

Opinion Leaders

July 2008

Editorial

European M&A facilitated by the advent of cross-border mergers, as corporate laws are being harmonized, slowly but steadily

The principal purpose of the bill adapting various provisions of French corporate law to those of the European Community – the final version of which was adopted on June 19, 2008 – is to transpose into French law various Community regulations, in particular Directive 2005/56/EC of October 26, 2005 on cross-border mergers of limited liability companies.

The new Act also makes certain changes in rules applicable to domestic mergers, concerning in particular the role of merger and transfer “appraisers” (*commissaires à la fusion et aux apports*) and the protection of bondholders in the event of mergers involving limited liability companies (SARL) that have issued bonds.

The enactment of the bill represents another step in the harmonization of corporate law in Europe. Its provisions supplement earlier laws on the European Company adopted in France in July 2005. Since then, many small and medium-size enterprises as well as larger corporations (SCOR, Allianz, DEXIA, etc.) have opted for this form of business organization.

The legal framework for cross-border mergers had also been reinforced at the time. Provisions on mergers applicable to European Companies now apply generally to all limited liability companies. This provides companies and the financial sector with one more tool for overcoming the technical problems and political or psychological obstacles that stand in the way of mergers and acquisitions in Europe.

Broadly speaking, it creates a new legal framework, as provisions pertaining to cross-border mergers incorporate some of the regulations applicable to employee participation in European Companies. Other provisions will probably soon be added to this body of law, making rules governing the transfer of registration applicable to all corporations and creating a “small European company” governed by simplified rules.

We will of course continue to monitor and report on changes in the law as they occur.

Legal and Tax Watch

Legal News

The “LME” bill on the modernization of the economy

The bill on the modernization of the economy will be examined by a joint parliamentary committee (*Commission mixte paritaire*) over the next few days, before being formally voted on by the Senate and the National Assembly. It is now expected to become law before the end of the month, and most of its provisions will go into effect immediately.

Publication of the bill will also make effective the various decisions by Parliament granting the government authority to issue Orders:

- concerning trusts;
- to revise corporate bankruptcy protection laws and improve the prevention and management of business solvency issues;
- on the regulation of competition, including establishing a Competition Authority (*Autorité de la concurrence*);
- to take the measures required to simplify and improve procedures for securing and registering intellectual property rights and exercising related rights thereunder;
- to modernize the legal framework applicable to the French financial markets.

These Orders will have to be issued within six months of the enactment of the LME, except in certain instances related to financial law, where the government will be granted additional time of up to eighteen months.

Our next issue, which will come out in September, will contain a complete review of the Act's principal features (pertaining, *inter alia*, to corporate law, financial law and commercial law).

Reform of registration procedures for mutual funds: a note on the assignment of financial management responsibilities

The AMF has issued additional information concerning the procedures for assigning the financial management of existing mutual funds or investment companies. Henceforth, that assignment will no longer need to be registered with the AMF. However, the Authority notes that assignments of this kind must be consistent with the activities of the management companies concerned.

Directive 2005-11 of December 13, 2005 on information to be provided in connection with public offerings

The directive has been revised to apply to simplified review and registration procedures in the case of prospectuses issued by certain corporations in connection with public offerings ("simple track").

MiFID: The AMF publishes a new set of FAQs concerning the implementation of the MiFID

In anticipation of the publication of a European Directive on the distribution of fund shares or units, the AMF has published a new series of answers to frequently asked questions. The document notes, among other things, that investment services providers (ISP) who wish to perform transactions involving portfolios under their management must *“be able to demonstrate that the transactions are being performed in the interest of their clients and that they do not give rise to conflicts of interest. For this purpose, the investment services provider must determine the terms and conditions on which such transactions can be performed without harming the interests of their clients, by identifying conflict-of-interest situations defined by article 313-19 and by following a procedure aimed at ensuring that the transactions are performed without regard to extraneous considerations. In addition, where applicable, the services provider may be subject to a best execution obligation for those types of transactions.*

Advertising of financial products

In a decision dated June 24th of this year, the Court of Cassation’s Commercial Division cited the principle according to which *“advertising by a person offering its customers shares or units of a mutual fund should be consistent with the proposed investment and should identify its least attractive features, if any, as well as describe the risks inherent in choices on which the benefits described are contingent.”*

In the case before the Court, a bank had published a brochure in which:

- it was stated that "you do not need to worry about fluctuations in financial markets"
- a chart was included that did not indicate the possibility of losses at any point, even in the event of certain markets declining.

The Court of Cassation held that the court below could not have found that that investors had been fully informed just because they had received a COB-registered notice that did not contain those statements. It confirmed that investment professionals’ duty to inform their clients was not satisfied by the delivery of a notice bearing the COB’s stamp, when the advertising itself failed to meet those requirements.

Bill on employee earnings

On July 1st, the government introduced a bill on employee earnings.

It addresses three issues:

the promotion of voluntary profit-sharing plans and access to mandatory plans,

- the modernization of procedures for setting the minimum wage,
- incentives for wage and salary negotiations that would make them a pre-condition for reductions in employer contributions.

