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# Loi Pacte: An Ambitious Reform to Enhance Business Growth and Transformation in France

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## Synopsis

After months of being passed to and fro between the houses in Parliament, the Loi Pacte (the 'Law') was voted on 11 April but published only on 23 May 2019, because of the various challenges filed by opposition MPs and senators with the French Constitutional Council which resulted in 20 of the 221 Articles of the Law being censored, due inter alia to their remoteness from the initial purpose of the draft bill.

Pacte stands for *Plan d'Action pour la Croissance et la Transformation des Entreprises*, meaning literally Action Plan for Business Growth and Transformation, which was one of the themes of Emmanuel Macron's election manifesto during the 2017 presidential campaign and remains an essential goal for his government and the country's economic attractiveness to foreign investors.

The Law is the result of dialogue with hundreds of companies and institutions around the country and consultation with thousands of individuals. According to the State Secretary[1] to the Minister of Finance, it was this 'mobilisation of collective intelligence' that led to the emergence of 'concrete measures that will have a direct impact' on the life of companies.[2]

The Law indeed addresses a variety of themes as diverse as the privatisation of Aéroports de Paris[3] and la Française des Jeux,[4] which were specifically the target of several challenges, the role companies play in society, which is too often regarded as being adverse to their employees' interests, the removal of various obstacles to the growth of companies at the different stages of their life cycle (from creation to their sale), the liability applicable in case of traffic accidents involving autonomous vehicles, the reinforcement of foreign investment controls and of gender representation at the boards of French companies, amending securities law so as to improve its efficiency and the attractiveness of French law, amending several rules applicable to companies listed in France (including in relation to squeeze out procedures) and initial coin offerings.

The author presents some of the key corporate and restructuring related changes provided by the Law.[5]

## Amendments to the Code of Commerce and Monetary and Financial Code addressing corporate related issues

### *Financial auditing of companies – reducing the costs for smaller companies and aligning the French rules on the thresholds applicable in other European countries*

The statutory duty for public limited companies ('*société anonyme*') and partnerships limited by shares ('*société en commandite par actions*') to appoint, as from their creation, one or several auditors ('*commissaire aux comptes*') whose mission is to certify their accounts and carry out a number of assessments and prepare various reports[6] to the shareholders, is removed.

Likewise, the thresholds for the mandatory appointment of statutory auditors in commercial companies, whatever their legal form,[7] are also amended and increased. These amended thresholds were introduced by a decree published on 26 May 2019[8] and aligned with

**Notes**

1 Ms Delphine Gény-Stephann.

2 https://www.gouvernement.fr/en/pacte-the-action-plan-for-business-growth-and-transformation.

3 Aéroport de Paris is listed on Euronext Paris. ADP builds, develops and operates various airports in France and overseas.

4 FDJ is a state controlled company which specialises in lottery games and sports betting.

5 Considering the magnitude of the Law (125 pages), the author has made a selection of the sections of the Law commented in this article, which only gives a limited picture of all the areas covered by the Law. For more information or detailed information please seek professional advice.

6 The list of the auditors' duties has increased over the years and eventually been deemed to be a 'mission of general interest' for the benefit of lenders, trade suppliers, investors and employees.

7 Including also, beyond public limited companies and partnerships limited by shares: *société à responsabilité limitée, société par actions simplifiée, société en nom collectif and société en commandite simple.*

8 *Décret 2019-514 du 24 mai 2019, signé par le Premier Ministre, la Garde des Sceaux et la Ministre des Outre-mer*, published in the *Journal Officiel* of 26 May, text No. 4.

the provisions of the 2013/34 EU Directive of 26 June 2013[9] on small companies, which on their balance sheet data exceed at least two of the three following criteria:

(a) balance sheet total: EUR 4,000,000;

(b) net turnover: EUR 8,000,000;

(c) average number of employees during the financial year: 50.

The Law, however, provides that shareholders of companies which do not qualify for the appointment of an auditor under these criteria, but which hold at least 10% of the share capital[10] (not of the voting rights) can petition the court in which the company is incorporated to appoint a statutory auditor. Obviously, the filing of such a petition will be the method of challenge used by minority shareholders, if the majority shareholders at an ordinary shareholders' meeting reject a resolution presented by the minority shareholders to appoint an auditor when the above criteria are not met. When an auditor is voluntarily appointed, i.e. when not required under the Code, the duration of the latter's mission can be limited to three years.

