

Opinion Leaders

April 2009

EDITORIAL

December 2006: a senior manager of a French multinational is ready to spend his holidays under the Miami sun. But as soon as he arrives to the airport, the American police arrest him and place him in custody. September 2008: the federal judgment is announced: 30 months in prison followed by three years' probation and more than \$250,000 in damages. The reason? The manager had paid \$2.5 million in bribes to an executive of a public sector company in a Latin American country in order to obtain a contract. The sum had been shared with a government official in that country.

Why did the American judicial authorities spontaneously intervene in a case where American interests would not, at first glance, appear to have been involved?

In fact, the French multinational is also listed on a stock exchange in the United States – and is therefore subject to the American anti-corruption legislation, the Foreign Corrupt Practices Act (FCPA). The FCPA applies to any executive, employee, agent or shareholder acting on behalf of, among others, a company listed on a stock exchange in the United States, and punishes any act of corruption of a public entity perpetrated anywhere in the world. An executive of a French company organizing an act of corruption in Latin America from France therefore falls within the scope of the FCPA if the French company is listed in the United States.

Although the FCPA has existed since 1977, it has never been more relevant than now. The authorities charged with its oversight, the SEC (Securities and Exchange Commission) and the DOJ (Department of Justice) have announced in the last two to three years that they would make applying the FCPA an enforcement priority, in close cooperation with their counterparts abroad. The \$800 million in fines imposed in 2008 confirms the long-term trend of a rapid increase in the level of financial penalties and the prosecution of individuals.

At the same time, use of "negotiated" solutions with the SEC and the DOJ is increasingly frequent. These solutions make it possible to reduce the level of penalties if the company cooperates fully from the onset of the investigation, or to suspend the procedure indefinitely (deferred prosecution), based on voluntary proposals by the company to ensure that the company is in compliance in the future. The authorities often demand that an independent compliance monitor, rather dreaded, be appointed to ensure compliance with these commitments and report, where appropriate, any breach likely to re-start the proceedings.

In this context – and taking into account that the OECD also adopted an anti-corruption convention in 1997 – European companies, including French ones, must now be proactive and establish internal procedures to prevent failings: drafting of practical guides, training of employees and subcontractors, specific analysis of compliance with anti-corruption laws during acquisition due diligence, etc. This move is part of the wider tendency towards the moralisation of business life, an issue which is especially critical in this period of crisis when behaviour which appears contrary to the interest of society is highlighted as never before.

Legal and Tax Watch

Wealth tax holding companies: will there be a new shake-up of the system?

This did not occur as a result of the second amended finance act for 2009 dated 20 April, 2009. Neither the amendment adopted at the initiative of Deputy Forissier nor those submitted by Senator Adnot were successful. Deputy Forissier's amendment aimed to allow wealth tax holding companies, from the 2010 campaign, to include more than 50 shareholders provided they invested in small companies (with less than 50 employees and annual turnover of less than or equal to €10 million) less than 10 years old. The amendments proposed by Senator Adnot aimed to make a distinction between holding companies with less than 100 shareholders and those with 100 shareholders or more, by imposing more restrictive investment rules on the latter and further reducing the tax benefits to which they are entitled, to 50% instead of 75% of total payments into eligible companies.

We might also have expected the government to introduce into this draft law an increase in the limit of wealth tax reduction, currently set at €50,000 per year, to €100,000, following up on announcements by the French President, reiterated by the minister Christine Lagarde. However no amendment of this kind has been made... Time will tell whether this political desire will come to fruition, especially in the second half of the year when the finance laws are examined.

The government has nevertheless recently taken two measures to increase revenue and promote investments:

- firstly, as agreed last year, *"the notification obligations which apply to taxpayers, companies and operators under the SME wealth tax system^[1]"* may be sent *"for the majority of taxpayers"* by 15 September, 2009 at the latest, not 15 June, 2009. This tolerance will lead to a ruling which will be published in the coming days. This ruling process is nothing short of astonishing...
- then, the decree which was expected to be published to bring into effect the increase in the payment limit to €2.5m per wealth-tax target company appeared in the Journal Officiel. The increase applicable to payments made between 1/01/2009 and 31/12/2010 came into force on 18 April.

Meanwhile the system for wealth-tax exemption, the decree setting out notification obligations and the instructions accompanying the mechanism, adopted in 2007, are all still in the pipeline...

Assistance and support measures for LBO funds

According to an article published in Les Echos, leading French institutional investors expect to create an investment system in which they will place their leverage debts, enabling them to invest in the stock of LBO companies in difficulty while entrusting their management to an ad-hoc structure. A similar regime was established to tackle the difficulties of Crédit Lyonnais with the creation of the CDR (Consortium de Réalisation).

Furthermore, the second amended finance act for 2009 extended the short-term deferment of capital gains regime set out in article 39 quaterdecies of the CGI (French General Tax Code) to debt buybacks carried out between 23 April, 2009, and 31 December, 2010. From now on, debt buybacks may be spread, in equal shares, over the year in which they occur and the two following years.

Ratification of orders passed in the economic and financial fields

The draft law ratifying 10 orders passed on the basis of the powers set out in the Modernization of the Economy (LME) Act of 4 August, 2008, relating to financial instruments, public offerings, fixed capital investment companies, and transposition of the third directive to prevent money laundering and funding of terrorism... are all due to be published shortly.

AMF news

Publication of a new "Q&A" covering the MiFID Directive

Although it came into force on 1 November, 2007, the MiFID Directive continues to arouse questions among professionals, particularly investment services providers. This is demonstrated by the fact that AMF published a new "Q&A" on 9 April aiming to clarify the rules governing order fulfilment. This confirms the rules by which, firstly, a financial services provider (FSP) responsible for sending an order to another FSP or fulfilling it must be able to justify that the order sent or fulfilled was issued by the orderer and, secondly, that an FSP responsible for sending an order to another FSP or fulfilling it must be able to provide this proof at the time the order is received or sent.

