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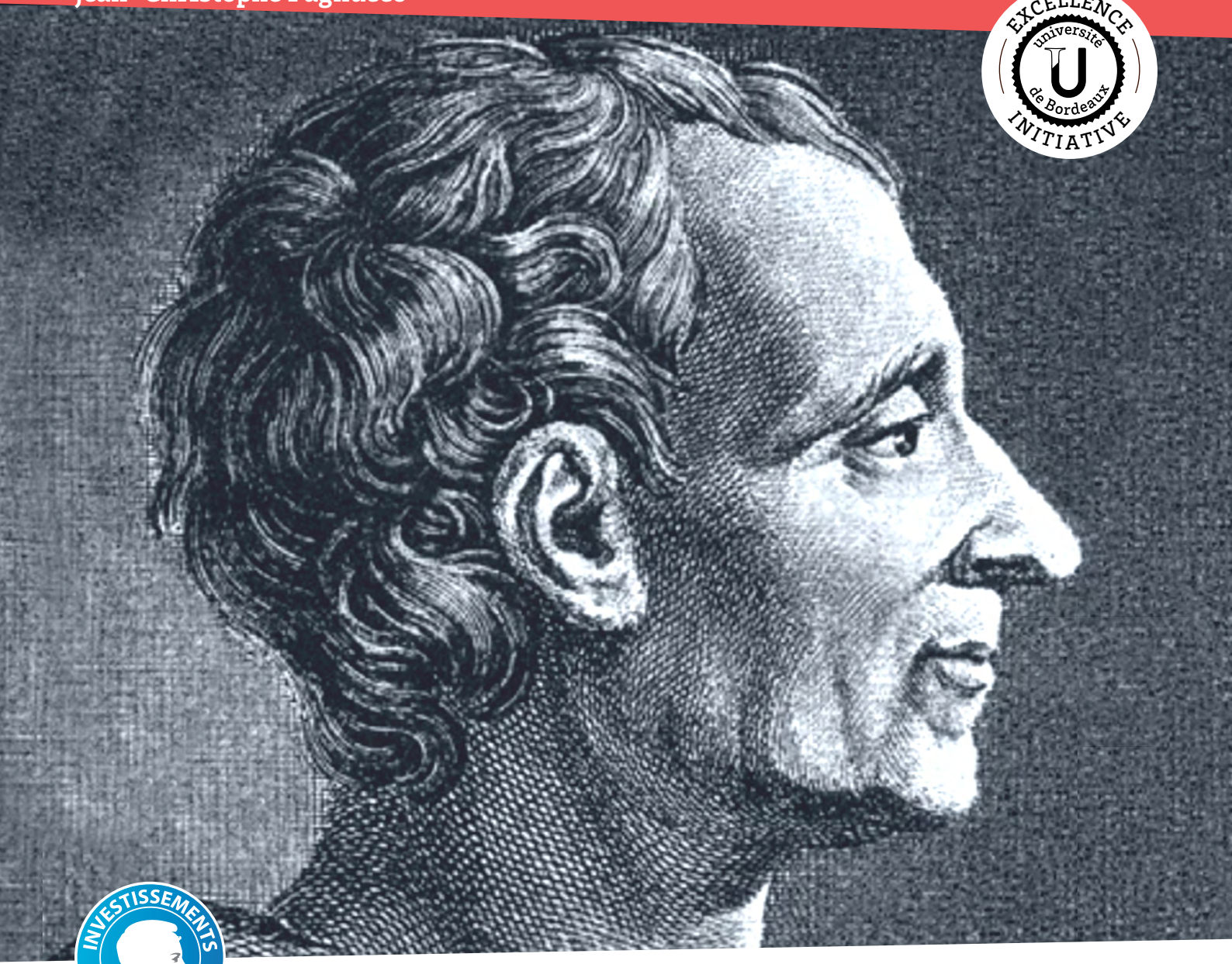

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Business Law:

The contributions to company law made by the *loi Macron* of 6 August 2015

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The widely-held perception of the *loi Macron* remains connected to a trend, much criticized by the parties concerned, towards the liberalisation of the liberal professions. While much has been written about the promotion of the free (real or supposed) installation of some of those professions, it is on the corporate structures created for the exercise of said professions that the new Law has brought about the most decisive reforms, especially the legal professions, thus sketching out, in a few worrying lines, the future of those professions, invited and likely soon compelled, notably through the liberalisation of their holdings, to make radical changes to their financing and, certainly over time, their exercise (I). Other measures will promote investment in French companies or through French company structures (II). Lastly, other more specific and diverse measures make largely insensitive changes to the legal status of company executives, to whom those measures offer new powers and impose new constraints (III).