The Law also provides for some exceptions to the principle that commercial companies not meeting the criteria are exempted from appointing an auditor. For instance:

- companies whose shares are publicly traded, credit institutions and insurance companies remain bound to appoint an auditor, whatever their size;[11]
- companies controlling other companies are bound to appoint an auditor when the combined criteria of the controlling and controlled companies exceed specific criteria, unless the controlling entity already has an auditor.[12] These specific criteria are different and lower compared to those set out above, i.e. total balance sheet criteria is EUR 2,000,000, the net turnover is set at EUR 4,000,000 and the average number of employees during the financial year at 25.[13]

### *Creation of a simplified audit regime for small companies ('petites entreprises')*

A simplified audit regime is created, for which the following companies are eligible:

- The holding company is required to appoint an auditor when the group of controlled companies meets at least two of the specific criteria mentioned above;
- The company, controlled by another company, meets two of the above specific criteria during a financial year; and
- Companies which voluntarily appoint an auditor even if they do not meet the above specific criteria

Under the simplified regime the auditor is bound to prepare two reports: (i) the usual report on the annual accounts, and (ii) a report to the management – and this is new – identifying the financial, accounting and management risks to which the company is exposed. If the company is a small group head entity, the report will need to cover the risks faced by all the group companies.

The auditor will thus be exempted from the preparation of various reports, such as, inter alia, on:

- regulated agreements;
- the need to convene a shareholders' meeting in case of management deficiency ('*en cas de carence des dirigeants*', e.g when the statutory number of directors is not met in public limited companies, or in case of death of the MD of a private limited company and the need to appoint another MD);
- the grounds for a share capital reduction;
- the need for the shareholders to decide on the dissolution of the company or the continuation of its business when the equity has fallen below half the share capital level;
- compensation for the best paid employees;
- share capital increases with the cancellation of preferential subscription rights.[14]

These measures are applicable as from the first financial year following the publication of the decree setting the criteria (see above) and no later than 1 September, meaning that companies whose financial year ends on 31 December 2019 and which exceed at least two of the above criteria are required to apply the measures in 2019.

The auditors whose mission is ongoing at the time of the date of entry into force of the Law will continue until their contractual term.

**Notes**

9 Article 3.2 of the Directive on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC.

10 Article 20 of the Law and Article L 225-218 of the Code of Commerce in its amended version.

11 Article 20-22 of the Law.

12 Article L 20-22 of the Law, which is the amended Article L 823-2-2.

13 Those applicable to small companies in the EU Directive of 26 June 2013.

14 This list is not comprehensive.

### *Easing of the conditions for granting advances on current accounts and for private limited companies to issue bonds*

Until the enactment of the Law, French commercial companies were not authorised to receive, on a regular basis, current account advances from their shareholders, unless the latter held at least 5% of their share capital.

In order to ease the financing of companies, this restriction is now removed from the French Financial and Monetary Code.[15]

The Law also provides that private limited companies ('*société à responsabilité limitée*') that have appointed an auditor can issue bonds. Until the enactment of the Law, the faculty for private limited companies to issue bonds was limited to those companies that were bound by law (i.e. when meeting specific criteria) to appoint an auditor. The reference to companies bound to appoint an auditor is now removed from the French Code of Commerce.

The issuing of bonds by private limited companies remains, however, subject to (i) the company's shareholders having regularly approved the accounts of the last three financial years of 12 months each, and (ii) the appointment of an auditor.

### *Extension of the auditors' area of intervention*

Prior to the Law, auditors were prohibited from carrying out, directly or indirectly, any activity of a commercial nature.

This prohibition is now amended so as to allow auditors to do so in limited circumstances and provided that they comply with their rules of independence and ethics. Auditors, for example can now be members of multi-professional commercial companies[16] together with lawyers[17] and other professions, including for example court appointed administrators handling insolvencies and notaries, which will enable audit firms to offer a broad range of services in a 'one stop shop' and to become serious competitors to other professions practising on their own.

Auditors are also given the possibility to provide services, beyond the statutory control and certification of companies' accounts, including the providing of certificates[18] in relation for example to compliance with Corporate and Social Responsibility regulations, tax filings, cyber related risks, or the providing of training sessions in relation to similar and/or financial topics.

