

LIBERALIZATION OF THE FRENCH ALTERNATIVE FINANCING REGIME

12 December 2016

A series of recently adopted legal provisions have extended the scope of alternative financing in France, notably by increasing ceilings for financing via crowdfunding, creation of a new financial instrument called a “*minibon*”, clarification of rules applicable to some crowdfunding platforms and authorization for certain investment funds to grant loans to businesses. However, more extensive liberalization will certainly be necessary to unleash the potential of alternative financing.

During the year 2016, French regulation of alternative finance, including the crowdfunding regime established two years ago, has been liberalized in important ways: (1) by increasing the ceilings and expanding the types of financing permitted on crowdfunding platforms of a *conseiller en investissements participatifs* (“**CIP**”), a *prestataire des services d’investissement* (“**PSI**”) or an *intermédiaire en financement participatif* (“**IFP**”); (2) creation of a new instrument for alternative finance, known as a “*minibon*”, which is a kind of promissory note (*bon de caisse*); (3) clarification of certain rules applicable to CIPs; and (4) opening up lending to businesses by certain investment funds. The first two sets of measures result from ordinance n° 2016-520 of 28 August 2016 and decree n° 2016-1453 of 28 October 2016; the third set from changes in published positions and practice of the French financial markets regulator, the *Autorité des Marchés Financiers* (“**AMF**”) during 2016 and from the regulation (*arrêté*) of 12 October 2016; and the fourth from decree n° 2016-1587 of 26 November 2016.

In evaluating the impact of these measures, it should be borne in mind that French law sets out an unusually broad banking monopoly, which prohibits, subject to exceptions, any grant of credit, on a “habitual” basis, to businesses or individuals other than by licensed credit

institutions (banks) or finance companies. Nevertheless, recent liberalization measures reflect the intent of French authorities to gradually extend the role of alternative finance in providing funding to businesses.

The liberalization of alternative finance in France fits into a broader trend, illustrated by EU Regulation n° 2015/760 of 29 April 2015 on European long-term investment funds (“**ELTIF**”), under which certain alternative investment funds (“**AIFs**”) can grant loans to companies directly;¹ a new provision permitting loans among companies having certain business relationships, subject to stringent limitations;² the ESMA opinion of 11 April 2016 advocating liberalization and harmonization of rules on financing of businesses by investment funds;³ and article 117 of the so-called “Sapin II” law which allows French authorities to adopt legislation relating to financing of businesses by funds and assignment to them of business loans.⁴

¹ EU regulation 2015/760, which entered into force on 9 December 2015; see also the French *Code monétaire et financier* (“**CMF**”) articles L214-154, L214-160, L214-169 et L221-32-2 and similar developments abroad, for instance in Germany (amendment of the OGAW-Umsetzungsgesetz which entered into force on 18 March 2016) and in Italy (Decree-law of 14 February 2016).

² Provisions adopted in the so-called « Macron » law of 6 August 2015 and its implementing decree, cf. CMF articles L511-6 3 bis, R511-2-1-1 et seq.

³ Document ESMA/2016/596, which deals with various issues including the licensing of the relevant investment funds and their management company the supervision of their activities, opening up these funds to individual investors and rules relating to liquidity and use of leverage.

⁴ Law related to transparency, fight against corruption and the modernisation of economy, as voted on the 8th of November 2016 (awaiting promulgation), article 117.

1. Amendments to conditions for financing via internet platforms of by CIPs, PSIs and IFPs

Decree n° 2016-1453, mentioned above, which entered into force on 31 October 2016, makes two modifications to the rules applicable to offerings of securities (shares and bonds) via internet platforms of CIPs or PSIs.

First, the ceiling for offerings by any issuer during any 12-month period via such platforms, without a formal prospectus, has been raised to 2.5 million euros, provided that offerings of shares exceeding 1 million euros may not represent more than 50% of the issuer's share capital.⁵

Second, whereas since 1 October 2014 only ordinary shares or plain-vanilla bonds could be offered on such platforms, decree n° 2016-1453⁶ allows issuance of:

- any kind of shares (including preferred shares) which give the holder a right to vote proportionate to the holder's share of the issuer's capital, subject to double voting rights as permitted by existing law;⁷
- participating notes, issued for a term of not more than 10 years, by share companies belonging to public sector, private limited cooperative companies (*sociétés anonymes coopératives*), mutualist or cooperative banks (*banques mutualistes ou coopératives*) and public establishments having an industrial or commercial purpose (*établissements publics de l'Etat à caractère industriel et commercial*).

