initially held. If a bidder exceeds this threshold it will be required to file a mandatory offer.

Provisions relating to employees

In relation to the filing of a public tender offer, French law requires the bidder and the target to immediately convene a meeting of their respective works councils.[3] If the companies concerned do not have a works council, the employees of the respective companies must be given equivalent information as that which would have been provided to the works council.[4] Since the Florange Law came into effect, the works council of the target must also be subject to a consultation procedure (except in circumstances in which the bidder already holds, alone or in concert, more than 50 percent of the capital or voting rights of the target company).[5]

The works council of the target company must issue an opinion at the latest within one month from the filing of the offer. The target company's board of directors must wait until the works council has issued its

opinion in order to issue the board's own substantiated opinion (*avis motivé*) about the merits of the offer. However, if the works council has failed to issue its opinion within one month of the filing of the offer, the works council will be deemed to have been consulted.[6]

At the first meeting of its works council, the target company shall indicate whether the offer has been solicited or not. The works council may decide that it wants to hear the bidder and designate a financial expert — the cost of which the employer must bear.[7] Once designated, the financial expert will issue a report evaluating the bidder's industrial and financial plans for the target company as well as any consequences these plans may have on employment, work sites and the site of the target's headquarters. This report must be issued within three weeks from the filing of the offer.[8]

If ultimately the bidder acquires control over the target company, the bidder shall provide information to the target's works council relating to the implementation of its plans regarding employment, work sites and the site of the headquarters. These reports must be given in the sixth, 12th and 24th month following the closing of the offer.[9]

Board neutrality

Following the entering into force of the Florange Law, unless the company's by-laws provide that the management must obtain the prior approval of the shareholders in relation to any takeover decision:

- the board of directors may take all immediate protection measures and any decisions during the offer period in order to frustrate the bid, provided that the decisions are made in the interests of the company;
- any delegation of powers the shareholders granted prior to the filing of the tender offer is no longer automatically suspended during the tender offer; and
- the target company is able to implement a share buy-back program during the tender offer period.

Notably, the response document the target company provides to shareholders must mention any measures taken by the target company that may have the effect of frustrating the takeover bid. A bidder, having sought approval from the AMF, may withdraw its tender offer in circumstances in which the decisions taken by the target company during the offer period will affect the substance or increase the cost of the offer.

Introduction of a new type of mandatory tender offer in circumstances in which the main asset of a public company is to be sold

French regulations have been reinforced to tighten control on foreign investment.[10] In parallel, following the transfer of significant assets from two major French listed companies, a bill was filed in June 2014, which — if passed — would require the mandatory filing of a tender offer on the shares of a company listed on a European regulated market considering the sale or transfer of important assets. Failure to file a tender offer relating to the shares of the selling company in these circumstances would result in the sale of the assets being invalid. However, the AMF does provide for certain exemptions when the seller is under financial stress.

In addition, any person having purchased a significant portion of the assets of a French company listed on a European regulated market in the last 12 months, who then purchases additional assets from that company, is required to file a tender offer relating to the shares of the seller. Notably, this bill has been

introduced by a member of the Senate in order to encourage public debate relating to France's manufacturing capacity. The AMF and the Corporate Governance Supervisory Committee plan on contributing further to discussions relating to this matter.

Double Voting Rights to Loyal Shareholders and Extension of the Allocation of Free Shares

In order to encourage shareholders in public companies to hold their shares for long periods of time, the Florange Law has introduced provisions which automatically grant double voting rights to shareholders holding registered shares for a period of at least two years. This provision automatically applies to listed companies (NYSE Euronext Paris), unless the relevant company's by-laws (which must have come into effect after 29 March 2014) provide otherwise. Certain companies have introduced contrary provisions in their by-laws before their initial public offering[11] or have modified their by-laws at their annual shareholders meeting[12] in order to avoid double voting rights being granted to shareholders. Notably, any share transferred or converted into bearer form will lose any double voting right attached to it. However, certain transfers will not cause the double voting right to be lost, for example, a transfer following a succession process, or the partition of property jointly owned by spouses, or a transfer by way of a gift *inter vivos* to a spouse.

The Florange Law has also increased the portion of share capital that may be freely granted to employees from 10 percent to 30 percent, provided that free shares be allocated to all employees and not solely to top managers. The difference between the number of shares allocated to each employee must be inferior to a ratio of one to five.

