

Borloo plan and environmental responsibility in support of a green economy

Recent law no. 2008-757 dated August 1, 2008, adopted in the wake of EC Directive no. 2004/35 dated April 21, 2004, and the Borloo plan form the framework for the development of a green economy in France.

The law dated August 1, 2008 has laid the foundation for an environmental liability system that is inspired by the polluter pays principle. This special framework is novel on more than one count since it organizes a system to remedy and prevent damage to the ecology, assessed independently of its consequences on human health and human activities. The law also introduces a dual system of liability – strict liability and liability for proven fault – of operators of an occupational activity, depending on the risk represented by the activity and on the environment harmed or threatened.

This new environmental liability should therefore incite businesses to adapt their production tools, operating methods and insurance coverage so as to take this new risk into consideration, since the law will apply to proximate causes occurring as of April 30, 2007 and broadly defines operators as including entities “effectively controlling” the person carrying out the activity concerned...

The Borloo plan to promote the development of a green economy, popularly known as the “green business” plan, which was publicly released on November 17, 2008, has also announced the upcoming adoption of 50 measures geared to promoting the development of renewable energies.

Solar energy, wind energy and geothermal energy are at the core of this plan.

Besides new territorial planning tools, various measures have been taken, including: the construction of at least one photovoltaic unit per region between now and 2011, an attractive purchase rate for electricity produced from solar energy coming from occupational buildings, the introduction, starting in 2009, of a “renewable heat fund”, to support production of heat from a variety of renewable sources for central heating systems, and the creation of an additional 6,000 wind turbines between now and 2020.

The adoption of laws and decrees are now awaited that should lead to a structural changes in the energy sector.



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ALERION 

THE NEW REFORM OF BANKRUPTCY AND INSOLVENCY PROCEEDINGS: WHAT CONSEQUENCES FOR CREDITORS ?



Shortly after entering into force, the company rescue law dated July 26, 2005 has already been reformed pursuant to regulatory order no. 2008-1345 dated December 18, 2008.

What is involved is not an overhaul of the overall system, but a series of minor improvements to the law, after three years of application.

Among the announced measures, two are of special interest to creditors, and will be briefly presented below.

Change in voting rules within creditors' committees (financial institutions creditors' committee and trade creditors' committee)

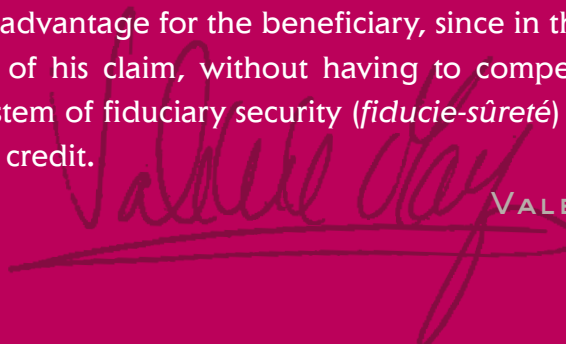
While the companies rescue law had provided that the decision of every committee was taken "*at a majority of its members, representing at least two thirds of the aggregate amount of the claims of all committee members*", the majority requirement is now of two-thirds of the amount of the claims "*held by the members having voted*" (Article L. 626-30-2 of the French Commercial Code). Claims held by non-voting members will therefore no longer be taken into account in calculating whether the majority requirement has been met.

Accordingly, in case of high absenteeism, the proposed plan, which may contain significant time extensions and debt reduction, may be adopted by a small minority of the creditors, both in terms of their number and the percentage of claims represented. This being the case, it is now essential that creditors attend their committee meetings and vote so as to avoid sacrifices being imposed on them without having had their say in the matter.

Extension to the fiduciary field of the release of surety mechanism

The regulatory order extends to the fiduciary field the release mechanism that already exists in the field of sureties (Article L. 622-7 (3) of the French Commercial Code, applicable during the observation period): if the fiduciary assets (*patrimoine fiduciaire*) are necessary to continue operations, the bankruptcy judge may authorize their removal in consideration of payment to the creditor benefiting from fiduciary security over the assets concerned.

This is a considerable advantage for the beneficiary, since in this scenario he can receive full payment of his claim, without having to compete with the other creditors; with the system of fiduciary security (*fiducie-sûreté*) thus becoming an instrument facilitating credit.


VALÉRIE MAYER

OTHER MEASURES IN A NUTSHELL

- 1 The "**fictive right of retention**" for non-possessory security interests has been declared "**unenforceable**" during safeguard of receivership proceedings.
- 2 **Equality of treatment between creditors** is no longer the rule in committees, when "**differences in situation so justify**".
- 3 In case of "**unfair loans**", the collateral given is no longer automatically invalid but can be reduced.

SECURITIES LAW : THE REFORM IN A NUTSHELL



Pursuant to a regulatory order (*ordonnance*) dated January 22, 2009, adopted pursuant to Article 152 of the law on economic modernization ("LME") dated August 4, 2008, the legislative framework governing public offerings has been substantially overhauled, with effect as of April 1, 2009.

One key change pertains to terminology, with the term "offer to the public" ("*offre au public*") replacing the previous "*appel public à l'épargne*" (which covered listing on a regulated market and an offering of securities to the public). While the definition of offer to the public is very differently framed, in reality it covers basically the same situations as the previous term. As of April 1, 2009, "*an offer of securities to the public*" [shall] *consis[t] of one of the following transactions (Article L .411-1 of the French Monetary and Financial Code):*

- *a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide on the purchase or subscription of these securities;*
- *a placement of securities through financial intermediaries."*

Another terminological change is reflected by use of the term financial securities ("*titres financiers*"), which was introduced by another regulatory order dated January 8, 2009. Financial securities (previously financial instruments) encompass shares, debt securities and shares or units in equity funds ("OPC").