With respect to loans arranged on internet platforms of IFPs, decree n° 2016-1453 raised the applicable ceiling per lender from 1000€ to 2000€ for interest-bearing loans and from 4000€ to 5000€ for interest-free loans.⁸

These measures will be supportive of the growth of this market, although they do not impact the two

very important restrictions which inhibit development of marketplace lending in France: the prohibitions on lending by legal entities (including investment funds) and on making interest-bearing loans to consumers.

2. Creation of the *minibon*, as a type of promissory note (*bon de caisse*)

Ordinance n° 2016-520 of 28 April 2016 established a new legal framework for the *bon de caisse*, a kind of promissory note, which has existed for ages, constituting an acknowledgement of a debt resulting from an underlying loan. A *bon de caisse*, which has a maturity of five years or less, may be issued by any person engaged in commerce (*commerçant*, which may be either a company or an individual with commercial activity), provided that the issuer has established its third annual accounts.

Prior to the entry into force of this ordinance on the 1st October 2016, there was no specific regulation of issuance of *bons de caisse* via crowdfunding, and it was used with success for the financing of SMEs via crowdfunding platforms.

The new provisions modify the general regime applicable to *bons de caisse* and provide for a new crowdfunding regime applicable to a specific category thereof, called "*minibons*".

Rules applicable to *bons de caisse* generally⁹ have become more restrictive, notably by prohibiting their issuance other than in bearer form or by finance companies (*sociétés de financement*) or transfer thereof by endorsement. Issuance of *bons de caisse* via an intermediary or in series (i.e. with terms such as duration and interest rate being identical) is prohibited, except if *minibons* are used. The *bons de caisse* are to be recorded in a register kept by the issuer, which is to provide the investor with its latest financial statements, certified as "sincere" (which statements the issuer is required to release publicly)¹⁰ and a registration certificate including certain required information.¹¹ The assignment of a *bon de caisse* is subject to general

⁵ CMF article D411-2; this limit does not apply to securities offers of an intermediate holding company, which owns ownerships or beneficial interests in an underlying company, which does not go beyond this limit for more than 50%.

⁶ See CMF article D547-1.

⁷ French Commercial code, article 225-123.

⁸ CMF article D548-1.

⁹ CMF article L223-1 et s.

¹⁰ CMF article L223-4.

¹¹ CMF article D223-1.

rules regarding assignment of rights and becomes binding on the issuer upon notification to it. Sale of *bons de caisse* via canvassing remains prohibited.

As for the *minibons*,¹² they can be issued in series, by companies issuing shares – SAs, SASs or (at least in principle) SCAs – as well as by SARLs (issuance by civil companies, in particular SCCVs, being excluded), provided that the issuer's share capital is fully paid up. They are represented by a registration certificate, featuring certain required information, which is provided to the investor. They must bear a fixed interest rate, which is capped (just like loans intermediated by IFPs) by the usury rate applicable to overdrafts by professionals,¹³ and they are amortised by payments, quarterly or more frequently, in a constant total amount of principal and interest (so that bullet payments at maturity are prohibited).¹⁴ The maximum amount of *minibons* issued by any issuer over any rolling 12 month period is €2.5 million.

Minibons can be issued only via internet platforms of CIPs or PSIs, which for this purpose will have access, as will IFPs, to the interbank database on business borrowers (*Fichier Bancaire des Entreprises* or "FIBEN"). Rules of good conduct applicable to CIPs and PSIs for the intermediation of shares and bonds also apply to intermediation of *minibons*. These platforms can take on the administrative tasks of handling subscriptions and updating the register of *minibons*. Transfer of *minibons* can be accomplished either by assignment notified to the issuer or by a blockchain process, pursuant to procedures to be set out in a future decree.

