Kramer Levin

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Our recent seminars…

- 07/09/2018 – **Annual Conference of the European Law Institute (ELI) - Blockchain technology and smart contracts panel** – H. de Vauplane
- 12/09/2018 - **Round table "ECM - DCM: in one year, everything has changed"** - F. Poudelet
- 25/09/2018 - **Corporates Breakfast - Update on the new AEMF/AMF Liquidity Contracts regulation January 2019** - G. Kolifrath
- 25-26/09/2018 – **French-American Cyber Security Conference** – N. Lenoir and S. Ettari
- 04/10/2018 – **AMAFI Conference "Fight against corruption - Performance of risk mapping: meeting and exchanges with the French Anti-corruption Agency (AFA)** – G. Kolifrath
- 05/10/2018 - **EIFR and Labex ReFi Morning - The legal consequences of a "hard BREXIT" on financial activities in Europe** - Th. Bonneau and H. de Vauplane
- 09/10/2018 – **AEDBF Symposium - Data in the age of the DSP2 and the GDPR** – G. Kolifrath, M. Plankensteiner and P. Storrer
- 10-11/10/2018 – **Bordeaux FinTech 2018** – H. de Vauplane
- 12-13/10/2018 – **FUTURAPOLIS Health** –N. Lenoir
- 18/10/2018 - **OCBF Directorates General Seminar** - H. de Vauplane
- 18/10/2018 – **Insurance Seminar - Product governance, insurance consulting, compensation policy: what are the operational consequences of the DDA?** – H. Bouchetemble, G. Kolifrath
- 18/10/2018 – **AEDBF Luxembourg Conference - Cryptocurrencies: a legal challenge for Luxembourg** – H. de Vauplane
- 19/10/2018 – **Conference - Real estate funds: structuring and tax news** – P. Appremont and P. Le Jeune
- 25/10/2018 - **Legaltechs Nights 2018** - H. de Vauplane
- 05/11/2018 – **Legal crypto Mondays** – H. de Vauplane, G. Kolifrath
- 07/11/2018 – **Kramer Levin Derivatives Breakfast - Brexit: Will derivatives go off on a tangent?** G. Kolifrath, J. Blanchet, L. Sharkey

… and coming soon

- 15/11/2018 - **Fintech Breakfast - The treatment of cryptocurrencies in the PACTE Law and the 2019 Finance Bill** -H. de Vauplane
- 27-28/11/2018 – **Blockchain Paris 2018** – H. de Vauplane
- 27-29/11/2018 – **Trustech** – P. Storrer
- 12/12/2018 - **Blockchain Conference at the Faculty of Law** - H. de Vauplane

Capital markets

ESMA withdraws MiFID I automated trading guidelines

On September 26, 2018, the ESMA Supervisory Board decided to withdraw the MiFID I guidelines of February 24, 2012 relating to systems and controls in an automated trading environment for trading platforms, investment firms and competent authorities.

This decision comes after the entry into force, on January 3, 2018, of the MiFID II Directive, replacing MiFID I, which already incorporates the concepts set out in these 2012 guidelines.
As a reminder, these guidelines particularly addressed the following issues:

- organisational requirements for electronic trading systems of regulated markets and multilateral trading facilities;
- organisational requirements for electronic trading systems of investment firms (including trading algorithms);
- organisational requirements for regulated markets and multilateral trading systems to promote a fair and orderly trading process in an automated trading environment;
- organisational requirements for investment firms to promote a fair and orderly trading process in an automated trading environment;
- organisational requirements for regulated markets and multilateral trading systems to prevent market abuse (including market manipulation) in an automated trading environment;
- organisational requirements for investment firms to prevent market abuse (including market manipulation) in an automated trading environment;
- organisational requirements for regulated markets and multilateral trading systems where members/actors and users provide direct access to the market/sponsored access;
- organisational requirements for investment firms that provide direct market access and / or sponsored access.

Publication of new indicators for trading platforms

On September 27, 2018, ESMA announced the future publication of two new indicators (*Completeness Ratio* and *Completeness Shortfall*) for trading platforms detailing the provision of double volume cap (DVC) data and bond liquidity.

ESMA considers that the provision of complete, accurate and timely data is essential for the proper implementation of MiFIR and compliance with its requirements.

