

Published on 1 October 2009



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The Constitutional Council Partly invalidates the law facilitating SMBs' access to credit

The Law n°2009-1255 aimed at facilitating access to credit for small and medium sized businesses (SMBs) and improving the operation of financial markets (the “Law”) was promulgated by the President on October 19, 2009, after a partial invalidation by the Constitutional Council.

Only one day after it had been adopted on first reading by the French National Assembly on September 17, 2009, the Law was referred to the Constitutional Council for review of its legality. In its decision n°2009-589 DC dated October 14, 2009, the Constitutional Council invalidated two Articles of the Law, including Article 16 that would have authorized the issuance in France of Islamic bonds known as “sukuks”.

1. Law aimed at facilitating SMBs' access to credit

Within the context of the international financial crisis and the SMBs' feeling of insecurity fueled by the excessive cautiousness of most financial institutions, the Law aims notably to increase the accountability of credit lending institutions and impose more transparency for the benefit of companies.

As such, the Law imposes on banks and insurance companies the obligation to inform in writing their clients of any reduction or withdrawal of credit with a notice period of 60 days. In addition, credit institutions have the obligation to disclose and explain, upon request, the reasons for the reduction or withdrawal of credit.

SMBs wishing to borrow funds may also request an explanation on their rating by the bank (assessment of the credit risk based on the information collected and processed by the *Banque de France* in the so-called *Fichier Bancaire des Entreprises*, i.e. a database where all recorded companies are awarded a rating that provides

information on their ability to meet their financial commitments).

To ensure that the banks really provide financing to SMBs, the Law also requires all banks to issue a monthly report on the amounts lent to companies incorporated in the last three years and to publish each year the volume of outstanding credit.

2. The Constitutional Council invalidates two Articles of the Law

More than 60 Members of the National Assembly filed an application with the Constitutional Council, hoping to have Articles 14 and 16 of the Law, resulting from Senate amendments, declared unconstitutional based on the fact that such articles should not allegedly have been lumped into the Law as they concern a separate issue.

Article 14 of the Law released certified public accountants, when providing legal advice, from the obligation to report suspicions of money laundering, as codified in the French Monetary and Financial Code pursuant to Ordinance n°2009-104 of January 30, 2009 that transposed Directive 2005/60/CE known as the “Third EU Money Laundering Directive”.

This Article had been added to the initial text through an amendment adopted during a public session of the French Senate.

Article 16 of the Law supplemented Article 2011 of the French Civil Code relating to the rules governing the regime of *fiducie*.

Pursuant to paragraph one of Article 2011, the *fiducie* is “an operation whereby one or more settlors transfer assets, rights or collaterals, or a group of assets, rights or collaterals, present or future, to one or more *fiduciaires* (trustees) who, keeping them separate from their own estate, act for a specified purpose in favor of one or more beneficiaries”.

The specificity of the *fiducie* is that it results in a duality of ownership between the *fiduciaire* who is charge of managing the assets, on the one hand, and the economic owner who receives and keeps the profits derived from the *fiducie*, on the other hand.

This specific type of contract was introduced in the French Civil Code pursuant to Law n°2007-211 of February 19, 2007. This was a significant change in the French legislation as the regime of the *fiducie* was designed to compete with the “trust” vehicle widely used in common law countries. Yet, the *fiducie* is still seldom used in France, despite some recent adjustments resulting notably from Law n°2008-776 of August 4, 2008 known as the Law for Modernization of the Economy.

Article 16 was supposed to supplement Article 2011 of the French Civil Code in order to adapt the rules governing the *fiducie* regime in view to authorizing the issuance in France of financial instruments compliant with the principles of Islamic finance, i.e. *sukuk* (a type of Islamic bond that circumvents the religious

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prohibition on earning interest).

Sukuks are financial instruments, the remuneration and capital of which are indexed on the performance of one or several asset(s) held by an issuer and used for the payment of the remuneration and the repayment of sukuks. The holder has an indirect right on such asset(s) that can be enforced in case of issuer's default. Contrary to bonds, sukuks are backed by an asset which makes it possible for the [investment](#) to earn a [return](#) without the payment of [interest](#).

This adaption of the *fiducie* regime was made within the framework of the consultation launched by the Minister of the Economy, Industry and Employment on the legal amendments to be made to the *fiducie* regime to facilitate its use by Islamic finance and following the announcement in the spring that a legislative reform addressing this issue would be undertaken in autumn.

In its decision of October 14, 2009, the Constitutional Council held that Articles 14 and 16 of the Law had no link, even indirect, with SMBs' access to credit. In its official press release, the Constitutional Council specified - which in itself is quite important - that it invalidated the two Articles on procedural grounds rather than on substantial grounds.

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