WEIL & ASSOCIES

NEWSLETTER

THE FRENCH "PACTE" AND "SOILIHI" LAWS

MAIN CHANGES IN TERMS OF CORPORATE / M&A

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With two new legislation enacted in 2019, France aims at encouraging entrepreneurship and innovation by lightening constraints and burdens to company growth.

On May 22nd, 2019, France adopted the Law Nr. 2019-486 on Business Growth and Transformation, also known as the "**PACTE Law**", which contains a large range of measures covering many aspects of company life intended to encourage small and medium-sized companies (SME) to grow and create jobs.

The second Law of July 19th, 2019 on the Simplification, Clarification and Updating of company law (called "**SOILIHI Law**"), that came into force on July 21st, 2019, also makes several changes to corporate law and brings new simplification to the legal environment.

This Newsletter focuses on the main provisions which directly relate to corporate law and M&A transactions.

I - CORPORATE LAW

CERTIFICATION OF FINANCIAL STATEMENTS

The PACTE Law lightens the obligations for companies to use statutory auditors for certification of their financial statements.

- ***Exemption in some companies:***

Joint-stock Companies (*Sociétés anonymes)*, European Limited Companies and Private Limited Companies by Shares (*Sociétés en commandite par actions*) will now be exempted from appointing an outside auditor, if they do not exceed certain thresholds. Previously, these companies were required to appoint an auditor, with no threshold requirements.

- ***New thresholds for the appointment of statutory auditors:***

The thresholds for the appointment of an auditor are harmonized for all commercial companies. The appointment will be mandatory if two of the following three thresholds are exceeded:

- 4,000,000 € of balance sheet
- 8,000,000 € of turnover excluding VAT
- 50 employees

The aim of this measure is to reduce the costs of companies and facilitate their development for the smallest of them.

- ***Reducing the term of the appointment to 3 fiscal years***

The PACTE Law opens the possibility for companies to appoint an auditor for three fiscal years (instead of the prior six years), when the appointment is voluntary. The possibility for a 3-year appointment gives companies flexibility and makes a voluntary appointment more attractive as being less committal.

The new rules for the appointment of statutory auditors apply to financial years ending on or after the 27th May, 2019. Current mandates must continue until their expiry date.

SIMPLIFICATION OF COMPANY REGISTRATION

The PACTE Law creates a unique Online Platform to replace the current complex system of 7 different networks of administrative centers.

This Online Platform will collect all information and supporting documents and serve as the direct interface between companies and the various government agencies involved in the registration process (such as tax authorities, social security department, court clerks, company register keepers), regardless of the companies' size, activity, location and legal form (Article L. 123-33 *Code de commerce*).

The unique electronic center will be operational as of 1st January 2021, yet the obligation to use it will apply no later than 1 January 2023.

CAPITAL INCREASE RESERVED FOR EMPLOYEES – REMOVAL OF THE THREE-YEAR CONSULTATION

The SOILIHI Law removes the obligation for joint stock companies to convene a general shareholders' meeting every three years in order to decide on a capital increase reserved for employees participating in a company savings plan, when the shares held collectively by employees represent less than 3% of the share capital (former Art. L. 225-129-6 al. 2 Code de commerce). This mechanism was proving ineffective in promoting employee share ownership since the resolution presented on the legal deadline was systematically rejected by the shareholder's meeting.

On the other hand, the obligation to vote on a draft resolution reserved for employees is maintained in case of a share capital increase by cash contribution.

NO MORE CONTRIBUTION AUDITORS FOR SPECIAL ADVANTAGES OR FOR CONTRIBUTIONS IN THE FORM OF SERVICES OR KNOW-HOW

For SAS (*simplified Joint stock companies)*, the SOIHILI Law removes the obligation to appoint a contribution auditor in the event of special advantages or contributions in the form of services or know-how (*apports en* industrie). Thus, the creation of statutory preference shares will escape the procedure of special advantages that could prove costly for start-ups seeking financing.

WRITTEN CONSULATION/QUESTIONS IN JOINT STOCK COMPANIES

The SOIHILI Law provides for the possibility of not convening a meeting of the Board of Directors or Management Board (*Directoire*) for decisions of minor importance, but to consult its members in writing. These decisions of minor importance may be provided for in the articles of association.

It also provides for the possibility of delegating to the Chief Executive Officer (*Directeur Général*) or the Deputy Chief Executive Officer (*Directeur general délégué*) the task of answering written questions from shareholders (New Art. L. 225-108 Code de commerce).

