

I. Legal and Regulatory Changes, Guidebooks and Recommendations

1.1 Measures of simplification – New Decree and Order relating to the French Trade and Companies Registry

Within the framework of the various measures of corporate simplification adopted in France throughout 2012, new Decree N° 2012-928 of 31 July 2012 and Order of 31 July 2012 relating to the French Trade and Companies Registry (“TCR”) entered into force on **1st September 2012**. These concern in particular the following measures:

- ◆ The possibility for entities and individuals registered with the TCR to have the domain name of their website indicated on their Corporate Extract (*extrait Kbis*). This will help evidence the use of the domain name since the date of publication with the TCR (for example, in cases of actions for unfair competition).
- ◆ Various simplifications regarding filings and formalities with the TCR (such as, for example, the fact that the clerk of the Commercial Court can now directly strike off from the TCR a company that has had no activity for 2 years, unless the entity regularises its situation once informed of the procedure).

1.2 Opinions provided by the Coordination Committee of the TCR

Amongst the 13 opinions provided by the Coordination Committee of the TCR in May and in June 2012, we have chosen to summarise 2 of the opinions hereafter:

- ◆ **Opinion 2012-026:** Precise date of the transfer of assets and liabilities of a subsidiary to a sole shareholder company:

In the absence of creditor oppositions, the precise date of the transfer of assets and liabilities (and thus the legal disappearance of the subsidiary) is the day following the expiry of the 30-day opposition period **at midnight**, it being specified that the opposition period begins the day following the date of publication in a legal newspaper of the decision of the sole shareholder to transfer the assets and liabilities of its subsidiary.

- ◆ **Opinion 2012-030:** Impossibility of obtaining a Corporate Extract from the TCR in English:

The Clerks of Commercial Courts who issue Corporate Extracts from the TCR can merely issue them **in French** due to Article 2 of the French Constitution (“the language of the French Republic is French”) and Article 1 of the Law N°94-665 of 4 August 1994 (“French is the language of the public services”), and the fact that Clerks of Commercial Courts are considered as public servants.

1.3 Updated recommendation of the French Financial Markets Authority on data room procedures for companies listed on a regulated market

The French Financial Markets Authority (*Autorité des Marchés Financiers*) updated on **1st August 2012** its recommendation N° 2003-01 relating to data room procedures in companies listed on a regulated market. The recommendation spells out how these procedures can be made more secure so as to safeguard shareholders' interests and comply with the fundamental principles of equal investor access to information and non-use of privileged information.

1.4 Remuneration of officers and directors in French companies (public companies/private companies)

In order to limit the remuneration of officers and directors of public companies, Decree 2012-915 of 26 July 2012 regarding the modalities of control of the State entered into force on **28 July 2012** (see summary hereunder).

For private companies, the Ministry of the Economy has announced that a draft bill (regarding the control of remuneration and modernisation of corporate governance) should be presented to the French Parliament during the fall. The General Treasury Department issued contemplated orientations and a list of questions on 8 August 2012, which it submitted to public consultation (up until 15 September 2012).

♦ **Decree on the remuneration of officers and directors of public companies and state-owned or state-controlled companies (including *Aéroports de Paris* and *Compagnie Nationale du Rhône*):**

The gross annual fixed and variable remuneration of officers and directors of such companies (i.e. Presidents of Boards of Directors, General Directors, Delegate General Directors, President-General Directors, Presidents and members of Executive Boards, Presidents of Supervisory Boards, Presidents and Managing Directors, and all those with equivalent functions) is capped at **€450,000**.

The entities which have not yet fixed the remuneration of such officers and directors for 2012 must comply with the new provisions, and for those who already have, the provisions shall apply to the next Board decision on future remuneration.

♦ **Consultation on the remuneration of officers and directors of other companies:**

In the consultation document of 8 August 2012, the following questions were put forward:

- Which companies should be concerned: listed companies only, or all companies of a certain size?
- Should certain restrictions be extended to officers with no management powers, or even to all employees?
- Should contemplated measures be formalised by law or is it sufficient to complete optional Corporate Governance Guidelines? Should such Guidelines then become mandatory?

