

# Opinion Leaders

## Corporate / Private Equity / Financing

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### EDITORIAL

#### The end of the concept of public offerings...

The start of 2009 has been marked by the adoption of a series of orders concerning company law and financial law.

The order which interested us particularly was that of 22 January 2009 relating to public offerings, replacing the French notion of public offerings with a more European notion of public offers of securities.

With the declared objective of improving Paris's competitiveness as a financial centre, the new definition of a public offer of securities is now either "a communication sent to people in any form and by any means and presenting sufficient information about the conditions of the offering and the securities being offered as to enable the investor to decide to buy or subscribe to those financial securities" or "an investment in financial securities".

According to the report to the French President dated 23 January 2009, this new definition should not modify the type of operations covered by the definition of a public offering contained in French law.

This does not mean that the broader definition will not lead to some difficulties of interpretation. Communications lacking sufficient clarity concerning the key characteristics of the securities offered should nevertheless be able to escape being defined as a public offer of financial securities.

The substitution of the notion of public offering in favour of that of a public offer has also resulted in the removal of the status of company making a public offering. So making a public offer at any given time will not impose further recurrent obligations on the company as a result of the offer.

It is worth noting finally that the order stipulates that simplified joint-stock companies [*sociétés par actions simplifiées*] may make use of offers completed via private placement (meaning limited to qualified investors or a restricted circle of investors) or relating to securities not covered by the public offer regulations due to the size of the planned operation.



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## ... and marketing of wealth tax holding companies?

The other event which has marked the start of this year relates to restrictions imposed by the 2009 finance law on wealth tax [ISF] holding companies.

While this vehicle has increasingly attracted traders and investors, the 2009 French finance law will limit the marketing of these vehicles as from the start of the 2010 French wealth tax campaign, to the extent that the number of shareholders of these holding companies will be limited to 50.

Let us hope that these new concepts do not have the knock-on effect of depriving SMEs of much-needed sources of funding in these times of financial crisis.

## Legal and Tax Watch

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### Legal News

#### Update on French Law on Modernization of the Economy of 4 August 2008

The French Law on Modernization of the Economy of 4 August 2008 authorized the government to take action by passing orders in several fields relating to company law and financial law. Acting in accordance with this authorization, the government has just passed a significant number of orders.

##### ▪ *Reform of public offerings*

The order of 22 January 2009 relating to public offerings replaces the notion of "*public offering*" by that of "*public offer of financial securities*" and/or "*admission to trading on a regulated market*". While the second notion is familiar, the first is new.

The public offer is either the result of:

- a communication sent to people in any form and by any means and presenting sufficient information about the conditions of the offering and the securities being offered as to enable the investor to decide to buy or subscribe to those financial securities;
- or an investment in financial securities through financial intermediaries.

However, as a result of the size of the offer or its intended recipients, the offer may avoid definition as a public offer. For instance, one outcome of the draft amendment to the French financial markets authority [AMF] General Regulations, which were subject to consultation until 13 February, is that the offer need not qualify as a public offer when:

- it amounts to less than €100,000,
- its total amount is between €100,000 and €2,500,000 and relates to at least 50% of the issuer's capital,
- each of the investors subscribes to at least €50,000,
- the nominal value of the securities is at least €50,000.

Similarly, offers addressed exclusively to companies supplying portfolio management investment services on behalf of third parties, qualified investors or a restricted circle of investors, do not constitute a public offer.

The order goes on to put an end to doubt over the ability of a simplified joint-stock company to make use of private placement. For part of this approach, seemingly supported by the AMF, considers that only companies authorized to make public offerings – and therefore not simplified joint-stock companies – can benefit from exemptions to public offerings. Remembering that simplified joint-stock companies cannot be listed on a regulated market, the order authorizes simplified joint-stock companies to fall back on private placement of their shares. But they do not benefit from all the exemptions to public offers. For instance, private placement of simplified joint-stock company shares is not authorized except in the event that the offer is aimed exclusively at those persons stipulated above (qualified investors, etc.) or requires a minimum investment of €50,000 per investor. Simplified joint-stock companies therefore do not benefit from exemptions linked to the total amount of the offer or the percentage of the capital offered.

