

# Client Alert

Latham & Watkins  
Corporate and Finance Departments

## Recent French Legal Developments in Securities Law

Various legal developments have been implemented in France during the last nine months regarding securities law:

- The implementation into French Law of the amended EU Directive on Prospectus modifying the scope of public offerings in France and adding exemptions to the requirement to issue a prospectus; the *Autorité des Marchés Financiers* (AMF), the French Financial Markets Authority, also issued a recommendation on disclosure requirements applicable to listed issuers implementing financial transactions without the issuance of a prospectus;
- The clarification of rules governing sounding out the market for financial offerings, equity lines and reporting on net short positions;
- The reporting of major shareholding/threshold crossing to include cash settled derivatives;
- The amendment of takeover bid regulation including the extension of the right to condition tender offers upon anti-trust clearance and exemptions for mandatory tender offers on shares listed on Alternext (the French MTF organized by NYSE Euronext);
- Corporate governance matters, including the possible introduction of a "say on pay" process.

"Recent French legal developments involve public offerings, net short positions, corporate governance, and other reporting requirements."

### I. Implementation Into French Law of the Amending EU Directive 2010/73/EU on Prospectus<sup>1</sup>

The Directive 2010/73/EU dated 24 November 2010 (the Amending Directive), amending the Prospectus Directive 2003/71/EC and the Transparency Directive 2004/109/EC, aims at reducing the burdens weighing on companies within the EU to the necessary minimum without compromising the protection of investors and the proper functioning of the securities markets in the EU.

EEA Member States were required to bring into force the laws and regulations necessary to comply with the Amending Directive by 1 July 2012. To this extent French Law has been amended in July and November 2012 through the AMF General Regulation and the French Monetary and Financial Code.

The key points of the reform are the following:

### **A. Larger transactions out of the scope of public offerings**

- **Private placement: Increase of the restricted circle of investors.** Offers addressed to fewer than 150 (formerly 100) non-qualified investors per EU Member State do not qualify as public offering. Please note that under French law, given different legal position issued by the AMF and financial professional associations, it remains unclear whether the shareholders or the managers of the issuer may be targeted as the sole or the main beneficiaries of a private placement.
- **Increase of the maximum amount below which the offer does not qualify as public offering.** Offers within the EEA whose total consideration is lesser than €5 million (formerly €2.5 million) over a 12-month period do not qualify as public offering.
- **Increase of the minimum offer value.** Under the former regime, either offers of securities addressed to investors who acquired for a total consideration of at least €50,000 or offers of securities with a nominal value of at least €50,000 did not qualify as public offering. The amount of €50,000 has been increased up to €100,000 for a better distinction between retail and professional investors. However securities that have been issued prior to December 31, 2010 will benefit from the grandfathering clause for which the lower amount of nominal value of €50,000 remains applicable.
- In February 2013, through its Position 2013-03, the AMF, concerned by the equal level of information between all investors, reminds that listed issuers which implement financial transactions which do not qualify as public offerings (*e.g.* private placement or transaction of an amount below €5 million), and thus, do not require the issuance of a prospectus, are however subject to on-going disclosure requirements and are required to provide the public with an accurate, precise and fair information, and to disclose as soon as possible any privileged information, and the characteristics of any transaction likely to have a significant impact on the market price of a financial instrument. In that respect, the AMF requires from those issuers to publish a press release at the launching of the offer as well as a second press release with the final conditions thereof. In its Position, the AMF provides for the minimum information regarding offer to be disclosed (the main terms and conditions, the timetable of the offer and a reference to the main risk factors associated to the issuer disclosed in its financial annual report).

### **B. Larger exemptions from prospectus requirements**

- **Employee share schemes.** Employee share schemes exemption from prospectus was extended to issuers that do not already have securities admitted to trading on an EEA regulated market if either (i) they have their head office or registered office within the EEA, or (ii) they have securities admitted to trading on a third-country market in respect of which the European Commission has adopted an equivalence decision, and provided that information on the securities offered, the rationale, the terms and conditions of the offer be made available.
- **Exemption to the benefit of credit institutions.** Offers of non-equity securities issued in a continuous or repeated manner by credit institutions whose total consideration in the EEA is less than €75 million (formerly €50 million) are not subject to the public offering provisions and are therefore exempted from prospectus.

