Kramer Levin

Banking, Finance and Insurance Letter

04 November 2019

Legal News – September – October 2019

In this edition

Capital market

- Benchmarks
- Credit rating agencies
- Prudential regulation and credit rating
- Distance financial contract
- Public offering of securities

Banking & Finance

- Brexit
- Withdrawal of approval
- Consumer credit
- Funds received from the public and banking monopoly
- Interruption of bank loans
- Duty to warn
- Pledge of a bank account

Our next seminars …

07/11/2019 **Afterwork 100 Women in Finance "Gender Pay Equality : Legislation, Transparency and Culture"** (Paris)
Kramer Levin Women's Initiatives

15/11/2019 **Seminar: Initial Margin Implementation - How to do it?** (Paris)
G. Kolifrath and Fieldfisher

21/11/2019 **Africa Blockchain Summit 2019** (Rabat, Morocco)
H. de Vauplane

26/11/2019 **AEDBF Switzerland Seminar "DLT & Blockchain: Swiss and European perspectives"** (Geneva)
H. de Vauplane

27/11/2019 **M&A Meeting "M&A: Develop your practice in the light of recent case law"** (Paris)
J-M. Desaché, R. Feldman, A. Paszkiewicz and C. Pedrini

For any information on any of the subjects covered by this letter, do not hesitate to contact us:

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

CAPITAL MARKET

Benchmarks

The regulation of benchmarks aims to govern the indices used as benchmarks in financial instruments and financial contracts or to measure the performance of funds: we want them to be accurate and honest. This is why the Regulation of June 8, 2016 *(Reg. (EU) No. 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and contracts or to measure of the performance of investment funds and amending Dir. 2008/48/CE and 2014/17/UE and Reg. (EU) No 596/2014)* regulates the actors who produce the indices, those who contribute to this production and those who use them: the professionals who produce the indices are called administrators. It should be noted that it is possible to use both the benchmarks provided by an administrator located in the European Union and those provided by an administrator located in a third country. But in the latter case, the benchmark index and the administrator must meet the conditions set out in Article 30 of the Regulation of 8 June 2016, one of which is the adoption of equivalence decisions by the European Commission.

By these decisions, the Commission assesses the legislation of a third country in the light of European legislation: the decisions of 29 July 2019 concern Australia *(Commission Implementing Decision (EU) 2019/1274 of 29 July 2019 on the equivalence of the legal and supervisory framework for benchmark indices in Australia pursuant to Regulation (EU) 2016/1011 of the European Parliament and of the Council)* and Singapore *(Commission Implementing Decision (EU) 2019/1275 of 29 July 2019 on the equivalence of the legal and supervisory framework for benchmark indices in Singapore pursuant to Regulation (EU) 2016/1011 of the European Parliament and the Council)*.
They are important for benchmark indices such as, for Australia, the Bank bill sap Rate and the S&P/ASX 200, for Australia, and for Singapore, the Singapore interbank Offered Rates (SIBOR) and the Singapore Dollar Swap Offer Rate (SOR) due to the expiry of the transition period.

Credit rating agencies

The equivalence decisions that the European Commission may take with regard to credit rating agencies must, under Article 5 § 6 of the Regulation of 16 September 2009, comply with three conditions. One of these conditions was strengthened in its content in 2013. As a result, the Commission has had to review previously granted equivalence decisions.

This new examination led the Commission to conclude that the States that benefited from equivalence continued to comply with the conditions initially required by European legislation. However, not all of them have taken into account the new requirements resulting from the Regulation of 21 May 2013. Consequently, for the States (United States, Brazil, Japan and Hong Kong) in accordance with the new requirements, the Commission has taken new equivalence decisions (Commission Implementing Decision (EU) 2019/1279 of 29 July 2019 on the recognition of the legal framework and supervisory framework of the United States of America as equivalent to the requirements of Regulation (EC) No 1060/2009 of the European Parliament and the Council on credit rating agencies; Commission Implementing Decision (EU) 2019/1281 of 29 July 2019 repealing Implementing Decision 2014/245/EU on the recognition of Brazil's legal and supervisory framework as equivalent to the requirements of Regulation (EC) No 1060/2009 of the European Parliament and of the Council on credit rating agencies; Commission Implementing Decision (EU) 2019/1283 of 29 July 2019 on the recognition of Japan's legal framework and supervisory framework as equivalent to the requirements of Regulation (EC) No 1060/2009 of the European Parliament and of the Council on credit rating agencies; Commission Implementing Decision (EU) 2019/1284 of 29 July 2019 on the recognition of Hong Kong's legal framework and supervisory framework as equivalent to the requirements of Regulation (EC) No 1060/2009 of the European Parliament and the Council on credit rating agencies). On the other hand, for those States (Argentina, Australia, Canada and Singapore) that are not in compliance, decisions to withdraw equivalence have been adopted (Commission Implementing Decision (EU) 2019/1276 of 29 July 2019 repealing Implementing Decision 2012/627/EU on the recognition of Australia's legal framework and supervisory framework as equivalent to the requirements of Regulation (EC) No 1060/2009 of the European Parliament and the Council on credit rating agencies;
Commission Implementing Decision (EU) 2019/1277 of 29 July 2019 repealing Implementing Decision 2012/630/EU on the recognition of Canada's legal framework and supervisory arrangements as equivalent to the requirements of Regulation (EC) No 1060/2009 of the European Parliament and of the Council on credit rating agencies;

