BOUYGUES GROUP INTERNAL CHARTER

ON REGULATED AGREEMENTS

SCOPE OF APPLICATION

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INTRODUCTION

The provisions of French law that cover regulated, or related party, agreements were primarily designed to resolve potential conflicts of interests between companies and their senior executives or shareholders, as well as between companies that have senior executives and/or shareholders in common *(shareholders in common for private limited companies: Article L. 223-19 of the French Commercial Code).*

The lack of case law precedent and the relatively vague wording of the legislation mean that considerable uncertainty surrounds regulated agreements, in particular when it comes to identifying those agreements that should be subject to control procedures.

Moreover, French company law has no provisions that specifically cover groups of companies. Dealing with regulated agreements is therefore complex since the regulations do not take into account the existence of agreements that are specific to groups of companies (agreements for administrative assistance, loans and advances, cash pooling and tax election, for example).

This Charter reflects the requirements of Recommendation No. 2012-05 issued by the AMF (French financial markets authority) on 2 July 2012[1]. It takes account of the paper on "Regulated and day-to-day agreements" issued by the CNCC (the French auditors' professional body) in February 2014, and incorporates Order No. 2014-863 of 31 July 2014 and Law No. 2015-990 of 6 August 2015. Its purpose is to provide clearer delineation of the scope of French regulations, in particular by laying down a number of principles that can be used to define a regulated agreement and to determine whether or not it should be included in the control procedure (section I) and, in addition, to clarify certain aspects of the control procedure itself (section II).

I –SCOPE OF APPLICATION OF THE REGULATIONS

The main difficulty involves determining (i) which agreements should in principle be included in the regulatory procedure and, (ii) those agreements, which, as an exception, are exempt from the control procedure (prohibited agreements and/or unregulated agreements that cover day-to-day operations carried out under normal business conditions).

A – THE PRINCIPLE

1. Entities concerned by the regulations

Regulated agreements primarily concern:

- French public limited companies (*Société Anonyme – SA*) with a Board of Directors (Articles L. 225-38 *et seq.* of the Commercial Code),
- French public limited companies (*Société Anonyme – SA*) with an Executive Board and a Supervisory Board (Articles L. 225-86 *et seq.* of the Commercial Code),
- French limited partnerships with shares *(Société en Commandites par Actions – SCA)* (Article L. 226-10 of the Commercial Code),
- French simplified limited companies *(Société par Actions Simplifies – SAS)* (Articles L. 227-10 *et seq.* of the Commercial Code),
- French private limited companies *(Société À Responsabilité Limitée – SARL)* and French private limited companies under sole ownership *(Entreprise Unipersonnelle à Responsabilité Limitée – EURL)* (Articles L. 223-19 *et seq.* of the Commercial Code),
- Non-trading legal entities governed by private law that have an economic activity (Article L. 612-5 of the Commercial Code). These mainly include non-profit organisations, foundations, Economic Interest Groupings (EIGs) with a non-trading purpose, works councils and non-trading partnerships, provided that they have an economic activity.

[1] Amended on 11 February 2015

The following are exempt from the regulations:
- French limited partnerships *(Société en Commandite Simple – SCS)*,
- French general partnerships *(Sociétés en nom Collectif – SNC*),
- EIGs with a commercial purpose.

2. Reference to the definition of an agreement

2.1. Broad definition of the concept of an agreement

The wording of the article on French public limited companies (Article L. 225-38 of the Commercial Code) is very broad and covers "all agreements".

Other than those agreements, which, due to their characteristics, are exempt from control (cf. section B) or have to be subject to a specific procedure, no other agreements should be excluded from the control procedure on any pretext:

- In principle, the control procedures apply to intra-group agreements (subject to the exception mentioned in section B (i) in the case of 100%-owned subsidiaries); specificities linked to the existence of a group are not necessarily taken into account.
  This is because parent companies and subsidiaries often have senior executives in common. For this reason, agreements signed between the two entities are in principle subject to the control procedure for regulated agreements. Moreover, even if there are no senior executives in common, this procedure is frequently followed, as the Commercial Code also makes the control procedure mandatory for agreements signed between a limited company and one of its shareholders who has more than 10% of the voting rights or, for a shareholding company, the company controlling it.

