Kramer Levin

Banking, Finance and Insurance Letter

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Should you need any further information, please contact :

Gilles Kolifrath, Partner

T : +33 (0)1 44 09 46 44, M : +33 (0)6 75 18 84 12

E : gkolifrath@kramerlevin.com

Kramer Levin – 47 avenue Hoche, 75008 Paris

www.kramerlevin.com

COVID-19

Short selling

With regard to short selling, or more precisely, net short positions, two sets of measures have been taken: lowering of thresholds (a) and prohibitions (b). These measures are based on the provisions of Articles 20 and 28 of the Regulation of 14 March 2012 (Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps) which relate to the powers of intervention of national authorities (Article 20) and ESMA (Article 28) in the event of exceptional circumstances.

- The Regulation of March 14, 2012 requires that the national authorities be notified of all net positions relating to shares listed on a regulated market or a multilateral trading system when these positions exceed 0.2%: the threshold has been lowered to 0.1% by Article 2, § 2, of the decision of March 16, 2020 (ESMA decision of March 16, 2020 to require natural or legal persons holding net short positions to temporarily lower the notification thresholds for net short positions in relation to the issued share capital of companies whose shares are admitted to trading on a regulated market above a certain threshold for notification to the competent authorities, in accordance with Article 28 (1) (a) of Regulation (EU) No 236/2012 of the European Parliament and Council), which entered into force immediately, and applied for a period of 3 months, and therefore until June 16, 2020 (art. 4).

- Short sales, known as "naked" sales, are in principle permitted, although they must in fact be covered meaning that they are indirectly prohibited. Subject to this reservation, they are possible under normal circumstances, but may be prohibited in exceptional circumstances. These prohibitions were issued in March 2020 by the French, Italian, Spanish, Belgian and Austrian authorities (AMF, Temporary ban on short selling of shares admitted to trading on trading platforms under the jurisdiction of the AMF , in accordance with Article 23 of Regulation (EU) of the European Parliament and of the Council No 236/2012 of March 14, 2012 (March 17, 2020); Decision (of the President) of March 17, 2020 relating to the prohibition of net short positions; Decision (of the college)

of March 17, 2020 relating to the extension of the prohibition on net short positions; Opinion of the ESMA of 17 March 2020 on a proposed emergency measure by Comision Nacional del Mercado de Valores the under Section 1 of Chapter V of Regulation (EU) n ° 236/201, 23 March 2020, ESMA70-155-9556; ESMA Opinion of March 17, cc2020 on a proposed emergency measure by the Commissione Nazionale per le Società e la Borsa under Section 1 of Chapter V of Regulation (EU) No. 236/201, March 23, 2020, ESMA70-155-9565; ESMA Opinion of March 19, 2020 on a proposed emergency measure by the Financial Security and Markets Authority under Section 1 of Chapter V of Regulation (EU) No. 236/201, March 23, 2020, ESMA70-155-9590; ESMA Opinion of March 23, 2020 on a proposed emergency measure by the Austrian Finanzmarktaufsicht under Section 1 of Chapter V of Regulation (EU) No. 236/201, March 23, 2020, ESMA70-155-9604).

Transparency

Financial information, as it results from the Transparency Directive (Directive 2004/109/EC of the European Parliament and of the Council of December 15, 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Dir. 2001/34/EC), is an important element for investors because they take it into account in their investment decision, which ESMA recalls in its public statement of March 27, 2020 (Public Statement, Actions to mitigate the impact of COVD-19 on the EU financial markets regarding publication deadlines under the Transparency Directive, March 27, 2020, ESMA31-67-742). At the same time, and because of deadlines imposed by legislation but occurring during the health crisis that the European Union is experiencing, ESMA recognises that it may be difficult for issuers to meet the dates imposed by the texts. ESMA therefore encouraged national authorities to take account of issuers' difficulties if they have any in meeting their obligations, it being specified that issuers must inform the national authorities, explain the reasons for their delay and indicate the estimated date of publication.

Distribution of dividends

In a press release of March 30, 2020 entitled "The ACPR calls on credit institutions under its direct supervision and finance companies to refrain from distributing a

dividend", the ACPR invited "credit institutions under its direct supervision and finance companies, to ensure, at least until October 1, 2020:

- that no dividend will be paid and that no irrevocable commitment to pay dividends will be made for the years 2019 and 2020
- to ensure that no share buybacks to remunerate shareholders take place".

