



We are delighted to bring you the latest edition of our legal newsletter.

As in previous Newsletters, this issue features topical legal issues which you may encounter.

We alert our readers to the fact that the articles in the newsletter are not intended to provide you with exhaustive information and do not constitute legal advice.

We welcome any comments and/or queries that you may have.

**This newsletter is also available in French & Japanese.**

**BERSAY & ASSOCIES**  
Société d'Avocats

31, avenue Hoche, 75008 Paris  
Téléphone 33 (0)1 56 88 30 00  
Télécopie 33 (0)1 56 88 30 01

22, rue Croix-Baragnon, 31000 Toulouse  
Téléphone 33 (0)5 62 26 20 79  
Télécopie 33 (0)5 62 26 08 34

<http://www.bersay-associes.com>  
<mailto:contact@bersay-associes.com>

**IN THIS ISSUE:**

**COMPANIES LAW / FINANCE LAW ..... 2**

Reforms in finance law ..... 2

**FINANCIAL LITIGATION ..... 3**

"Madoff" case: depositories under fire ..... 3

**COMPETITION / DISTRIBUTION ..... 4**

Reform of the competitive tendering procedure pursuant to an executive order dated November 13th, 2008..... 4

**INSOLVENCY PROCEDURES..... 5**

Reform of the law on distressed companies: executive order dated December 18th, 2008 ..... 5

**LABOR AND EMPLOYMENT LAW ..... 7**

Contribution by the law in favor of earned income 7

**INTELLECTUAL PROPERTY / NEW TECHNOLOGIES ..... 9**

The Paris Court of Appeal cracks down on unauthorized automatic access to société.com's online database ..... 9

Information to be given to consumers regarding the private copy levy ..... 9

**AREAS OF LEGAL PRACTICE ..... 11**

## COMPANIES LAW / FINANCE LAW

### Reforms in finance law

So as to make the French financial marketplace more attractive, Art. 152 of law no. 2008-776 dated August 4th, 2008 on the modernization of the economy ("LME"), authorized the government to take the measures necessary to modernize the legal framework of the financial marketplace by executive order.

Making use of that authorization, the government passed several reforms by executive order, in particular as concerns public offerings (1) and the rules governing preferred shares (2).

#### 1. The reform on public offerings (Executive Order no. 2009-80 dated January 22nd, 2009)

The stated aim of executive order no. 2009-80 on public offerings is to facilitate the financing of companies on markets, specifically by bringing French law into line with the European standards with which international investors are familiar.

The main changes that will be introduced by this order, once it enters into force on April 1st, 2009, are the following:

**1.1.** Some of the terminology used in public offerings will be replaced by terminology considered to be more comprehensible for international players.

The current term "*appel public à l'épargne*" will be replaced by the European term "*offre au public de titres financiers*" (offer of securities to the public) associated, as applicable, to the term "*admission aux négociations sur un marché réglementé*" (admission to trading on a regulated market).

This new definition does not modify the type of public offering transactions stemming from the definition of "*appel public à l'épargne*" in French law.

Art. L. 411-1 of the French Monetary and Financial Code ("MFC")<sup>1</sup> will henceforth read as follows:

*"An offer of securities to the public" consists of one of the following transactions:*

1. A communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide on the purchase or subscription of these securities;

2. A placement of securities through financial intermediaries."  
[Emphasis added]

It should be noted that, based on this new wording, the offer to the public will concern securities (*titres financiers*) and no longer financial instruments (*instruments financiers*). This change is due to the fact that, strictly speaking, financial instruments cannot be offered to the public, since they cannot be the subject of an issue.

We would also specify that executive order no. 2009-15 dated January 8th, 2009, which entered into force on January 10th, 2009, amended the list of financial instruments covered by Art. L. 211-1 MFC, in particular by integrating the notions of "*securities (*titres financiers*)*" and "*financial contracts (*contrats financiers*)*".

**1.2.** The executive order does away with the status of companies making "*appels public à l'épargne*", with the result that companies making occasional offers to the public will no longer be placed under "*recurrent*" obligations (Report by the Economy, Industry and Employment Minister to the President of the French Republic concerning the executive order). So the obligation to prepare an internal control report, pursuant to Art. L. 225-37 and L. 225-68 Commercial Code (Comm. Code), will only apply to French companies "*the securities of which are admitted to trading on a regulated market*". An operator of an organized market can, however, request the imposition of this obligation on its market.

**1.3.** The minimum share capital requirement of €225,000 so as to be able to issue securities will be dropped from Art. L. 224-2 Comm. Code. Only the minimum share capital requirement for *sociétés par actions* (set at €37,000) will be kept.