- The fact that an agreement is merely verbal does not confer exemption from the regulations (e.g. intra-group agreements, which are incorrectly described as "cross-charging" agreements, are frequently not evidenced in writing).

- The fact that an agreement has several parties does not mean it is exempt from the control procedure (e.g. the incorporation of a company).

Case law has contributed to this broad definition by consistently holding, for example, that agreements should be subject to the control procedure not only when they are signed, but also when they are amended or renewed.

Accordingly:

- contracts that are renewable tacitly must be subject to the control procedure prior to each renewal,

- the termination of a contract by mutual agreement must also be subject to the control procedure.

Nevertheless, certain operations are exempt from the control procedure for regulated agreements. Thus, when the parent company of a group of companies acts as a guarantor to third parties for the commitments of one of its subsidiaries, such a guarantee does not constitute a regulated agreement between the parent company and its subsidiary, as the agreement is between the creditor and the guarantor, not the guarantor and the secured debtor — *Cour de Cassation* (French Supreme Court), Commercial Division, 9 April 1996.
This would not be the case, however, if the parent company, in a separate agreement, wished to stipulate the conditions under which its guarantee would be granted, for example by making it contingent on obtaining a "counter-guarantee" from its subsidiary or by stipulating that the subsidiary must pay for the guarantee service. Indeed, in this case, the agreement would be formed by the subsidiary and the parent company and would therefore have to be subject to the control procedure for regulated agreements.

Subscribing for an increase in capital appears to be an operation that is exempt from the control procedure, as the decision to increase the capital is more of a unilateral or institutional operation and probably not an actual agreement (in spite of the wording of Article L. 225-143 of the Commercial Code) for the company that subscribes for the increase. In principle, it is therefore exempt from the control procedure.

2.2. Operations that require specific control

The control procedure for regulated agreements does not apply to arrangements for which the legislator has stipulated a specific control procedure.
This applies in particular to **certain restructuring operations** (mergers, demergers, and asset-for-share exchanges that benefit from the legal treatment for demergers), which are within the competence of general meetings under a specific provision (Article L. 236-1 of the Commercial Code) and are not subject to the control procedure for regulated agreements. In the case of contributions in kind that do not qualify for the legal treatment for demergers, it appears that the procedure does not apply to the receiving company, since an extraordinary general meeting of that company must approve the valuation of the contribution; conversely, the control procedure does apply to the contributing company, since that company is not required to hold an extraordinary general meeting to approve the contribution — ANSA (French national association of public limited companies) memorandum, April - June 1999, 3006.

This is also the case for determining the **remuneration of the Chairman**, CEO and Deputy CEOs, which is in principle exempt from the Article L. 225-38 control procedure but nonetheless falls under the exclusive authority of the Board of Directors pursuant to Articles L. 225-47 and L. 225-53 of the Commercial Code

In companies whose securities are admitted to a regulated market, control is stricter, since the law requires commitments made by companies to their senior executives to be subject to the procedure for regulated agreements where such commitments relate to:

- components of remuneration, indemnities or benefits due or potentially due as a result of cessation or change of office, or subsequent to the executive ceasing to hold office (Article L 225-42-1 of the Commercial Code). This covers severance benefits, supplementary pension benefits and golden parachutes;
- defined-benefit pension commitments (top-up pension schemes).

Such commitments must also be contingent on performance conditions.

The legislation also covers commitments made pursuant to an employment contract by the company itself or by any company that controls or is controlled by the company where the person is appointed as a senior executive (Article L. 225-22-1 of the Commercial Code).