I. The liberalisation of corporate structures in the liberal sector

Although exercising a liberal profession when part of a company of professional services has been possible under French law since Law N° 66-879 of 29 November 1966 establishing private professional partnerships, the French legislature has also granted access, by Law N° 90-1258 of 30 December 1990, to commercial forms of French companies to those same liberal professionals. However, to do this, with due regard to the ethical rules specific to each profession and to prevent the forces of capital from interfering in the exercise of the liberal arts, professional partnerships thus created must comply, by their establishment and functioning, a number of rules laid down both by the framework 1990 Law and by decree issued for each profession concerned. The juxtaposition of these rules makes it a particularly cumbersome corporate vehicle, to the extent that it is required to comply, to the extent of their compatibility with the above rules, with those provisions specific to the chosen form of commercial company (SA, SCA SAS and SARL, as well as one-person variations of these last two forms).

Amongst the rules intended to preserve the ethics and independence of liberal professionals wishing to enter into partnership whilst expanding their professional network or even draining foreign investment through the SEL, it was until now provided that within this structure, the majority of the capital and voting rights must be held by professionals practising within the company; the remainder may be held by competitor professionals engaged in the same profession but outside the company, former partners now retired, former holders of associated rights - even, when the 1990 Law allows (which is not the case for the legal professions) and the decrees do not prohibit it, by external financial backers, whose professional capacity is irrelevant, and who merely intend to make a simple investment in such companies. Law n° 2011-331 of 28 March 2011 on modernising the legal professions and certain regulated professions, supplemented by Decree No. 2014-354 of 19 March 2014, had helped to make a significant exception to this rule. As of this order, the majority of capital, but not voting rights, could be owned by a *société de participation financière de profession libérale*, a genuine holding company intended to organise the holding of

[equity?] interests in the liberal corporate structures, provided that such a majority interest could be accepted only on condition that within the SPFPL, the majority of the capital and voting rights are held by associates in the profession corresponding to the purpose of the indirectly owned SEL.

Opening up the capital

It is this edifice of already complex rules that the *loi Macron* threatens to undermine with the scale of its reforms, the results of which will not contribute to the optimal legal usability of such structures. In a less anecdotal way, it is the very philosophy that guided the elaboration of the Law of 31 December 1990 that the *loi Macron* challenges. Since the entry into force of the law and for all SEL excluding companies bringing together healthcare professionals, even if the principle remains affirmed that the majority of the capital and voting rights must belong to practising professionals within the company (Law No. 90-1258, 30 December 1990, Art.5, I, A), it is recognised that, by way of derogation, more than half of the capital and voting rights can now be held by any natural or legal person who exercises the profession constituting the corporate purpose of the company or any one of the legal professions, whether established in France or legally established in another Member State of the European Union or party to the agreement on the European Economic Area or in the Swiss Confederation (Law N° 90-1258, cited above, Art.6, I, 3, para. 1).This possibility is now also open to SPFPLs (Art.6, I, A). At most there is a requirement that, when these external majority holdings are created, the SEL should number amongst its members, at least one person in the profession covered by the purpose of the company (Art.6, I, 3, para. 2). Resulting in the unprecedented outcome whereby an SEL of notaries, for example, could be controlled by a capital and political majority of barristers and only include amongst its members one lone notary in practice within the corporate structure , the possibility of overriding holdings remains closed to health professionals. Within an SEL constituted by the latter, the majority of voting rights still have to be held by those practising their profession within the corporate structure, even if the majority of capital may be held by another party. Could the legislature have considered the interests involved in liberal corporate structures in the health sector more worthy of protection than those in the legal and judicial sector?

Inter-professionalism

Moreover, we know that one of the ambitions contained in the Law of 31 December 1990 establishing SELs was the development of liberal professional networks, including the fight against international competition and, to that end, an inter- professionalism network. What had been a mere statement of principle, not relayed by the decrees issued for each profession, was set to become a reality with the *loi Macron*. As stated above, the brakes and legal limits on capital inter-professionalism have now been abolished, having already undergone a first significant attenuation in recent years with the introduction of *sociétés de participation financière de professions libérales*. Beyond the capital inter-professionalism thus permitted, the *loi Macron* opens to way for true inter-professional practice, primarily for legal and judicial professionals.

In fact, under Article 65, Law No. 2015-990 of 6 August 2015 authorises the government to legislate by ordinance to create a form of company that focuses on the common exercise of several of the professions of barrister, *avocat au Conseil d'Etat et à la Cour de cassation* (barristers with rights of audience before the *COnseil d'Etat* and the Court of Cassation), legal auctioneer, bailiff, notary, receiver, court-appointed representative, patent lawyer and accountant. For reasons relating to potential conflicts of interest arising from statutory audits, auditors were excluded from this list. Within the timeframe provided by the *loi Macron*, Ordinance N° 2016-394 of 31 March

2016 establishes the so-called *sociétés pluri-professionnelles d'exercice* (multi-professional practice companies), with the government highlighting the practical and financial advantages for businesses in dealing with a centralised agency for any kind of legal or accounting services and in benefiting from more competitive rates offered by these structures (which are able to do so by pooling their costs).