**1.4.** As of the date of entry into force of the executive order, simplified joint-stock companies (*sociétés par actions simplifiées*) will be allowed to offer securities to the public, provided the amount by investor and the par value of the security does not exceed certain thresholds set by the AMF's Rules. However, this type of company will still be unable to have its shares admitted to trading on a regulated market.

<sup>1</sup> Article L. 411-1 MFC currently reads:

*"An appel public à l'épargne consists of one of the following transactions:*

1. *The admission of a financial instrument to trading on a regulated market;*

2. *The issuance or sale of financial instruments to the public by reliance either on advertising, soliciting, or on credit establishments or investment service providers."*

## 2. Reform of the rules governing preferred shares (Executive Order no. 2008-1145 dated November 6th, 2008)

Art. 57 LME completed Art. L. 228-11 Comm. Code with the following provision: "*preferred shares without a voting right to which is attached a limited right to share in dividends, reserves or in the assets and liabilities in case of liquidation shall not have a preferential subscription right for any capital increase in cash, unless otherwise provided in the company articles/by-laws.*"

This wording did not settle the matter of whether preferred shares issued without voting rights during a specified period after which it is recovered, also recover their preferential subscription right.

Executive Order no. 2008-1145 on preferred shares (which entered into force on January 1st, 2009) settled the matter by once again modifying new Art. L. 228-11 Comm. Code, which now provides that preferred shares without voting rights for a specified period, and not just those without voting rights on a permanent basis, when they have the characteristics set forth above, are deprived of preferential subscription rights unless otherwise provided in the company articles/by-laws.

## FINANCIAL LITIGATION

### "Madoff" case: depositories under fire

Much ink will continue to be spilled on the biggest fraud ever to hit financial markets. US\$50 billion reported to have gone up in smoke, investors cheated throughout the entire world, and one man, Bernard Madoff, placed in house arrest in his New York apartment by the US courts, while awaiting trial.

This legal and financial imbroglio has showed up many failings in the system. More specifically, it has highlighted the lack of harmonization between the laws of countries, in particular those of EU Member States, as regards the rules governing the liability of financial players, including fund depositories. It has raised the issue of the exact scope of the liability of such players under national and EU laws.

At the end of December 2008, the Director of the Autorité des Marchés Financier (AMF) declared that in France, a depository is liable for the funds entrusted to him.

This liability, which in theory is strict, cannot be "*affected by the fact [that the depository] entrusts to a third party all or part of the assets in his safekeeping*" pursuant to Art. L. 214-26 MFC.

But is this the case in Luxembourg or Ireland, where the funds of LuxAlpha and Thema International Fund are located, funds counting among those most seriously exposed to the Madoff scandal? UBS in Luxembourg and HSBC in Ireland, respectively the depositories of LuxAlpha and Thema International Fund, are the main banks concerned. Both deny liability, on the grounds of the "delegation" of their deposit to a third party. The stakes are high for the numerous investors swindled who are looking to recoup their losses and thus parties with deep pockets.

In a press release issued on January 2<sup>nd</sup>, 2009, the Commission de Surveillance du Secteur Financier ("CSSF"), the Luxembourg financial market watchdog, stressed that "*the Luxembourg legislation applicable to Luxembourg depository banks as the custodians of the assets of investment funds are a faithful reflection of the provisions of European Council Directive 85/611/EEC*" (unofficial translation). On this basis, "*when the assets of a fund are deposited by a depository bank with a third party, the depository bank remains responsible for monitoring and supervising these funds*", responsibility which "*is not affected by the fact of entrusting to a third party all or part of the assets of a fund in its safekeeping*".

This "monitoring and supervision" duty seems to mirror the implementing circular of the 1985 UCITS Directive by Luxembourg, which specified that the notion of "safe-keeping" (*garde*) of assets by the depository, pursuant to the Directive, should be understood as meaning "supervision" and not, as a duty to reconstitute the funds.

Anxious to clear up any ambiguity, the Association Luxembourgeoise des Fonds d'Investissement and the Luxembourg government subsequently stated that the law of their country imposed a duty of custody and of restitution on depositories.

Following a letter sent by Christine Lagarde, pursuant to which the French Economy Minister requested the European Commissioner with responsibility for the Internal Market to re-open talks, in particular regarding "the liability of UCITS depositories", the latter replied that there was no doubt as to the fact that the Directive should be construed as allowing such depositories to be placed under a duty to reconstitute assets, even in case of delegated management or safe-keeping of securities. He conceded, however, that these notions needed to be supplemented or given further clarity, thus opening the way for a modification to the Directive, with the likely objective of seeking to go beyond the patchwork of national laws in this field.