With regard to **stock options** (Article L. 225-177 of the Commercial Code), the issue is to ascertain whether exercising options during the financial year as part of a typical stock option plan (some beneficiaries of which are senior executives of the company that set up the plan) is deemed to be remuneration within the meaning of Article L. 225-42-1, paragraph 2 of the Commercial Code and thus subject to the control procedure for regulated agreements.

In the view of the ANSA, options granted during the financial year, which are not linked to the termination of a directorship, but which aim, on the contrary, to secure executive loyalty and reward the performance of duties "*must only be subject to the rules on stock options, inasmuch as these rules, in principle, are an exception to those for regulated agreements, due to the specific nature of stock options*[2]."

[2] Legal Committee: No. 07-035, October 2007

3. Agreements that must be subject to control procedures

3.1. Agreements between the company and its senior executives or shareholders

3.1.1. The persons concerned are:

- **For public limited companies:**

Agreements entered into between the company and the following persons must be subject to the control procedure for regulated agreements:

- The CEO,
- The Deputy CEOs,
- The directors (including legal entities),
- The Executive Board and Supervisory Board members,
- The standing representatives of directors and Supervisory Board members, as they are subject to the same conditions and obligations as if they were directors or Supervisory Board members in their own right.

As well as agreements entered into by the company and:

- Shareholders (natural person or legal entity) who hold more than 10% of the voting rights,
- All companies that control a shareholding company that holds more than 10% of the voting rights.

In order to determine the 10% voting right threshold, where applicable it is necessary to take into account shares with double voting rights, voting right certificates and the various forms of treasury shares, etc.
The law only refers to "the" company that controls the shareholding company. In accordance with the position of the CNCC and the Ministry of Justice, we should adopt a broad definition of this concept and apply the control procedure for regulated agreements to those agreements entered into with all companies included in the chain of control of the shareholding company. Conversely, it is not necessary to take into account joint control (Article L. 233-3, paragraph 3) over the shareholding company exercised by companies acting together[3].
Moreover, if an agreement is entered into with a company that is under the control of the same shareholding company (the case for sister companies), it is necessary to examine whether or not the shareholding company is indirectly concerned by the agreement (in which case the agreement must be subject to the control procedure for regulated agreements), although this is anything but an automatic step (cf. paragraph 3.1.2. below).

[3] CNCC Bulletin, June 2002 p 145

- **For limited partnerships with shares**

The control procedure for regulated agreements (Article L. 226-10 of the Commercial Code) applies in limited partnerships with shares where the agreement is entered into by:

- One of the managers or one of the members of the Supervisory Board,
- One of the shareholders who holds more than 10% of the voting rights, or, for a shareholding company, the company controlling it.

- **For private limited companies:**

According to Article L. 223-19 of the Commercial Code, the control procedure for regulated agreements applies to agreements between the company and:

- One of its managers or shareholders.

- **For private limited companies under sole ownership:**

The applicable rules are fairly similar to those for private limited companies. The following are therefore concerned:

- The sole shareholder and/or the manager.
  However, unlike the control procedure that applies to companies with more than one shareholder, it is not necessary for the manager or the statutory auditor, if any, to prepare a special report on the agreement(s).

- **For simplified limited companies:**

Article L. 227-10, paragraph 2 applies to:

- The Chairman, CEO, Deputy CEO(s) and other senior executives (whose capacity is determined by the type of organisation implemented by the shareholders).

While the law considers that a "senior executive" is any person who has *de facto* management powers, in practice, it is prudent to extend this definition to include the members of the Supervisory Board. This is incidentally the position adopted by the ANSA[4] and the CNC.

- **Non-trading legal entities governed by private law that have an economic activity:**

- The agreements covered are those entered into by such entities and one of their senior executives (directors or one of the persons who performs a role of corporate officer), either directly or via an intermediary. Agreements are also concerned where they bind the non-trading entity to another legal entity (and no longer merely to a "company", since 15 February 2009) of which a partner with unlimited liability, manager, director, CEO, Deputy CEO, member of the Executive Board or Supervisory Board, or a shareholder with more than 10% of the voting rights is simultaneously a director or acts as an officer in said legal entity.