This multi-profession structure, which can borrow the features of an SEL but also those of a private partnership, an SA (*société anonyme* or public limited company), a SARL (*société à responsabilité limitée* or limited liability company) or a SAS (*société anonyme simplifiée* or simplified public limited company), must meet a number of requirements in order to form and operate. The first, and most significant, is to obtain the permission required to practise every profession, which will be, in the initial constitutions and approvals issued or refused by the authorities concerned, the real baptism of fire for such companies. Within the latter, the Ordinance requires compliance with a number of capital and policy demands: the entire share capital and voting rights must be held, directly or indirectly, by persons in one of the occupations in common within said company or by persons legally established in a Member State of the European Union. In addition, multi-profession practices must include amongst their members, at least one member from each profession encompassed by the company (Art. 36, para. 2). Moreover, in the event that such a multi-profession practice should take the form of an SA, the Ordinance requires the representation of at least one member in practice within the company, from each profession practised within the company, on the board of directors or the supervisory board. Furthermore, and for good measure, the articles of association must at the same time guarantee the independence of professional associates, collaborators and employees, together with compliance with the regulatory and ethical framework for in place for practising the profession, without there being any practical indication as to where the cursor will be placed and what the penalties are for failing to meet this requirement. The professionals working within the company are also invited to inform each other of any interests that may affect their practice.

Resorting directly to traditional models of trading company

Lastly, in a gesture whose consistency may elude its commentators, the *loi Macron*, achieved what the Law of 31 December 1990 had sought to avoid, namely the recognition of the possibility offered to the liberal legal professionals, directly to use the traditional models of trading company as their governing structure, again with the exception of companies requiring or resulting in the recognition of the status of rader, namely SNCs (*société en nom collectif* or general partnerships) and limited partnerships. This option is not without precedent in the world of the liberal professions, as it was already recognised to a certain number of professionals, including accountants. However, its recognition may examine, within a law having very significantly liberalised SEL control regulations. This opening-up to trading companies therefore necessarily raises two issues, namely that of the point resorting directly to commercial lines after the major liberalisation of the SEL and that of the very future of the SEL, the latter being more comprehensive.

As to the first question, there are a number of differences between the schemes. Although the rules on holding capital and power in future trade companies formed by members of the liberal professions are not completely free, they remain more flexible than those governing the holdings within SELs. Even if it is now possible in the latter that the majority of the capital and voting rights be held by legal professionals from outside the company, and not even in the same field of

specialism, they remain bound by a requirement according to at least one of the partners or shareholders must be a liberal professional in practice within the company .This final and rather lenient requirement does not exist for future *sociétés commerciales de professions juridiques*, trading companies formed by members of the legal professions: while it is required, under Article 65 of the *loi Macron*, such companies should as a minimum include amongst their associates, a liberal professional fulfilling the conditions required to exercise their functions, it is not required that this potentially sole representative of the profession should be in practice within the company. Admittedly, it is provided that, once the *société commerciale de profession juridique* borrows the features of an SA, at least one member of the profession concerned practising within the company is a member of the board of directors or supervisory board; however, this requirement does not apply to the management and representation within SARL or SAS bodies. There is therefore a real possibility for a SARL or SAS of legal professionals to be wholly owned, controlled and directed by external professionals, unless the decree of the *Conseil d'Etat* (already announced and required for the effective use of these company structures) which is intended to clarify the conditions for applying the legislation in accordance with the rules of ethics applicable to each profession, contradicts that possibility.

II. Investment incentives

Even beyond liberal structures, the *loi Macron* reflects the French government's desire to foster incentives for the creation and development of and investment in firms. In order to do this, it has renewed a number of existing provisions and created new ones, making novel use of old mechanisms such as limited partnerships, a relatively surprising legal structure for a new vehicle for investment.

Creation of the *société de libre partenariat*

Under Article 145, the *loi Macron* establishes the *société de libre partenariat*, a new vehicle for investment which stands alongside the SICAV and collective investment undertakings as specialised professional funds, created to boost the attractiveness of French tool for international investors. These companies have legal personality but are also transparent with regard to taxation. They take the form of a limited partnership and dramatically renew the use thereof, which was long thought to be reserved almost exclusively for inheritance constraints that affect SCSs. Although the traditional SCS scheme is only applicable in part to the *société de libre partenariat*, which is largely governed by specific provisions of the Code monétaire et financier (Monetary and Financial Code) (C. Monet. End., Art.L.214-162-1 to L. 214-162-12), it brings together general partners, who are jointly and severally liable for debts, and limited partners, responsible only to the extent of their contributions. Like the *limited partnership* known under English law, on which it is broadly based, this new structure will allow investors to combine statutory freedom and limitation of financial liability.