Since then, the CSSF has decided to address the matter head-on by indicating on February 3<sup>rd</sup> past, that "so as to best protect investors' rights", it would be taking LuxAlpha off the official list of UCIs and would be seeking, once the one-month period in which to appeal this decision has expired, its windup by the courts.

Its stated aim is for "the liquidator(s) to have the right to bring liability claims which may be necessary in the interests of the shareholders of LuxAlpha Sicav against the persons responsible for this Sicav and their service providers."

Following a meeting with UBS bank on February 6<sup>th</sup>, 2009, CSSF provided the bank with the results of its investigation into the different responsibilities incumbent on it as LuxAlpha's fund depository. CSSF requested UBS to make known its position in this respect in writing.

## COMPETITION / DISTRIBUTION

### Reform of the competitive tendering procedure pursuant to an executive order dated November 13<sup>th</sup>, 2008

On November 13<sup>th</sup>, 2008, the government adopted Executive Order no. 2008-1161 modernizing the regulation of competition. This executive order has made a few key changes to the procedure in competition cases:

- Decisions authorizing competition investigators to raid (search and seizure) the premises of companies are now subject to appeal.

Raids requested by the European Commission, the Economy Minister or *rapporteur général* of the Competition Authority must be previously authorized by the court of competent jurisdiction. Prior to the adoption of this executive order, such decisions could only be reviewed by the French Supreme Court. The absence of a two-tier system of review has been considered, in the field of tax investigations conducted on the basis of similar texts, as contrary to the requirement of a fair trial by the European Court of Human Rights (*Ravon v. France* dated February 21<sup>st</sup>, 2008). Orders authorizing searches and seizures are now subject to appeal (on a non-suspensive basis) before the competent Court of Appeal, within a period of 15 days in accordance with the rules of the French Code of Criminal Procedure.

- Besides seizing documents, investigators are now authorized, during raids, to carry out hearings of "the occupant of the premises or his or her representative so as to obtain useful information or explanations for the purposes of the investigation".
- This means that investigators will be able to carry out real interrogations of company officers or their representatives while benefiting from the surprise effect of the "raid", and that more caution will be required for company offices to avoid incriminating themselves.

In a concession to the rights of the defense, the executive order provides that the decision by the special judge (*juge des libertés et de la détention*) must indicate the possibility for the company concerned to "be assisted by the counsel of their choice". The latter should thus, in principle, be able to attend hearings.

Yet, the fact that the "exercise of this possibility does not entail the suspension of the search and seizure", points to the possibility that such hearings may be held outside the presence of the company's counsel if the latter is unable to immediately go to the premises.

- In addition, within the new Competition Authority, created on January 13<sup>th</sup>, 2009, the executive order sought to create a more effective separation between its investigation and decision-making roles, this absence of separation having been the subject of many criticisms.

Some of the duties formerly falling to the head of the Competition Authority now vest with its *rapporteur général* (chief case handler).

The *rapporteur générale's* duties thus comprise management of requests for application of the provisions applicable to business secrets and of access to the case file, as well as requests for procedural time extensions. The *rapporteur générale* also decides on whether the simplified procedure should be followed or not. Lastly, it is also up to the *rapporteur générale* to recommend to the Competition Authority that it investigate, on its own initiative, potentially anti-competitive practices.

- The introduction of a regime applicable to "micro-anti-competitive practices", meaning anti-competitive practices of a local dimension. By exception to the principle of the sole jurisdiction of the Competition Authority, new Art. L. 464-9 Comm. Code gives the Economy Minister an injunctive power and the power to levy fines of up to €75,000 or 5% of the last known turnover figure in France if that figure is lower). However, the Minister's power is limited to cases when the last annual turnover achieved in France by each undertaking concerned is less than €50 million, and the last combined turnover of the undertakings concerned, as the case may be, is less than €100 million.
- The regime applicable to "micro-anti-competitive practices" covers practices affecting a local market, and not practices likely to affect trade between Member States which come under Art. 81 (cartels) and Art. 82 (abuse of a dominant position) of the EC Treaty.

## INSOLVENCY PROCEDURES

### Reform of the law on distressed companies: executive order dated December 18th, 2008

Executive Order no. 2008/1345 dated December 18<sup>th</sup>, 2008, entered pursuant to the authorization given by the law on the modernization of the economy dated August 4<sup>th</sup>, 2008 (LME), completes the reform of the law on distressed companies initiated by the "rescue" law (*loi de sauvegarde*) of July 26<sup>th</sup>, 2005. Virtually all of the provisions of the order (with some three exceptions, simplifying the arrangements for replacement of the *juge-commissaire* in case of impediment or if that judge is no longer in office by amending Art. L. 621-9 *in fine*) entered into force on February 15<sup>th</sup>, 2009 and apply to proceedings opened as of that date.