[4] ANSA Memorandum, November-December 1995

3.1.2. The concept of an indirect interest

The legislation on public limited companies (Articles L. 225-38 to L. 225-86) and on limited partnerships with shares (Article L. 226-10) covers not only agreements between the company and its senior executives or shareholders, but also provides that the control procedure is applicable where the senior executive or shareholder, while personally not party to the contract, has an **indirect interest** therein.

The regulations have never defined the concept of an indirect interest. This is a fairly multifaceted concept that the courts have strived to define. Thus, for corporate officers, case law decisions have often deemed that it equates to personal gain derived from an agreement entered into with a third party; however, they have also noted, when defining an indirect interest, that it includes having interests in a co-contracting company "*that are sufficiently important to affect said company's policy*[5]" in its dealings with the company of which the person is a corporate officer.

For example, this includes agreements entered into by a company with another company in which the senior executive or shareholder holds a significant stake. It assumes, however, that the senior executive or shareholder concerned derives benefit from the agreement, even though he is not a party thereto.
We should note, however, that in a decision dated 23 October 1990, the *Cour de Cassation* (French Supreme Court) rejected an appeal on points of law against an appellate decision that annulled agreements entered into by a public limited company and a private limited company on the grounds that the chairman of the board of directors of the public limited company was the father of the only two shareholders of the private limited company. According to the *Cour de Cassation* (French Supreme Court), these facts were enough to demonstrate the existence of an indirect interest.

As case law currently stands, this concept of an indirect interest cannot, for all that, be cited extensively in order to have all intra-group agreements subject to the control procedure as a matter of principle, in particular agreements between sister companies with no senior executives in common, on the sole ground that the "*shareholder in common*" necessarily has an interest or agreements concluded between companies with no senior executives in common and from which the senior executives do not derive any personal benefit.

The Paris Chamber of Commerce and Industry (CCIP) has suggested a definition of an indirect interest, which has been adopted by the AMF[6]: *"A person is considered to be indirectly concerned by an agreement to which he is not a party where, due to his connections with the parties and the powers he has to influence their behaviour, he derives benefit from the agreement."* In our opinion, it is reasonable to use this definition.

We can observe in this respect that, since the Law of 1 August 2003, as far as the legislator is concerned, all agreements between a company and one of its shareholders who holds more than 10% of the voting rights (or the controlling company) for said company falls within the scope of regulated agreements, which does indeed mean that intra-group agreements must in certain cases only be subject to the control procedure.

Indeed, by converse implication, other than cases where there are senior executives in common, the control procedure for regulated agreements does not apply to shareholders who hold 10% of the co-contracting party (or the controlling company) or to agreements between sister companies. In the latter case, we cannot assert that the shareholder controlling the company automatically has an "indirect interest" on the sole basis that it also controls the co-contracting company. The mere fact of having a controlling shareholder in common in our opinion cannot be used to demonstrate its indirect interest within the meaning of Articles L. 225-38 and L. 225-86 of the Commercial Code. Each indirect interest must be assessed on its own merits.

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[5] *Cour de Cassation* (French Supreme Court), Commercial Division, 4 Oct. 1988, *Rev. sociétés 1989*, p. 216, commentary by Y. Chaput

[6] Proposal No. 22 in AMF Recommendation No. 2012-05, issued on 2 July 2012

3.1.3. The concept of an intermediary

The legislation also refers to agreements in which a senior executive deals with the company via an "intermediary".