The aim is that "in the context of the COVID 19 pandemic, credit institutions under the direct supervision of the French Prudential Supervisory Authority (ACPR) and finance companies must continue to fulfil their role of financing households and businesses". The press release of March 30, 2020 does not mention any text in support of this recommendation. (See also Recommendation BCE / 2020/1 of March 27, 2020 on dividend distribution policies during the COVID-19 pandemic and repealing recommendation BCE / 2020/1).

Financial obligations and emergency measures

Banking contracts and related guarantees, such as securities account pledges, are subject to the emergency measures resulting from Order No. 2020-306 of March 25, 2020 (relating to the extension of time limits during the health emergency period and the adaptation of procedures during the same period). However, they do not concern the related financial obligations and guarantees mentioned in Articles L 211-36 *et seq*. of the Monetary and Financial Code (Art. 1, II, 4°). This implies in particular that no extension of time is applicable to them. Consequently, swap contracts and financial guarantees can be executed without restriction.

Loans, pledge and emergency measures

Penal clauses and termination clauses are temporarily paralysed by Article 4 of Order no. 2020-306 of March 25, 2020:

"Penalties, penalty clauses, termination clauses and clauses providing for forfeiture, when their purpose is to punish failure to perform an obligation within a specified period, are deemed not to have taken effect or to have taken effect if that period has expired during the period defined in Article 1.

These penalties and these clauses take effect as from the expiry of a period of one month after the end of this period if the debtor has not performed his obligation before this term.

Penalties and the application of penalty clauses which took effect before March 12, 2020 are suspended during the period defined in I of Article 1".

It should be pointed out that the text does not expressly mention any contract, meaning that the text is intended to apply not only to the loan agreement but also to a collateral agreement such as a pledge of securities accounts as security for the loan. This is not without consequence, particularly in the event of a sharp fall in stock market prices, when a contractual clause requires the debtor to maintain a volume of securities up to a certain value. The termination clause cannot be applied if the debtor does not meet this obligation.

Monetary and Financial Code and emergency measures

The derogations provided for by Order No. 2020-306 of March 25, 2020 were supplemented by an Order of April 15, 2020 (Order No. 2020-427 containing various provisions on the time limits to deal with the Covid-19 epidemic). The provisions on the extension of time limits do not apply to the following obligations:

- "4° bis To obligations arising, for the persons mentioned in Article L. 561-2 of the Monetary and Financial Code, from Section 4 of Chapter 1 and Chapter II of Title VI of Book V of the same Code";
- "4°ter To the reporting obligations provided for in Articles L. 512-3 of the Insurance Code and L. 546-2 of the Monetary and Financial Code, for persons required to be registered in the single register mentioned in Articles L. 512-1 of the Insurance Code and L. 546-1 of the Monetary and Financial Code, as well as for their principals, the insurance companies with which they have taken out a professional civil liability policy and the credit institutions or finance companies with which they have taken out a financial guarantee";
- "4° Quarter To the obligations, in particular the reporting and notification obligations imposed pursuant to Books II, IV, V and VI of the Monetary and Financial Code on the entities, persons, offers and transactions mentioned in Article L. 621-9 of the same Code, as well as the obligations imposed pursuant to I and II of Article L. 233-7 of the Commercial Code;
- "4° quinquies To deadlines concerning the declarations provided for in Articles L. 152-1, L. 721-2, L. 741-4, L. 751-4, L. 761-3 and L. 771-1 of the Monetary and Financial Code" (Art. 1, II, 4°, Order of March 25, 2020 resulting from Art. 1, 4°, Order of April 15, 2020).

These derogations are thus explained in the report to the President of the Republic:

"The purpose of the exemptions provided for in 4° bis is to ensure the immediate implementation by the entities subject to asset freezing measures to combat terrorist financing and proliferation decided by the General Directorate of the Treasury of the measures relating to the fight against money laundering and terrorist financing, in accordance with international and European obligations (United Nations Security Council, European Union, Financial Action Task Force - FATF) and to enable the Tracfin service with national competence to provide the information necessary for its intelligence activities, which are essential for the fight against money laundering and terrorist financing, but also for the fight against financial crime in general.

The exemptions provided for in 4° ter concern the obligations to report to the Organisation for the single register of insurance, banking and finance intermediaries (ORIAS) weighing on insurance and reinsurance and banking and banking payment intermediaries, on their principals, on insurance companies with which these intermediaries have taken out a contract in respect of their professional civil liability and on credit institutions or finance companies with which they have taken out a financial guarantee in order to ensure an update of the information concerning them intended for individuals as well as insurance companies and credit institutions concerned with ensuring the regularity of the distribution of the products and services offered.