The text has a transversal approach, it has for its effect to simplify or clarify many of the provisions of Book VI Comm. Code, as well as containing real advances, of which we will present a brief overview.

#### 1. Ad hoc mandate and conciliation

The contribution made by the text is to now allow the debtor to propose the name of the ad hoc curator (Comm. Code, Art. L. 611-3).

As regards conciliation, the maximum legal period of four months (or five if extended) remains unchanged but does not encompass the time elapsed until the court enters its decision in the event of court approval (Comm. Code, Art. L. 611-6 (2)), although the latter must be sought within the legal time limit.

In addition, a new conciliation procedure can no longer be opened less than three years after the end of the conciliator's duties (Comm. Code., Art. L. 611-6).

An application for a grace period under Art. 1244-1 *et seq.* of the Civil Code ("Civ. Code") may also be made to the court based simply on an official final payment request and thus without waiting for the initiation of legal proceedings against the debtor by the creditor (Comm. Code., Art. L. 611-7 (5)). The disappearance of the possibility of granting such grace periods at the stage of court approval of the agreement should be noted (Comm. Code, Art. L. 611-8-II-3).

In addition, the executive order aligns the effects of an amiable agreement with that of a court-approved agreement (*accord homologue*) as regards (i) the suspension of individual proceedings against the debtor with respect to the claims covered by the agreement (Comm. Code, Art. L. 610-1, Art. L. 611-10-2 and Art. L. 611-10-3) and (ii) the protection of guarantors and co-obligors for which it provides a broader definition (Comm. Code, Art. L. 611-10-2).

Similarly, an agreement recorded by the court, in the same way as an agreement approved by the court, can be rescinded by right if the *président* of the court ascertains non-performance by the debtor with his commitments (Comm. Code, Art. L. 611-10-3).

Lastly, the text paves the way for an appeal by the parties to the agreement in case of dispute concerning the "new money" conciliation privilege (Comm. Code, Art. L. 611-10 (2)).

## 2. Making recovery more attractive

Extended conditions of eligibility: Recovery proceedings (*sauvegarde*) are opened at the request of a debtor who "without having defaulted on payments, can show difficulties that he is unable to overcome" (Comm. Code, Art. L. 620-1). Proof of difficulties "of a nature to lead to payment default" is no longer required.

Extended powers for the debtor: The debtor can propose an administrator of his choice for appointment by the court (Comm. Code, Art. L. 621-4); in case of, the court is required to state its reasons.

The debtor can also carry out the inventory, but it must be certified by a statutory auditor or by a certified public accountant (Comm. Code, Art. L. 622-6).

While in receivership (*redressement judiciaire*) proceedings, these duties are concurrently exercised with the administrator (if not fully exercised by the latter), in recovery proceedings only the debtor can request authorization from the court to carry out disposals other than in the ordinary course of business or to grant a mortgage or a pledge (Comm. Code, Art. L. 622-7, II), propose a substitution of guarantees/security interests (Comm. Code, Art. L. 622-8) or apply to the court seeking an order of partial cessation of the undertaking's business activities (Comm. Code, Art. L. 622-10).

Similarly, the text grants exclusivity to the debtor in claiming payment of claims arising prior to the date of the decision opening proceedings, when the latter (i) seeks to obtain the return of property and rights transferred by way of security to a *patrimoine fiduciaire* or (ii) to exercise a call option under a lease agreement when justified by the pursuit of operations and the amount of the payment is less than the fair market value of the property (Comm. Code, Art. L. 622-7).

The debtor is given a more prominent role at the preparatory stage since it is up to the debtor to propose a plan, with the assistance of the administrator, before discussion by the creditors (Comm. Code, Art. L. 626-2).

During the observation period, the debtor may request the conversion of the recovery proceedings into receivership proceedings in the absence of insolvency (i.e., payment default) if "the adoption of a recovery plan is manifestly impossible and if the closure of the proceedings would clearly lead, in a short timeframe, to defaulting on payments" (Comm. Code, Art L. 622-10).

More protection for company officers: Art. L. 626-4 Comm. Code, which enabled the courts to make adoption of the plan contingent, at the request of the public prosecutor's department, on the ouster of the director, or else the non-transferability or compulsory sale of their shares, is repealed but remains applicable in case of receivership proceedings.

Among the measures taken to increase the protection of company officers is the new definition given by the executive order to the category of "co-obligors and guarantors", which opts for a generic, broader, category encompassing "co-obligor individuals or individuals having stood personal surety or having assigned or transferred property as security" (Comm. Code, Art. L. 622-28). These persons are protected during the observation period but can also assert the provisions of the recovery plan (Comm. Code, Art. L. 626-11)

Non-enforceability of undeclared claims: Under the executive order undeclared claims are henceforth no longer enforceable against the debtor during the performance of the recovery plan or upon its completion, provided the debtor complies with the commitments included in the plan. In other terms, the performance of the recovery plan by the debtor releases the latter from undeclared claims (Comm. Code, Art. L. 622-26).

