

The Paris office of Hogan Lovells is pleased to provide this English language edition of our monthly e-newsletter, which offers a legal and regulatory update covering France and Europe for January 2018.

Please note that French legal concepts are translated into English for information only and not as legal advice. The concepts expressed in English may not exactly reflect or correspond to similar concepts existing under the laws of the jurisdictions of the readers.

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**1. Capital markets****The BMR applies from 1 January 2018 and the AMF has updated its policy**

The Benchmarks Regulation ("BMR") was adopted on 8 June 2016, against a background of several benchmark manipulation scandals such as those involving the LIBOR and EURIBOR.

The BMR provides a legal framework for the administration of benchmarks which are used in the European Union. It has applied from 1 January 2018.

The Autorité des Marchés Financiers ("AMF") has adapted several of its instructions, positions and recommendations to reflect the BMR.

- Any prospective benchmark administrator must seek the approval of the AMF.

If the administrator is an asset manager or another type of investment service provider, such status as an administrator will have to be added to its program.

If the administrator is an asset manager, the AMF will simply have to extend its approval.

- The AMF has updated its UCITS prospectus template, so as to take into account the new obligation to indicate in a prospectus whether the benchmark has been provided by an administrator registered on ESMA's public registry. To be consistent, the AMF has decided to also apply this requirement to AIFs.
- The AMF has adapted its policy in order to take into account the new benchmark requirements to prevent administrators from being subject to conflicts of interest, in particular intragroup conflicts of interest. This is the case, for instance, where a UCITS or an AIF which is a party to an OTC transaction is exposed to a benchmark calculated by a counterparty belonging to the same financial group as it.

## **MIFID applies from 3 January 2018**

The Mifid 2 pack (Mifid 2 and Mifir) strengthening the transparency and the security on the market had been adopted in 2014. It is now applicable. If Mifir, as a European regulation is of immediate application, the Mifid 2 Directive has been implemented by a French ordinance of June 2016, among others.

Many level 2 and 3 measures have been taken to precise the application of the pack.

The ESMA keeps taking new level 2 and 3 measures, mainly on pre and post-trade transparency (and more precisely on reporting and systematic internalisers).

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## **2. Competition**

### **France – Operational launch of the New Caledonian competition authority**

On 12 December 2017, the Congress of New Caledonia approved the list of five candidates put forward by the government to form the new competition authority. This authority should be effective at the end of February 2018. The New Caledonian competition authority will be chaired by Aurélie Zoude-Le-Berre, a former case handler of the French competition authority. She will be assisted by a general rapporteur, Virginie Cramésnil de Laleu, and three non-permanent members, Robert Simpson, Jean-Michel Stoltz and Matthieu Buchberger. Stakeholders have welcomed the operational launch of the competition authority which, since the enacting of the [law of the country n°2014-12 of 24 April 2014](#) establishing the competition authority in New Caledonia, had been long overdue.

### **European Union – Changes in the antidumping rules within the European Union**

On December 12, the European Parliament and the European Council adopted a new [Regulation \(EU\) 2017/2321 of the European parliament and of the council of 12 December 2017](#) amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union. The text entered into force on December 20, 2017.

This new regulation removes the distinction between market or non-market economies. The commission must now show that there is a significant market distortion between the sale price of a product and its production cost. It will be allowed to set the price of a product based, for example, on the price found in a country with the same level of economic development, or on relevant international prices and costs.

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## **3. Corporate**

### **France – Approval of the ANC Regulation on merger and acquisition transactions**

The French accounting standards authority (*Autorité des Normes Comptables, ANC*) had published on October, 2017 on its website the [ANC regulation No. 2017-01 amending the regulation ANC 2014-03 \(PCG\) regarding the accounting treatment of merger and acquisition transactions](#) (cf. corporate updates of October 2017).

This regulation was approved by [Order dated December 26, 2017](#) published in the Official Journal of December 30, 2017. It applies to mergers and related transactions dated as from January 1, 2018, *i.e.* transactions for which the contribution agreement will have been subject of the filing and publication formalities set out in Article L. 236-6 of the Commercial Code as from this date and, regarding the universal transfer of assets (*transmission universelle de patrimoine*) transactions, as from the date of publication of the wind-up decision in a legal gazette.

