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PACTE Law: Softened conditions for operating a shareholder current account

The shareholder current account is a corporate finance tool that is very popular among shareholders because of its ease of implementation and its neutrality with regard to the control of the company.

The so-called PACTE Law No. 2019-486 of May 22, 2019 has streamlined the terms and conditions governing current account advances (i) by lifting the requirement under which the shareholders had to hold at least 5% of the company's share capital on the one hand, and (ii) by legally recognizing the validity of current account advances made by Presidents of simplified joint stock companies and by general managers and deputy general managers of joint stock companies and simplified joint stock companies on the other hand.

The shareholder current account is often viewed by shareholders as a privileged tool enabling the company to meet its cash flow needs in a flexible and expeditious manner. It is important, however, to properly understand how it operates.

In practice, the current account may be funded by advances, i. e. the payment of funds to the company, or by loans, leaving at the disposal of the company sums which the shareholder temporarily waives to receive[1], e.g. dividends or remuneration. The contribution to the shareholder current account can be analyzed as a loan, for an indefinite period, from a shareholder to the company[2].

While the concept of shareholder current account is not defined as such by law, the current account mechanism is allowed by derogation from the principle of bank monopoly, which prohibits any person other than a credit institution from receiving repayable funds from the public on a regular basis[3].

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Indeed, Article L.312-2 of the French Commercial Code stipulates that "*are not considered as repayable funds from the public*" the funds received by the company or left into an account by:

– its shareholders,

– its directors, members of the Management Board and Supervisory Board, general managers and deputy general managers, president or managers,

– its employees, provided that their amount does not exceed 10% of the shareholders' equity.

The above-recalled provisions are those that have been relaxed by Law No. 2019-486 of May 22, 2019 on business growth and transformation, commonly referred to in French as the "PACTE Law". Indeed, Article L. 312-2 of the French Commercial Code, in its former version[4], made it possible for shareholders to make current account advances only if they held at least 5% of the company's share capital. This holding threshold was abolished by the PACTE Law, thereby facilitating the use of current account advances as a method for financing businesses.

In addition, the PACTE Law has extended the list of corporate officers authorized to make current account advances. Article L. 312-2 of the French Commercial Code, as amended by the PACTE Law, now expressly mentions the presidents[5] as well as the general managers[6] and deputy general managers[7], thereby providing a welcome clarification as to the type of corporate officers authorized to make current accounts advances.

As to the formalistic requirements associated with shareholders' current accounts, even if there is no legal obligation to conclude a current account agreement between the relevant shareholder and the company, we do believe however that it is appropriate to do so in order to set forth the terms and conditions governing the operation of the current account, in particular as regards repayment and the determination of the interest rate (when the current account bears interests). Indeed, in the absence of a contractual provision addressing this issue, current account advances are deemed to be made interest-free[8]. The terms and conditions governing the operation of the current account are also sometimes specified in the company's articles of association.

The operation of shareholder current accounts has a number of pitfalls (described in a non-exhaustive manner below) that have given rise to extensive case-law and require a certain degree of vigilance.

First of all, it often happens that the repayment of the shareholder current account is subject to certain conditions. For example, repayment can be subject to the restoration of shareholders' equity at a certain level[9] or to the available assets being greater than the liabilities due[10]. Care should be taken with regard to these conditions. To be valid, they must not be exclusively dependent on a decision by the company. Indeed, under French law, a provision that gives the debtor company the power to decide alone and arbitrarily on the performance of its repayment commitment is considered purely potestative and null and void.

It is sometimes appropriate to provide for the possibility to freeze the amounts paid in the current account in order to ensure the financial stability of the company. The decision to freeze such amounts is often addressed

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in the company's articles of association. Failing this, such a decision may be validly made during a general meeting of the company only with the unanimous consent of the shareholders because it entails an increase in their commitments[11].

Finally, a clarification is needed regarding the sale/transfer of shares. In the absence of an express clause in the company's articles of association or contractual provision, the transfer of his/her/it shares by a shareholder does not automatically entail the transfer of the current account opened in his/her/its name to the transferee. Indeed, the capacities as shareholder and creditor of the company are independent from each other[12]. It should be noted in this respect that the transfer of the current account results either from the company's articles of association or from contractual provisions set forth in the current account agreement or in the share transfer agreement.

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[1] Ministerial answer n° 34969: Official Journal of the Senate, October 22, 1980

[2] Commercial Chamber of the *Cour de Cassation* (French Supreme Court), November 19, 1986

[3] Article L.511-5 §2 of the French Financial and Monetary Code

[4] In force prior to May 24, 2019

[5] Of *sociétés par actions simplifiées* (simplified joint stock companies)

[6] Of *sociétés par actions simplifiées* (simplified joint stock companies) and *sociétés anonymes* (simplified joint stock companies) (cf. Senate's Report n°254 (2018-2019) of January 17, 2019 related to the Law No. 2019-486)

[7] Ibid.

[8] First Civil Chamber of the *Cour de Cassation*, November 26, 1991, n°90-17.169

[9] Court of Appeals of Paris December 12, 2007 n°05-15941

[10] Commercial Chamber of the *Cour de Cassation*, January 31, 2017, n°15-14.734 F-D

[11] Article 1836 of the French Civil Code

[12] Administrative Court of Orléans, February 28, 2017, n° 1601133

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