The bill's objective is to increase employees' vested interest in the profitability of their company, by improving their work-related earnings.

The bill is expected to be submitted to the next Council of Ministers and should come before Parliament after the summer recess.

Simplified State aid rules in Europe: a new regulation eliminates the need for prior notification to the EU of government aid to small and medium-size businesses

The European Commission has adopted a regulation that significantly relaxes rules governing competition by eliminating the mandatory notification by governments of financial aid extended to certain businesses. The new provisions pertain in particular to equity capital and new innovating companies.

In addition, the new General Block Exemption Regulation (GBER) combines and harmonizes in a single document previous provisions contained in five separate regulations, while at the same time extending the range of State aid eligible for exemptions. The regulations will go into effect in a few weeks.

Tax News

Decree on tax consolidation

The Decree of July 8, 2008, implementing changes in the taxation of groups of companies formed in accordance with article 223 A of the General Tax Code (CGI) and that of restructurings through partial spin-offs, has been published in the Journal Officiel.

The Decree spells out the filing obligations of companies wishing to take advantage of the tax consolidation option.

Investments in SMEs eligible for reductions in income and wealth taxes

The Minister of Finance was asked by National Assembly member Jacques Domergue whether premiums over par should be taken into account, in addition to the nominal value of shares purchased, when calculating tax benefits from an equity investment in an SME, in the form of a reduction either in income tax (art. 199 terdecies-O A of the CGI), or in the ISF wealth tax (art. 885-0 V bis of the CGI).

In her reply of June 17, Christine Lagarde stated that, in the case of equity issues by SMEs or holding entities “the amount of the investment used to calculate income-tax and wealth-tax reductions is equal to the number of shares subscribed for times their issue price, meaning their par value plus a premium, if applicable.”

Latest tax directives:

4 C-4-08 no. 73 of July 11, 2008: Deductible expenses (industrial and commercial benefits, corporate income tax, common provisions). Interest on funds provided by third parties. Conditions and restrictions applicable to deductions of interest on advances by shareholders or partners in addition to their capital contributions. Maximum rate of interest qualifying for tax deduction.

Industry news

Capital raised in 2008 by funds eligible for wealth-tax reductions

A survey of the impact of “Wealth-tax and SME” measures, published on July 9 by the French industry associations AFIC (*Association Française des Investisseurs en Capital*) and AFG (*Association Française de Gestion Financière*), shows that:

- 23 management companies have set up:
 - 29 funds eligible for wealth-tax reductions, including
 - 17 FIP regional funds, which attracted an average of 21.1 million euros
 - 11 FCPI innovation funds, which attracted an average of 15.2 million euros
 - one FCPR venture capital fund
- The funds attracted aggregate investments of:
 - more than 530 million euros, including
 - 359 million euros in FIP funds,
 - 167 million euros in FCPI funds
 - 7 million euros in the FCPR fund
- from more than 45,000 French taxpayers (or 9% of all individuals subject to the ISF wealth tax)
- or an average of € 11,200 each.

Important dates:

- **September 15, 2008:** Deadline for taxpayers to file individual statements and supporting documents, if any, required by articles 299(7) and 299(8) of the General

Tax Code (wealth-tax exemption for investments in small and medium-size businesses).

- **September 30, 2008:** Deadline for investment service providers offering investment advisory services to file their special 2008 report on investment advisory services with the AMF.

Latest Legal Advice and Deals -Upcoming conferences

Latest legal advice and deals:

- Comparative tax analysis between a French Holding company and a Luxembourg Soparfi
- Interviews within European subsidiaries (Sweden, Switzerland, Italy, France) of an American company with regards to the granting of stock options, the granting of a bonus to executive officers and the structuring of the acquisition of such subsidiaries
- Legal status of quotations (for the improvement of premises)
- Application of eligibility criteria to foreign funds investing in a French fund (asset segregation requirement) in a complex international context
- Preparation and negotiation of tripartite sub-custody agreements in connection with prime brokerage contracts for contractual and ARIA EL funds.
- Disputes regarding minimum business taxes and researches with regards to the incurred tax penalties
- Extension of management companies' scope to new financial instruments
- Regulation applying to the granting and the exercise of stock warrants of companies listed on the *Marché Libre*

Upcoming conferences:

- **Capital Creation 2008**, Proskauer Rose is sponsoring this conference, which will be held in Monaco from September 15 through 17.
- **Dow Jones Private Equity Analyst Conference**, Proskauer Rose is sponsoring this conference, which will be held at the Waldorf Astoria in New York on September 16 and 17.
- **“Reckless Misconduct”** a breakfast seminar led by Valérie Lafarge-Sarkozy and Rozenn Guillouzo, September 23 in the local offices of Proskauer Rose Paris.
- **"Private Placement"**, first annual European Union Cross-Border Private Placement Conference, October 16 and 17, 2008, Kikuoka Golf Club, Luxembourg, with a presentation by Daniel Schmidt, Partner, Proskauer Rose LLP.