The derogations provided for in 4° quater are justified by the need to ensure the continuity of market supervision, of operations carried out by issuers and players such as portfolio management companies, custodians, financial investment advisers, non-trading property investment companies, asset managers, intermediaries in banking operations and payment services in times of crisis, as well as the continuity of systems. This 4° quater is also intended to prevent the suspension of the reporting obligations imposed pursuant to I and II of Article L. 233-7 of the Commercial Code.

The 4° quinquies concerns the time limits for the declaration established for each physical transfer of capital from or to a Member State (obligation to declare capital to the customs administration). This derogation makes it possible to maintain the traceability of cross-border cash flows, which contributes to the fight against money laundering, terrorist financing and tax fraud, and the penalties applicable in the event of failure to comply with this reporting obligation. The time-limits relating to the declaration provided for in Article 3 of Regulation (EC) No 1889/2005 of the European Parliament and of the Council of October 26, 2005 on controls of cash

entering or leaving the Community are also excluded from the application of this Order where the declaration results from an obligation under European Union law

Force majeure

Is Covid-19 a force majeure event within the meaning of Article 1218, paragraph 1, of the Civil Code, according to which "There is force majeure in contractual matters when an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects cannot be avoided by appropriate measures, prevents the performance of its obligation by the debtor"? The issue can be discussed because there are arguments in both directions. The scale of the pandemic may argue in favour of the qualification. However, French case law generally refuses to classify epidemics as events of force majeure, although this is a matter of circumstance (see A. Fevre and X. Hu, *Epidémie de coronavirus (Covid-19) : est-ce un événement de force majeure ?*, BRDA 6/20; J. Heinich, *L'incidence de l'épidémie de coronavirus sur les contrats d'affaires: de la force majeure à l'imprévision*, D. 2020 p 611).

State-guaranteed loans

To support companies facing the Covid-19 crisis, a State-guaranteed loan programme was set up by an order of March 23, 2020 (order granting a State guarantee to credit institutions and finance companies pursuant to Article 4 of the amending finance Act No. 2020-289 for 2020 of March 23, 2020, OJ of March 24, 2020, text No. 10). This system is applicable to loans granted since March 16, 2020 and applies until December 31, 2020 (Art. 1). It should be noted that this provision applies only to certain types of loans (cf. Art. 2), that the credits granted to the beneficiaries mentioned in the decree (Art. 3) must be granted without guarantee or security (Art. 1) and that the guarantee granted to the lenders by the State is partial (Art. 6). It should also be noted that the State guarantee only comes into play if the borrowers default and do not have the necessary assets to repay the lenders.

CRYPTO-ASSET MARKETS

AMF response to the public consultation organised by the European Commission

In its response to the public consultation (Press release "Crypto-asset markets: the AMF responds to the European Commission's consultation", April 7, 2020; AMF response to the "consultation document on an EU framework for markets in crypto-Assets") opened between December 19, 2019 and March 19, 2020, the AMF sent structuring messages to the European Commission and made a number of additional proposals.

Among the structuring messages, one concerns the classification of crypto-assets, with the AMF endorsing the distinction based on financial instruments. Furthermore, on the one hand, it considers it necessary to set up, at European level, a regime for crypto-assets that are not financial instruments and, on the other hand, it proposes the creation of the "Digital Lab", which designates a European derogation mechanism that would allow national authorities to waive certain requirements laid down in European legislation and identified as incompatible with the blockchain environment: this mechanism could apply to legislation relating to central securities depositories.

Among the additional proposals, the one concerning the interpretation of the concept of financial instruments should be noted. The AMF would like to harmonise Member States' interpretations so that utility tokens are not regarded as financial instruments in some countries and excluded from this classification in others.

BANK CREDITS

Banking monopoly and franchise network

Do loans granted by a franchisor to its franchisees violate the banking monopoly? The answer is affirmative if they do not fall under any of the derogations provided for in the Monetary and Financial Code. In the case at the origin of the judgement of January 15, 2020 handed down by the Commercial Chamber of the Court of Cassation (appeal no. 17-27.778), the derogation concerning intra-group transactions was discussed. It could not be used because no capital ties within the meaning of Article L 511-7, I, 3°, of the Monetary and Financial Code were identified.

This means that loans granted by the franchisor to franchisees could constitute a wrongful practice that was punishable under unfair competition law.

Mortgage loan and interest rate clause referring to an official reference index provided for by national regulations

Within the scope of Directive 93/13 of April 5, 1993 on unfair terms in consumer contracts falls the term of a mortgage loan agreement concluded between a consumer and a professional, which provides that the interest rate applicable to the loan is based on one of the official reference indices provided for by national legislation which may be applied by credit institutions to mortgage loans, where those rules provide neither for the mandatory application of that index independently of the choice of those parties, nor for its supplementary application in the absence of a different arrangement between those parties (ECJ, March 3, 2020, case C-125/18 Marc Gómez del Moral Guasch v Bankia SA).

