

Modernization of Bond Issuance

One week after the publication of ordinance n°2017-748 dated 4 May 2017 regarding the role of security agents, the modernization of French law continues with an in-depth reform of bond issues with ordinance n° 2017-970 dated 10 May 2017.

The current system dating back to a decree-law of 1935 and a reform in 1966 does not match the current standards of the bond market. Therefore a reform is necessary especially as regards bond issues offered to institutional investors.

The reform comes with ordinance n° 2017-970 dated 10 May 2017 which aims to reinforce the attractiveness of French law relating to the framework for bond issuance. The ordinance has immediate effect. Certain provisions will entail implementing decrees (*décrets d'application*).

Clarification of the status of the representative of bondholders

Without involving major changes, the measures regarding the representative of the bondholders mainly aim to clarify the method of appointment of the representative and his role.

The appointment of the representative of the bondholders

The provisions relating to the appointment have been clarified. It is now expressly specified that the representative of the bondholders is appointed either in the issue agreement, at the general meeting, or failing that at the request of any interested person. In the case of a public issue, the initial representatives are appointed in the issue agreement.

Since institutional investors tend to invest in securitized bonds the new provisions also specify that a future representative of the bondholders can be named in the securities agreement (*l'acte constituant les sûretés pour le compte de la masse des obligataires*).

Finally, for the sake of compliance with European law the representative can be a person who is a national of, or a permanent resident in, any European Union member state. It is no longer limited to French residents.

The role of the representative of the bondholders' group

Concerning the role of the representative of the bondholders' group (known as *la masse*), the ordinance grants him (or it) the ability to delegate his power to a third party subject to the same restrictions. This will enable the representative of the bondholders' group to delegate the management of securities to a security agent.

Furthermore the representative's powers of representation before the courts are listed in Article L. 228-54 of the French *Code de Commerce* and are now to be recognized by the court.

The Bond market's modernization

The measures regarding bond markets mainly aim to adapt the current system to market conditions. The idea is to grant more flexibility in the relationship between the issuer and the institutional bondholders. These provisions affect the issue as well as the life of the bonds.

Issue of the bonds

The ordinance expands the circle of people who can be granted a delegation of power by the board of directors of the issuer so he or she is able to issue the bonds. The new provision refers to "anyone" being a possible delegate of the powers so the list is no longer limitative. Accordingly the delegate will be able to take faster decisions about the issue having regard to market conditions.

The ordinance facilitates the use of the bond market for financing subsidiaries in a group. The subsidiary which is to issue bonds will no longer have to file two years' audited accounts if the company acting as guarantor of the issue (usually its parent company) files the guarantor's accounts. Issuers who are in a group may therefore issue bonds at less cost by avoiding the need to have their assets and liabilities fully audited.

Life of the bonds

The ordinance distinguishes between retail issues, offered to the public (where the nominal value of the bond is less than €100,000) and wholesale issues, offered to institutional investors (where the nominal value is €00,000 or more).

In the case of issues (not involving an equity option) and where the nominal value of the bond is not less than an amount to be fixed by a decree of the *Conseil d'Etat* (which will be €100,000), the parties are free to negotiate the issue contracts which they wish. The same principle applies to issues where trading in the bonds is required in a minimum aggregate nominal value of the same amount.

In this context new provisions allow the parties to define the conditions of majority and quorum of bondholders required to make decisions in accordance with market standards. For example, day to day decisions could be taken with a simple majority while some more important questions could be decided by enhanced majority.

Moreover, since institutional investors do not need the same protection as the general public the creation of a group representing bondholders is not automatic when the issue is localized in France. The issuer will also be able to correct unilaterally a material error in the documentation without asking for bondholders' approval or request all bondholders' consent.

Where the issue is not a public offering, the issue contracts and related documents, including for paying agency and hedging, can be in English. For all bond issues, the ordinance provides that decisions of the bondholders may be taken by written resolution including electronically.

The position has also been clarified where an issuer wishes to issue bonds secured on assets (*Obligations assorties de sûretés réelles*). The issuer is required to convene a bondholders' meeting if the benefit of this security is not to be extended to existing bondholders.

In conclusion, the ordinance has removed the formal requirement in the case of underwritten issues to have a notarial deed declaring the result of subscriptions.

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