Second chance given to the debtor: among the key innovations is the possibility of converting the recovery proceedings into receivership proceedings in the event of the rescission of the plan due to payment default having occurred. Previously, this event automatically entailed conversion of the proceedings into the judicial liquidation of the debtor (Comm. Code, Art. L. 626-27). This provision entered into force on January 1<sup>st</sup>, 2009 and applies to proceedings underway.

The consideration of new developments in the field of security interests: The executive order neutralizes the impact of the creation by the LME of a right of retention to the benefit of the pledgee without dispossession by indicating that this right is not enforceable during the observation period or during the period of performance of the plan, unless the encumbered asset is transferred in application of Art. L. 626-1 Comm. Code (Comm. Code, Art. L. 622-7, I (2)).

In addition, new Art. L. 622-23-1 neutralizes the effects of the *fiducie-sûreté* (system whereby the principal transfers title to various assets to the fiduciary agent as security in respect of a loan or other obligation, the purpose being to enable the fiduciary agent to sell these assets at the maturity of the guaranteed obligation if the principal is in default) in case of insolvency proceedings against the *fiduciant* to avoid his assets being wiped out by the automatic realization of the fiduciary contract. So, any transfer or sale of rights or property of the *fiduciant* to the benefit of the *fiduciaire* or of a third party on the mere basis of the opening of the proceedings, the approval of a plan or non-payment of an earlier claim, is invalid.

In addition, the administrator may put an end to the contract "making available" the assets transferred to the *fiducie-sûreté* if he considers that the continuance of that contract is not useful to the debtor (Comm. Code, Art. L. 622-13).

Lastly, the executive order expressly authorizes a claim to be made by the beneficiary of a *fiducie-sûreté* (Comm. Code, Art. L. 624-16).

### 3. Innovations concerning judicial receivership

Definition of defaulting on payments (insolvency):  
The executive order consecrates the solution devised by the French Supreme Court on the taking into consideration of liquidity reserves and moratoriums in determining the debtor's available assets enabling him to face his current liabilities (Comm. Code, Art. L. 631-1).

### 4. Innovations concerning judicial liquidation

When (i) the debtor's assets do not include real estate property, (ii) the debtor has turnover before tax of less than €300,000 and (iii) has not employed more than one employee during the six months preceding the date when the proceedings are opened, the simplified judicial liquidation procedure will be mandatory (Comm. Code, Art. L. 641-2 and Art. 71 of decree no. 2009-160 dated February 12<sup>th</sup>, 2009).

### 5. Fine-tuning liability cases and penalties

Liability for corporate debts under former Art. L. 652-1 *et seq.* has been repealed. This provision applies to proceedings underway on February 15<sup>th</sup>, 2009 (Comm. Code, Art. L. 652-1 *et seq.*).

Lastly, claims in liability due to inadequate assets are now only possible in case of liquidation (Comm. Code, Art. L. 651-2).

## LABOR AND EMPLOYMENT LAW

### Contribution by the law in favor of earned income

Law no. 2008-1258 dated December 3<sup>rd</sup>, 2008 in favor of earned income was published in the *Journal Officiel* on December 4<sup>th</sup>, 2008 (the "Law").

Among the array of measures covered by the Law, the following key measures can be identified concerning:

- (i) the adoption of incitement measures to encourage the expansion of voluntary profit-sharing (*intéressement*),
- (ii) freedom for the employee to choose the use of the sums owed to him on the basis of mandatory profit-sharing (*participation*), and
- (iii) employee savings and stock ownership plans.

#### 1. Voluntary profit-sharing

##### ➤ Creation of a tax credit

Companies "taxed on their actual earnings" may benefit from a tax credit if, between the date of publication of the law and December 31<sup>st</sup>, 2014, they:

- set up a voluntary profit-sharing agreement, in which case the amount of the tax credit will be of 20% of the profit-sharing bonuses owed on the basis of the year "when no voluntary profit-sharing agreement was in force on the basis of the last four financial years preceding that of the first application of the agreement". This credit is deductible from corporate income tax;
- or
- execute an amendment to their voluntary profit-sharing agreement modifying, to the benefit of employees, the arrangements for calculation of the profit-sharing, in which case the amount of the tax credit will be of 20% of the difference "between the voluntary profit-sharing bonus owed on the basis of the financial year and the average bonus owed on the basis of the previous agreement".