More specifically:

- the *completeness ratio*: is an indicator of the performance of a particular platform taken separately, independently of the performances of other platforms. This ratio is calculated by dividing the number of records received from a platform by the total number of records expected on that platform for the relevant period. A record corresponds to a bi-weekly report for the DVC and one day for bond liquidity;
- the *shortfall ratio*: is an indicator of the performance of a platform compared to other trading platforms. It reflects the percentage (relative to other platforms) of missing records for which a platform is responsible.

These two new indicators will help trading platforms to provide complete and accurate data in a timely manner, providing performance information on the timeliness and completeness of the delivery of their data.

The indicators were first published on October 8, 2018 for DVC data and October 31, 2018 for bond liquidity.

Analysis of derivatives outstandings in the EU by ESMA

On October 18, 2018, ESMA published its first annual statistical report on the derivatives market in the EU.

ESMA estimates that based on the data available to it through the reporting imposed by the EMIR Regulation, the European market for derivatives cleared in clearing houses amounts to 660 trillion Euros, i.e. 660 billion billion Euros.

This report is the first overview of the EU's derivatives markets.
The primary objective of this data analysis is to contribute to the risk assessment carried out by ESMA in order to facilitate the control of entities by both national and European supervisory authorities and to strengthen the convergence of supervision.

The report consists of three sections:

- market supervision: analysis of structures and trends of European derivatives during each reporting period, based on indicators developed for risk management;
- statistical methods devoted to specific issues in the analysis of data relating to derivatives; and

- derivatives market statistics: a complete list of indicators and measures currently followed by ESMA.

A major step forward to raise awareness of the issues and macroeconomic risks of one of the world's largest markets.

Banking

Competent court in matters of tort liability of issuers of financial securities

On September 12, 2018, the Court of Justice of the European Union "CJEU" issued a decision concerning the determination of the competent court in matters of liability of issuers of financial securities pursuant to the Brussels I Regulation.

In specie, a London bank issued certificates in the form of bearer bonds, initially subscribed by institutional investors who subsequently sold them on the secondary market to retail investors, particularly Austrian investors. However, some of the money invested in the certificates by said Austrian investors was lost due to a pyramid fraud system.

One of the Austrian investors therefore brought an action against the issuing bank before the Commercial Court of Vienna, Austria, for the payment of damages on the basis of the tort and contractual liability of the bank, in particular due to the incompleteness of the information in the bank's prospectus.

The court declared that it lacked jurisdiction and this decision was upheld on appeal. On appeal from the investor, the Austrian Supreme Court, in turn, asked the CJEU for a preliminary ruling on the following question:
"*Under Article 5 (3) of Regulation [No 44/2001], what is the competent court for extracontractual claims for liability arising from the prospectus when:*

- *the investor has taken his investment decision caused by the incomplete prospectus at his home, and*
- *on the basis of this decision, he transferred the purchase price of the security acquired on the secondary market from his account held by an Austrian bank to a settlement account held by another Austrian bank, where said purchase price was then transferred to the seller on behalf of the applicant?*".

Several answers could be given; could it be considered that it was:

- the court in whose jurisdiction the investor is domiciled?
- the court in whose jurisdiction is located the registered office of the bank or its branch managing the applicant's bank account from which it transferred the invested amount to the settlement account?
- the court in whose jurisdiction is located the registered office of the bank or its branch managing the settlement account?
- one of these courts, at the choice of the applicant?
- none of these courts?

The Court reiterates that the liability arising from incomplete information of the prospectus is tort liability. The Court then proceeds with an analysis of the concept of "*place where the harmful event occurred or is likely to occur*". Thus, the Court recalls that this concept:
"*cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere; and*
this concept does not refer to the place of the applicant's domicile where the centre of his assets is located, on the sole grounds that he has suffered a financial loss there resulting from the loss of elements of his assets which occurred and was undergone in another Member State".

The CJEU upholds the applicant's request by confirming, in particular after studying a body of evidence and in accordance with its previous case law, that the place of occurrence of the damage is the place where the bank account on which the applicant performed the transaction and on which said loss directly occurred is located; thus, the Austrian court was competent.

This judgement is an opportunity to clarify once again the framework of the liability of issuers due to their prospectus and to recall the criteria applicable to the definition of the place of occurrence of the damage. By this solution, the CJEU reinforces the protection of investors by recognising the jurisdiction of the courts of the location of the bank used to carry out the investment transaction (and therefore generally their home).