New rules governing public offers of securities come into force

In order to take into account the reforms to public offerings – now called either "public offers of financial securities" or "admission to trading on a regulated market" – implemented by the order of 22 January, 2009, the AMF General Regulations have been updated, as have the instructions relating to information to be provided (no. 2005-11) and publication of remuneration paid to legal controllers of accounts (no. 2006-10).

FCPR instructions

FCPR instructions 2009-03 (simplified FCPR) and 2009-04 (authorized FCPR) relating to the creation (approval or declaration) procedures and to shareholder information have been published. These instructions replace the COB instructions of 6 June, 2000. The draft instructions relating to prospectuses are still at the consultation stage.

Report on voting rights and annual information sheet

As a reminder:

- within four months of the end of its financial year, the management company must report on the conditions in which it has exercised its voting rights in a report appended, where applicable, to the Board's management report. This diligence

applies to securities held by an FCPR when they are traded on a regulated market of a signatory state to the agreement on the European Economic Area or a recognized foreign market.

- the portfolio management company and the investment services provider managing the portfolio on behalf of the third party must send the AMF the information which appears in the information sheet within four and a half months following the end of the financial year. Its content is set out in the appendix to instruction 2008-03.

Tax news

Recent taxation instructions

- [13 A-2-09](#) no. 47 of 23 April, 2009: Right to the restitution of direct taxes according to income – Adjustments to take account of income generated outside France - VIII of article 121 of act no. 2008-776 of 4 August, 2008, on modernization of the economy.
- [4 H-2-09](#) no. 46 of 22 April, 2009: Corporation tax – Special provisions – Opting for the partnership tax regime by share capital companies.
- [4 F-2-09](#) no. 45 of 21 April, 2009: Industrial and commercial profits- Special provisions – Exemption of sums received from the sale of electricity by an individual - Article 83 of the amended finance act for 2008.
- [4 C-3-09](#) no. 40 of 9 April, 2009: Costs and expenditure (Industrial and commercial profits, corporation tax, common provisions). Measure promoting sponsorship. Income tax. Tax reduction in respect of charitable donations by individuals. Payments made to endowment funds. [4 C-4-09](#) no. 40 of April 9, 2009: Costs and expenditure (Industrial and commercial profits, corporation tax, common provisions). Interest on third-party equity. Conditions and limits for deduction of interest on advances granted by shareholders over and above their shareholding. Maximum rates of interest deductible for tax purposes. [5 C-2-09](#) no. 39 of 7 April, 2009: Income tax. Tax on net capital gains from sales by company directors when they retire. Adjustment to the conditions for application of the transitional system set out in article 150-0 D ter of the CGI (French General Tax Code). Comments on paragraphs II and III of article 38 of the amended finance act for 2008 (act no. 2008-1443 of 30 December, 2008).

- [4 A-7-09](#) no. 34 of 30 March, 2009: Adjustment to the conditions for eligibility to the status of innovative young company and measures in favour of academic young companies whose main activity is promoting research work which the directors or partners have contributed to, while studying or while carrying out their jobs in a higher educational establishment.

Recent Legal Advice and Key Deals –Upcoming conferences

Recent Legal Advice and Key Deals:

- Wealth tax holding companies: constitution, information notices and marketing procedures
- Challenging SCR adjustment to the minimum business tax contribution
- Public offering
- Simplified FCPRs : ratio audit
- Funds of Funds : ratio audit
- Review of a hedge Fund
- Formation by an American fund of an American Holding company for the acquisition of a French company in the IT industry

Upcoming conferences:

Private Equity

- **Tax & Legal Committee** – Organized by the EVCA in Proskauer Rose's premises on 12 May 2009, with Me Daniel Schmidt and Mrs. Mary B Kuusisto, as speakers.

Labor Law

- **HR Club: Termination procedures: contractual termination, resignation, dismissal, formal acceptance, cancellation, transaction** – organized in partnership with the AEF in Proskauer Rose's premises on 14 May 2009 with Béatrice Pola as speaker.

- **Conference Liaisons Sociales about “Economic lay-off”**, on 14 May 2009 at the Maison de l'Amérique Latine, with Me Yasmine Tarasewicz as speaker, organized by Liaisons Sociales.
- **"Latest developments in the concept of equal treatment"** training – at the Maison du Barreau in Paris on 25 May 2009, with Me Yasmine Tarasewicz as speaker.
- **"Organizing Global Reductions in Force : law and methods"** on 5 June 2009 at the Cornell University of New-York with Me Yasmine Tarasewicz as speaker.

Disputes

- **"Procédure Pénale" conference** – Organized by Dii at their premises on 20 May 2009 with Philippe Goossens and Eric Deprez as speakers.

Publications:

- ***Les Fonds de Capital Investissement, Principes Juridiques and Fiscaux***, 2nd edition, Daniel Schmidt and Florence Moulin (Proskauer Rose), Preface by Hervé Novelli, published by Gualino Editeur
- ***Le Guide des négociations commerciales 2009-2010***, Mireille Dany (Proskauer Rose), Régis Fabre and Léna Sersiron (Baker & McKenzie), from Éditions Dalloz
- ***Guide de l'investissement ISF dans les PME***, published by Les Echos-Capital Finance, with the collaboration of Daniel Schmidt and Florence Moulin (Proskauer Rose).

For more details:

<http://www.lesechos.fr/lettrespro/presentation/capital/guideisf/index.htm>

[1] Memo from the French Fiscal Legislation Department to AFIC dated 22 April, 2009