##### ➤ Exceptional bonus

Companies having concluded a voluntary profit-sharing agreement or an amendment to an existing agreement, as of the date of publication of the law and by no later than June 30<sup>th</sup>, 2009, may pay to all staff an exceptional bonus of an amount capped at €1,500 by employee which must be paid by the company by no later than September 30<sup>th</sup>, 2009.

This bonus is exempted from all social security and related contributions and levies, with the exception of the CSG and the CRDS, sick-leave contributions / occupational illnesses and its amount is added to the tax base of the tax credit referred to above.

For the employee, it is subject to personal income tax (unless earmarked for a savings plan).

So as to promote increased voluntary profit-sharing among small companies, the law provides for the introduction of a voluntary profit-sharing scheme at the branch level to which companies may adhere (Law, Art. 3).

Voluntary profit-sharing agreements are concluded for a fixed term of three years and previously automatically expired on that date, thus requiring a new agreement to be concluded.

The law now organizes the automatic renewal of the agreement, provided such renewal is allowed by the agreement and that none of the parties "authorized to negotiate a voluntary profit-sharing agreement" (i.e. representative trade union organizations and works councils) requests its renegotiation within three months preceding the agreement's anniversary date. (Law, Art. 8).

## 2. Mandatory profit-sharing

### ➤ Free use of profit-sharing amounts owed

The distinction between mandatory and optional profit-sharing has become narrower since the law has ended the mandatory "lock-up" of mandatory profit-sharing amounts owed. The employee now has the choice, upon every profit-sharing payment, between:

- immediate payment of the amounts, in which case they are exempted from social security and related levies but are subject to CSG and CRDS and subject to personal income tax,
- earmarking them, as per the arrangements set forth in the mandatory profit-sharing agreement; except in case of early "unlocking", these proceeds will only be available upon the expiry of a period of 5 years and are exempted from social security and related levies, CSG, CRDS and personal income tax.

## 3. Employee savings and stock option plans

Extension of the employee savings regimes to company heads and to their spouse, who benefits from the status of the employed or shareholder spouse, to the CEOs, managing directors, managers or board members of legal entities (Law, Art. 11 and 12), who are now benefit from:

- mandatory profit-sharing in companies with less than fifty employees that are not subject to the obligation to implement the mandatory profit-sharing rules, or in companies with less than two hundred and fifty employees having introduced a mandatory profit-sharing plan departing from the standard rules (*accord de participation dérogatoire*) (their rights being calculated on that part of the special profit-sharing reserve exceeding the amount that would have been paid in application of the ordinary rule of law),
- optional profit-sharing or the savings plan of their company, if having less than 100 employees, instead of less than 250.

### ➤ PERCO

Regarding the corporate collective pension savings plan ("PERCO"), which allows employees to constitute savings available upon retirement in the form of an annuity or a lump sum, the law authorizes:

- its unilateral introduction by the company if the negotiations to conclude a collective agreement fail;
- negotiations in view of its introduction three years (instead of five years) after the introduction of a PEE (company savings plan);
- the PERCO rules to provide for automatic membership of all employees, subject to an express opt-out by the employee,
- an initial payment by the company, within the limit of the cap set by decree, even in the absence of any contribution made by the employee.

### ➤ Stock-options and free share grants

Henceforth, stock-options or free shares can no longer be granted to the officers and directors of listed companies in any one of the following cases:

- the company grants free shares or stock-options to the benefit of all employees and at least 90% of the employees of its French subsidiaries,
- the company concludes a optional profit-sharing agreement, mandatory profit-sharing plan departing from the standard rules (*accord de participation volontaire*) applicable within the company and to at least 90% of the employees of its French subsidiaries.

\*

Lastly, companies respecting their annual obligation to negotiate in the breach, a certain number of reductions or exonerations of the payment of social security and related levies are now contingent on compliance with that obligation (Law, Art. 26).

## **INTELLECTUAL PROPERTY / NEW TECHNOLOGIES**

### **The Paris Court of Appeal cracks down on unauthorized automatic access to société.com's online database** (*Paris Court of Appeal, January 23rd, 2009*)

The "IIEESS" case offers a rare case of application by the courts of the provisions of law no. 98-536 dated July 1<sup>st</sup>, 1998, integrated in Art. L. 341-1 through L. 343-7 of the Intellectual Property Code ("IPC").

In that case, company "S" offered services on its [www.societe.com](http://www.societe.com) website for which it was remunerated on a per-click basis.

The French company IIEESS marketed, for its part, a software product called "Ditel Qualification Pro", published by the US corporation Ditel LLC, which enables its buyers to access the public database of company "S" and to use the latter's data without its authorization.

