

The New French regime on repurchase of debt securities

France has enacted new set of rules to facilitate the possibility for a French issuer to repurchase debt securities (including short term instruments). A new French law allows a French issuer to repurchase debt securities without being obliged to cancel them and the French securities regulator (*Autorité des marchés financiers*) has amended its general regulation to allow an issuer to repurchase or to make tender offers on its bonds by instituting simplified procedures.

The purpose of this client briefing is to give an overview of these two amendments and to describe the new regime applicable to the repurchase of debt securities.

The French legal regime relating to repurchase by issuers of their debt securities has been amended twice in the past year. These amendments come at a time when the French State has clearly indicated a desire to make Paris a more attractive market place for the listing of bonds and the *Haut Comité de Place* (a dedicated committee created for the purpose of amending the existing regulations) among others, has been leading initiatives to attract more Paris listed bonds.

Firstly, the French law relating to banking and financial regulation n° 2010-1249 dated 22 October 2010 enables issuers to repurchase their debt securities without being obliged to cancel them. Secondly, the regulations of the French securities regulator (*Autorité des marchés financiers*) have been amended to facilitate the repurchase of bonds and to allow an issuer to make tender offers on its bonds by instituting a new and specific procedure called an "orderly acquisition procedure" (*procédure d'acquisition ordonnée*).

The new option for an issuer to repurchase its debt securities without cancellation

Before the new regime, a French issuer repurchasing its debt securities was obliged, under both civil and commercial law (Article 1300 of the French Civil Code and Article L.228-74 of the French Commercial Code), to cancel all of the debt securities so repurchased. The reasoning behind such an obligation was that, from a theoretical legal point of view, a person was not entitled to hold the position of debtor and creditor at the same time. As such, although challenged by French *doctrine*, cancellation of the repurchased debt securities was legally unavoidable and was thus considered an obstacle to the French State's desire to enhance liquidity of the secondary debt market.

Key Issues

Holding of debt securities without cancellation

Thresholds for bonds or TCN

Purpose of enhancing the liquidity of debt securities

Holding limited to one year for bonds

Holding for unlimited period for TCN

Simplified procedures for repurchase

Notification procedure to inform the market

Improves transparency and equality of treatment of holders

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Following a recommendation of the *Haut Comité de Place*, the new regulation (Article 76 of the law relating to banking and financial regulation dated 22 October 2010) provides some flexibility by allowing issuers to hold, up to a certain threshold, the debt securities so repurchased. To enable this, Article L.213-1 A of the French Monetary and Financial Code has been amended to expressly derogate from both the French Civil and Commercial Codes. The derogation applies not only to debt securities which are bonds (that are not convertible into shares), provided that they are admitted to trading on a regulated market or on a multilateral trading facility, but also to short term debt securities, known under French law as TCN (*titres de créances négociables*). In all cases, issuers are only entitled to hold their debt securities for the purpose of enhancing the liquidity of such debt securities. This condition is important as it forms the grounds for the amendment of the regulation. In the report which constitutes the basis of the new regulation, Mr. Marini, the author of the report, stressed that "*issuers have an objective interest to animate the secondary market to ensure that investors benefit from fluidity of transactions and that the prices are maintained*". According to Mr. Marini, "*liquidity of the debt instruments should not be artificial and the issuer should be a market maker rather than substituting the market for itself*".

The repurchases are only possible up to a certain threshold. As regards debt securities (TCN excluded), an issuer can only hold up to 15 per cent. of the outstanding debt securities in issue. In the event of fungible notes (*assimilation*), although French regulations do not specifically address this question, it should be concluded, due to the fungibility mechanism, that the calculation of the 15 per cent. threshold should be made once the notes are consolidated. As regards TCN, this threshold is 10 per cent., and is calculated on the outstanding amount of the TCN programme. In any event, an issuer wishing to repurchase its TCN will only be authorised to do so once it has notified the *Banque de France*.

The option for an issuer to hold its debt securities is limited to one year for bonds and the rights attached to the debt securities (including TCN) repurchased and not cancelled are suspended for the time said debt securities are held by the issuer. As a result, the issuer is not entitled to exercise any of the rights attached to the debt instrument *i.e.* financial rights and non financial rights, such as, for bonds, the right to participate in the meetings (*masse*) of the bondholders.

The establishment of simplified procedures aimed at improving the transparency of the acquisition and repurchase of debt securities

Taking into account market participant criticisms, the AMF concluded, following a public consultation, that the application of the former regulations was flawed as it contained a "*lack of clarity and flexibility and did not permit the objectives of transparency and equality of treatment to be achieved*". In particular, the procedure of *désintéressement*, when used to repurchase debt securities originally offered to the public, was considered by market participants as cumbersome, since the issuer, in certain cases, had to produce a *note d'information* (document describing the offer) and fulfill the general principles applicable to a public offer.