Market Abuse

- **In order to deal with the legislative, technological and market developments affecting the financial landscape, the EU has introduced a new European Regulation (Regulation (EU) 596/2014 of 16 April 2014) (the EU Market Abuse Regulation) to deal with market abuse.[13]**

  The EU Market Abuse Regulation directly applicable into any EU Member State Law, without any transposition process, provides for a common regulatory framework dealing with:

  - Insider trading
  - The unlawful disclosure of inside information and market manipulation (market abuse)
  - Exemptions for buy-back programs and stabilization
  - Exemptions for monetary and public debt management activities and climate policy activities
  - Market soundings
  - Accepted market practices
  - Measures to prevent and detect market abuse

  The EU Market Abuse Regulation will replace the existing EU Directive 2003/6 on market abuse and most of the provisions will enter into force on 3 July 2016. Those provisions dealing with the exemptions for the share buyback program and stabilization — which do not require implementation measures to be issued by the European Securities Market Authority (ESMA) — have already entered

into force on 2 July 2014. The new EU Market Abuse Regulation covers financial instruments traded on a multilateral trading facility (MTF) or for which the admission to an MTF is pending. It also applies to OTC derivatives, emission allowance trading and high frequency trading.

- **In addition to financial penalties incurred for market abuse, the EU Directive 2014/57 of 16 April 2014 on criminal sanctions for market abuse requires that market abuse** be qualified as a criminal offense. Notably, under French Law, market abuse is already sanctioned with criminal penalties.[14] However, the prison sentence required under the Directive is longer than the sentence required under French Law. The fact that two types of penalties exist under French law could be challenged following a decision of the European Court of Human Rights on 14 March 2014. That decision stated that the Italian system (which also has two types of penalty for certain offences) was contrary to the "*non bis in idem"* principle according to which a person may not be sanctioned twice on the same facts. Notably, the French Constitutional Court has already stated in its 28 July 1989 decision, that having two types of penalties was not contrary to the French Constitution; provided that the total amount of the two penalties combined does not exceed the maximum amount permitted under any one of those penalties. The French Supreme Court also recognized this dual system in its 22 January 2014 decision. According to the AMF, administrative sanctions are more efficient and better adapted to the market than the long and complex criminal process. However, any final decision on this issue will need to be made at the European level.

- Under French Law, criminal offenses for market manipulation have been extended to include index manipulation.

Corporate Governance

The first application of 'Say On Pay' in France

Recommended by the AFEP- MEDEF Corporate Governance Code, 'say-on-pay' has been applied for the first time in France at the annual meetings of shareholders held in 2014. According to the 2014 report of the Corporate Governance Supervisory Committee (the Committee) — created in 2013 to supervise corporate governance practices — almost all French listed companies have complied with the 'say-on-pay' guidelines and most of the other corporate governance recommendations. Shareholders resolutions dealing with compensation have been approved with an average favourable vote of 92 percent. The report highlights the fact that often very little information is provided to shareholders regarding management compensation and recommends that such information be given in accordance with the January 2014 practical application guide. The Committee also recommends that companies should specify in their annual reports the principles used to determine any amount of compensation. The Committee also recommends companies should also give details of any other form of compensation (*e.g.* provision of services made by the management to a third company and repaid by the issuer). Notably, a resolution on stock-options submitted to the shareholders' meeting of a CAC 40 company, held on 5 November 2014 was not approved — as the shareholders judged the performance criteria as too low.

Other matters in corporate governance

In 2014, the Committee notified 75 companies of their full or partial non-compliance with the Corporate Governance Code. These companies must take into account the Committee's comments in their next annual report. If they fail to do so, the Committee will 'name and shame' companies which are not complying in its next annual report.

The AMF, in its 2014 annual report on corporate governance, stated that with regards to the 60 listed companies considered for the purposes of the report, the percentage of women on the board of directors

had increased to 28 percent, and 32 percent of the companies had at least one woman on the board of directors. The percentage of independent members on the board and on board committees remains static at 59 percent. However, the AMF notes that more than half of the companies considered do not explain their independence criteria relating to business relationships, in particular when the board member is an investment banker. The AMF also observes that there is very little information provided regarding the measures implemented to solve any conflict of interest. Moreover, the AMF states that 59 percent of companies who have the same person serving as chairman of the board and as CEO, have a lead independent director in charge of governance issues. Finally, the AMF reminds how important it is for companies to apply the principle "comply or explain" in accordance with the French commercial code.

