

France: New Law on Banking and Financial Regulation

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In the summer of 2007, at the onset of the gravest financial crisis since World War II, the French government's top priorities were to try to limit damage to France's economy and to encourage the international community to learn how to avoid such crises in the future. Following the 2009 G-20 Summit in Pittsburgh, where it was decided to reinforce the regulation of financial systems,¹ Christine Lagarde, France's Minister of Economy, Finance, and Industry, presented a draft law on banking and financial regulation to the French Council of Ministers on October 16, 2009.

The first part of the draft law reinforced the regulation of France's banking sector and strengthened the mechanisms in place to prevent or manage any future crisis. The second part of the draft law included measures to improve financing channels primarily for small- and medium-size companies, and individual households. Parliament adopted a final version of the draft law on October 22, 2010, which was published in the Official Gazette of October 23, 2010, as Law 2010-1249 on Banking and Financial Regulation.²

Title I: Reinforcing Supervision of Financial Players and Markets

a. Creation of the Council in Charge of Regulating the Financial Sector and Monitoring Systemic Risk

Article one of the Law creates the Council in Charge of Regulating the Financial Sector and Monitoring Systemic Risk (*Conseil de la Régulation Financière et du Risque Systémique*) (CRFRS). The new body comprises eight members: the Minister of Economy as Chairman; the Governor of the *Banque de France*, who is also the Chairman of the Prudential Control Authority (*Autorité de Contrôle Prudentiel* (ACP)); the ACP's Vice Chairman; the Chairman of the Financial Markets Authority (*Autorité des Marchés Financiers* (AMF), an independent public agency tasked with investor protection, including the authority to regulate and oversee financial markets in France; the President of the *Autorité des normes comptables* (Accounting Standards Authority); and three additional persons selected for their knowledge of the monetary, financial, or economic fields.

The CRFRS has three missions: (1) to monitor the cooperation and exchange of information among the institutions its members represent; (2) to review analyses of the situation of the financial sector and markets and evaluate any systemic risk, taking into account the opinions and recommendations of the European Systemic Risk Council; and (3) to improve cooperation in setting international and European standards applicable to the financial sector and issue opinions on the subject if necessary. To further its missions, the law gives CRFRS the authority to question professionals from the financial sector. It will prepare an annual report for Parliament.

b. Increased Powers of the AMF

Article 2 of the law gives the Chairman of the AMF the authority to take emergency measures in the event of exceptional circumstances threatening the stability of France's financial system. These measures would restrict the negotiability of certain financial instruments for short periods, not exceeding two weeks. The emergency measures may be extended for up to three months by the AMF Governing Board. After this three-month period, the Minister of Economy must issue a regulation for any further extension. Article 2 could have been used, for example, to prohibit short selling during the 2007 crisis.

The penalties that the AMF may impose for violation of financial laws and regulations is also increased, from €10 million to €100 million (about US\$13.7-137 million) with respect to persons regulated by the AMF and those who commit market abuse, and from €1.5 million to €15 million (about US\$2.06-20.6 million) with respect to individuals placed under the authority or acting on behalf of persons regulated by the AMF.³

The AMF, in cooperation with the French Energy Regulation Commission (*Commission de Régulation de l'Energie*), will supervise and monitor carbon markets. The definition of regulated markets in financial instruments is amended to include carbon markets.⁴

c. Monitoring of Credit-Rating Agencies

The law establishes the AMF as the agency responsible for registering and monitoring credit-rating agencies in furtherance of a European Union (EU) regulation on the subject.⁵ Regulation 1060/2009 applies to credit-rating agencies registered in the EU and its principal aim is to protect the stability of financial markets and investors.⁶

In addition, the law sets forth a specific liability regime enabling both clients and third parties to claim compensation from EU-registered credit-rating agencies for losses or damages resulting from non-compliance with their obligations as defined under Regulation 1060/2009. The country where the damage occurs, not where the credit-rating agency is registered, determines the applicable law and competent jurisdiction. Furthermore, any contractual agreement made in advance of a dispute relating to Regulation 1060/2009, giving exclusive competence to a jurisdiction situated outside the EU, in a situation where French courts would otherwise have been competent, will be null and void. Finally, clauses excluding the liability of EU-registered credit-rating agencies are prohibited.⁷

