

The Pacte Act: changes impacting French financial law

Heralded as a “new step in France’s economic transformation”, the recently adopted Pacte Act aims to liberate companies from the burden of certain obligations and ensure they are better funded, more innovative and fairer¹. The *Plan d’Action pour la Croissance et la Transformation des Entreprises* (PACTE – Action Plan for Business Growth and Transformation) (**Loi Pacte** or the **Pacte Act**) was adopted at final reading by the French National Assembly (Assemblée Nationale) on 11 April 2019 and has been reviewed by the Constitutional Council (Conseil Constitutionnel), which has ruled on the constitutionality of this law and validated most of the provisions subject to its review.

This article looks at certain changes that the Pacte Act introduces that will impact French financial law

Creation of a minimum disclosure document for investors for “direct” offers of unlisted securities in the absence of a prospectus

Issuers making an offer of financial securities or shares offered through an investment service provider or a crowdfunding investment adviser through a website which meets the characteristics set out in the General Regulation of the *Autorité des marchés financiers* (AMF) must now do so in advance, publish and make available to any interested person a summary document intended for public disclosure, presenting the characteristics of the transaction, identifying the issuer and providing the information specified in the General Regulation of the AMF (*Règlement Général de l’Autorité des marchés financiers*).

Expansion of trading methods for negotiable debt securities

The trading of negotiable debt securities was previously limited to over-the-counter (OTC) exchanges on regulated markets, it will now be extended to other trading platforms (multilateral trading systems and organised trading systems). Such change was made necessary by the emergence of several private initiatives, based on these alternative trading platforms, the purpose of which was to create a secondary market.

Adaptation of the regime for branches of non-EU investment firms

The Pacte Act creates a specific definition of what is a “third-country enterprise”: it refers to an enterprise whose central administration or registered office is not located in a Member State of the European Union (EU), but if it were, would be either a credit institution providing investment services or carrying out investment activities or an investment firm.

The adaptation of the regime for branches of third-country investment firms will allow branches of third-country firms to provide investment services to eligible professional clients and counterparties, as permitted by EU Directive 2014/65 of 15 May 2014 on markets in financial instruments (MiFID) which establishes a comprehensive legal regime applicable to third-country branches authorised in France and also defines the powers of supervisory authorities in this field. This means that a non-EU company establishing a branch will be able to provide investment services and, where applicable, related investment services in France to non-professional clients, clients who have requested to be treated as professional clients and eligible professional clients and professional clients and counterparties, in the absence of an equivalence decision by the European Commission under Article 47 of MiFID.

¹ Please see: <https://www.gouvernement.fr/en/pacte-the-action-plan-for-business-growth-and-transformation>



Modernization of the asset management framework

The Pacte Act ratifies Ordinance No. 2017-1432 of 4 October 2017 on the modernization of the legal framework for asset management and debt financing and postpones, until 1 January 2020, the entry into force of the provisions amending part of the regime applicable to management companies and custodians of securitization entities.

The reform of the asset management framework modernizes the architecture of alternative investment funds by introducing the generic category of financing entities (*organismes de financement*), including traditional securitization entities and newly created specialized financing entities, which can each take the form of an unincorporated fund or a commercial limited liability company (*Société anonyme (SA)* or *Société par actions simplifiée (SAS)*).

The reform gives financing entities the possibility of granting direct loans to non-financial companies. It also amends the legal framework applicable to custodians of securitization entities in order to bring it closer to the standards required by the Alternative Investment Funds Managers Directive (**AIFMD**) for custodians of alternative investment funds.

Derivatives: removal of the “anatocism” rule for derivative transactions and extension of the list of derivative transactions eligible for close-out netting

The Pacte Act proposes to amend certain specific aspects of French law in line with the 2002 ISDA master agreement governed by French law published by the International Swaps and Derivatives Association, Inc. (**ISDA**) in July 2018.

French law does not normally allow the invoicing of capitalized interest when the interest subject to capitalization has been due for less than one year. The Pacte Act now provides for the possibility of amending this rule on the capitalization of interest due for at least one year (known as the “anatocism” rule) for framework agreements governing the conclusion of derivative transactions, so that the capitalization of interest due for a period of less than one year is possible, as provided for in the new ISDA master agreement governed by French law (and which on this point therefore remains the same as the ISDA master agreement governed by English law).

Similarly, under French law, before the Pacte Act, the scope of derivatives transactions eligible for the derogatory close-out netting regime provided for by the French Monetary and Financial Code (*Code monétaire et financier*) (which ensures the effectiveness of netting and termination clauses for derivatives contracts entered into by a company governed by French law even when that entity is the subject of insolvency proceedings) excluded spot exchange transactions, transactions in precious metals or transactions in CO₂ quotas. The Pacte Act removed this exclusion, which was identified as a hindrance to the development of a new model ISDA framework convention under French law.



System of interbank settlement or settlement and delivery of financial instruments: extension to third country systems

The Pacte Act extends the definition of a system of interbank settlement or settlement and delivery of financial instruments by extending it to third country systems.

A system of interbank settlements or the settlement and delivery of financial instruments within the meaning of the French Monetary and Financial Code (*Code monétaire et financier*) is now defined as:

- any system designated as a system and notified to the European Securities and Markets Authority (**ESMA**) by the relevant EU Member State;
- any system governed by the law of a non-EU country whose purpose is to settle foreign exchange transactions in payment against payment mode and in central bank money in which a participant within the meaning of the Monetary and Financial Code (*Code monétaire et financier*) is a direct participant, where such a system, approved by order of the Minister of Economy (*Ministre de l'économie*), after consulting the Banque de France, presents a systemic risk and a level of regulatory and operational security equivalent to that of the systems governed by French law;
- any system governed by the law of a non-EU country dealing principally with central bank money and intended to execute payments or to settle and deliver financial instruments, in which a participant within the meaning of the Monetary and Financial Code (*Code monétaire et financier*) is a direct participant, where such a system, approved by order of the Minister responsible for the economy, after consultation with the Banque de France, presents a systemic risk assessment and demonstrates a level of regulatory and operational security equivalent to that of systems governed by French law;
- a clearing house recognized by ESMA in which a participant within the meaning of the Monetary and Financial Code (*Code monétaire et financier*) is a direct participant, when this system, approved by order of the Minister responsible for the economy, after consultation with the Banque de France, presents a systemic risk.



Final thoughts

The French government must also adopt by ordinance, within twelve months of the publication of the Pacte Act, measures within the scope of the Pacte Act to reorganize the codification relating to:

- companies whose securities are admitted to trading on a regulated market or a multilateral trading facility;
- the status of registered intermediaries;
- the reporting obligations for threshold crossings; and
- takeover bids.

These measures impacting financial law are part of a sprawling text that aims to simplify companies' daily lives and make them more competitive.

Contacts



Baptiste Gelpi

Partner, Paris

T +33 1 53 67 22 71

baptiste.gelpi@hoganlovells.com



Marie-Agnès Guillemare

Senior Associate, Paris

T +33 1 53 67 23 71

marie-agnes.guillemare@hoganlovells.com