Identification of Bondholders

Issuers may now identify their bondholders in accordance with the Ordinance of 31 July 2014[15]. This Ordinance amends the Commercial Code to allow issuers to identify shareholders and bondholders (holding shares in bearer form or bonds issued after the Ordinance entered into force on 3 August 2014, unless the bond subscription agreement provides to the contrary) upon request to the central depositary. The issuer may not share this information.

New Rules Relating to French IPOs

- Following the publication in December 2014 of a report by a working group created to consider the measures relating to the financing of French companies through IPOs, **the AMF decided in January 2015[16] to maintain the requirement that any IPO of a French issuer include a retail portion**; and to allow investors to cancel any orders placed on the Internet, up until the public offering's closing date. This new rule, which requires a technical upgrade, should be made applicable from 31 March 2015.

- In order to accelerate the offer timetable in line with European practice, the AMF has provided new rules giving the underwriters' financial analysts' access to information regarding the offer before the AMF approves the prospectus, provided the analysts be subject to a non-disclosure agreement and to a Chinese wall.

- Moreover, **the pricing rules have been made more flexible.** Only the maximum offer price is required to be mentioned in the prospectus, the assessment criteria is no longer required, and the price range of more or less than 15 percent must be published three days before the offer's closing date, at the latest.

- Finally, **the IPO prospectus and prospectus for subsequent public offerings may be drafted in English, provided that a summary in French is available**.

Rules Governing Crowdfunding

Crowdfunding in France is governed by the Ordinance of 30 May 2014 and the Decree of 16 September 2014 as well as the General Regulations of the AMF. The new measures entered into force on 1 October 2014. The measures relate to professionals that promote crowdfunding. Crowdfunding involves the offer of financial instruments or the granting of loans or gifts.

Offers of financial instruments

- Offers of financial instruments are limited to €1 million per year, which may be made in one or several instalments.[17]

- **These types of offers do not qualify as public offerings**[18] **and therefore do not require a prospectus, provided that**: (i) the financial instruments are offered through a website set up according to Articles 325-32 of the General Regulations of the AMF (according to which (a) access should only be granted to identified investors who have acknowledged the risks and have given information regarding their knowledge and expertise in finance and investments and (b) the crowdfunding projects must have been selected according to certain criteria which must be made available on the website); and (ii) offers must be made through an investment services provider or a crowdfunding advisor.

- When an investment services provider makes an offer, the offer can relate to any equity or debt securities which have not been admitted to trading on a regulated market or a multilateral trading facilities. When a crowdfunding advisor makes the offer, the offer may only concern ordinary shares or bonds at a fixed rate.

- **Prior to any subscription, the issuer shall provide the following information:**[19]

  - A description of its activities, its business project and the specific risks attached to its business

  - Existing financial statements and a business plan

  - A list of its shareholders and management team and their respective shareholding in the project

  - The rights attached to the financial instruments offered and any existing mechanism in place relating to the liquidity of the securities or the absence thereof

- **The concept of 'crowdfunding advisor'**[20] has been specifically created. A crowdfunding advisor must be a legal entity whose purpose is to provide investment advice regarding crowdfunding via a website. The advisor must: (i) be registered with the official register of financial banking and insurance intermediaries (ORIAS); (ii) be a member of a specific professional association; and (iii) benefit from professional insurance. Pending the creation of an accredited association, the AMF will review the professional skills of the platform making the application to be a crowdfunding advisor and its ability to comply with the business guidelines and organization regulations set out in the AMF's General Regulations. This examination is conducted on the basis of an entity's application which is included in AMF instruction No. 2014-12.