d. Implementation of the Prudential Control Authority

The law ratifies Executive Ordinance 2010-76 of January 21, 2010, which established the Prudential Control Authority (*Autorité de Contrôle Prudentiel*) (ACP). This new administrative authority resulted from the merger of four approval and monitoring authorities of the banking and insurance sectors. The ACP oversees consumer protection, promotes financial stability at the national and EU levels, and facilitates French influence on international financial reform negotiations. The ACP will guarantee implementation of restrictions on bank bonuses decided on by the G-20 participants. Banks and insurance companies are required to establish committees

that will examine the remuneration of market operators. In addition, the ACP will check bank charges and will be able to monitor compliance with the commitments made by each bank within the framework of the Financial Sector Consultative Committee.⁸

e. Transposition of EU Directives

The law authorizes the French government to transpose into national law within six months of its promulgation, by means of executive ordinances, the provisions of the following directives of the European Parliament and of the Council:

- Directive 2009/110/EC of September 16, 2009, on the taking up, pursuit, and prudential supervision of the business of electronic money;⁹
- Directive 2009/65/EC of July 13, 2009, on the coordination of laws, regulations, and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS);¹⁰ and
- Directive 2009/44/EC of May 6, 2009, amending Directive 98/26/EC on settlement finality in payment and the securities settlement system and Directive 2002/47/EC on financial collateral for linked systems and credit claims.¹¹

f. Regulation of Derivative Markets and Naked Short Sales

An investor selling financial instruments (securities and options, forwards, swaps, etc.) is prohibited from issuing a sale order unless he holds in his account the financial instruments he is selling or he has taken the necessary measures to ensure that he will be able to deliver such financial instruments on the settlement date. The settlement date, which is three trading days after the sale under the current rule, will be reset at two trading days once an equivalent harmonization regime is implemented at the EU level.¹²

g. Improvement of the Governance of Risk in Companies

The law enhances risk management of certain regulated entities, such as credit institutions and insurance and re-insurance companies, by requiring that a specialized committee monitor the risk management policy, procedures, and systems of the entity.¹³

h. Reinforcement of Financial Professional Obligations to Clients

The last chapter of Title I reinforces the obligations of financial intermediaries to their clients. The law first clarifies the concept of banking and financial solicitation (*démarchage bancaire et financier*). Professionals in the financial field engaged in solicitation activities “may only act on behalf of their principal and within the limits of the services, operations, and products for which their principal is authorized.”¹⁴ The law defines banking intermediaries (*intermédiaires en opérations de banque et en service de paiement*) and sets forth their regulatory regime. Their services include “introducing, presenting, or assisting in the conclusion of banking operations or payment services or carrying out any work or advice preliminary to the completion of such banking or payment services.”¹⁵ Finally, all financial intermediaries will be required to register in one single register that consumers will be able to consult.¹⁶

Title II: Promotion of Economic Recovery

a. Reform of the Procedure for Mandatory Tender Offers

The law reforms the procedure for mandatory tender offers to protect shareholders and prevent “rampant” takeovers. To achieve these goals, the law first amends the definition of “parties acting in concert” contained in article L. 233-10 of the Commerce Code. The law provides that parties “are considered acting in concert ... [if they] entered into an agreement with a view to acquire, transfer, or exercise voting rights, to implement a common policy in relation to the relevant company, or to obtain the control of the company.”¹⁷

To increase transparency, voting rights acquired by way of temporary transfers of shares that represent more than 0.5% of the voting rights in a company having its registered seat in France and whose shares are admitted to trading in the EU or European Economic Area (EEA) must be disclosed to the company and the AMF three days before a shareholder meeting. If this requirement is not met, the voting rights associated with the shares will not count, not only for that meeting but also for any other shareholder meeting until the resale of the shares.¹⁸

The law also decreases the threshold that triggers the obligation to launch a mandatory tender offer from one-third (i.e., 33%) to 30% of the shares or voting rights. It provides that

any person or legal entity, or shareholder in a company whose seat is located in France and whose shares are listed in France or in another EU or EEA Member State, acting alone or in concert within the meaning of article L. 233-10 of the Commerce Code, which happens to hold, directly or indirectly, more than 30% of the shares or voting rights, or to hold, directly or indirectly, between 30% and 50% of the shares or voting rights of a company, and who in less than 12 consecutive months, increases its share- or voting-rights holding by at least 2% must immediately notify the AMF and file a draft mandatory tender offer procedure.¹⁹