It also does away with the status of companies making "*appels public à l'épargne*". The upshot is that a company which makes a once-off or occasional offer to the public is no longer subject to special obligations other than in the context of the offer, which will cease once the offer has been completed.

Companies whose shares are admitted for trading on a regulated market and which are therefore in a permanent situation of making offers to the public remain, for their part, subject to the same obligations as before.

One of the consequences of the elimination of the concept of companies making "*appels publics à l'épargne*" is the dropping of the requirement of a higher minimum share capital for companies making public offers. For an SA (limited company), share capital of €37,000 will now suffice. However, a decree should be published setting forth a shareholders' equity requirement; it being specified that all market operators will have the possibility of setting requirements specific to their market, as regards share capital and shareholders' equity.

The last major change consists in the possibility opened for a SAS (simplified-joint stock company) to make offers to the public, provided the investment is of at least €50,000 or the par value of the securities offered is of at least €50,000.

JÉRÔME WERNER

IN A NUTSHELL

- 1 The term "offer to the public" replaces the former "*appel public à l'épargne*";
- 2 Disappearance of status of company making "*appels publics à l'épargne*";
- 3 Possibility for a SAS (simplified-joint stock company) to make a public offer.

WHAT'S NEW AT THE FIRM

The tax department to the fore**A third partner joins the tax law team**

Philippe Pescayre, joined by one of his associates, Julien Lebel, teams up with Alerion after 9 years spent at Ernst & Young in charge of patrimonial taxation and family business in France and Luxemburg. Philippe Pescayre has expertise in real estate and corporate taxation, and controls and litigations for patrimonial companies.

Alerion's tax department now covers all the various aspects of corporate and patrimonial tax, with special emphasis on real estate taxation.

The firm is also renowned in other areas: the tax optimization of restructuring and acquisition or sale operations, mainly overseas, and the defence of category interests (lobbying or group litigation).

The firm's tax department already comprises 8 lawyers.

Alerion's breakfasts: tax news for 2009

In order to broaden its clients' business spirit, Alerion has decided to share with them the various themes of legal news in the framework of intimate breakfast sessions. It is easy to pencil in two hours early morning even in a busy schedule, in order to learn about new legal measures and ask specialists technical questions.

Thus, the lawyers from the tax department presented on January 28th, 2009, a summary of the 2009 tax news (2009 Finance Law, Amended Finance Law for 2008 and the Economy Modernization Law).

Reminder of the 2008 breakfast themes: 2008 Finance Law, URSSAF issues and risks linked to the pension and contingency system, commercial negotiation between suppliers and distributors linked to the Economy Modernization Law ("LME") and a breakfast alongside our Canadian partner, Lette, and the Embassy of Canada, presenting the settlement possibilities in Canada.

Our teams are growing

Nicolas Mathey, a professor of law, currently teaching at University Evry Val d'Essonne, where he is responsible for the Master 2 Merger Acquisition jointly with Christophe Gerschel and the Master 2 bio-technological Law, is now contributing to the firm's scientific committee. He will be focusing on finance law, banking law, corporate law but will also be involved in contract and distribution law.

Since the beginning of the year, Romain Aupoix has been a part of the labour law team and Aude Savopoulos the corporate/ private equity/ merger acquisition department.

OUTSIDE ENDEAVOURS



Natalia Sklenarikova teaches law to 1st and 2nd year students at the European school.

PUBLICATIONS



"Allocation of the results of reserves and donations", by Philippe Pescayre and Karine Khau-Castelle, in *Gestion de Fortune*, n° 298, April 2009, page 56 and following.

"Germany: the uncompleted reform of the law for limited liability companies (GmbH)" by Jérôme Werner, in *Revue de droit des affaires internationales*, April 2009, n°2, pages 149 and following.

Interview of Nathalie Dupuy-Loup and Fahima Gasmi in the article: "Environmental responsibility: the positive consequences of the new law", in *L'Argus de l'assurance*, n°7103, January 16th, 2009, pages 28 and following.

"Tax litigation: finding one's way through the procedures", by Stanislas Vailhen, in *AGEFI* on December 19th, 2008.

"Stress at work", by Jacques Perotto, in *Cahiers du DRH*, n° 149, December 2008, pages 22 and following.

Small business act, France challenges the EU, by Jacques Bouyssou and Fahima Gasmi in *Biotech Finances*, n° 397 from December 1st, 2008, page 5.

OUR ACTIVITIES OVERSEAS



On December 4th, 2008, Alerion signed a partnership with the Korean firm De Ryook-Aju, recently merged, which is today the fourth largest Korean firm with 120 lawyers. Alerion's Asian desk which was already working with De Ryook, thus strengthens its relations with Korea and Asia. Following the partnership with the Canadian firm Lette, this new agreement is a testament to Alerion's dynamic international development which now has bases in North America and Asia.

In March, Jacques Bouyssou attended the AFIC (French association in capital investment) event in Korea and Japan. During this journey he met local firms and investors, visited high profile centres such as the science city at Tsukuba (Japan) and strengthened relations with Korean and Japanese colleagues.