### **France – Electronic filing of the reference document now possible**

The French financial markets authority (*Autorité des marchés financiers, AMF*) updated the [instruction DOC-2016-04](#) regarding the information to be disclosed in case of a public offering or admission to trading of securities on a regulated market in order to allow the electronic filing of reference documents.

The reference document, which contains detailed information on the business, financial situation and prospects of a company, is under the AMF supervision. It may take the form of the company's annual report or the form of a specific document drawn up for the purpose of a market transaction.

As from January 15, 2018, reference documents must no longer be sent to the AMF through the mailbox provided for this purpose, but through the AMF extranet. Such change in filing procedures is part of the dematerialization of filing processes carried out by the AMF. A letter will be sent to issuers enabling them to connect as from this date on their ONDE account (AMF extranet website).

#### **France - Order amending the AMF General Regulation**

[Order dated December 20, 2017](#) amended Books II to V and repealed Book VII of the General Regulation of the French financial markets authority (*Autorité des marchés financiers, AMF*).

Such amendments result from:

- the entry into force, on January 3, 2018 of the "MiFIR Directive", the "MiFIR Regulation" and the European regulations supplementing MiFIR Directive 2 and MiFIR Regulation;
- the implementation of the separation of the legal regime of investment firms and portfolio management companies;

the entry into force of [Ordinance n°2017-1162 of July 12, 2017](#) adopting simplification and clarification measures for information obligations for companies. The ordinance amends the information obligations of *sociétés anonymes* and *sociétés en commandite simple*. It also redistributed the content of the management report and the report on corporate governance, which replaced the Chairman's report (cf. corporate updates of September 2017).

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#### **4. Data protection & IT**

##### **Darty sanctioned by the CNIL for breach of its obligation of security**

The CNIL identified a security breach that allowed free access to all the data provided by Darty's customers via an online form for after-sale services. The CNIL considered that the fact that Darty used a data-processor to implement and manage the online after-sale service tool did not release Darty from its obligation to ensure the security of the personal data processed on its behalf, as a data controller. Thus, Darty should have (i) previously checked that the setting parameters of the implemented tool did not allow unauthorized third parties to access to customer data and (ii) been diligent in monitoring the corrective actions implemented by the data processor when the violation had been detected.

Due to this breach of its obligation of security of personal data, the CNIL issued a [public fine of 100,000 euros](#) against Darty.

##### **The CNIL published a new guide on the security of personal data**

In order to help professionals in their compliance with the General Data Protection Regulation (the "*GDPR*"), the CNIL published a [guide on the security of personal data](#) reminding the basic precautions to implement systematically to ensure a level of security adapted to the risk.

##### **The CNIL published the "Silver economy and personal data" compliance package**

The "[Silver economy and Personal Data](#)" compliance package enables professionals offering products and services intended to seniors to integrate personal data protection as early as possible when developing their products and services.

## Consequences of the Brexit on the transfer of personal data

On 9 January 2018, the European Commission published a [statement](#) indicating that the UK will be considered as from 30 March 2019 as a third country to the EU, when Brexit becomes effective (unless the withdrawal agreement sets another date). Thus, any transfer of personal data from the European Union to the UK will need to be governed by appropriate GDPR safeguards (standard contractual clauses, binding corporate rules, codes of conduct or certification mechanisms), subject to any adequacy decision of the European Commission recognizing the UK as ensuring an appropriate level of protection of personal data.

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## 5. Employment

### France – Decree about the remuneration amount

**Enhancement of the minimum wage (SMIC) for 2018:** Through [Decree n° 2017-1719 dated 20 December 2017 \(Journal officiel dated 21 December 2017\)](#), since January, 1<sup>st</sup> 2018, the gross hourly minimum wage is equal to EUR 9.88 (increase of 1.23 %), i.e. EUR 1,498.47 monthly based on the 35-hour statutory working time per week.

### France – Implementation of the Social and Economic Council (SEC)

**Appointment of an expert:** [Ministerial Decree dated 21 December 2017 \(Journal Officiel dated 1<sup>st</sup> January 2018\)](#) has updated the list of experts for which the SEC or the Health, Safety and Working Committee, may appoint should they decide to be assisted on health and safety matters.

### France – Prevention of occupational risks

**Hyperbaric works:** [Ministerial Decree dated 29 September 2017 \(Journal Officiel dated 12 January 2018\)](#) has defined the certification required for companies that carry out hyperbaric works referenced as "A" or "D", as well as certification required for organizations responsible for authorizing these companies.