### *Improving the identification of shareholders in listed companies and simplifying the exercise of their rights*

The Law has introduced some provisions[19] of EU Directive 2017/828 of 17 May 2017, amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, into the French Code of Commerce.

The Law sets out the advantages for the issuing company and its shareholders resulting from the identification of the latter, consisting in the easing of the communication between the company and its owners, facilitating their access to shareholders' meetings and to relevant information and more generally the exercise of their rights.

For instance, the Law has widened the scope of the derogation to the principle according to which an account must be registered in the name of the real owner when the latter is not resident in France. The Law provides that, when the equity securities or bonds of the company are traded on one or more regulated markets or multilateral trading facilities authorised in France or in another EU Member State, or on a market considered equivalent to a market regulated by the European Commission, and that their owner is not domiciled in France within the meaning of the Civil Code, any intermediary may be registered on behalf of such owner.

Where the company's equity securities or bonds are admitted to trading only on one or more markets considered equivalent to a regulated market by the European Commission, this entry may be made on behalf of any owner. The intermediary's registration may be made in the form of a collective account or several individual accounts, each corresponding to an owner.[20]

Furthermore, regarding the identity of shareholders of listed companies, the Law provides in relation to the owners of bearer shares, that the company's articles of association may provide that the issuing company or its agent is entitled to request, at any time, either from the central depositary who maintains the account for said shares or directly from one or more intermediaries,

**Notes**

15 Article L 312-2 of the French Financial and Monetary Code.

16 Article 31-3 of the Law 90-1258 of 31 December 1990, on the exercise of liberal professions in companies, as amended by the Law, so as to include auditors in the list of the professions allowed to be members of the *sociétés pluri-professionnelles d'exercice*: '*Il peut être constitué une société ayant pour objet l'exercice en commun de plusieurs des professions d'avocat, d'avocat au Conseil d'Etat et à la Cour de cassation, de commissaire-priseur judiciaire, d'huissier de justice, de notaire, d'administrateur judiciaire, de mandataire judiciaire, de conseil en propriété industrielle de commissaire aux comptes et d'expert-comptable. Une telle société est dénommée "société pluri-professionnelle d'exercice".*'

17 Practising as '*avocat*' and not 'in-house lawyers'.

18 Article L 820-1-1 of the Code of Commerce, as amended by the Law.

19 Inter alia those referred to under Article 3 of the Directive.

20 Article L 228-1 al. 7 of the Code of Commerce.

information concerning their owners granting immediate or future voting rights in its shareholders' meetings.

In companies whose shares are admitted to trading on a regulated market, the faculty of requiring information regarding the identity of its shareholders is now a matter of law and any statutory clause to the contrary is deemed null and void.

### *Setting a new framework for the digital assets market*

In consideration of the spectacular increase in digital assets offerings, including of tokens ('*jetons numériques*'), which had no legal definition until the publication of the Law, the Law improves the predictability and transparency of the digital assets market[21] and provides, inter alia, a legal definition of tokens.

A token is defined in the Financial and Monetary Code[22] as 'any intangible property, representing in digital form one or more rights that may be issued, registered, retained or transferred by means of a shared electronic registration device that makes it possible to identify, directly or indirectly, the owner of the said property'.

The key players of this growing market, the Initial Coin Offering ('ICO') fundraisers and digital assets services providers are also given the possibility to apply respectively for an optional visa and optional licence. The French Stock Market Regulator, the AMF, will have the powers to supervise the labelled ICOs and licensed service providers.

The ICO visa should, however, not be viewed as an assessment of the project's investment viability. The aim of this optional regime for ICOs essentially consists in (i) providing the investors with better information and protection by reducing the regulatory uncertainty; and (ii) encouraging the ICO fundraisers to choose France as their legal residence. From a practical standpoint, ICO project holders who have obtained the optional visa will benefit from the special guarantee for access to basic banking service which has always been a great challenge for them.

The optional licence can now be obtained for the activities of electronic wallets, purchase, exchange and trading platforms, reception and transmission of third-party orders, third-party portfolio management and advice, underwriting and placing on or without a firm commitment basis. The electronic wallets and providers of the exchange services of digital assets for legal tender are subject to mandatory registration with the AMF irrespective of whether they opt for the licence. These entities will be jointly supervised by the AMF and the French Prudential Supervisory and Resolution Authority ('*Autorité de Contrôle Prudentiel et de Resolution*').