- Crowdfunding advisors must comply with general standards of loyalty, good conduct and remuneration similar to those applicable to investment services providers in accordance with Articles 325-35 and *seq*. of the AMF's General Regulations. A crowdfunding advisor does not qualify as an entity providing investment services relating to a placement, provided that its website complies with the AMF's General Regulations and does not solicit investors in view of a specific project.[21]

Loans or Gifts

- This form of crowdfunding is governed by Articles 548-1 and *seq*. of the French Monetary and Financial Code (*Code monétaire et financier*) and is supervised by the Prudential Supervisory and Resolution Authority, which is the French banking authority. This form of crowdfunding does not offer securities but instead relates to loans, with or without interest, and gifts. Legal entities may benefit from all forms of crowd financing. However, for individuals, the code distinguishes between individuals acting: (i) for professional or commercial purposes; and (ii) for training purposes. Loans without interest for training financing may only be made by individuals who are not acting for commercial or professional purposes. The beneficiaries or project owners, must disclose their

projects to crowdfunding intermediaries[22] and make the information available on the website of the crowdfunding intermediary. The project owners will not be held liable other than in relation to the accuracy of the information provided relating to their projects. They are not required to verify the expertise or financial capacity of the lenders.

- Crowd financing must be used to finance projects involving the purchase of goods or the provision of services, and projects must give information as to the amount required and timing of the project. Gift amounts are not limited but loan amounts cannot exceed €1 million per project. A lender may only lend, if an interest rate is applied, an amount of up to €1,000 per project and, if an interest rate is not applied, an amount of up to €4,000. The agreement between the lender and the project owner must be made in writing or by way of any durable medium. The duration of any loan to which an interest rate is applied may not exceed a period of seven years.

- **The purpose of crowdfunding intermediaries is to liaise between project owners and authorized lenders.** Intermediaries are legal entities with professional expertise in banking or other financial fields, and they are required to have professional insurance. They may carry out fund transfers provided they have been approved as a payment institution. They must comply with the rules of good conduct laid out in Articles L. 548-6 and R. 548-4 and *seq*. of the French Monetary and Financial Code (*Code monétaire et financier*). They are required to disclose to the public (lenders and donors): the criteria governing the selection of projects and of the project owners, information regarding remuneration, and data relating to the projects or the loan (duration, date of repayment, risks). Intermediaries are not expected to assess the financial situation of the project owners, or the financial capacity of the lenders. Their sole obligation is to make available on their website a platform which allows lenders to assess a project's investment potential and provide for a standard form of loan, which may or may not be subject to a rate of interest.

Conclusion

As the securities market grows more active in Europe, both French and international companies doing business in France will need to stay abreast of the many significant changes to both EU and French law regulations.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Olivier du Mottay
olivier.dumottay@lw.com
+33.1.40.62.23.39
Paris

Marie-Chrystel Dang Tran
marie-chrystel.dangtran@lw.com
+33.1.40.62.21.30
Paris

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Endnotes

1 The mandatory offer threshold is 30 percent of the share capital or voting rights of the target company, or for a shareholding of between 30 percent and 50 percent, the number of shares initially held, increased by one percent.

2 Article 234-9-6 bis of the AMF General Regulations.

3 Articles L. 2323-21 and L. 2323-25 of the French Labor Code.

4 Article L. 2323-26 of the French Labor Code.

5 Articles L. 2323-23 and L. 2323-26-1 B of the French Labor Code.

6 Except in circumstances in which this period has been extended by a judge at the request of the works council in the event of there being material difficulties in accessing the relevant information to issue the opinion. The judge cannot extend this period if such difficulties result from the deliberate unwillingness of the target company to provide such information with an intention to obstruct the offer (article L. 2323-23 of the French Labor Code).

7 Article L. 2323-21 of the French Labor Code. The financial expert must be a certified accountant.

8 Article L. 2323-22-1 of the French Labor Code.

9 Article L. 2323-26-1 A of the French Labor Code.

10 See our Client Alert N° 1688 of 16 May 2014.

11 Elior in May 2014.

12 Alstom in July 2014.

13 Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

14 By virtue of Articles L. 465-1 and L. 465-2 of the CMF, market abuse is sanctioned with a one-year prison sentence and a fine of €1.5 million, up to 10 times the amount of the profit derived from the abuse.

15 Amending Article L. 228-2 of the Commercial Code.

16 AMF Recommendation 2015-02.

17 Articles L. 411-2, I *bis*, 3° and D. 411-2 of the Monetary and Financial Code(CMF).

18 Article L. 411-2 I *bis* of the CMF.

19 Article 217-1 of the AMF General Regulations.

20 Articles 547-1 and *seq*. of the CMF.

21 AMF press release of 30 September 2014, and AMF and ACPR common position 2014-P-08 for the ACPR and DOC 2014-10 for the AMF.

22 Articles L. 548-1 and R. 5483-5 of the CMF.