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“The Macron Law”

The law No. 2015-990 for the economic growth, activity and equal economic opportunities, (hereunder “The Macron Law” or the “Law”) was enacted on 6 August 2015 and published in the Official Journal dated 7 August 2015.

You will find hereunder the main measures which might be of particular interest to foreign investors:

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The Competition Authority's structural injunction power censured by the Conseil constitutionnel

Article 39 of the Law extended the French Competition Authority's (the "Authority") power to impose measures of structural injunction in the retail sector to mainland France. These new measures would have, under certain conditions, allowed the Authority to impose divestments on undertakings in a dominant position.

The Constitutional Court ("Conseil constitutionnel") considered that this measure would have disproportionally infringed both economic freedom and ownership rights. This measure was therefore censured by the Conseil constitutionnel.

Moreover, another less substantial provision has also been censured by the Conseil constitutionnel. This is Article 216 of the Law which provided for the possibility for the Authority's inspectors and the DGCCRF's agents to receive detailed invoices from the telephone operators in the context of competition investigations. The Conseil constitutionnel found that this provision did not present sufficient safeguards to protect the right to privacy and protection of personal data.

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Procedural innovations in competition law introduced by the Law and which will come into force

The other dispositions of the Law providing for the modification or introduction of certain procedures before the Authority have been upheld, particularly:

> The most significant change is undoubtedly Article 218 of the Law, which establishes a procedure known as "settlement" in place of no-challenge procedures.

Henceforth, when a company agrees not to challenge the objections notified to it, the Rapporteur Général will submit a settlement proposal fixing the minimum and the maximum amount of the fine envisaged.

In the event of the company refusing to conclude a settlement, or if no agreement is found on the minimum and maximum amount of the fine, it will still have the possibility to continue the procedure by challenging the objections.

This new settlement procedure is largely based on that which already exists in European law in so much as it too aims at an economy of means and simplification of the procedure. However, procedurally, a major difference exists between the two mechanisms. In France, settlement procedures are only available once the statement of objections has been notified to the parties, unlike the system in force

before the European Commission, where the settlement is concluded before the notification of the statement of objections.

> In terms of leniency, Article 218 of the Law also provides for a simplification of the procedure by introducing the possibility for the Rapporteur Général to grant an immunity from being fined before having previously established a report.

> Article 37 of the Law also introduces a new Article L. 462-10 in the Commercial Code which establishes a prior information mechanism for the Authority on group purchase and/or referencing agreements, or the sale of services to suppliers, within a two-month period prior to their implementation.

> Several provisions of the Law also reinforce the Authority's powers in merger control, as much with regards to the standard examination (Phase 1) as to the in-depth analysis (Phase 2):

- In Phase 1, Article 215 para. 4 allows the Authority to suspend the time limit within which it must decide on a concentration, especially when the notifying parties failed "to inform it of a new fact which should have been notified if it occurred prior to notification" or "to transmit all or part of the information requested within the time limit".

  Moreover, Article 215 para. 3 of the Law stipulates that the waiver provided by Article L. 430-4 of the Commercial Code, enabling the notifying parties to proceed with all or part of the concentration prior to obtaining an authorisation decision (notwithstanding the suspensive effect), will be automatically void if, within three months from the completion of the transaction, the Authority has not received the complete notification of the operation.

- In Phase 2, Article 215 para. 8 of the Law provides that from now on only the President of the Authority, and not the panel, has the power to review a decision by which a merger was cleared after an in-depth examination. The same is true for decisions necessary for the implementation of the measures in the aforementioned decision.

  Furthermore, when commitments are submitted late (less than 20 days before the expiry of the Phase 2 deadline of 65 working days), the period of examination of the Authority is now explicitly set at a maximum of 85 working days from the opening of Phase 2.

- Finally, the merger control thresholds in territorial departments and communities have also been clarified.

Entry into force:

These provisions come into effect the day after publication of the Law.

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Employees' information in case of sale of their business/company

Article 204 of the Law amends the provisions on employees information in case of sale of a business/company of law No. 2014-856 of 31 July 2014 on the social and solidarity economy (the "Hamon law"):

> Articulation of the information delivered to employees on the possibilities to acquire their company/its business introduced by article 18 of the Hamon law with the provisions of articles 19 and 20 of the same law.

  Indeed, the provisions of the Commercial Code introduced by articles 19 and 20 of the Hamon law relating to employees information on the sale of their business will not apply if the company carried out employees information on the acquisition in the 12 months preceding the sale, including information on the possibility of a sale or any substantial change in the company's capital.