Commission Implementing Decision (EU) 2019/1278 of 29 July 2019 repealing Implementing Decision 2014/248/EU on the recognition of Singapore's legal framework and supervisory arrangements as equivalent to the requirements of Regulation (EC) No 1060/2009 of the European Parliament and of the Council on credit rating agencies; Commission Implementing Decision (EU) 2019/1282 of 29 July 2019 on the recognition of Argentina's legal framework and supervisory framework as equivalent to the requirements of Regulation (EC) No 1060/2009 of the European Parliament and of the Council on credit rating agencies) The European Commission's decisions entered into force 20 days after their publication in the OJEU on 30 July 2019.

Prudential regulation and credit rating

Can an External Credit Assessment Agency (ECAI) challenge and request suspension of a draft technical performance standard that results in a deterioration of its credit rating levels within the prudential regulatory correspondence scale? The answer is negative, according to the Joint Committee of European Supervisory Authorities, because the draft standards are a preparatory act which, with certain exceptions, cannot be the subject of an appeal independent from the final act *(Board of Appeal of the European Supervisory Authorities (ESA), Decision of 13 September 2019, Creditreform Rating AG v. The European Banking Authority (EBA), BoA-D-2019-05)*.

Distance financial contract

The Directive of 23 September 2002 *(Directive 2002/65/EC of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directives 90/619/EEC, 97/7/EC and 98/27/EC)* provides for cases in which the right of withdrawal does not apply. Member States may not provide for any others. Thus, if a case law recognises derogations in addition to the legislation, in breach of European Union law, it is for the judge to adopt an interpretation in accordance with European Union law, "by amending, if necessary, established national case law if it is based on an interpretation of national law incompatible" with it *(ECJ, 11 September 2019, Case C-143/18)*.

Public offering of securities

Ordinance No. 2019-1067 of 21 October 2019 amends the provisions relating to public offerings. According to the report to the President of the Republic, the reform has a threefold objective:

"The first is to draw conclusions, under French law, from the amendment of the concept of public offer of securities as now conceived by Regulation (EU) No 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market. Second, it is a question of removing from French law those provisions which would be in contradiction with this Regulation, all the measures of which will be directly applicable as from 21 July 2019 and will replace all the provisions which constituted measures transposing Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading. Third, it is a question of modernising the rules on public offers by amending provisions that may appear inappropriate.

The draft ordinance is composed of twelve chapters. "The first includes amendments to the Civil Code, the second those relating to the Commercial Code, the third those relating to the Monetary and Financial Code, the fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh draw conclusions from the amendments made within the three previous codes in the Insurance Code, the General Tax Code, the Energy Code, the Rural and Maritime Fisheries Code, the Sport Code, the Transport Code, the Forest Code and the Labour Code, and the twelfth, finally, amends or repeals certain uncodified legislative texts".

BANKING & FINANCE

Brexit

For months, the no-deal hypothesis has generated documents from the European Commission and the European Supervisory Authorities. Among the most recent are a *Communication of the EBA on the UK withdrawal from the EU, 08 October 2019* and a *Public Statement, Update on the UK's withdrawal from the EU - preparation for a possible no-deal scenario on 31 October 2019, 7 October 2019 ESMA90-1-167* as well as an unofficial Commission document *(Non paper contingency measures in financial services)*. However, the no-deal hypothesis seems to be moving away because of the UK and EU agreement announced on Thursday 17 October 2019? Stay tuned.