### C. Clarifications of certain prospectus rules

- **Qualified investors.** The definition of qualified investors has been aligned with the definition and criteria of professional clients and eligible counterparties as defined in EU Directive 2004/39/EC on Financial Markets (MiFID).
- **Prospectus use in “retail cascades”.** The AMF clarified the regime of the “retail cascades”, under which securities which have not been initially offered to the public may be sold indirectly by financial intermediaries to retail investors provided that, a valid prospectus is made available and, its use has been authorized under written form by the issuer.

### D. Prospectus summary

- **Prospectus summary designed as a source of key information.** Pursuant to the amended AMF General Regulation, the prospectus summary shall provide, when read together with the prospectus, key information to investors to assist them in considering the investment.
- **Key information.** Key information is defined as: *“essential and appropriately structured information which is to be provided to investors with a view to enable them to understand the nature and the risks of the issuer, guarantor and the securities that are being offered to them or admitted to trading on a regulated market and [...] to decide which offers of securities to consider further”*.

The key information shall include the following elements: (i) a short description of the risks associated with and essential characteristics of the issuer and any guarantor, including their assets, liabilities and financial position as well as (ii) those relating to the investment in the relevant security, (iii) the general terms of the offer, including estimated expenses charged to the investors by the issuer or the offeror, (iv) details of the admission to trading and (v) purposes of the offer and use of proceeds.

- **A new ground for civil liability in case of incomplete summary.** In addition to the issuer’s civil liability incurred if a summary is misleading, inaccurate or inconsistent with the relevant parts of the prospectus, the amended Article L. 412-1 of the French Monetary and Financial Code provides for an additional ground for liability if a summary does not provide, when read together with the other parts of the prospectus, key information in order to aid investors when considering whether to invest in such securities. The summary shall contain a clear warning to this effect.

## II. Sounding Out the Market for Financial Offerings, Clarification of Applicable Rules

In 2011 and 2012, the AMF imposed significant penalties on several French banks to sanction the way they conducted market surveys between the end of 2008 and the beginning of 2009. Actually, these cases highlighted the discrepancy between the market practice and the AMF General Regulation which established almost automatically a link between a market survey and the disclosure of privileged information. Consequently, the AMF General Regulation was amended to clarify the regime applicable to investment services providers carrying out market surveys in connection with the preparation of a financial operation.

As a result, the AMF General Regulation<sup>2</sup> sets out (i) a more precise definition of market survey and acknowledge that such survey does not automatically lead to the disclosure of a privileged information and (ii) the duties to comply with when conducting such a survey.

Besides, the AMF General Regulation refers to the Code of good conduct published by the *Association Française des Marchés Financiers* (AMAFI), a professional financial markets association. As these rules have been approved as professional guidance by the AMF, any failure to comply with them may be sanctioned by the AMF Enforcement Committee.

### **III. New Position/Recommendation on Equity Line**

In December 2012, the AMF<sup>3</sup> completes its disclosure requirements for equity line programs in a new recommendation pursuant to which, where a resolution authorizing the implementation of an equity line is submitted to the shareholders' meeting, the issuer shall disclose the main characteristics of the program (amount, dilution, discount granted to the intermediary, term, impact on existing shareholders), as well as its purposes with regard to the recent financial situation of the issuer, through the issuance of a prospectus or, if exempted from prospectus, the publication of a press release.

Besides, the issuer shall inform immediately the market of the conclusion of an equity line agreement with the same information described above and of any issuance of shares and the use of proceeds. Moreover, throughout the duration of the program, the issuer shall not carry out any issuance of shares where it is unable to provide the market with all the useful and sufficient information (*i.e.* the privileged information within the meaning of Directive 2003/6/EC on market abuse).

