



JONES DAY
COMMENTARY

IMPLEMENTATION OF THE CRD IV PACKAGE INTO FRENCH LAW: WHERE DO WE STAND?

The legislative implementation of the CRD IV Package into French law was finalized by Ordinance (a government act having the force of a legislative action) no. 2014-158 dated February 20, 2014 (the “Ordinance”). The CRD IV Package is intended to implement the Basel III agreement in the EU. It consists of the Capital Requirements Regulation no. 575/2013 dated June 26, 2013 (the “CRR”), which is directly applicable to firms across the EU without further national implementation, and the Capital Requirements Directive no. 2013/36 dated June 26, 2013 (the “Directive”), which must first be made into national law before it may become enforceable.

Law no. 2013-672 dated July 26, 2013 relating to the separation and regulation of banking activities (the “Ring-Fencing Law”) had already implemented a number of new requirements arising from the CRD IV Package:

- Credit institutions, investment firms, financial holding companies, and mixed financial holding companies country-by-country reporting on, *inter alia*, the number of employees on a full time equivalent basis, profit or loss before tax, and public subsidies received;
- The extension of the mandate of the French banking regulator (the “ACPR”) to oppose where necessary the appointment of members of the board of directors;
- Rules on remuneration (including bonus cap). It is worth noting in this respect that the European Banking Authority published on February 19, 2014 final draft Regulatory Technical Standards on classes of instruments that may be used for the purposes of variable remuneration.

Of particular interest are new provisions introduced by the Ordinance in the areas of governance, prudential supervision, and authority of the ACPR.

SCOPE OF THE ORDINANCE

The Ordinance applies to credit institutions, investment firms, and financing companies (*sociétés de financement*, which are French-specific institutions qualifying as financial institutions within the meaning of the CRR) with the exception of:

- Certain governance aspects, that apply only to institutions deemed systemically important (“systemic importance” for such purposes is to be defined by way of secondary legislation); and
- Some requirements that apply to credit institutions and some investment firms only, e.g., capital buffer requirements will apply to investment firms depending on the scope of the MiFID investment services that they are licensed to perform.

ENHANCED CORPORATE GOVERNANCE RULES

Management Structure. Under French company law, entities in the form of a *société anonyme* with a board of directors may choose between two options: either the chairman of the board of directors is also the company’s chief executive or the chairman and the chief executive are two separate persons.

Under a position recently issued by the ACPR (Position no. 2014-P-02 dated January 29, 2014), the roles of chairman and chief executive of credit institutions should not be combined, unless justified by the institution and authorized by the ACPR.

With respect to limits on appointments to officer and director positions, stricter rules than those provided under French company law now apply to systemically important credit institutions and financing companies. Senior managers and members of boards of directors or any other body performing similar equivalent duties may not hold more than one single position as chief executive or equivalent and two directorships or equivalent, or four directorships or equivalent.

The ACPR may authorize directors or equivalent to hold one additional non-executive directorship.

Internal Control. The senior personnel management body must approve and periodically review the strategies and policies for taking up, managing, monitoring, and mitigating the risks the institution is or might be exposed to, including those generated by the macroeconomic environment in which it operates.

Specialized Committees. In addition to the remuneration committee that is already required for systemically important credit institutions and investment firms, such institutions, together with financing companies, will also be required to set up a nomination committee and a risk committee. Both committees are to be composed of non-executive members of the management body with the required level of expertise to perform the duties that fall on each committee. Where the ACPR is in charge of consolidated supervision of the group to which the relevant institution pertains, the institution is to decide whether to set up the committees at the level of the institution or at the consolidated level.

The role of the risk committee is to advise the board of directors or equivalent on the global strategy of the institution and its willingness to take risks. The committee is tasked with reviewing whether the price of products and services provided are consistent with the risk profile of the institution and if the remuneration would not lead to excessive risk-taking.

The role of the nomination committee is to periodically review the composition and performance of the board as well as the knowledge, skills, and experience of the individual members of the board and to identify potential candidates for board appointment. The nomination committee is also tasked with putting in place a policy promoting gender diversity on the board.