Considering that the design, use, publishing and marketing of this software constituted an act of unfair competition and of passing off, company "S" sued IIEESS in summary proceedings before the Paris Commercial Court, under Art. L. 341-1 and L. 342-1 IPC, seeking an injunction, subject to a fine for non-compliance, ordering:

- the cessation of the software's distribution,
- the communication of the corresponding sales figures,
- the sending to all users of that software of a notice requesting the return of all copies of that software against a refund.

By ruling dated June 18, 2008, the Paris Commercial Court granted the claims made by company "S", except for the claim seeking the dispatch of the notice to all of the software users.

IIEESS and Ditel LLC appealed the ruling with the Paris Court of Appeal.

On appeal, company "S" sought the upholding of the ruling entered in summary proceedings and also sought, as a cross-appeal, brought under Article 1382 Civ. Code, to have IIEESS and Ditel LLC ordered to pay it €50,000 in damages due to the acts of passing off committed by the sale of the "Ditel Qualification Pro" software.

In its decision dated January 23, 2009, the Court of Appeal held that the ruling entered in summary proceedings should be upheld as regards "the injunction order entered against IIEESS and Ditel prohibiting them from distributing their software as is", but that the cross-appeal by company "S" was unfounded as brought under Article 1382 Civ. Code and not under the IPC.

Company "S" could not rely on the provisions of Article 1382 Civ. Code in the context of an appeal against a ruling entered in summary proceedings so as to obtain an award of damages.

However, the court invited company "S" to bring its Article 1382 claim on the merits before the proper court, by insisting on the fact that the commercial use of the name and features of the services offered online by company "S" made by IIEESS and Ditel LLC characterized acts of unfair competition and passing off, regardless of the automatic extraction or quantitatively substantial extraction of the [www.societe.com](http://www.societe.com) website.

The Court also added that inasmuch as such use was not justified by considerations of compatibility between two products or by the need to inform consumers, it effectively caused a manifest nuisance (*trouble manifestement illicite*) for company "S".

In its decision, the Paris Court of Appeal sought to crack down on the marketing in France of increasingly sophisticated software tools ("datawarehouse", "datamining") enabling automatic unauthorized access to public databases, a phenomenon increasingly faced by database producers.

### **Information to be given to consumers regarding the private copy levy** (*French Supreme Court, 1st Civil Division, November 27th, 2008*)

In France, the sale or purchase of blank recording media (CD or DVD) is subject to a payment called "private copy levy", which is due to authors, performing artists and producers of phonograms or videograms under Article L. 311-1 IPC.

The question that arose was whether the private copy levy applied to companies established within the European Union when selling such media in France, over the Internet, and what obligations they were under in terms of informing French consumers.

In the instant case, Rue du Commerce company had sued for unfair competition several competitor companies established in other EU Member States, on the grounds that they also offered similar products for sale on the Internet (blank CDs and DVD) without indicating that the prices practiced did not include the private copy levy due or remaining due in France.

It also sought an injunction prohibiting them from integrating, for French consumers, the amount of the private copy levy for which they were liable or, at the very least, previously informing such consumers of the impact of the French levy on the prices practiced.

Pursuant to a decision handed down on March 22<sup>nd</sup>, 2007, the Paris Court of Appeal denied Rue du Commerce's claims for the following reasons:

- the companies sued were not liable for the private copy levy pursuant to the criteria laid down by Article L. 311-4 IPC,
- it had not been shown that those companies implemented unfair business practices aiming at taking advantage of the different requirements under existing rules so as to capture its customers, thus committing acts of unfair competition under Article 1382 Civ. Code.

In a decision dated November 27<sup>th</sup>, 2008, the French Supreme Court upheld the Court of Appeal's decision on the non-applicability of Article L. 311-4 IPC to the companies sued.

It did, however, find that *"by considering that the absence of any indication reminding French consumers of the strict requirement they are under to pay the private copy levy is not wrongful, while observing that this levy was not without impact on the selling price of the products concerned, of which it was strictly necessary to inform the consumer, the Court of Appeal failed to draw the consequences at law of its own findings concerning the capture of the customers of Rue du commerce and thereby failed to properly apply the above rule of law [Art. 1382 Civ. Code]"*.

Based on this partial reversal by the French Supreme Court, companies established in an EU Member State are required to include in their commercial documents a notice informing French customers of the impact of the private copy levy when making intra-Community purchases.



**AREAS OF LEGAL PRACTICE**

• **MERGERS & ACQUISITIONS**

Engineering of takeovers and deal structuring, legal due diligence, restructuring operations, joint ventures, obtaining necessary administrative permits and licenses, drafting and negotiation of documentation (letters of intent, sale & purchase agreements, warranties that assets and liabilities are as stated, bank guarantees, shareholders' agreements, etc.), merger deals, takeovers of companies in difficulty or in the framework of insolvency procedures.