The AMF regulation now gives an issuer the possibility to use two kinds of simplified procedure, both aiming at improving transparency and equality of treatment of bondholders.

The first procedure is set out in the new Article 238-2 of the AMF regulation, which states that, in the event that an "*issuer has acquired more than 10 per cent. of the securities (admitted to trading on a regulated market or a French multilateral trading system facility) representing a single bond issue on or off the market in one or more transactions, it shall notify the market within four trading days*".

Any acquisition of debt securities not initially offered to the public (a private placement) for an amount of more than 10 per cent., will have to follow the same notification procedure (notification of the market within four trading days) if such private placement is admitted to trading on a regulated market or a French multilateral trading system facility.

In terms of practical formalities, the notification has to be made *via* a press release which follows the general rules applicable to regulated information *i.e.* a full and effective dissemination of regulated information within the meaning of Article 221-4 of the AMF general regulation (e.g. press release published by specific commercial publishers). The notification has to be made within four trading days of such repurchase and any other repurchase of any additional tranche of 10 per cent. of the same bond issue must follow the same notification procedure.

The second procedure is a new procedure allowing the issuer to make tender offers on its debt securities (other than TCN) called "*acquisition ordonnée*" (orderly acquisition procedure) and is established by Articles 238-3 et seq. of the

general regulation of the AMF. This new procedure supersedes both the former procedures of tender offers (*offre public d'acquisition*) and the procedure of *désintéressement*. The orderly acquisition procedure is defined by the AMF regulation as "an initiative by the issuer, its agent or a third party to set up a centralised facility that enables the issuer to offer all holders of a single issue the option of selling or exchanging some or all of the debt securities that they hold, while ensuring equal treatment of all holders".

The fact that this new procedure is based on a centralised facility, enabling the issuer to offer all holders of a single issue the option of selling or exchanging some or all of the debt securities, makes the issuer a real market maker.

An issuer wishing to make such a tender offer *via* the orderly acquisition procedure (when such a procedure involves debt securities initially offered through a public offering in France) must publish a press release, disseminated in accordance with the terms of the AMF instruction n°2010-02 dated 25 May 2010, on or before the opening day of the acquisition procedure. The AMF *instruction* is available on the AMF website and describes the contents of such press releases.

The press release must contain the following items:

1°) Identity of the issuer and, as the case may be, of the agent or third party carrying out this procedure and the terms and conditions of the repurchase.

2°) The terms and conditions of the acquisition, in particular, the following items :

- a description of the contemplated debt securities which are subject to repurchase,
- price (or a description of how the price is fixed) or exchange parity of the debt securities offered,
- description of the offered debt securities,
- duration of the acquisition period,
- number of debt securities that the initiator is committed to purchase (or the maximum amount of such a repurchase),
- the outstanding amount of the contemplated debt securities at the time of the purchase,
- the number of debt securities it has already acquired, and
- the terms and conditions of the settlement.

If the repurchase procedure does not cover the total outstanding amount of the debt instrument issue, the terms and conditions of the reduction have to be mentioned.

Any press release, as well as any marketing materials, must be transmitted to the AMF before dissemination. The orderly acquisition procedure must not only uphold the equality of treatment of noteholders of the debt instrument so redeemed, but also the general principles contained in Book VI of the general regulation of the AMF (in particular the market abuse regulation).

French market participants are welcoming the possibility to redeem their debt securities without cancellation and have progressively amended their EMTN programmes to allow such a repurchase in accordance with French law. Any foreign issuer seeking to repurchase debt securities governed by foreign law, issued from abroad and offered to the public or listed in France, should follow the new procedure regime established by Article 238-2 *et seq.* of the French AMF regulation.

The new procedure established by Articles 238-2 *et seq.* is not intended to apply to TCN. Consequently, it is yet to be determined whether a new set of rules will be established to regulate the repurchase process of TCN. In addition, the period for which an issuer can hold its TCN has not yet been established, as the period of one year applies to bonds only. Therefore, one may conclude for the time being that an issuer of TCN can hold its TCN for an unlimited period.

There is little doubt that the option for an issuer to repurchase its debt securities without cancellation and the new orderly acquisition procedure "*left to the appreciation of the issuer*" (*i.e.* at the initiative of the issuer), constitute a new step in the

enhancement of secondary market liquidity for debt securities, allowing a greater frequency of repurchases and the possibility for an issuer, by holding its debt securities, to take advantage of adjustments in market prices.

This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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