Evolution of the AMF's doctrine on shareholders rights and voting in general meetings

On October 5, 2018, the AMF published the report of the working group on shareholder rights and voting the general meeting, as well as its Recommendation No. 2012-05 on general shareholders' meetings of listed companies.

The AMF, through these various recommendations, addresses the following points:

- issuers must take into account any vote cast through a voting document or form that meets legal and regulatory requirements;
- the facilitation of the exercise by proxyholders of instructions received from their principals, by the delivery by issuers to proxyholders who so request at the general meeting of a reasonable number of voting boxes;
- the recommendation to shareholders and issuers using the services of a bailiff at meetings to require that he specifies in his report the extent and limits of his mission;
- the fight against the billing of costs deterring shareholders from voting or registering in registered form;
- strengthening the trust of market players in the management of votes, by recommending the development by the players concerned of a methodological guide to the treatment of votes at general meetings.

The AMF also proposes legislative and regulatory adaptations concerning the transparency of proxy and correspondence voting (timestamping, electronic confirmation of receipt, confirmation of the taking into account of shareholders' votes or reason for not taking it into account, publication of the number of votes rejected when the results are announced).

These various recommendations are intended to strengthen the *rationae* of collective decision-making for the benefit of shareholders but create operational constraints as well as additional causes of liability for issuers.

Collective management

Publication by the French Financial Management Association "AFG" of statistics on Responsible Investment in the French asset management industry

Responsible Investment brings together the investment strategies of management companies that comply with the Environmental, Social and Governance (ESG) criteria.

At December 31, 2017, responsible investment in France amounted to 1,081 billion Euros and continues to grow. This growth is accompanied by an increase in the quality of management processes, notably through the communication of ESG practices by managers and investors, and the creation of labels by the Ministry of the Economy and Finance and the ecological and inclusive transition (ISR and TEEC label).

This trend is not a transitory or endemic effect; there is a trend at European level that is part of the implementation of the European Commission's action plan on sustainable finance.

Even if the strategies employed remain rather rudimentary for the moment considering the novelty of this typology of investments (selection of investments meeting as far as possible the specifications of responsible investment), the coming years will be the occasion to develop more sophisticated strategies incorporating greater diversification of ESG companies as well as ESG investment categories.

Insurance

EIOPA publishes a decision on the cooperation of the competent national authorities in the supervision of the insurance distribution of intermediaries and insurance companies

On October 10, 2018, EIOPA published its decision to replace the Luxembourg Protocol, which was to be substantially revised following the new regulatory framework for the distribution of insurance services.

This decision aims to strengthen cooperation between the competent national authorities and more specifically to improve the exchange of information to ultimately protect the interests of consumers and the effectiveness of supervision.

Gabriel Bernardino, President of EIOPA, said in this context that effective and close cooperation between the competent authorities is essential for the conduct of preventive measures relating to supervision and risk management. It is more important than ever to achieve strong objectives of cooperation between the competent national authorities to ensure an appropriate level of consumer protection throughout the European Union.

Letter from the ESAs relating to IRFS 17 in insurance contracts

On October 18, 2018, the three ESAs sent the *European Financial Reporting Advisory Group* "EFRAG" a letter of approval of IFRS 17 standards on insurance contracts.

The three ESAs have always emphasised the importance of replacing the current accounting system, IFRS 4, which entered into force in 2005, intended as a temporary measure that allowed the maintenance of certain grandfather clauses of different incompatible

accounting practices. IFRS 4 was therefore not consistent with its objective of transparency and comparability of financial reporting by insurance companies at the heart of the project of the union of capital markets.

In this context, the ESAs monitored EFRAG's approval processes and expressed some reservations (lack of transparency in decision-making, lack of depth in some of the technical analyses of the EFRAG group of experts).

The ESAs emphasise that completing the approval process in a timely manner is particularly important, in particular because of the possible option for insurance companies and financial conglomerates (carrying out an insurance activity) to defer the application of IFRS 9 (relating to financial instruments) until January 1, 2021, effective date of IFRS 17.

This is why the ESAs recall the attention that EFRAG must give to compliance with deadlines, without which the application of the IFRS standards could be disorderly.

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