Consumer credit and methods of calculating the withdrawal period

Article 10(2)(p) of Directive 2008/48/EEC of April 23, 2008 on credit agreements for consumers, according to which the credit agreement states in a clear and concise manner "the existence or absence of a right of withdrawal, the period during which that right may be exercised and other conditions governing the exercise thereof, including information concerning the obligation of the consumer to pay the capital drawn down and the interest in accordance with Article 14(3)(b) and the amount of interest payable per day" must be interpreted "as meaning that the information to be specified, in a clear and concise manner, in a credit agreement in accordance with that provision includes information on how the period of withdrawal, provided for in the second subparagraph of Article 14(1) of that directive, is to be calculated" (ECJ, March 26, 2020, Case C-472/01). C-66/19, JC v Kreissparkasse Saarlouis).

Consumer credit and the concept of cost of credit excluding interest

The concept of "cost of credit excluding interest" is not provided for in Directive 2008/48/EEC of April 23, 2008. The ECJ, in a decision of March 26, 2020 (Case C-779/18, Mikrokasa S.A., Revenue Niestandaryzowany Sekurytyzacyjny Fundusz Inwestycyjny Zamknięty v XO), considers that Article 3(g) (definition of the total cost of credit), Article 10(2) (relating to information on the APR) and Article 22, § 1 (prohibition on Member States maintaining or introducing provisions other than those

laid down by the directive) of that directive "must be interpreted as not precluding national legislation which lays down a method of calculation relating to the maximum amount of the cost of the credit excluding interest which may be imposed on the consumer, provided that that legislation does not introduce additional information obligations relating to that cost of the credit excluding interest which are additional to those laid down in Article 10(2)".

Pledging of bank accounts and receivership of the borrower

When a loan is secured by a pledge on an account and the debtor is placed in receivership, but no monthly instalment of the loan is unpaid, can the banker isolate on a special account blocked in its favour the balance of the pledged account up to the amount of its claim? The Commercial Chamber of the Court of Cassation gave a negative reply in a judgement of January 22, 2020 (Appeal No. 18-21-647). The response is the same even if this blocking is based on a contractual clause.

National Payment Incident Register (FICP)

The decree of February 17, 2020 (amending the decree of October 26, 2010 on the national register of credit repayment incidents for individuals, OJ of February 20, 2020, text no. 22) adapts the operating rules of the FICP to the GDPR. In particular, it provides a clarification concerning the terms of the right of access: Article 15, paragraph 2, of the Order of October 26, 2010 (derived from Article 5, 2°, b), of the Order of February 17, 2020) is supplemented by the following provision: "The right of access may be exercised by post, by electronic means under the conditions laid down by the Banque de France or at its counters.

PAYMENT SERVICES

General obligations of payment service providers

In order to combat VAT fraud in e-commerce transactions, Council Directive (EU) 2020/284 of February 18, 2020 amended Directive 2006/112/EC of November 28, 2006 (Directive 2006/112/EC on the common system of value added tax), which lays down the general accounting obligations of persons liable to VAT. These changes have resulted in new requirements for payment service providers, who must keep "sufficiently detailed records of payees and of payments in relation to the payment services they provide for each calendar quarter to enable the competent

authorities of the Member States to carry out controls of the supplies of goods and services which, in accordance with the provisions of Title V, are deemed to take place in a Member State" (Article 243b, Dir. of December 28, 2006, from Article 1, Dir. February 18, 2020).

CIVIL LIABILITY

Liability of contracts in respect of third parties

The plenary assembly of the Court of Cassation recalled, in its judgement of January 13, 2020 (appeal no. 17-19.963) that: "20. The breach of a contractual obligation by a contracting party is of such a nature as to constitute a wrongful act against a third party to the contract when it causes him damage.

21. It is important not to hinder compensation for this damage.

22. Accordingly, a third party to a contract who establishes a causal link between a breach of contract and the damage he suffers is not required to show a tort, delict or quasi-delict distinct from that breach".

CONTACTS

Gilles Kolifrath
Partner
gkolifrath@kramerlevin.com

Thierry Bonneau
Consultant
thbonneau@kramerlevin.com

François Poudelet
Counsel
fpoudelet@kramerlevin.com

Pierre Storrer
Counsel
pstorrer@kramerlevin.com

Wadie Sanbar
Counsel
wsanbar@kramerlevin.com

Linda Sharkey
Attorney admitted to New York bar
lsharkey@kramerlevin.com