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## AFTER CROWDFUNDING, LOANS BETWEEN COMPANIES AS A NEW WAY OF FACILITATING THE FUNDING OF BUSINESSES

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In order to remedy the growing reluctance of banks to extend credit to micro-companies, small- and medium-sized businesses and so called *entreprises de taille intermédiaire*, i.e. literally intermediate-sized companies, the Law on growth, economic activity and equality of economic opportunity, commonly known as the “Macron Law”, has created a new exception to the French banking monopoly by allowing certain types of companies to grant short term loans under certain conditions.

In order to compensate for the banks’ over-cautiousness in granting loans – which already led to the generalization of crowdfunding<sup>[1]</sup> – the Law of August 6, 2015 on growth, economic activity and equality of economic opportunity has created a new exception to the banking monopoly imposed by Article L. 511-5 of the French Monetary and Financial Code<sup>[2]</sup> by authorizing stock corporations and limited liability companies, the account of which are certified by a statutory auditor, to grant, “as an ancillary activity to their core business”, loans of a maturity of less than two years to micro-companies, small- and medium-sized businesses and intermediate-sized companies “with which they have economic ties justifying such grant”<sup>[3]</sup>.

### 1. Requirements for the lender and the borrower

#### 1.1. Requirements for the lender

The lender must be a stock company or a limited liability company, the accounts of which are audited and certified by a statutory auditor, and meet the following requirements<sup>[4]</sup>:

1. At the close of each of the two financial years that precede the date on which the loan is granted, the shareholders’ equity must exceed the amount of the share capital and the company must show a gross operating surplus;
2. The lender’s net cash position, defined as the value of the financial assets with a maturity of less than one year minus the value of the financial debts maturing in less than one year, as of the close of each of the two financial years that precede the date on which the loan is granted must be positive;
3. The principal amount of all the loans so granted by a single company during a financial year may not exceed the lower of the following threshold:

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1. 50 % of net cash or 10 % of such amount calculated on a consolidated basis at the level of the group to which the lender belongs;
2. 10 million euros, 50 million euros or 100 million euros for loans granted respectively by a small- and medium-sized business, a mid-market company or a large company;
4. The principal amount of all the loans so granted by a single company to another company during a financial year may not exceed the higher of the following thresholds:
  1. 5 % of the threshold mentioned in Section 3 a above;
  2. 25 % of the threshold mentioned in Section 3 b within a maximum of 10,000 euros.

The lending activity resulting from the grant of loans in the above-mentioned conditions must be ancillary to the lender's core business.

### 1.2. Requirements for the borrower

The borrower must be a micro-company, a small- or medium-sized business or an intermediate-sized company.

Article 3 of Decree of December 18, 2008 on applicable criteria for determining the category to which a company belongs for the purpose of statistical and economic analysis defines these categories of companies as follows:

- Micro-companies means companies with fewer than 10 people and whose annual turnover or balance sheet total does not exceed 2 million euros;
- Small- and medium-sized businesses means companies with fewer than 250 people and whose annual turnover does not exceed 50 million euros or whose balance sheet total does not exceed 43 million euros;
- Intermediate-sized companies means companies that do not belong to the SMB category, employ fewer than 5,000 people and whose annual turnover does not exceed 1,500 million euros or whose balance sheet total does not exceed 2,000 million euros.

## 2. Relationships between the lender and the borrower

### 2.1. Definition of the required "economic ties"

A loan between companies may be granted wherever the lender or a member of its corporate group<sup>[5]</sup> (hereinafter an "affiliate") and the borrower or any of its affiliate have economic ties under one or several of the following arrangements<sup>[6]</sup>:

- Both are members of the same economic interest group or the same group to whom was awarded a public contract or a private contract as provided for