NEW METHOD OF CALCULATING THE MAJORITY IN JOINT-STOCK COMPANIES

With the SOIHILI Law, the majority required for the adoption of decisions of ordinary and extraordinary general meetings of listed and unlisted joint stock companies (*Sociétés anonymes*) shall henceforth be determined solely on the basis of the votes casted by the shareholders present or represented.

Abstentions, as well as blank or void votes, will no longer be counted as negative votes, but will be excluded from the count (New Article L. 225-96 and L. 225-98 *Code de commerce*).

II - MERGERS AND ACQUISITIONS (M&A)

EXTENDING THE SCOPE OF THE SIMPLIFIED MERGER REGIME

The SOIHILI Law extends the scope of the simplified merger regime, which until now was reserved for mergers and acquisitions between a parent company and its subsidiary in which it holds 100% of the capital or at least 90% of the voting rights.

Since July 21st, 2019, the following transactions are also eligible for the simplified merger regime:

- Merger between sister companies, when the same parent company holds 100% of the share capital or at least 90% of the voting rights of the acquiring company and the absorbed company (Articles L. 236-11 and L. 236-11-1 of the French Commercial Code as amended).

- The demerger/split of a company to the benefit of several sister companies, when the demerged company and the beneficiary companies are all wholly owned subsidiaries of the same parent company (Article L. 236-2, § 4 of the French Commercial Code with reference to Article L. 236-11 of the amended French Commercial Code).

- The partial contribution of assets, when the transferring company holds 100% of the capital of the company receiving the contribution and contrariwise when the receiving company holds 100% of the capital of the transferring company (Article L. 236-22, §§ 2 and 3 of the amended Commercial Code).

REMOVAL OF THE CONFORMITY STATEMENT

Until now, simplified joint stock companies (*Sociétés par actions simplifiées*) and Private Limited Companies by Shares (Art. L. 236-6 *Code*

du commerce) involved in a merger or demerger operation, as well as companies involved in a cross-border merger operating within the European Union, have been required to file a declaration of conformity with the clerk of the commercial court, under penalty of nullity.

This obligation has been removed by the PACTE Law.

DELEGATION OF MERGER TRANSACTIONS

The PACTE Law has also amended Art. L. 236-9 *Code de commerce*. From now on, (i) the extraordinary general meeting of the merging company may delegate its authority to the Board of directors (or the Management Board) to decide on a merger for a period not exceeding 26 months, and (ii) the extraordinary general meeting of the acquiring company may decide on the merger and delegate to the Board of directors (or the Management Board) the authority to set the final terms and conditions for a period not exceeding 5 years.

TRANSFER OF GOING CONCERNS / MANAGEMENT LEASE

The SOIHILI Law makes two important changes to the law applicable to business assets.

First, it deletes many written statements that were mandatory in contracts for the transfer of going concerns under penalty of nullity (Art. L. 141-1 repealed of the *Code de commerce*).

Secondly, it removes the requirement that a business must have been operated for a minimum of two years before it can be granted under a management lease (*Location-gérance).*

PROTECTION OF STRATEGIC COMPANIES

The procedure for prior authorisation of foreign investment in France has been strengthened and expanded in order to better protect strategic sectors.

As a rule, foreign investments in activities that (1) involve the exercise of public authority or (2) may harm public order, public safety and national defence or are related to research, production or trading of weapons, explosive powders or substances are subject to the prior authorization of the French Minister of Economy. Without prior authorisation, the investment is deemed null and void.

The PACTE Law grants more powers to the Minister of Economy in the control of such foreign investments. From now on, the Minister of Economy:

- has extensive powers of injunction with regard to investors who have not requested prior authorization or do not comply with the conditions that may be attached to investment authorizations: injunction under the obligation to file an application for authorization, to restore the previous situation or to modify the investment (Art. L. 151-3-1 of the Monetary and Financial Code);

- may take protective measures: in particular, suspend the voting rights attached to the portion of the shares whose holdings should have been authorized or limit the distribution of dividends attached to those shares (same Article);

- imposes financial penalties for four types of non-compliance, the amount at which is the highest of the following: twice the amount of the irregular investment; 10% of the annual turnover-excluding tax of the company carrying out the activities defined in I of Article L. 151-3; five million euros for legal persons and one million euros for natural persons (L. 151-3-2 of the same Code).

Finally, in accordance with the new article L. 151-5 of the Monetary and Financial Code, the administration in charge of controlling foreign investments in France may require the communication of all documents and information necessary for the performance of its mission. In this case, a company cannot impose business secrecy to the administration, and will be obliged to provide it with the requested documents.

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