The law defines the method of calculation of “fair price” in regard to mandatory tender offers.²⁰ It also introduces new procedures regarding these offers that apply only to small- and medium-size companies.²¹ The law authorizes the government to transpose into national law by way of an executive ordinance a European Parliament directive on the exercise of certain rights of shareholders in listed companies.²²

b. Improvement of Insolvency Law for Companies Facing Financial Difficulties

An “accelerated financial safeguard” procedure is introduced that may be triggered under certain circumstances. The debtor must not be insolvent, must face insurmountable difficulties, and must meet certain thresholds involving turnover or the number of employees. The procedure will be available to a debtor that has reached an out-of-court restructuring arrangement with a majority of its financial creditors and/or bondholders only. The arrangement does not include suppliers of services or goods. The debtor will be able to impose this arrangement on financial creditors who refused to take part in the restructuring through a summary court proceeding. The court must

decide within one month from the opening of the accelerated financial safeguard procedure whether to approve the arrangement.²³

c. Credit Insurance

Credit insurers will have access to the *Fichier Bancaire des Entreprises* (Corporate Banking Database, FIBEN) under certain conditions. All companies recorded in the database receive a rating based on their ability to meet their financial commitments.²⁴

d. Covered Bonds

The law creates a new type of covered bond called *obligation de financement de l'habitat* (home finance bond) to facilitate the refinancing of home loans. These bonds will be issued by a new category of credit institution (*sociétés de financement de l'habitat*) whose “exclusive purpose will be to grant or finance home loans and to issue home finance bonds within the conditions defined by a decree.”²⁵

Concluding Remarks

This article summarizes the most important features of the very complex Law on Banking and Financial Regulation. Christine Lagarde welcomed the law’s publication, noting that it implements the G-20 decisions at the national level and places France in “the vanguard of the radical reform of the financial system,” at a time when the French presidency of the G-20 is close at hand.²⁶

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¹ For more on the G-20 Pittsburgh Summit, see *The Pittsburgh Summit: Key Accomplishments*, THE PITTSBURGH SUMMIT 2009, <http://www.pittsburghsummit.gov/resources/129665.htm> (last visited Dec. 2, 2010).

² Loi 2010-1249 du 22 octobre 2010 de régulation bancaire et financière, LEGIFRANCE, <http://www.legifrance.gouv.fr> (File: Les autres textes législatifs et réglementaires).

³ *Id.* art. 6.

⁴ *Id.* art. 9.

⁵ *Id.* art. 10.

⁶ Regulation (EC) 1060/2009 of the European Parliament and of the Council of 16 September 2009 on Credit Rating Agencies, 2009 OFFICIAL JOURNAL OF THE EUROPEAN UNION [O.J.] (L 302) 1, available at EUROPA, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:302:0001:0031:EN:PDF>.

⁷ *Id.* arts. 10, 11.

⁸ *Id.* arts. 12–23.

⁹ Directive 2009/110/EC of September 16, 2009, 2009 O.J. (L 267) 7, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:267:0007:0017:EN:PDF>.

¹⁰ Directive 2009/65/EC of July 13, 2009, 2009 O.J. (L 302) 32, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:302:0032:0096:en:PDF>.

¹¹ Directive 2009/44/EC of May 6, 2009, 2009 O.J. (L 146) 37, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:146:0037:0043:EN:PDF>.

¹² *Id.* art. 27.

¹³ *Id.* arts. 29–35.

¹⁴ *Id.* art. 36.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* art. 48.

¹⁸ *Id.* art. 49.

¹⁹ *Id.* art. 50.

²⁰ *Id.*

²¹ *Id.* arts. 53–55.

²² *Id.* art. 56; Directive 2007/36/EC of the European Parliament and of the Council of July 11, 2007, on the exercise of certain rights of shareholders in listed company, 2007 O.J. (L 184) 17, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:184:0017:0024:EN:PDF>.

²³ Directive 2009/44/EC of May 6, 2009, arts. 57, 58, 2009 O.J. (L 146) 37, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:146:0037:0043:EN:PDF>.

²⁴ *Id.* art. 59.

²⁵ *Id.* art. 73.

²⁶ Press Release, Ministère de l'Économie, des Finances et de l'Industrie Christine LaGarde: “Avec la publication de la loi de régulation bancaire et financière, la France tourne le dos à la finance deregulee” [“With the publication of the Law on Banking and Financial Regulation, France is turning its back on deregulated finance”] (Oct. 23, 2010), http://www.economie.gouv.fr/discours-presse/discours-communiques_finances.php?type=communique&id=4708&rub=1.