Legal experts frequently use this concept, which is primarily found in the capacity law and property disposition law (Civil Code, Articles 911 and 1125-1 in particular), as well as in numerous cases of commercial law.
Whether or not a person is found to be acting as an intermediary falls to the sole discretion of the courts that rule on the merits. Thus, the *Cour de Cassation* (French Supreme Court) ruled that a chairman's spouse was an intermediary (Commercial Division, 23 January 1968), as was a **nominee** who had acquired corporate assets through funds obtained by the executive with whom the company had refused to deal directly (Commercial Division, 7 March 1977).

The presence of an intermediary only points to the existence of an indirect interest, which explains why the courts use both of these concepts in combination.

3.2. Agreements between a public limited company or a limited partnership with shares and another undertaking

The control procedure for regulated agreements is not limited to contracts between the company and its senior executives or shareholders.
Articles L. 225-38 and L. 225-86 of the Commercial Code also refer to agreements between a company and an undertaking, if a company senior executive owns, is a partner with unlimited liability in or, in general, manages the undertaking concerned.

The concept of an "undertaking" is extensive and covers, in particular, commercial companies, non-trading partnerships, sole traders, EIGs and even organisations, provided that they have an economic activity.

Moreover, the regulations also apply to agreements between French companies and foreign companies[7]. The term "senior executive" is then defined using French legal criteria, in order to verify whether the functions conferred on the senior executive are equivalent to those for which senior executives are responsible under French law.

3.2.1. Agreements between a public limited company and an undertaking with senior executives in common

The concept of "senior executives in common" is defined broadly and concerns:

- at the level of the public limited company, the directors, CEOs, Deputy CEOs, and members of the Executive Board and Supervisory Board for public limited companies,
- at the level of the undertaking, the directors, CEOs, Deputy CEOs, managers, members of the Executive Board and Supervisory Board and, in general, all senior executives in the undertaking.

3.2.2 Agreements between a limited partnership with shares and an undertaking with senior executives in common

The concept of "senior executives in common" covers:

- at the level of the limited partnership with shares, the managers and members of the Supervisory Board, and

- at the level of the undertaking, the directors, managers, CEOs and members of the Executive Board and Supervisory Board of the undertaking.

[7] CNCC Bulletin, December 2004 p 706

3.2.3. Other agreements between a public limited company or a limited partnership with shares and an undertaking

Agreements between a company and an undertaking are also subject to the prior authorisation of the Board of Directors (public limited company) or Supervisory Board (limited partnership with shares) if one of the senior executives (director, CEO, Deputy CEO, Executive Board member, Supervisory Board member for public limited companies or manager and Supervisory Board member for limited partnerships with shares) of the company is:

- The owner of the undertaking. The term "owner" includes, in particular, the executive owners of individual undertakings, but can reasonably be extended to other hypotheses (such as, for example, the case where the senior executive holds the majority of the capital in a public limited company, simplified limited company or private limited company).

- A partner with unlimited liability. In practice, this is the case where the senior executive is a partner in a general partnership (this is true for one Bouygues group company in which Bouygues is a director and that signs an agreement with Bouygues Relais SNC), a non-trading partnership or the general partner in limited partnership.

3.3. Agreements between a private limited company/private limited company under sole ownership and another company

The following agreements must be subject to the control procedure: "*agreements entered into with a **company** in which a partner with unlimited liability, a manager, director, CEO, executive board member or supervisory board member is simultaneously a manager or shareholder in the private limited company* [8]."

Article L. 223-19 of the Commercial Code only specifically refers to agreements between a private limited company and another "company". It thus appears that these provisions do not apply to agreements with other legal entities, such as EIGs or organisations, for example.

B – THE EXCEPTION

The following are exempt from control procedures (i.e. authorisation and approval):

- for a public limited company (SA) or limited partnership with shares (SCA)[9] – **agreements entered into between "*two companies one of which owns, directly or indirectly, the entire share capital of the other, after deducting where applicable the minimum number of shares needed to comply with the requirements of Article 138 of the Civil Code or Articles L. 225-1 and L. 226-1 of the Commercial Code*"** (Articles L. 225-39 and L. 225-87 as amended[10] (SA), and Article L. 226-10 (SCA)). In cases where the procedure would normally apply in both companies, the exemption applies in both the parent and the subsidiary.