Finally, the order limits share capital increases by joint stock companies, carried out with removal of the preferential subscription right pursuant to article L.225-136 of the French Commercial Code and limited to the investors stipulated above, up to an annual limit equal to 20% of the corporate capital. This clause raises the most questions.

This Order will come into force on 1 April 2009.

#### ▪ *Reform of SICAFs and closed-end funds under foreign law*

The order of 30 January 2009 relating to fixed capital investment companies, closed-end foreign funds and certain financial instruments modernizes the legal framework for SICAFs, formed as a public company, whose purpose is to manage a portfolio of financial instruments. SICAFs, considered to be closed-end since shareholders cannot, as in a SICAV, demand to buyback their shares at any time, set an investment strategy. It is exempt from compliance with investment ratios or structuring of assets but must adhere to a risk dispersion principle. Nevertheless, a SICAF may be entirely invested in a foreign investment fund's shares. A SICAF, managed by an AMF-certified management company and possessing a suitable business plan, may make a public offer unless the nominal amount of its shares is below a certain threshold. Finally, both SICAFs and closed-end funds under foreign law may be listed in France. Closed-end funds under foreign law may only be listed if the fund is subject to rules ensuring the safety of operations and guaranteeing investors' interests and rules governing buy-back and holding of shares equivalent to those in place for SICAFs.

- ***Strengthening of the system to prevent money laundering and financing of terrorism***

The order of 30 January 2009 relating to prevention of use of the financial system for the purposes of money laundering and financing terrorism prohibits cash payments over a certain amount, authorizes certain professionals (including portfolio management companies) to use procedures provided by other professionals for identifying clients, extends the scope of the TRACFIN declaration to sums which could come from crime (including tax fraud), etc.

- ***Reform of share buy-back and notifications in the event of breaching statutory thresholds and of intent***

The order of 30 January 2009 relating to share buy-back, notification in the event of breaching statutory thresholds and notification of intent reforms conditions for buy-back of shares (10% threshold basis, removal of the obligation to transfer bought-back securities to registered form, production of a single report, etc.) by companies whose securities are admitted for trading on a regulated market or a multilateral trading facility (Alternext). It also modifies the notification of statutory thresholds and intentions (addition of two new thresholds involving the obligation to notify of intent, etc.).

- ***Extension of the duty to inform and advise from portfolio management companies to insurance companies***

Order n° 2009-106 of 30 January 2009 relating to marketing of life insurance products and collective welfare and insurance operations extends the duty to inform and advise included in the MIF Directive to insurance companies in the event of sale of a life insurance contract.

- ***Status and operation of reinsurance companies***

It stipulates the inspection conditions and the powers of the ACAM over reinsurance companies and the steps for opening an insolvency protection, bankruptcy or administration procedure for them.

### **New trust reform**

An order of 30 January 2009 relating to various measures covering trusts extends the benefit of trusts to individuals. Until recently, only legal entities liable to French corporation tax [IS] could transfer part of their assets to a third party to manage on behalf of a beneficiary. It will therefore enable individuals to allocate part of their assets to a third party. The order also set the taxation applicable to trust operations using a general principle of transparency or neutrality.

### **Decree n° 2009-158 of 11 February 2009 relating to endowment funds**

The decree stipulates the financial management procedures for endowment funds (eligible assets, risk dispersion and control rules, formation of a consultative

committee for large funds, etc.), the role of the CAC and the government regulatory body, the conditions of campaigns for public donations and the rules applicable to the winding-up of the fund.

**FBF code of good conduct relating to pay awarded to financial market professionals**

The FBF has adopted the working group's conclusions in relation to pay awarded to financial market professionals. Supervisors (CB, ACAM, AMF) will examine the systems for rewarding professionals in the light of these professional principles, in order to assess the risks.

The principles relate to professionals (front office, support functions, control) in all market activities, investment banking and financing, whatever the legal form of the company (bank, insurance company, investment company, management company, etc). From 2009 these will apply to variable pay to be paid in 2010.

## AMF news

**Thierry Francq is appointed AMF secretary general from 1 March 2009.**

### **Ruling of 30 January 2009 approving modifications to the AMF General Regulations**

From 1 July 2010, investment services providers (management companies, etc.) must verify that their employees who carry out key functions (manager, RCCI, etc) are suitably knowledgeable, in accordance with the stipulations of a financial market high commission.