These providers, who are very close to core financial services providers, will be subject to a set of common rules (insurance or equity, internal control procedures, resilient IT system, transparent pricing policy, etc.) as well as to specific rules applicable only to certain providers.

### *Extending the possibility for unlisted companies to issue Preferred Shares with double or multiple voting rights*

Preferred Shares can be issued subject to compliance with the provisions of Articles L 225-122 to -125 of the Code of Commerce, which set a principle and an exception.

The principle provided in Article L 225-122 is: 'one share gives right to at least one voting right' and the exception, provided in Article L 225-123 is that double voting rights are possible, subject to the following three cumulative conditions being met:

- a provision authorising double voting rights must be included in the company's bylaws;
- the shares must be nominally registered ('*inscription nominative*'); and
- the shares must have been registered in the name of the same shareholder for at least two years.

The Law adds that compliance with Articles L 225-122 to -125 referred to above is limited to companies whose shares ('*actions*') are admitted to trading on a regulated stock market or a multilateral trading system. In substance, this means that unlisted companies other than '*sociétés par actions simplifiées*' (see below) may now issue Preferred Shares with double or multiple voting rights, provided that this is made possible in their bylaws.

This is therefore a major change for unlisted '*sociétés anonymes*' (public limited companies) and '*sociétés en commandite par actions*' (partnerships limited by shares), which issue shares named '*actions*' versus '*parts sociales*' (which are issued by '*sociétés à responsabilité limitée*', '*société en commandite simple*' and '*sociétés en nom collectif*' and are not eligible for this new regime). Previously, only the '*sociétés par actions simplifiées*' or SAS had the faculty to create a specific class of ordinary shares with

**Notes**

21 The term 'digital assets' comprises tokens issued during ICOs (which are not financial instruments) and virtual currencies (for example, the bitcoin) as defined by the 5th European AML Directive. A token in its term is defined as: 'any intangible asset representing, in digital form, one or more rights, which may be issued, registered, retained or transferred by means of a distributed electronic ledger which identifies, directly or indirectly, the owner of such asset' (Article L 552-2 of the French Financial and Monetary Code).

22 Article L 552-2 of the French Financial and Monetary Code.

multiple voting rights, by including ad hoc provisions in respect of these rights in their bylaws.

The Law further adds that these amendments to the regime of Preferred Shares apply[23] as from the publication of the Law, i.e. as from 23 May 2019.

### *Amending the current securities law regime*

The Law authorises the French Government to reform the current securities regime within the next two years, the purpose of the reform being to clarify and facilitate the understanding of French securities law in order to improve legal certainty and the attractiveness of French law. Reforming the '*cautionnement*' (i.e. the French equivalent to a surety bond), which is one of the most used securities granted by individuals, is one of the top priorities of the future reform.

Indeed, over the years, regulations in relation to the *cautionnement* have piled up, including: the requirement for specific handwritten mentions to be affixed in the guarantee by individual guarantors; a proportionality requirement between the guarantor's assets and revenues and the debt guaranteed; a specific information duty owed by banks to the guarantors and specific provisions of the French insolvency law and of the French consumer code. This accumulation of rules has contributed to the development of significant litigation in relation to this guarantee and created a situation of legal uncertainty which will be remedied by the Government.

### *Adding to gender representation at boards and supervisory boards*[24]

Gender representation criteria were introduced in French law in 2011[25] and are currently applicable to companies (i) whose shares are traded on a regulated market, or (ii) exceeding a certain size, i.e. meeting at least two of the following three criteria[26] for three years in a row:

- employing more than 500 employees,
- realising a turnover in excess of EUR 50 million, and
- presenting a total balance sheet of, or exceeding, EUR 50 million.

The companies falling under the scope of these criteria are bound to ensure gender representation on boards of at least 40% of each gender. In that respect, Article L 225-18-1 of the Code of Commerce adds that when a board is composed of no more than eight directors, the gap between genders cannot exceed two and that any appointment made in breach of this Article is void.

In its last sentence, this Article further provided (until the enactment of the Law) that the nullity of an appointment does not trigger the nullity of the vote(s) cast by the director whose appointment was made in breach of this Article.

The Law has deleted this last portion of Article L 225-18-1 of the Code and this has created some concern around the validity of board deliberations[27] and the need to comply with the gender provisions.

