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A look back at the key corporate law developments in 2011

French corporate law has been substantially amended in 2011 following the enactment of the Law n°2011-525 of May 17, 2011 for the Simplification and Improvement of the Quality of Law (the “Law”).

In our February 2011 e-newsletter, we outlined the main contemplated measures – that were still being discussed at that time – and underlined that an important part of the forthcoming reform was aimed at modernizing French corporate law.

The key provisions of the Law have now become effective and, at the dawn of this New Year, it is the right time to go back over the flagship measures that have been adopted.

Softened rules governing share capital increases

a) Share capital increase with suppression of the shareholders’ preferential subscription right

The previously applicable set of rules lacked clarity, in particular with respect to the role of the statutory auditor.

Since the enactment of the Law, the statutory auditor is no longer required to issue a report to the Board of Directors (or Managing Committee) if the latter decides, under a delegation of authority granted to it by the General Meeting of Shareholders (“GMS”), to carry out a share capital increase with suppression of the preferential subscription right (which could be detrimental to the quality of the information provided to shareholders).

The statutory auditor must now issue a first report to the GMS when the GMS determines itself the terms and conditions of the share capital increase or when it grants to the Board of Directors a delegation of authority to carry out the share capital increase pursuant to terms and conditions defined by the GMS. As the case may be, the statutory auditor must then issue a second report to the GMS on the manner in which the Board of Director has exercised the authority granted to it.

b) Share capital increase reserved for employees

Before the enactment of the Law, the procedure requiring the holding of a GMS in *sociétés anonymes* and *sociétés par actions simplifiées* on mandatorily proposed share capital increases reserved for employees brooked no exception, even when the relevant companies had no employee! As non-compliance with that requirement could result in the nullification of the share capital increase, law practitioners would systematically apply the procedure.

From now on, when the capital of a joint-stock company is increased by way of cash contribution, the obligation to have the GMS deliberate on a draft resolution providing for a share capital increase reserved for employees only applies when the relevant "*company has employees*" (Article L.225-129-6 §1 of the French Commercial Code).

The Law also introduced another exemption since "controlled companies", as defined in Article L.233-16 of the French Commercial Code, no longer have the obligation to have the GMS deliberate on the issue of employee stock ownership in case of a share capital increase. These "controlled companies" are also now exempted from the obligation to convene every three years a GMS to deliberate on a proposed share capital increase reserved for employees when employee stock ownership accounts for less than 3% of the capital, insofar as this obligation is complied with at the Group level.

This exemption is, however, limited to the case where the controlling company has put in place a system of share capital increase to which the employees of controlled companies are eligible (Article L.225-129-6, §3 of the French Commercial Code).

Simplified rules governing mergers and demergers

a) Information and reporting obligations imposed on the management

The Law extends the currently applicable rules to so-called *fusions simplifiées* (short-form mergers) by allowing shareholders (acting unanimously) to release the Board of Directors (or Managing Committee), or any other competent body within a *société par actions simplifié,* from the obligations to issue a report on the contemplated merger or demerger (Article L.236-9, §4 of the French Commercial Code).

On the other hand the shareholders' right to information is strengthened since the competent corporate body of the relevant companies must now inform its respective shareholders, before the GMS is convened to deliberate on the contemplated transaction, of any significant change in the company's assets and liabilities between the date of issuance of the merger treaty draft and the holding of the GSM convened to deliberate on the merger (Article L.236-9 §5 and §6 of the French Commercial Code).

b) Absorption of a wholly-owned subsidiary

If the absorbing entity owns 100% of the capital of the to-be-absorbed entity, neither the absorbing entity nor the to-be-absorbed entity has the obligation to convene a GMS to deliberate on the contemplated transaction.

Yet, in order to take into account the legitimate interests of minority shareholders, the shareholder(s) of the acquiring entity representing less than 5% of the capital may file a petition with the court to request the appointment of a representative that would convene the GMS of the acquiring entity to deliberate on the contemplated transaction (Article L236-11 of the French Commercial Code).

These provisions apply to merger transactions between joint-stock companies and/or French *sociétés à responsabilité limitée* (limited liability company).

c) Absorption of a subsidiary in which the parent company holds 90% of the shares

The set of rules governing *fusions simplifiées* (short-form mergers) now applies when the absorbing entity owns at least 90% of the capital of the to-be-absorbed entity. The approval of the contemplated transaction by the GSM of the absorbing entity is no longer required (except if one or several minority shareholder(s) representing at least 5% of the capital file a petition with the court to request the appointment of a representative to convene a GMS).

In the event no report is issued by the merger auditor or the management, the residual shareholders shall be entitled to have their shares bought-back at fair value prior to the completion of the transaction.

d) Demerger

In case of demerger of a joint-stock company wholly-owned by the beneficiary companies, the appointment of a demerger auditor is no longer required.

In addition, the companies involved in the demerger transaction have no longer the obligation to convene a GMS (Article L.236-11 of the French Commercial code making a reference to Article L236-16 of said Code), unless one or more shareholder(s) of the beneficiary companies representing at least 5% of the capital file a petition with the court to request the appointment of a representative to convene a GMS.

Other significant changes

a) New regulation governing so-called *conventions courantes* (ordinary agreements)

It should be recalled that agreements entered into between a company and some of its legal representatives, corporate officers or shareholders are classified either as ordinary agreements or regulated agreements, and may be subject to a specific control procedure.

Ordinary or unregulated agreements concern day-to-day transactions, i.e. transactions performed in the usual course of business and entered into under normal business conditions.

The burdensome notification procedure applicable to ordinary agreements has been repealed. The Law has abolished the requirement according to which the corporate management bodies and statutory auditors were to be notified of any agreements entered into under normal business conditions between the company and one of its corporate officers or shareholders holding more than 10% of the voting rights.

b) Alert procedure initiated by the statutory auditor

As per the French Commercial Code, the alert procedure is aimed at drawing the attention of the corporate managers and officers on the necessity to take measures to remedy a worrisome evolution of their company’s situation.

Statutory auditors who initiated and then interrupted an alert procedure within a commercial corporation or private law person conducting a business activity may resume it from the point it had reached if they consider that the continuation of the company’s business becomes jeopardized (insofar as the procedure is resumed within a period of six months from the its initiation and the urgency of the situation requires the adoption of immediate measures).