### **OPCI: publication of instructions**

The AMF published instruction n°2009-01 on 6 January 2009 detailing the approval procedure for OPCIs and their obligations in terms of information. An instruction n°2009-02 specifies the content of the complete prospectus of OPCIs managed by the AMF.

### **Information to OPCVM unit holders and shareholders**

The AMF has just stated its stance in relation to informing unit holders and shareholders at the time of publication/updating of the three following documents:

- ***Guide to producing prospectuses for OPCVMs:*** it comes up with a number of practical recommendations for producing prospectuses for OPCVMs. The OPCVMs affected are mainly non-specific OPCVMs but other types of OPCVM are also encouraged to draw on these principles. For instance, in relation to venture capital funds liable for wealth tax [ISF], the AMF states that "*use of the initials 'ISF' in the name of the approved FCPR is possible provided a legal and taxation analysis of the fund's eligibility for reduction of wealth tax is supplied by the management company at the time of the request for approval of the product. Furthermore, wording such as "FIP eligible for ISF wealth tax reduction" will be encouraged for use of the initials "FIP-ISF", which does not correspond to any legal form.*- ***Best practice guide for producing marketing documents:*** this stipulates the management company's obligations in relation to its distributor particularly for the production of promotional documents. Both the company and its distributor must ensure that the information is clear and not misleading. The company must therefore provide the distributor/marketer with the necessary information and verify the quality of the documents prior to marketing.
- ***Best regulation – examination of the behavior of OPCVMs – Summary of observations.*** Based on the practices it has observed, the AMF reiterates a number of principles particularly in relation to marketing of OPCVMs.

For instance, *"the management company must ensure that all references to the OPCVM in press articles, adverts, web communications or any other medium do not appear until after the OPCVM has been approved by the AMF"*.

## **Tax news**

### **Business tax: procedures for calculating the value-added of companies carrying out financing operations**

In ruling n° 2009/02 published 20 January, the taxation administration stipulates under what conditions companies which carry out financing operations without being approved as a credit establishment and without being subject to the accounting plan for credit establishments (PCEC 1993) can determine their value-added by applying banking value-added rules. It also stipulates that the capital gain from sale of equity investments held by these companies do not constitute elements to be used to calculate value-added.

### **Reduction in wealth tax and state aid: maximum authorized payments per target company are lowered**

Following the ruling by the European Commission on 17 December 2008 to raise the maximum authorized limits for state aid through guidelines in relation to capital investment, French legislation modified the maximum authorized payment per target company as part of the terms for reducing wealth tax in article 885-0 V bis of the French General Tax Code [CGI].

For payments made between 1 January 2009 and 31 December 2010, the maximum will effectively rise from €1.5m to €2.5m over 12 months.

This measure will come into force on a date to be set by decree and at the latest on 30 April 2009.

Furthermore, the limit on state aid authorized by the rules relating to de minimis aid was also raised by the European Commission. This ruling led to a change in French legislation to the limit on state aid, granted by various means such as reduction of the wealth tax for investment in an SME, tax reduction granted to innovative young companies (JEI) and high-growth SMEs, etc.

The effect of this amendment is to raise the maximum limit for authorized payments from €200,000 to €500,000 over three financial years. This measure, which applies to payments made between 1 January 2009 and 31 December 2010, will come into force on a date to be set by decree and at the latest on 30 April 2009.

This modification results from articles 15 and 14 of the 2009 amended finance law n° 2009-122 of 4 February 2009.



### **Wealth tax holding companies: a taxation instruction pending?**

Wealth tax holding companies will have four additional conditions imposed on them from the 2010 wealth tax campaign, namely:

- the company must have at least 50 partners or shareholders,
- none of its corporate officers must be legal entities,
- it must not grant its partners or shareholders capital guaranties in return for their subscriptions,
- it must not offer any automatic exit arrangements at the end of five years.

A taxation instruction is due to explain and clarify the conditions for applying this mechanism.