Relaxing the system of warrants for subscription to business creator shares

Governed by Article 163 bis G of the Code général des impôts (CGI - General Taxation Code), these warrants are intended for employees and directors contributing to the creation of innovative SMEs, constituted and registered with the RCS for less than 15 years in the form of stock companies, subject to corporation tax and which have not been created, save for some exceptions, in the context of a merger, restructuring, extension or resumption of pre-existing activities, without such warrants benefiting the directors and employees of their subsidiaries. On these points, under Article 141, amending Article 163 bis G of the CGI on certain points, the *loi Macron*

liberalises positive law as of its publication. Firstly, the warrants in question can now be awarded to employees and directors of subsidiaries of companies eligible for the measure, provided that they hold at least 75% of the capital or rights, unless the subsidiaries in question themselves meet these eligibility requirements, with the exception of the requirement that at least 25% of the capital be held by individuals. Moreover, the measures also become accessible to companies created as part of a restructuring or the resumption of pre-existing activities, provided however that all companies participating in the operation are themselves eligible.

Simplifying the bonus share scheme

For over 10 years, the law has allowed corporations to make grants of free shares to employees and corporate officers. So far, the beneficiaries of these grants only became owners of said shares at the expiry of a vesting period, corresponding to a minimum of two years if a number of conditions set by the plan were or remained effectively fulfilled. Once the transfer of ownership was complete, recipients were required to observe a period of custody of securities, also a minimum of two years before you can realize the sale, bringing the total period acquisition and conservation at least four years. In its Article 135, the *loi Macron* embodies the government's desire to revitalise this mechanism by easing the qualifying conditions, reducing the securities acquisition period by one year and by making the retention period optional, all whilst providing that the total vesting and holding period must currently remain at least equal to two years. Incidentally, the taxation and social schemes applicable to these stock awards are significantly more flexible or simplified.

Reforming the information measures under the *loi Hamon*

The Law of 31 July 2014 on the social economy (known as the *loi Hamon* or "Hamon law") imposed, in an arrangement criticised as much for its expediency as for its effectiveness, on the sellers of a business or a majority stake in companies with fewer than 50 employees, operated as an SA, SARL, SAS or SCA, informing employees at least two months before the sale transaction. Under Article 204, the *loi Macron* introduces a number of amendments to mitigate both the scope and the penalty for this obligation to inform. As to the scope, the term "vente" (sale) substituted for "cession" (transfer), which has the immediate effect of company acquisition transactions free of charge but also contribution transactions from the scope of the measures provided under the *loi Hamon*. Also affecting the scope of the obligation, it is stipulated that said obligation is no longer to be enforced when, during the twelve months preceding the sale, information concerning sale has already been issued in accordance with the Law of 31 July 2014 or if, during that period, measures for providing information to employees have been implemented, specifically on "the general orientations of the company relative to the detention of its capital, particularly in the context and conditions of a sale of the latter and, where appropriate, the context and conditions of a substantial change in capital" As to the penalty, where the *loi Hamon* granted the right to any employee to apply to the court for a finding of invalidity of a sale transaction completed in disregard of that duty to inform - which resulted in the contested provision being declared unconstitutional - the *loi Macron* only punishes the breach of that obligation by a civil penalty capped at 2% of the sale amount, handed down solely at the request of the Public Prosecutor's Office, and that can only be consecutive to an action for damages.

III. The amendments to the legal status of company executives

Other more specific measures may be mentioned in that they contain both prerogatives and constraints for company executives. These include:

• the opportunity afforded to SARL managers (*Code du commerce* (Commercial Code), Art. L. 223-18) or the boards of directors (*Code du commerce*, Art. L. 225-36) and supervisory boards (*Code du commerce*, Art. L. 225-65) of an SA alone to decide the transfer of the registered office, subject to subsequent ratification by the general assembly, which greatly extends the possibility previously recognised to them of deciding on the transfer within the same or neighbouring *département*;

• the restriction to three (rather than five) corporate mandates held in companies whose securities are admitted to trading on a regulated market by persons exercising a mandate as chief executive office, board member or sole chief executive officer in a company whose securities are admitted to trading on a regulated market and which employs at least five thousand permanent employees within the company and its direct or indirect subsidiaries, whose registered office is on French territory; or at least ten thousand permanent employees within the company and its direct or indirect subsidiaries, whose registered office is located on French territory and abroad (*Code du commerce*, Art. L. 225-94-1);

• submission to the regulated agreements scheme, under the terms of Article 229 of the Law, of the pension commitments made by a listed company to the benefit of an employee named president, CEO, deputy CEO, board member or sole CEO.