- for a public limited company (SA), limited partnership with shares (SCA), private limited company (SARL) or simplified limited company (SAS) – agreements regarded as "unrestricted" because they relate to "day-to-day operations carried out under normal business conditions" (Articles L. 225-39 and L. 225-87 (SA), L. 226-10 (SCA), L. 223-20 (SARL) and L. 227-11 (SAS)).

[8] Article L. 223-19 of the Commercial Code

[9] Note that this does not apply to a simplified limited company because Article L. 227-10 of the Commercial Code has not been amended, probably because such agreements can be entered into without prior approval.

[10] Articles 6 and 9 of Order No. 2014-863 of 31 July 2014 on company law, implemented in application of Article 3 of Law No. 2014-1 of 2 January 2014 giving the government authority to make the running of companies simpler and more secure.

How should "day-to-day operations carried out under normal business conditions" be interpreted?

On this point, the Group's position may occasionally be more restrictive than that of the CNCC, given the stakes (the risk of the agreements being annulled) and the caution, which, in our opinion, is required when interpreting this provision.

1. Day-to-day operations

Interpreting the concept of "day-to-day operations" is probably one of the most difficult aspects of regulated agreements.
At first sight, the concept of "agreements concerning day-to-day operations" could appear to warrant an extremely broad interpretation, given the very general nature of the wording.

Numerous case law decisions have sought to set the limits of this definition. While the decisions are based on the specific case facts, which means that differences in interpretation are possible, the legal precedent on the substantive aspects is nevertheless consistent.
According to the *Cour de Cassation* (French Supreme Court) (i) (Commercial Division, 21 April 1977) day-to-day operations are those that the company usually carries out and that fall within the scope of its activity, as defined by the by-laws (corporate purpose), (ii) moreover, (Commercial Division, 1 October 1996) operations that the company carries out within the scope of its ordinary business activity and, for disposals, that are decided under conditions that are "usual" enough to equate to day-to-day operations.
The *Cour de Cassation* (French Supreme Court) has also held that the non-recurring nature of an agreement rules out the possibility of qualifying as a day-to-day operation (Commercial Division, 11 March 2003).

Strictly speaking, the 1977 precedent could be deemed to be restrictive since it apparently only covers agreements that directly contribute to fulfilling the actual corporate purpose of the company (i.e. in practice, primarily those agreements that are usually signed with the company's clients and that truly constitute its ordinary business activity).

However, this definition is assessed in light of the wording of the company's by-laws. If we look at the wording of numerous by-laws for commercial companies, we can see that the corporate purpose very often contains very general provisions that cover operations outside the scope of the core activity: "all technical, commercial and financial operations in connection with the above purpose and all similar or related purposes (…)."

The reference to the concept of "activity defined by the by-laws" therefore gives more leeway when defining the concept of day-to-day operations.

In this regard, note that the by-laws of numerous companies provide for the possibility of acquiring interests in other companies and that, consequently (and primarily for holding companies), even the purchase or sale of securities may fall within the scope of Article L. 225-39, depending on the circumstances and conditions of the transaction.

It therefore appears that the control procedure applies to some agreements, which, although frequently entered into by companies within the scope of their business activity, are not directly involved in the performance of said activity.

Moreover, as we have seen, the CNCC sometimes adopts a more relaxed position since, for intra-group agreements, the concept of a day-to-day operation is not assessed at the level of the company concerned, but at the level of groups of companies in general.

At the very least, a principle of consistency and continuity should be applied when interpreting this concept at the level of each company. Ultimately, it is up to each business segment legal affairs department to assess whether or not an agreement is a day-to-day operation, according to the circumstances.