> Additionally, the Law limits the right of information of employees only to cases of sale of the company, excluding any other form of transfer (parliamentary proceedings exclude, without limitation, contributions, assets contributions, exchanges, donations, intra-group sales, reorganisation, etc.).

> Furthermore, it provides a simplification of procedures for informing employees. If the information is given by registered letter with acknowledgment of receipt, the obligation will be satisfied from the first presentation of the letter to the recipient and not in its actual delivery.

> Finally, it removes the invalidity sanction in case of non-compliance with the information obligation. A preliminary question on constitutionality has been brought before the Constitutional Council, which declared unconstitutional, in a decision, dated 17 July 2015, provisions of the Hamon law relating to the invalidity of the sale for failure to prior information of employees. The decision had an immediate effect so that since 17 July, there is no sanction for failure to comply with these provisions. The Macron Law fills this void by creating a civil fine, the amount of which shall not exceed 2% of the sale amount, which may be decided by the court if the company has not followed the procedure. However, this provision will not take effect until later (see below "Entry into force").

Entry into force:

The provisions of article 204 will come into force on a date set by decree and not later than six months after the enactment of the Law.

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Bonus shares regime

Article 135 of the Law aims at making the tax and social regime applicable to bonus share plans more attractive, notably by introducing the following amendments:

> from a legal perspective, under the current regime the vesting and holding periods, in general, needed to be at least two years each. Under the new conditions introduced by the Law, (i) the mandatory vesting period is reduced to one year and (ii) no holding period is mandatory any longer, as long as the vesting period aggregated with the holding period is, at least, equal to two years. As a consequence, if the bonus share plan provides for a vesting period of two years, no holding period is mandatory. In practice, however, holders of bonus shares may want to keep their shares for at least two years as from their acquisition in order to benefit from a reduction in the applicable income tax on their gain (see below);

> the vesting gain, corresponding to the value of the bonus shares as at the date of their vesting, is subject to personal income tax in the hands of the holders, according to a progressive scale (up to a marginal rate of 45%, plus, as the case may be, an extra tax on high income at the rate of up to 4%) as capital gain (as opposed to salary income as it is currently the case), after application of certain specific rebates. More particularly, the acquisition gain may benefit, under certain conditions, from a 50% rebate if the shares are held for at least two years from the date of vesting, and from a 65% rebate for a holding period of at least eight years from the date of vesting;

> as a consequence of the vesting gain being taxed as capital gain, it will be subject to social contributions at the rate of 15.5% (instead of the 8% rate applicable under the current system for active income);

> at the level of the employee benefiting from the bonus shares, the 10% employee's contribution which is currently applicable on the vesting gain will be repealed;

> at the level of the employer, the 30% contribution will be replaced by a 20% contribution, it being specified that such contribution will, under the new conditions, be due at the time of the vesting of the bonus shares (as opposed to the time of their grant) and will be assessed on

the value of the shares at the time of vesting (as opposed to, at the employer's discretion, their fair value for consolidated accounting purposes or value at the date of grant). In addition, no such 20% contribution will be levied (up to a specific ceiling) for bonus share plans granted by small and medium enterprises (SME) which have never distributed any dividends since their creation.

Entry into force:

These new provisions will be applicable to bonus shares whose grant has been authorised by a decision of the extraordinary general meeting taken after the publication of the Law.

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Société de Libre Partenariat ("SLP")

The "*société de libre partenariat*" ("SLP") has been introduced by Article 145 of the Law to propose an alternative to the highly competitive European investment vehicles. The idea behind such introduction is to propose vehicles with legal characteristics similar to anglo-saxon structures, such as limited partnerships, which are well known by capital investment players, while offering a flexibility of functioning as well as a secure tax regime.

The SLP will be incorporated as a *société en commandite simple*. From a regulatory point of view, it will qualify as a professional specialised fund (*fonds professionnel spécialisé*). In this respect, the provisions of the Monetary and Financial Code applicable to the professional specialised funds will also apply to the SLP unless otherwise excluded by the Monetary and Financial Code.

From a legal perspective, the SLP will benefit from a separate legal personality and it will have a governance mainly based on (i) two different categories of partners: on one hand, the *associés commanditaires* (limited partner) whose liability will be limited to the amount of their contributions, and on the other hand, the *associés commandités* (general partners) whose liability will be unlimited and (ii) a manager (*gérant*).