### **IV. Reporting of Major Shareholding/Threshold Crossing to Include Cash Settled Derivatives**

Several cases of secret stake-building, in which cash-settled derivatives were used, highlighted the weaknesses of the French legislation on threshold crossing notification. In this respect, the report from the working group set up by the AMF in 2008 already mentioned the need to improve the quality of information released to the market, especially to prevent from creeping acquisitions and in that respect the necessity to assimilate cash-settled derivatives when calculating the thresholds of share capital and voting rights that trigger mandatory notifications.

Since 2009, French Law only assimilates to shares and voting rights held by the declarant, the shares already issued or the voting rights that a person is entitled to acquire on its own initiative, immediately or for future delivery, pursuant to an agreement or a financial instrument. However, the other financial instruments such as cash-settled derivatives which were not taken into account for the thresholds calculation were only disclosed as a separate information upon disclosure of a required threshold. However, further steps were taken by courts and the legislator to include these financial instruments in the threshold calculation as explained below.

Given recent case law that has sanctioned the abusive use of cash settled financial instruments such as equity swap or total return swap in order to avoid disclosure requirement regarding the crossing of legal threshold<sup>4</sup>, the French legislator took a further step by modifying the French Commercial Code<sup>5</sup> effective since 1 October 2012 pursuant to which, cash-settled derivatives, which have an economic effect upon the reporting person that is similar to ownership of such shares or voting rights, shall be taken into account for the calculation of the ownership to be disclosed in order to determine whether a threshold has been crossed. According to the AMF General Regulation, are deemed to have a similar effect, financial instruments meeting the following conditions: (i) the instrument is referenced, indexed or related to the shares of an issuer and (ii) it gives the reporting person a long position in the shares. This concerns notably contracts for difference, equity swaps and any financial instrument exposed to an equity basket or index comprising several issuers unless they are sufficiently diversified.

The number of shares or voting rights to be taken into account by the reporting person are to be calculated according to a delta-adjusted reporting method, whereby such number is to be calculated by multiplying the maximum number of shares or voting rights covered by the agreement or financial instrument by the delta of the agreement or instrument. It should be noted that the delta is comprised between (-)1 and +1 (between (-)1 and 0 for an instrument giving a short position; between 0 and +1 for an instrument giving a long position). For instance, the delta relating to equity swaps or credit first default is equal to +1 and is therefore neutral.

Please note that this aggregation should not apply to the calculation of the thresholds that trigger the mandatory filing of a tender offer.

Moreover, an additional reporting notification is henceforth required from the AMF General Regulation<sup>6</sup> in case of a change in the allocation among the type of financial instruments held referred to in Article L. 233-7-I (effective holding) and Article L. 233-9 (assimilated holding) of the French Commercial Code (*e.g.* the conversion of the holding of shares assimilated into an actual holding of shares, as a result of exercise of a financial instrument or financial agreement) shall be disclosed under the same conditions as the new crossing of a threshold.

Please also note that, when issuing a declaration of intent an investor holding shares already issued which are the subject of cash-settled derivatives having an economic effect that is similar to ownership of such shares or voting rights, is required to disclose its intentions regarding the nature of settlement of these derivatives in cash or in underlying securities<sup>7</sup>.

## **V. Net Short Positions**

### **A. Disclosure requirements specific to Net Short Positions**

In the wake of the financial crisis, a number of EU Member States introduced regulation relating to short sales and credit default swaps across the EU, including temporary ban on the taking of net short positions in the stock of specified financial institutions. In order to harmonize these regulations, the European Parliament and the Council of European Union adopted on 14 March 2012 Regulation (EU) No 236/2012 on short selling and certain aspects of credit default swaps (the Short Selling Regulation or the SSR). In addition, the European Commission adopted a package of four implementing and delegated regulations (the Implementing Regulations) setting out important technical rules needed to ensure the uniform application and enforcement of the SSR.

The Short Selling Regulation introduces an EU-wide notification and reporting regime relating to net short position in shares and in sovereign debt.