• **CAPITAL INVESTMENTS AND LBOs**

Representation of investment funds, issuers, targets and company officers, during the due diligence, advisory and negotiation processes.

• **COMPANY LAW**

Asset and equity transactions, capital increases, issuance of composite securities (notes convertible or repayable in shares, share subscription warrants, investment certificates, priority dividend shares etc.), stock option agreements, company founder share plans, temporary business combinations, management fees and cash management agreements, changes to charter/by-laws and legal secretariat services.

• **SECURITIES LAW**

IPOs and preparatory work, drafting of prospectuses, legal secretariat services for listed companies, relations with market authorities, securities litigation.

• **BANKING AND FINANCE**

Advice on loan and financing agreements, warranties/guarantees, syndication, banking regulations, financing of acquisitions and structured asset financing (particularly of real estate).

• **COMMERCIAL CONTRACTS / ECONOMIC LAW**

Advice and litigation with commercial contracts, i.e. service, sale, distribution, concession, franchise, commercial agent agreements, distributor/supplier relations, general terms of purchase/sale, commercial partnerships, manufacturing and subcontracting agreements, business sale agreements, management leases, consumer law, public and private procurement contracts.

• **LABOR AND EMPLOYMENT LAW**

Advice and litigation work in collective and individual disputes as well as in social security law and criminal labor law.

• **LITIGATION / INTERNATIONAL ARBITRATION**

Litigation and arbitration work covering all facets of business, company and securities law, as well as insolvency procedures and white-collar crime. Representation at all stages of the dispute, from pre-litigation to litigation before judicial or arbitral courts, protective measures and enforcement.

• **REAL ESTATE LAW**

Advice and litigation work in connection with commercial leases, real estate due diligences, purchase/sale of property and of preponderantly real estate companies, financing of real estate acquisitions.

• **INSOLVENCY PROCEDURES**

Alert, restructuring and reorganization procedures, amicable composition and ad hoc representation procedures. Court-ordered reorganization, continued operation, sale and continuation plans, liquidation.

• **COMPETITION LAW (FRENCH AND EU)**

Advice and litigation work in respect of industrial cooperation agreements and structuring of distribution networks. Representation before the competition authorities and courts in cartel, anti-competitive practices, abuse of a dominant position and unfair competition. Advice on merger control (conduct of feasibility studies, preparation of notification files, negotiation with the national and Community control authorities), and on State aids/subsidies.

• **IT LAW**

Development and integration of software, licenses, assignments and other software contracts, facilities management, maintenance of IT systems and software, appraisals of the compliance of IT services, anti-piracy fight.

• **ELECTRONIC COMMUNICATIONS**

Regulatory domain; construction of networks, co-localization of facilities, agreements and general terms of supply of services, access and interconnection agreements, judicial or administrative litigation (against the decisions of the regulatory authority).

• **INTERNET**

Creation and hosting of websites, affiliation, partnership, audit of websites, application for and defense of domain names, market shares, online auctions, ASP licenses.

• **MEDIA**

Advertising (protection, operation) and marketing; sponsoring; regulation of broadcasting and of electronic communication services (TV, mobile phone TV, Internet TV, video on demand etc.).

• **PROTECTION OF PERSONAL DATA AND PRIVACY RIGHTS**

Relations with the CNIL; specific regulations on electronic communications (geolocalization services, storage of traffic data); breach of privacy rights, defamation.

• **LITERARY AND ARTISTIC PROPERTY RIGHTS, COPYRIGHT AND NEIGHBORING RIGHTS**

Protection and licensing of copyright and neighboring rights; audiovisual (cinema, TV) and multimedia (online and offline video games, cd-roms etc.) production and co-production; motion picture regulations; distribution licenses (TV, merchandizing, video distribution, derivative rights); rights of performing artists, sports law; infringement litigation (customs seizures, infringement seizures, proceedings before civil and criminal courts).

• **INDUSTRIAL PROPERTY**

Advice and litigation in the field of trademarks, patents and/or design and model applications, transfers of technology and/or know-how, unfair competition and passing off

• **WIDE NETWORK OF FOREIGN CORRESPONDENTS**

The Firm has developed a wide network of foreign correspondents in most industrialized countries and in certain developing countries.

• **ISO 9001**

The Firm was the first Paris law firm to obtain ISO 9001 certification back in 1998.

31, avenue Hoche  
75008 Paris  
Phone : 33 (0)1 56 88 30 00  
Fax: 33 (0)1 56 88 30 01

22, rue Croix-Baragnon  
31000 Toulouse  
Phone: 33 (0)5 62 26 20 79  
Fax: 33 (0)5 62 26 08 34

www.bersay-associes.com  
contact@bersay-associes.com