ENHANCED CAPITAL REQUIREMENTS SUPERVISION

The Ordinance introduces capital buffers applicable to credit institutions and investment firms that are authorized to provide the MiFID investment services of dealing on own account, underwriting of financial instruments, and placing of financial instruments on a firm commitment basis as follows:

- The capital conservation buffer set at 2.5 percent under the CRR;
- The countercyclical buffer, on the basis of a rate to be determined by the French authority responsible for macro-prudential policy (*Haut Conseil de Stabilité Financière*);
- The systemic risk buffer;
- The global systemic institutions buffer, the list of which will be set by the ACPR; and
- The other systemic institutions buffer.

STRENGTHENED REGULATORY AUTHORITY AVAILABLE TO THE ACPR

Instrumental in the enlarged role of the ACPR should be the procedures to be set up by credit institutions, investments firms, and their outsourcees to allow the reporting of regulatory capital violations, whether potential or proven, to the ACPR.

Whistleblowing Procedure. The staff of credit institutions and investment firms and the staff of their external services providers may (this is not an obligation) report to the ACPR any violations of the CRR or capital requirements regulation taken on its basis. The ACPR will then collect the receipt of reports on breaches in circumstances that protect the identity of reporting employees and the confidentiality of reported data. Reporting should have no negative impact on the career or remuneration of reporting employees.

Exchange of Information and Cooperation Among Supervisory Authorities. The ACPR will exchange with the other supervisory authorities information on a number of respects to assist with the supervision of credit institutions or investments firms passported into France.

The authority of the ACPR had already been significantly strengthened by the ACPR to include, *inter alia*, the power to oppose the appointment of members of the management body if they no longer fulfill the skill to perform and dismiss their duties, and resolutions powers.

Where the solvency or liquidity of the supervised institution may be compromised or if information received or

requested by the ACPR reveals that the ACPR is liable to be in breach of requirements set out under the CRR, the ACPR now has the additional authority to:

- Ban certain activities such as the receipt of deposits;
- Require the transfer of certain activities;
- Limit the number of branches of the supervised institution;
- Limit or prohibit the payment of dividends or other distributions in connection with Core Equity Tier 1 and remuneration of staff, except where this limit or prohibition would qualify as an event of default.

Sanctions. Pursuant to the Ordinance, the Enforcement Committee of the ACPR may levy the following sanctions in the case of breach of capital requirements regulation:

- In respect of a mixed financial holding company, a mixed parent company of a financing company that failed to submit to an inspection from the ACPR, or to defer to an injunction from the ACPR, a pecuniary sanction of up to €1 million;
- A pecuniary sanction of up to 10 percent of the total annual net turnover of the institution in the preceding financial year; where the undertaking to be sanctioned is the subsidiary of a parent undertaking, the relevant figure to be taken into account is the gross income resulting from the consolidated financial statements of the ultimate parent undertaking in the preceding financial year, or up to twice the amount of the benefit derived from the breach where such benefit may be determined;
- In addition to issuing a warning, a reprimand, a partial prohibition from performing certain transactions, or a partial or total withdrawal of license, a credit institution, investment firm, financing company, mixed financial holding company, or mixed parent company of a financing company may be given a pecuniary sanction of up to 10 percent of the annual net turnover;
- In the case of natural persons incurring direct and personal liability in the breach, senior managers, or members of the management body or equivalent, a temporary ban not exceeding 10 years and/or a fine of up to €5 million, or up to twice the amount of the benefit derived from the breach where such benefit may be determined.

TIMING FOR ENTRY INTO FORCE

Entry into force of the Ordinance is phased in as follows:

- Governance rules entered into force on January 1, 2014;
- New regulatory powers conferred on, and sanctions that may be levied by, the ACPR take immediate effect;
- Country-by-country reporting with respect to name(s), nature of activities, geographical location, turnover, and number of employees on a full time equivalent basis will be required for credit institutions, holding financial companies, and mixed holding financial companies and investment firms as from July 1, 2014; on July 1, 2014 at the latest, globally systemically important institutions will be required to disclose profit or loss before tax, tax on profit or loss, and public subsidies received to the EU Commission alone;
- Provisions relating to liquidity will enter into force when relevant guidance is issued by the European Banking Authority;
- Capital buffers will enter into force in circumstances to be set by way of secondary legislation and at the latest on January 1, 2019.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com.

John C. Ahern

London

+44.20.7039.5176

jahern@jonesday.com

Philippe Goutay

Paris

+33.1.56.59.46.58

pgoutay@jonesday.com

Anselme Mialon, an associate in the Paris Office, assisted in the preparation of this Commentary