As an alternative investment fund, the SLP vehicle will be entitled either (i) to be self-managed (to the extent the SLP meets the conditions imposed on any other management company) or (ii) to delegate the management of its portfolio to a management company authorized by the *Autorité des Marchés Financiers* (the French Market Regulation Authority, ("AMF")).

The SLP, as a professional specialised fund (*fonds professionnel spécialisé*) will not be subject to investment ratios applicable to professional private equity investment funds ("FPCI", formerly known as "FCPR"). As a result, subject to the exception of the tax constraints detailed below, the SLP will be entitled to retain a broad investment policy. Moreover, the SLP is allowed to

enter into loans financings, without any limitation based on the amount of its assets.

The SLP documentation should be mainly composed of its by-laws, which may be drafted in English or in French. An extract of these by-laws (and which content will be detailed by a decree waiting to be published) will have to be published in French with the Register of Companies (*Registre du commerce et des sociétés*).

From a tax perspective, the SLP will be assimilated to an FPCI, thus resulting in the possibility for:

> the SLP, if it complies with the FPCI ratios (investment for at least 50% of its assets in equity issued by European non-listed companies), to offer to its French investors the same favourable tax regime as the one proposed by the FPCI; and

> the carried interest unit holders, to benefit from the *Arthuis* tax favourable regime (to the extent the standard conditions, including a minimum 1% -investment of the size of the fund, to benefit from this regime are met).

Finally, as a result of the legal characteristics of the SLP, questions regarding the tax characterisation of French investment funds, which are regularly raised (for instance in Germany with respect to the FPCI) should be addressed, thus enabling these entities to be recognised as transparent entities for tax purposes, in these jurisdictions.

Entry into force:

These provisions will enter into force the day after the publication of the Law to the Official Journal. However, a decree and the update of the AMF General Regulation and instructions will be awaited to know the whole regulatory framework to set up the first SLP.

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Continuation of the modernisation of the State as shareholder and of the privatisation rules

The reform of the State as a shareholder started 10 years ago with the creation of the agency for the State's stakes (*Agence des Participations de l'Etat*).

The Order No. 2014-948 dated 20 August 2014 rebuilds and simplifies the rules of governance and those about operations on the share capital of public enterprises. It also reinforces the powers of the Commission for Public Stakes and Transfers (*Commission des Participations et des Transferts*).

Articles 187 and 188 of the Law provide new simplifications.

In particular, it entirely repeals the previous privatisations laws (except for article 10-II of the law No. 86-912 dated 6 August 1986 regarding golden shares introduced before the enactment of the Macron Law under the 1986 law) ending the dispersal of texts and the extreme difficulty of their articulation (law No. 86-793 dated 2 July 1986 authorising the Government to take various economic and social measures, law No. 86-912 dated 6 August 1986 on privatisations modalities and law No. 93-923 dated 19 July 1993 relating to privatisations).

The privatisations undertaken by the local authorities or their groupings will now be exclusively ruled by the order and no longer by the former privatisations laws.

Entry into force:

These provisions will enter into force on the day after the publication of the Law.

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Privatisation of French regional airports

The Toulouse airport privatisation process was, as background information, controversial and politically sensitive. Local authorities expressed dissatisfaction with the process for, in their view, failing to adequately involve them. They also criticised the Government which, in their view, placed too much importance on financial criteria and not enough on industrial experience.

Article 191 of the Law partly aims at responding to the criticisms. Namely, the draft bill was proposed with the goal of reaching a consensus before the launch of future airport privatisation processes. The Law obligates the Government to provide selection criteria and encourages dialogue between the purchaser and the involved local authorities.

Experience in airport management. A new eligibility criterion to submit a bid is that the bidder must have prior direct or indirect experience in airport management. Specifically, the Law states that "*the bidder shall have experience as an airport operator or as shareholder of an airport operating company*".

Consequently, investors with experience in airport management will be able to bid on their own and financial investors that do not hold shares in airport operating companies will not be able to bid alone. Such investors, nonetheless, would be able to bid as part of consortiums, alongside companies with the requisite industrial experience.

Preservation of key matters of national interest. A criterion related to the "*preservation of key matters of national interest concerning air transport*" will also be included in the tender specifications.

This criterion refers to the "*overriding requirements of the general interest*" which is well known under European law. This case law principle was established to authorise certain exemptions to the free movement of capital provided under the Treaty on the Functioning of the European Union.