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## 6. Finance

### PSD2 applicable since 13 January 2018

The 2007 Payment Services Directive ("PSD") aimed at creating a safe and harmonised market of electronic payments within the EU. It was revised by a directive (EU) 2015/2366 ("PSD2") adopted on 25 November 2015 and implemented in France by an ordinance of 9 August 2017.

Most of the directive is applicable since 13 January 2018.

Its purpose is to take into account continued technological innovations, increase consumer protection with respect to the increasing volume of electronic payments or against fraud.

With PSD, credit institutions had lost the payment services monopoly. They had to share the services with new payment services providers. PSD 2 introduces 2 new payment services providers, belonging to a category of third-party providers ("TTPs"):

- Account Information Service Providers ("AISPs"), whose purpose is to provide information on several accounts held by a customer, in order to give him a complete picture of his financial situation;
- Payment Initiation Service Providers ("PISPs") who stands between the payer and his online payment account, by starting the payment to a

third-party beneficiary. The payer can then make an online payment by direct debit on its account; provided that the PISP (person authorised only to exercise this new payment service) did not come into possession of funds from the payer and the payment service provider where the payers' or ASPSP account is held shall ensure the PISP access to the online account of the payer2;

These provisions constitute "Open Banking", in other words the obligation for banks to open up their IT infrastructure to TPPs. PSD2 imposes the guarantee of a secured communication between traditional banks and the providers.

As for banks, these 2 new payment services providers must send an application file to the AMF.

PSD2 imposes an « enhanced customer identification» against fraud and in order to protect customers' data protection.

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## 7. Insurance

### European Union – Solvency II – Group supervision

The European Insurance and Occupational Pensions Authority ("**EIOPA**") published on 25 January 2018 a report on the application of group supervision under the Solvency II Directive. The EIOPA notably mentions the difficulties faced in the implementation of the definition of groups and the supervision of such groups in specific situations, such as when individual insurance undertakings are acting in consort, when third country groups are operating in the European Economic Area ("**EEA**") through multiple entry points rather than using a holding company for their operations in the European market, or when non-EEA structures with related investment funds are investing in several otherwise unconnected insurance undertakings across the EEA. The EIOPA suggests solutions to resolve the above issues.

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## 8. Reale estate

### Publication of the list of the neighbourhoods for the "Malraux mechanism"

The Ministerial Order dated 19 January 2018, published on 31 January 2018 in the Official Journal sets the list of the neighbourhoods on which the tax reduction provided by the 2016 Financial Law will be applied.

The 2016 Financial Law extended the geographical scope of the "Malraux mechanism" (*dispositif Malraux*) to the old neighbourhoods with a high concentration of old and degraded accommodations.

This mechanism allows the tax payers who invest in apartments to renovate to benefit from tax reductions under certain circumstances.

The list of the neighbourhoods on which the tax reduction provided by the 2016 Financial Law will be applied is available at the General Commission for Territorial Equality and downloadable from the website of National Institute of Geographic and Forest Information ([www.geoportail.gouv.fr](http://www.geoportail.gouv.fr)).

### VAT exemption: application to leasing agreements

Please see "Tax" section for further details.

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## 9. Tax

### VAT exemption : application to leasing agreements

The French tax authorities (the "**FTA**") drew the consequences of two decisions from the French Administrative Supreme Court (*Conseil d'Etat, 23 November 2015, n°375054 et n°375055*) and updated their general guidelines so as to clarify the application of the VAT exemption provided by Article 257 bis of the French Tax Code (the "**FTC**") to the transfer of real estate assets realised as part of leasing agreements (*BOI-TVA-DED-60-20-10-20180103, n°286*).

As a reminder, Article 257 bis of the FTC provides that supplies of goods and services realised between VAT taxpayers as part of the transfer of a

partial or total universality of assets are exempt from VAT provided that the beneficiary of the transfer continues to operate the transferred universality of assets.

With respect to transfers realised as part of leasing agreements, the FTA notably specifies that Article 257 *bis* of the FTC applies to the resale of a real estate asset acquired by a lessee, who has exercised the option provided by the leasing agreement, provided that the buyer continues to lease such real estate asset.

The FTA also published two rulings that draw the practical consequences of this general clarification (*RES n°2018/01 et n°2018/02 (TCA) dated 3 January 2018*).

**"Malraux" tax reduction: publication of the list of eligible areas**

Please see "*Real Estate*" section above for further details.

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