As regards the net short position in shares, the transparency thresholds previously provided under French law (effective since February 2011) remain unchanged. Nonetheless, it should be noted that the implementation of the Short Selling Regulation had a significant impact upon investors as far as these transparency obligations were extended to short positions in all shares admitted to trading in EU markets, provided that the principal trading market for the share under consideration is located in Europe. Thus, any natural or legal person holding a net short position in relation to the issued share capital of a company shall notify the AMF within the trading day of the crossing of the relevant threshold, or any other relevant competent authority, where the position reaches or falls below a percentage equal to 0.2 percent, 0.3 percent or 0.4 percent of the issued share capital of the company concerned. Where the position reaches or falls below a percentage that equals 0.5 percent of the issued share capital of the company concerned and each 0.1 percent above such position shall be disclosed to the public by the AMF on its website.

As regards the net short position in sovereign debt, the EU Regulation introduces a new regime of notification to the AMF or any other relevant competent authorities, whereby the threshold is either 0.1 percent where the total amount of the outstanding issued sovereign debt is between €0 and €500 billion or 0.5 percent where the total amount of the outstanding issued sovereign debt is above €500 billion or where there is a liquid futures market for the particular sovereign debt.

For notification purposes, the notifying person shall use the AMF website called ONDE available since 1 November 2012. In this respect, the AMF issued on 31 October 2012 a user's guide for the new reporting system.

## **B. Prohibition on net short positions**

The SSR as well as the Implementing Regulations became directly effective since 1 November 2012 in EU countries. As such, they became applicable directly in each Member State without the need for domestic implementing measures:

- require that, in order to be regarded as a covered short sale, the financial instrument shall be borrowed (or agreed to be borrowed) or subject to an arrangement with a third party under which that third party has confirmed that the financial instrument has been located or otherwise has a reasonable expectation that settlement can be effected when it is due;
- generally prohibit the naked short selling of certain financial instruments. Please note that in France, such prohibition as well the conditions of a covered short sale have already been introduced into French Law the Law of 22 October 2010<sup>8</sup>;
- introduce a ban on uncovered sovereign credit default swaps; but allow national relevant authority to temporarily suspend the restriction in their own jurisdiction where it has objective grounds for believing that its sovereign debt market is not functioning properly and that such restrictions might have a negative impact on the sovereign credit default swap market;
- the relevant share must have been located and the short seller must have reasonable expectation that settlement can be done when due;
- introduce an EU-wide notification and reporting regime for net short positions as described below.

## **VI. Takeover Bid**

Following the AMF public consultation on certain provisions relating to takeover bids, the AMF amended its General Regulation on the tender offers rules as follows:

- extension of the condition precedent relating to antitrust such that a bidder may condition its offer upon merger control clearance required by antitrust rules other than those prevailing in the EU or in the USA, provided that the time frame for obtaining the merger control clearance be compatible with a period of ten weeks beginning from the opening of the offer, unless the AMF agrees to extend the offer timetable;
- introduction on organized multilateral trading facilities (Alternext) of two new exemptions from the requirement of filing a mandatory offer: these exemptions apply where the threshold of 50 percent of the share capital (or voting rights) is exceeded consecutive to (i) the subscription of a reserved capital increase or (ii) the exercise or conversion of securities giving access to equity, provided that they have been previously submitted for approval to the shareholders' meeting;
- authorization for the bidder of a takeover bid operated by means of exchange of securities, to carry out a share buyback program during pre-offer and offer periods.



- in order to limit creeping takeover (acquisition of a *de facto* control at an offer price without a control premium), the AMF is considering the introduction of a minimum threshold of 50 percent of the share capital or the voting rights of the target company to be obtained by the bidder as a result of the tender offer, failing which, the tender offer shall be automatically null and void. In addition, the AMF is also considering the suppression of the existing possibility for a shareholder holding between 30 percent and 50 percent of the share capital or the voting rights, to increase its shareholding of up to 2 percent within a twelve months period, without having to file a mandatory tender offer.