The application of the "*overriding requirements of the general interest*" is limited to narrow circumstances as it is subject to a proportionality test by the European Union Court of Justice. The proportionality test assesses whether an exemption to the free movement of capital is proportionate to the objective pursued and whether the same objective could be attained through less restrictive measures.

Preservation of the attractiveness of the territory. A criterion concerning the "*preservation of the attractiveness of the involved territory and its economic and touristic development*" will also be included in the tender specifications.

This criterion was not included in the initial draft bill proposed by the Minister of Economy. Instead, it stems from a call by local authorities to play a more integral role in the privatisation process. Local authorities would like to see the purchaser selected on factors beyond just those that are in the interest of the Government, which already owns the infrastructure and is in charge of air policing.

Co-operation with local authorities. Another criterion which will be included in the tender specifications places an obligation on bidders to develop the airport in co-operation with local authorities. The Law does not provide much detail in relation to the scope of this co-operation; however, the goal is to ensure that the airport development strategy is built in harmony with public policies. The obligation to co-operate is applicable during the duration of the concession.

Further, the co-operation obligation is expected to mitigate potential controversies relating to airport management by fostering dialogue with local stakeholders. This dialogue should also allow for better integration of the purchaser with local economic players.

Expected Nice and Lyon airports privatisations. The privatisation of airport concession companies shall now be authorised by law. The Macron Law already provides for the privatisation of the Nice and Lyon Airports, which should be launched in the autumn.

Entry into force:

These provisions will enter into force on the day after the publication of the Law.

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Introduction of the ability to squeeze out certain shareholders in reorganisation proceedings

One of the main insolvency law provisions of the Law – Article 238 (provided under Section 3 "*Effectiveness of the safeguard, reorganisation, professional rehabilitation and liquidation proceedings*"), is the introduction of a new article L. 631-19-2 of the Commercial Code providing for the ability, in reorganisation proceedings, to squeeze out certain shareholders.

This much awaited provision had originally been proposed under the draft Order No. 2014-236 dated 12 March 2014 but, considered as an expropriation, it was not adopted considering the risks of censure by the Constitutional Council.

The measure, which had nevertheless not been dropped, is this time subject to conditions which should enable it to justify the infringement of the shareholders' property right, including notably:

> a company with a minimum workforce of 150 employees or a dominant company within the meaning of article L. 2331-1 of the Labour Code with a minimum global workforce of 150 employees;

> a risk of serious trouble to the national or local economy and the employment area;

> a modification of the share capital being the only serious option enabling avoidance of such trouble and enabling the continuation of the business (after examination of the possibility of totally or partially selling the business).

Squeezing out shareholders that have refused a modification of share capital provided under a reorganisation plan benefiting one or several persons who undertook to implement such plan can take two different forms:

> a forced dilution of shareholders' rights as part of a capital increase and an officer being appointed by the court in order to convene the shareholders' meeting and vote in lieu of dissenting shareholders, or

> a forced sale, to the benefit of the persons who undertook to implement the reorganisation plan, of the shares of shareholders holding the majority voting rights or a blocking minority; failing any agreement on the value of the transferred shares, this value is to be set by an expert appointed by the president of the court.

Entry into force:

This provision will be applicable to reorganisation proceedings opened from the date of publication of the Law.

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Capping of damages for unfair dismissal censored by the Conseil constitutionnel

Article 266 of the Law provided for a cap, between 2 and 27 months maximum of salary, for damages in case of unfair dismissal regarding two criteria: the length of service and the company's headcount.

The French Constitutional Council ruled that while the legislature could cap the compensation due to the employee, he should retain criterion directly related to the prejudice suffered by the employee, which was not the case with the headcount criterion. The French Constitutional Council has censored all the provisions of Article 266 regarding the breach of the principle of equality before the law.

However, Article 258 of the Law still provides the ability for the industrial tribunal judge to take into account indicative standards, whose requirements will be fixed by decree, in order to determine the amount of the compensation regarding the length of service, the age and the occupational status of the employee.

Entry into force:

Provisions of Article 258 will enter into force the day of the publication of the Law.

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Lower sanctions in case of obstacle to the regular exercise of staff representative institutions

Article 262 of the Law reduces the sanctions in case of offence of obstruction (so called "*délit d'entrave*"):

- the Law removes the imprisonment penalty provided by the French Labour Code in case of offence of obstruction; however
- fines are significantly increased: €7,500 for individuals and €37,500 for companies.

Entry into force:

These provisions will enter into force on the day after the publication of the Law.

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