The contemplated orientations for the draft bill cover three themes:

- limitations to certain forms of remuneration (such as stock-options, performance shares, variable remuneration, golden hellos, golden parachutes, non-compete indemnities, additional pension plans, etc.);
- corporate governance rules regarding the remuneration of officers and directors (transparency regarding remuneration, the role of shareholders or remuneration committees in fixing remuneration, the holding of multiple offices);
- other provisions on corporate governance not linked to remuneration (the functioning of shareholder meetings, the related-party agreements' regime or the activity of proxy voting advisory firms).

1.5 French Corporate Governance in Listed Companies: a Guidebook for Investors

The French Institute of Directors (*Institut Français des Administrateurs*), the Greater Paris Investment Agency (*Paris Ile-de-France Capitale Economique*), together with the French Council of the Association of Registered Accountants (*Conseil Supérieur de l'Ordre des Experts-Comptables*) and the National Institute of Statutory Auditors (*Compagnie Nationale des Commissaires aux Comptes*), are all at the initiative of a Guidebook (available both in French and in English) called "**French Corporate Governance in Listed Companies: a Guidebook for Investors – Driving Growth & Attractiveness**" published in July 2012.

The document describes the legal framework and typical practice of corporate governance among listed companies in France, and is meant to assist parties and investors who are interested in how Corporate Governance is applied by listed companies in France.

The Guidebook provides a summary of the regulatory environment and soft law for Corporate Governance in France and the scope for application of such requirements under French Law, and is divided into three sections:

- Structure of a Board of Directors: composition, status and objectives;
- Functioning of a Board and its Committees;
- Communication – Shareholders Stakeholders – Corporate Social Responsibility (CSR).

The Guidebook shows the progress made in the application of best practices among the larger listed companies, and special thought has been given to non-resident shareholder issues.

II. Recent case law

2.1 Respect of the rights of a corporate officer of an SAS dismissed during a shareholder meeting

By a decision of 10th July 2012, the Commercial Section of the French Supreme Court (*Cass. Com.* 10 July 2012 N° 11-19.563, *Bonin vs Sté GRS Valtech*) rejected the claim of a Delegate General Director of an SAS (*société par actions simplifiée*) who had filed for damages for a dismissal, which he considered had taken place in an insulting and vexatious manner (since he had not been convened to provide his arguments against the dismissal, which is mandatory under French law).

Prior to the decision to dismiss, the Delegate General Director had sent an email to the President-General Director setting out not only the divergent viewpoints and criticisms he had against the company, but also, in extremely clear terms, his wish to impose his point of view on the company if he were to remain in function. This court decision therefore specifies that the company need not invite the corporate officer to present his defence to a possible dismissal insofar as he has already taken the initiative of clearly suggesting the dismissal as an alternative to the meeting of certain conditions.

2.2 Protection of a corporate name registered as a trademark

By a decision of 10th July 2012, the Commercial Section of the French Supreme Court (*Cass. Com.* 10 July 2012 N° 08-12.010, *Sté Coeur de Princesse vs Sté Mattel France*) specified that a corporate name only benefits from the protection as a trademark insofar as the activities are effectively carried out by the company and not merely set out in the Articles of Association. This innovative decision aims to avoid a trademark registration that is carried out merely to “pre-empt” a trademark to prevent other companies of carrying out an effective activity under such name.

2.3 The transfer of assets and liabilities of a subsidiary to a sole shareholder company cancelled for fraud

By a decision of 11th September 2012, the Commercial Section of the French Supreme Court (*Cass. Com.* 11 September 2012 N° 11-11.141, *Sté ASG Alliance Security GmbH vs URSSAF de Paris Région Parisienne*) decided to cancel for fraud the transfer of assets and liabilities of a French subsidiary to a German sole shareholder company, considering that the latter had intentionally been set up at the last minute to “absorb” and strike off the subsidiary from the TCR. This process took place during the court debate relating to the opening of insolvency proceedings (without the subsidiary mentioning the transfer of assets and liabilities during the court hearings), thereby depriving the creditor (in the present case: the French social security institution, the *URSSAF*) of the efficiency of its right of opposition to the transfer of assets and liabilities.

This newsletter is not designed to provide legal or other advice.

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