## **VII. Corporate Governance**

Pursuant to the 2010 Grenelle II Law introducing corporate social responsibility and effective since Decree No. 2012-557 dated 24 April 2012, listed companies and large size companies shall indicate in their annual report the way they take into account social and environmental impacts of their activity as well as their corporate commitments to improve their environmental performance. The report shall include information in relation to the current and previous financial years for comparison purposes. This requirement shall apply for the largest companies from the next annual shareholders meetings held on 2013. In addition, such information will have to be verified by an independent third party-expert, the opinion of which shall be transmitted to the shareholders. This requirement shall apply from the next annual shareholders meetings held on 2013 for the listed companies and from the next annual shareholders meetings held on 2017 for the other large companies. Please note that legal provisions regarding the conditions under which the independent expert shall deliver its opinion have been submitted to a public consultation, the results thereof have not yet been published.

In addition, the Gallois report on competitiveness delivered to the French Government in November 2012 recommends to introduce at least four representatives of employees with effective voting powers on the board of directors and board committees of companies having more than 5,000 employees.

### **A. Say on Pay**

During its presidential campaign, the French President promised to take a new law in order to supervise executive compensation, in particular excessive pay packages. In this regard, the Government launched a public consultation where market participants were asked whether it should be envisaged to implement a say on pay process and whether such process should be binding or not upon the issuers. At this stage, no draft of a bill has been yet published.

The Publicis Groupe company has decided to make the first step before enactment of a new law and will thus, submit to its May shareholders' meeting the compensation of the main executives through an advisory vote. It should be noted that the AMF and more recently the AFEP-MEDEF (the major private companies and French employers' associations) expressed a favorable opinion on the implementation of such an advisory vote. On the other hand, other representatives of the French private companies (*e.g.* ANSA) reiterated their opposition to an advisory vote on the ground that the determination of the remuneration by the appointing corporate body is essential for maintaining an appropriate balance between the powers given to the shareholders and the powers given to the board of directors.

### **B. Shareholders' meeting held by listed companies**

The AMF working group on general meeting held by listed companies, which was launched in May 2011, published its conclusions which were also subject to a public consultation. The report delivers a positive overall verdict as to the

functioning of general meeting in France and made thirty-three proposals aimed at improving specific points on the dialogue between shareholders and issuers and, the information provided to shareholders prior to the voting of the resolutions.

It should be noted that a large number of these recommendations does not require any amendments to the existing legislation or regulation. As a result, these AMF's recommendations will be applicable to general meetings held by listed companies from 1 January 2013. It should also be noted that some of these recommendations are not applicable to small-caps and mid-caps companies.

Among other initiatives, the AMF recommends:

- to improve the clarity of the resolution titles submitted to the general meeting and to clarify the wording of the statements of reasons to enlighten the shareholders on the decisions to be taken;
- to justify new financial authorization requests for issuance of new shares in relation with the business strategy;
- regarding related-party agreement, the board of directors shall motivate the authorization and explain the interest of such agreement for the company as well as its financial terms and conditions.

#### **Endnotes**

<sup>1</sup> Please note that a previous *Client Alert* (*Client Alert No. 1121* as of 18 January 2011) summaries the key provisions of Directive 2010/73/EU amending the Prospectus and Transparency Directives.

<sup>2</sup> Article 216-1.

<sup>3</sup> AMF recommendation No. 2012-18.

<sup>4</sup> In the Wendel/Saint Gobain case law, the Wendel company has used for the acquisition purpose cash-settled derivatives (*i.e.* total return swaps) which were not, at this time, under the scope of the threshold crossing notification. Nevertheless, in 31 May 2012 the Paris Court of Appeal found evidence these derivatives were used to prepare the acquisition of a significant position in Saint-Gobain, in purchasing the shares acquired and held by the banks for the hedging purpose; and the preparation of this transaction should have been disclosed as such to the market according to the AMF General Regulation (CA Paris, pôle 5, ch. 5-7, 31 mai 2012, RG 2011/05307, Sté Wendel rev. Sociétés 2012 p. 586 ).

<sup>5</sup> Articles L. 233-7 and L. 233-9.

<sup>6</sup> Article 223-11-1 of the AMF General Regulation.

<sup>7</sup> Article 223-17 7° of the AMF General Regulation.

<sup>8</sup> Article L. 211-17-1 of the French Financial and Monetary Code.

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