### **The measure setting an overall cap on tax deductions and allowances has come into force**

The measure capping tax deduction on income deriving from a number of deductions/allowances at €25,000 increased by 10% of the taxable income has come into force (article 200-0 A of the French General Taxation Code). This particularly applies to income tax deductions granted in the context of investments made in SMEs ("Madelin") or subscription to FCPI or FIP shares (article 199 terdecies-0 B of the French General Taxation Code). Future investors and subscribers should be informed of this measure.

### **Decree n° 2009-116 of 30 January 2009 relating to procedures for applying the option for the partnership tax regime set out in article 239 bis AB of the French General Taxation Code**

Since the French Law on Modernization of the Economy, share capital companies (SA, SAS and SARL) are authorized under certain conditions to opt for the so-called "semi-transparent" or "translucent" partnership tax regime, which allows the company's losses to be deducted on behalf of the partner while preserving the legal advantage represented by the limit on their asset liability. The decree sets out the procedure for opting for (government-established process) and relinquishing the regime as well as the notification obligations binding on these companies for the duration of the option.

### **Recent taxation instructions**

- 7 S-3-09 n° 18 of 18 February 2009: Wealth tax – Tax calculation – Tax deduction resulting from donations made to certain public utility bodies - Extension to donations made to university foundations and partnership foundations
- 5 A-1-09 n° 13 of 6 February 2009: Clauses common to direct taxes. Various declarations. Declaration of securities transactions.
- 7 S-1-09 n° 9 of 23 January 2009: Wealth tax. Tax calculation. Taxation rate applicable in 2009.



- 5 C-1-09 n° 9 of 23 January 2009: Gains from the sale of securities and pension entitlements by individuals. Updating of the annual taxation limit. Handover threshold applicable to income tax for 2009.

## **Recent Legal Advice and Key Deals – Upcoming conferences**

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### **Recent Legal Advice and Key Deals:**

- Plan to merge/takeover three FCPRs,
- Creation of several wealth tax holding companies,
- Creation of several wealth tax FCPI/FIPs
- Creation of an FCPR exclusively for wind power,
- Plan for mezzanine capital,
- Consequences of a Chapter 11 procedure by an American company on its French and European subsidiaries
- Consultation on strategy to be put in place by a company in the event of expected bankruptcy,
- Memorandum on the confidentiality of communications between attorneys and their clients and possible waiver of confidentiality in the event of a dispute,
- Consultation on strategy to be put in place to remove a corporate officer who is also an employee (CEO of a simplified joint-stock company and member of the Board of a public company),
- Consultation on the conditions for enforcing a foreign judgment and the exception of connectivity in international private law,

### Upcoming conferences:

- **Debate LJA about** “Transposition de la 3<sup>e</sup> directive blanchiment - Quelles incidences pratique pour les professionnels”, on 2<sup>nd</sup> March from 9 AM to 11:30 AM at the Hotel de Crillon in Paris, with Me Yasmine Tarasewicz as speaker.
- **« La Loi de Modernisation de l'Économie » conference**, on 5<sup>th</sup> March, with Me Mireille Dany as speaker in the Paris office of Proskauer Rose.
- **« FCPR / FCPI / FIP : Perfectionnement » training**, on 13<sup>rd</sup> March, with Me Olivier Dumas as speaker, organized by the AFIC.
- **Club RH “Salariés étrangers - Salariés à l'étranger”**, on 19<sup>th</sup> March, with Me Beatrice Pola as speaker, organized in partnership with AEF in the Paris office of Proskauer Rose.
- **Conference Liaisons Sociales about “Economic lay-off”**, on 26<sup>th</sup> March at the Westin in Paris, with Me Yasmine Tarasewicz as speaker, organized by Liaisons Sociales.
- **“Criminal procedure” conference**, on 27<sup>th</sup> March, with Me Philippe Goossens and Me Eric Deprez as speakers, organized in partnership with Dii.
- **“La Faute Inexcusable” conference**, on 2<sup>nd</sup> April, with Me Valérie Lafarge-Sarkozy and Me Philippe Goossens as speakers, organized by the EFE.
- **Annual Conference of Investment Capital**, on 7<sup>th</sup> April from 8 AM to 6:30 PM in Palais Brongniart in Paris, with Me Daniel Schmidt as speaker, organized by the AFIC. Proskauer Rose is sponsor of this event.

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**Corporate / Private Equity / Financing**

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