

Corporate Authorizations and Capital Markets Law in France

The French Code de commerce has recently been amended by ordinance N° 2017-970 dated 10 May 2017. In this perspective, Article L. 228-40 of the Code de commerce is amended in the view of widening the scope of delegation of powers. This is the main purport of the reform. The new Article L. 228-40 is now drafted as follows:

“The Board of Directors, the Management Board, the manager or the managers are capable of deciding or authorizing the issue of bonds, except if the Articles of Association reserve this power to the general meeting or if the general meeting decides to exercise such power.

The Board of Directors or the Management Board may delegate to any persons of its choice, the necessary powers to carry out, within a period of one year, the issue of bonds and to determine the terms and conditions.

Designated persons report to the Board of Directors or the Management Board under conditions determined by these bodies.”.

The new regime of delegation applicable to limited companies is now synchronized with the regime applicable to credit institutions (banks) (establishments de credit). This allows the possibility to delegate to any persons (and not only to a specific person provided for in former Article L. 228-40, such as a member of the Board of Directors), the power to carry out the contemplated bond issue. The term person(s) used in Article L. 228-40 is generally understood as individual(s). This construction is consistent with market practice, even if, from a French law perspective, a literal interpretation could lead to the possibility for a person within the meaning of French law (i.e. an individual or a legal entity) to carry out the contemplated bond issue.

Such a literal construction would imply the possibility for another company, for example for a company within the same group of the issuer, to carry out a bond issue. Such a construction, although not being currently in line with market practice of corporate or banks, cannot be excluded. In practice, this would lead to the possibility for an issuer to administratively externalize the carrying out of the bond issue and, why not, to the possibility for a specific dedicated entity to be created within a group of companies or banks to bear the administrative burden of the bond issue. This might be interesting for companies or banks which are

contractually structured as a group of companies, with the funding being separately managed.

In practice, this amendment allows members of the issuer, typically members of the funding department, to carry out bond issues. Such members do not longer have to be at the same time members of the Board of Directors as this is, to a certain extent, considered as useless for the single purpose of carrying out bond issues decided by the Board of Directors. In addition, asking a member of the Board of Directors to carry out bond issues may lengthen the issuance process due to his potential non-availability.

It has also to be emphasized that Article L. 228-40 maintains the concept of delegation of powers only, this being in line with market practice. However, in theory, it can be considered that a delegation of signature is also possible, as new Article L. 228-40 does not prohibit it.

**EIRL Me Ludovic Timbal Duclaux de Martin Avocat à la Cour -
Barreau de Paris**

Up to date 17 August 2018.