- under Ordinance of July 23, 2015 on public contracts;
- One of the two companies has benefited over the last two financial years or benefits from a public subsidy as part of a single project that involves both companies and, where applicable, other entities, and that meet the following criteria:
    - The project must have been approved by a competitive cluster, as defined by the 2005 Finance Act of December 30, 2004;
    - A subsidy must have been granted by (i) the European Commission or any entity to which the European Commission has delegated this power, (ii) a region or any entity to which the region has delegated this power, or (iii) the French Agency for the Environment and Energy Management, the National Research Agency or the French Public Investment Bank;
  - The borrower or any of its affiliates is a direct or indirect subcontractor – within the meaning of Law of December 91, 1975 on subcontracting – of the lender or any of its affiliates acting as prime contractor, subcontractor or client<sup>[7]</sup>;
  - The borrower or any of its affiliates has granted to the lender or any of its affiliates a license to use a patent or a trademark, a franchise or a leasing-management agreement;
  - The lender or any of its affiliates is a client of the borrower or any of its affiliates. In this case, the total value of goods and services purchased during the last completed financial year preceding the date on which the loan is granted or during the current financial year in the framework of a contractual relationship which is established as of the date of the loan must be at least equal to 500,000 euros or represent a minimum of 5% of the turnover of the borrower or its relevant affiliate during the same financial year;
  - The lender or any of its affiliates is indirectly linked to the borrower or any of its affiliates through a third party with whom the lender or any of its affiliates and the borrower or any of its affiliates, insofar as each is concerned, have had a business relationship during the last completed financial year preceding the date on which the loan is granted, or have an established business relationship as of the date of the loan. In the framework of this relationship, the total value of goods and services purchased by the client from the supplier during the last completed financial year preceding the date on which the loan is granted or during the current financial year in the framework of a contractual relationship which is established as of the date of the loan must be at least equal to 500,000 euros or represent a minimum of 5% of the turnover of the supplier.

## 2.2. Limitations

However, the grant of the loan must neither (i) place the borrower in a state of economic dependency that would infringe the provisions of Article L. 420-2§2 of the French Commercial Code, nor (ii) have the effect of imposing to a business partner payment terms that do not comply with the maximum payment terms prescribed by Articles L. 441-6 and L. 443-1 of the French Commercial Code.

### 3. Specific formalities to be complied with

#### 3.1. Compliance with the so-called “regulated agreements” procedure

Granted loans must be formalized in a loan agreement that will be subject to the rules applicable to so-called “regulated” agreements, as per Articles L. 225-38 to L. 225-40 or L. 223-19 and L. 223-20 of the French Commercial code, as the case may be.

#### 3.2. Role of the statutory auditor

The amount of the granted loans must be specified in the management report and included in a certificate delivered by the statutory auditor.

The statutory auditor must be informed annually of the pending loans that have been granted. In addition, in a certificate to be annexed to the management report, the statutory auditor must attest, for each of the granted loans, the initial amount of the loan and the outstanding capital, and certify that applicable provisions are duly complied with<sup>[8]</sup>.

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#### Notes

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- [1] Cf. the article entitled "Crowdfunding à la française" published in our [January 2015 e-newsletter](#).
- [2] This Article prohibits any person other than a credit or financial institution to carry out credit transactions "on a regular basis".
- [3] Article 167 of the Law of August 6, 2015 on growth, economic activity and equality of economic opportunity, amending Article L. 511-6 of the French Monetary and Financial Code.
- [4] Article 1 of Decree of April 22, 2016 on loans between companies, creating Article R. 511-2-1-2 of the French Monetary and Financial Code.
- [5] "Group" is to be understood here as all the companies included within the same scope of consolidation, within the meaning of Article L. 233-16 of the French Commercial Code, wherever the cash position of these companies are managed at the group level.
- [6] Decree of April 22, 2016 on loans between companies.
- [7] It should be specified, however, that any loan so implemented does not affect or replace the obligations imposed on the lender or its relevant affiliate that acts as prime contractor, subcontractor or client.
- [8] Article 1 of Decree of April 22, 2016 on loans between companies, creating Article R. 511-2-1-3 of the French Monetary and Financial Code.

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