## Amendments to the Code of Commerce regarding insolvency related issues

### *Suggesting the name of an administrator in insolvency proceedings*

As in safeguard proceedings, where the debtor is entitled to propose the name of one or several administrators to the court at the hearing where the commencement of the proceedings is decided, the Law has extended this faculty to debtors asking for the opening of administration proceedings ('*redressement judiciaire*').[28] The court, however, retains a discretionary right to appoint whomever it considers fit, and usually appoints a local administrator and a Paris area administrator when two administrators are to be appointed in matters of a certain size.

Being in a position to suggest names is an obvious benefit to debtors, when they are satisfied with the services of the administrator who may have assisted in a previous role as a '*mandataire ad hoc*', '*conciliateur*' or '*administrateur*' in safeguard proceedings. On the other hand, using this faculty to ask for the appointment of someone other than the administrator designated in previous proceedings will be a challenging exercise, as the Law does not provide for the confidentiality of the suggestion of names and discussion which may arise in that regard between the court and debtor.

**Notes**

23 Article 100 II of the Law.
24 Directoire.
25 Law No. 2011-103 of 27 January 2011.
26 Article L 225-18-1 of the Code of Commerce.
27 ANSA – Loi Pacte. L'essentiel des dispositions de droit des sociétés, Juin 2019, No.19-034, Jean-Paul Valuet, secrétaire général honoraire de l'ANSA.
28 Article L 631-9 of the Code of Commerce.

### *Deciding over managing directors' compensation*

Until the Law, the compensation owed to the managing director of a company applying for '*redressement judiciaire*' administration was set and subject to reduction by decision of the supervising judge. This was indeed a strong incentive for debtors to apply for safeguard proceedings, to which this provision was not applicable, rather than for administration.

The Law now provides that the compensation is maintained as is ('*la remuneration ... est maintenue en l'état*'), unless the supervising judge decides otherwise when seized by the court appointed administrator, the creditors' representative and public prosecutor.

### *No longer reference in the criminal record to liquidation proceedings commenced against entrepreneurs/ individual tradesmen*

According to Article 768 of the French Code of Criminal Procedure, a reference was made in the criminal record[29] of French born entrepreneurs or individual tradesmen ('*personne physique commerçante*') to the commencement of liquidation proceedings[30] against them, even when said proceedings were of a commercial nature only and had no criminal implications whatsoever.

The Law removes this reference to liquidation proceedings in the criminal record, but maintains the reference to:

(i) personal bankruptcy ('*faillite personnelle*'), which is a specific sanction, which in essence prevents a director from being involved in the management of any commercial or business entity or any company engaged in economic activity, as a result of the commission of a number of wrongful acts[31] listed in Article L 653-1 of the Code of Commerce;

(ii) prohibition on management ('*interdiction de gérer*'), which is a sanction which can pronounced separately from the personal bankruptcy sanction.

## Conclusion

Several other ambitious reforms have been enacted recently, such as the reform of the French judiciary system,[32] including (i) the creation of a new court of first instance ('*le tribunal judiciaire*') which will replace the High Court ('*tribunal de Grande Instance*') and the district court ('*tribunal d'instance*') as from 1 January 2020 and (ii) new rules regarding the representation of parties at hearings and the faculty for the parties to apply for a procedure conducted exclusively in writing and with no formal hearing.

The French Cassation Court has also decided to amend the form of its rulings and to develop the motivation of its most important rulings, as from 1 October 2019, so as to make them more comprehensible and improve the perception that French law is reliable and can be an acceptable alternative to the laws of other jurisdictions.

**Notes**

29 *Casier judiciaire.*

30 '*Le casier judiciaire national automatisé reçoit, en ce qui concerne les personnes nées en France et après contrôle de leur identité au moyen du répertoire national d'identification des personnes physiques ...: ... 5° Les jugements prononçant la liquidation judiciaire à l'égard d'une personne physique, la faillite personnelle ou l'interdiction prévue par l'article L. 653-8 du code de commerce*'.

31 Including for example the wrongful carrying out of an unprofitable business, which would necessarily lead to the company's insolvency; the concealing or misappropriation of all or part of the company's assets, or the fraudulent increase of the liabilities of the company.

32 *Loi de programmation et de réforme de la justice*, published in the Official Gazette on 24 March 2019.