Withdrawal of approval

An email in which the ECB requests a credit institution to send its communications to it as part of an administrative procedure for the withdrawal of its authorisation through or with the approval of the competent person is analysed in a preparatory act which does not produce binding legal effects likely to affect its interests. Consequently, it is not likely to be the subject of an action for annulment and the action for annulment is inadmissible *(TEU, 2° ch. Order 10 July 2019, Case T-687/18; Pilatus Bank ple v. ECB)*.

Consumer credit

Although the Directive of 23 April 2008 *(Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC)* is of maximum harmonisation, Member States are given some flexibility. Thus, although the Directive provides for the examination of the creditworthiness of the customer without requiring the banker to refrain from concluding the credit agreement in case of doubt about it, national legislation may impose an obligation of abstention on the banker because this obligation does not affect the objective of making lenders accountable and dissuading them from granting loans irresponsibly *(ECJ, 6 June 2019, Case C-58/18)*.

Funds received from the public and banking monopoly

The funds received or left in account by shareholders and managers do not traditionally constitute funds received from the public *(Article L 312-2, Monetary and Financial Code)* meaning that they do not fall under the banking monopoly. However, this exclusion was subject, in the case of shareholders, to the holding of at least 5% of the share capital. The Pacte Law of 22 May 2019 *(art. 76)* abolished this condition and, at the same time, extended the circle of persons making such contributions. "Chief Executive Officers and Deputy Chief Executive Officers, Chairmen of simplified joint stock companies" are added to the list mentioned in Article L 312-2 of the Monetary and Financial Code, which already included, and in particular, directors, members of the management board and the supervisory board.

Interruption of bank loans

The possible failure of the banker to fulfil his obligation to verify that the depositor was the beneficiary of the cheque does not deprive him of the right to terminate without notice the financial assistance granted in the event of serious misconduct by the beneficiary of the credit *(Court of Cassation, Commercial Division, 11 September 2019, appeal no. G 17-26.594)*. This solution is fully justified because the situations and behaviour taken into account by Article L 313-12, paragraph 2, of the Monetary and Financial Code are only those of the debtor; the text does not require the banker's behaviour to be taken into account when assessing them.

Duty to warn

In the case of a loan or lease granted to a legal person, the banker has a duty to warn if this legal person can be considered profane. The character of an uninformed borrower is assessed only in the person of its legal representative. Moreover, as just decided by the Court of Cassation *(Court of Cassation, 3rd Civil Chamber, 19 September 2019, appeal No. 18-15.398)*, the partners of the legal person, even if they are indefinitely liable for company debts, do not have to be warned due to the credit granted to the legal person of which they are members.

Pledge of a bank account

The provisions of Article 2360 of the Civil Code have thus far given rise to few judicial decisions. Hence the interest of the judgement delivered by the Commercial Division of the Court of Cassation on 25 September 2019 *(Appeal No. 18-16.178)*.

In this case, precautionary seizures had been made after the pledge put in place as security for bank loans. This had led the banker to transfer the seized sums to a special account. The debtor was then put into judicial liquidation and, since the protective seizures had been released, the lender banker, the beneficiary of the pledge, had re-credited the pledged account with the sums credited to the special account and had requested a judicial allocation.

The liquidator challenged this request, but in vain: the rights of the secured creditor were recognised by the Court of Cassation: "But whereas the allocation of the sums to which the precautionary seizures related to an account specially opened by the bank for this purpose was a simple accounting operation intended to isolate them pending the fate that would be reserved for them, without affecting the rights of the parties, so that in the absence of conversion of the precautionary seizures before the opening of the collective proceedings, these sums were deemed to appear on the secured account on the date of the judgement that put the company in judicial liquidation; on this ground of pure law, suggested by the defence, substituted for those criticised, the decision is justified".

The Court of Cassation thus upheld the challenged decision while emphasising that the reasoning according to which the release of the provisional seizures could be analysed as an ongoing operation within the meaning of Article 2360 of the Civil Code was incorrect.

CONTACTS

Gilles Kolifrath
Lawyer, Partner
gkolifrath@kramerlevin.com

Thierry Bonneau
Consultant
thbonneau@kramerlevin.com

François Poudelet
Lawyer, Counsel
fpoudelet@kramerlevin.com

Pierre Storrer
Lawyer, Counsel
pstorrer@kramerlevin.com

Wadie Sanbar
Lawyer, Counsel
wsanbar@kramerlevin.com

Linda Sharkey
Lawyer at the New York Bar
lsharkey@kramerlevin.com

Gaëlle Libouban
Lawyer
glibouban@kramerlevin.com