With respect to the banking monopoly, ordinance n° 2016-520 provides for two new exceptions: one exception, to the prohibition on receiving deposits from the public, for issuers of *bons de caisse* which do not engage in such issuance as their normal business and a second exception, to the prohibition on lending, for individuals subscribing to *minibons* other than for professional or commercial purposes and for legal entities which do not do so as a

principal activity.¹⁵ Further, certain alternative investment funds should be able to invest in *minibons*, subject to rules applicable to them (see below).

3. Clarification of certain provisions applicable to CIPs

During the year 2016, practice of the AMF practice regarding the licensing and supervision of CIPs has evolved. Becoming a CIP, by registration with ORIAS (the registry of insurance and financial intermediaries), requires an authorization from the AMF after examination of an application including a detailed presentation of its proposed business and its resources, as well as numerous exhibits. The review process by the AMF of CIP licensing requests has raised many new questions relating to the application, in the crowdfunding context, of principles generally applicable to financial service providers. The AMF's practice has become clarified during 2016, which can make review of applications more straightforward.

In addition, CIPs will now be allowed, among other things:

- to act as intermediaries in private placements of securities and *minibons*;¹⁶
- to keep the issuers' registers of securities and *minibons*;¹⁷
- to intermediate payments, by becoming agent of a payment services provider.¹⁸

¹² See CMF article L223-6 and seq.

¹³ CMF articles L223-10 and L313-5-1 .

¹⁴ CMF article D223-3.

¹⁵ CMF articles L511-6, 7bis and L511-7, 4.

¹⁶ CMF article L547-1 I.

¹⁷ CMF article L547-1 II.

¹⁸ Cf. *S'informer sur le nouveau cadre applicable au financement participatif (crowdfunding)* of 30 September 2014 updated on 26 August 2016, pages 3 and 9.

4. The opening of credit granting to certain investment funds

A very important development for alternative financing relates to granting of loans to companies and individuals, by professional or institutional investors. Although growth of such financing has been spectacular in some other countries – in the United Kingdom, other EU countries, the United States and in China – this has not been the case in France.

While the French banking monopoly provides for an exception for granting of loans by UCITS and certain other investment funds,¹⁹ this activity was until now severely limited by rules applicable to such funds, in particular in respect of composition of their assets.

In addition to those funds qualifying as ELTIFs, two types of investment funds may now lend directly to companies (without having the loan made by a bank and immediately transferred to the fund). These are the specialized professional fund (*fonds professionnel spécialisé* or “FPS”) and the professional capital investment fund (*fonds professionnel de capital investissement* or “FPCI”).

To grant loans, two conditions will have to be fulfilled: the fund must be entitled to hold the relevant assets and its management company must be licensed by the AMF to manage “granting loans” (*octroi de crédit*) and not “selection of claims” (*selection de créances*). AMF instruction DOC-2016-02 of 27 June 2016 defined the criteria applicable to such management companies engaged in granting loans.

Decree n° 2016-1587 of 26 November 2016 defined the standards to be observed by FPSs and FPCIs granting loans to legal entities (other than financial institutions or collective investment schemes). Management companies of such funds must be licensed (in France or in another EEA Member State which has the same requirements as France) for “granting loans” and must insure that the fund will respect operating and other

requirements, such as procedures for analysis and risk evaluation, updating information relating to borrowers, selection of credit risks, anti-money laundering/financing of terrorism and communication to borrowers of characteristics of proposed loans and consequences of default. The management company must conduct a legal analysis of the conditions applicable to the loan so as to insure that they respect all conditions applicable locally to lenders and, when the loans are secured, legal analysis of the existence and validity of the security.

However, according to this text, the subscription of minibons does not require license of the management company for “granting of loans”, as such. Nevertheless, the AMF will require the management company to have resources sufficient to carry on this activity; on this point, the AMF may soon clarify its position.

However, the conditions required for subscription of minibons by a securitization entity (*organisme de titrisation* or “OT”) are for the moment not defined.

Contact



Reid Feldman, Associé, Avocat aux barreaux de Paris et de Washington D.C .

rfeldman@kramerlevin.com



Hubert de Vauplane, Associé, Avocat au barreau de Paris,

hdevauplane@kramerlevin.com

¹⁹ CMF article L511-6 first paragraph *in fine*.