2. Operations performed under normal business conditions

The purpose of the regulations is to exempt from the control procedure those agreements for which the conditions proposed to the co-contracting party do not cause it to benefit from conditions that are more advantageous than those that would be proposed to a third party.
The concept of "normal conditions" is thus generally defined as being "conditions that are comparable to those ordinarily granted to by the company to another company in the same sector of activity for the same type of operation."

The normal nature of the operation is assessed, firstly, with reference to economic conditions and therefore with regard to a market price or usual market conditions. Case law decisions also refer to the concept of "balance of reciprocal benefits", which is a cue to take into account not only the price *per se*, but more generally all the conditions under which the transaction is concluded (e.g. payment times and guarantees).

3. Agreements with low or high financial stakes

In order to avoid too many agreements being submitted to the Board of Directors for prior approval, it may be tempting to adopt the approach that "minor agreements" or "agreements of little importance" from a financial standpoint do not need to be subject to the control procedure for regulated agreements.

For hypothetically day-to-day operations, it appears logical, in principle, to exempt agreements with low financial stakes from the control procedure, while still ensuring that the minor financial consideration paid corresponds to normal conditions and, moreover, that the contract does not have significant stakes for the co-contracting parties. In other words, a certain amount of caution is required and it is the responsibility of each business segment legal affairs department to assess the situation in practice according to the company concerned and the relative nature of the concept of "little financial importance".

Conversely, as we have seen, for agreements with high financial stakes, it is prudent to ensure that they be subject to the control procedure. Here again, depending on the specific circumstances and the individual situation of the business segment, it is up to the legal affairs department to take a final decision.

4. Intra-group agreements

This is a key issue for the Bouygues group legal experts.

Should we consider that the agreements usually entered into by companies in the same group constitute "day-to-day operations" within the meaning of the regulations? How should the concept of "normal conditions" be interpreted within a group? Certain distinctions need to be made.

4.1. Commercial transactions that fall within the scope of the company's ordinary business activity

These transactions do not pose any difficulties and can be defined as "day-to-day operations".

With regard to the assessment of the "normal business conditions of the operation", care should be taken to ensure that all the benefits of belonging to the group are taken into account (*COB Bulletin No. 138* – June 1981[11]) as the price cannot constitute the sole reference criterion.

[11] Cf. Appendix 2

4.2. Other operations that are specific to groups of companies

These include, in particular, financial agreements (cash pooling, current account, loan and debt waiver agreements, for example), shared services agreements, employee secondment agreements and tax election agreements, etc.

Professional standards and the CNCC very often tend to prefer an approach based on the concept of a day-to-day operation "within a group of companies", which leads them to presume that such operations are "day-to-day" and rather to focus on the terms of such agreements by checking whether or not they were entered into on "normal terms" in light of the aforementioned criteria; this requires in-depth analysis of the agreement and may give rise to differences in interpretation.
Recent case law confirmed this with regard to a cash pooling agreement (Versailles Court of Appeal, 2 April 2002).

Assessing what constitutes "normal terms" and the amount of fees invoiced for such intra-group transactions is of course a much more problematic issue.

For example, in a decision dated 17 October 2003, the Paris Court of Appeal ruled that amounts charged under a shared services agreement are normal when invoiced at cost price, or with a reasonable margin intended to cover indirect overheads.

Given the specific and non-standard nature of these agreements, and also the purpose of the regulations (namely a public policy objective: protect the company and its senior executives, minority shareholders and corporate creditors), the Group takes the view that it is prudent and appropriate, as the regulations stand, to adopt the position that most if not all of these agreements should be subject to control procedures, with the possible exception of (i) employee secondment agreements (which are very common and always invoiced to the user company at cost price, to avoid illegal sub-contracting of labour), (ii) agreements for which the financial stakes are very low, and (iii) cases where it is beyond doubt that the agreement was concluded on "normal terms" (according to the business segment legal affairs department).