
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 October 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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- **Capital Markets**

France – French preparation for a "no-deal Brexit"

The negotiations between the United Kingdom and the European Union took a step forward on 14 November 2018 in favor of a "soft Brexit". The French government is nevertheless preparing a law that would allow certain measures to be taken in case of a "no-deal Brexit".

On March 29, 2019, the United Kingdom ("UK") will leave the European Union ("EU"). After 20 months of negotiations, the UK and the 27 remaining countries of the EU have finally agreed on a draft withdrawal agreement.

Last night, the British cabinet approved the project. The 600-page text of the draft withdrawal agreement now needs to be reviewed by the House of Commons before the end of the year and voted on by a majority of the House.

Should negotiations within the UK fail, France has prepared a legal framework to deal with the possibility of a "no-deal Brexit".

On October 3, 2018, the French government presented a bill authorizing the government to take the necessary measures in a wide variety of areas including:

- the right of entry and residence of British citizens in France, to prevent a British citizen living in France from finding himself in an unregulated situation on 30 March 2019;
- allowing British citizens undertaking a salaried professional activity in France to continue their activity;
- the transport of passengers and goods between the UK and the EU;
- recognition of contributions to the British pension plan paid by French citizens;
- mutual recognition of diplomas held by British and French citizens;

- the access of French entities to the interbank payment and settlement systems of third countries, including the United Kingdom as of the date of its withdrawal. It would be sensible, where appropriate, to make certain British payment systems (CLS, CHAPS and CREST) benefit from the protections provided under the Settlement Finality Directive of 19 May 1998;
- the continuity of contracts: in the absence of an agreement, UK financial sector institutions would become third country companies and thus lose their European passport. They would no longer be allowed to provide new banking and financial services in the EU. The draft law provides for the possibility of taking measures to ensure the continuity and the proper execution of contracts in progress.

The bill was considered by the French Senate on November 6.

The law is expected to be published in December 2018.

- **Commercial**

France – Pacte Bill and payment terms

The “Pacte” Bill was adopted by the French National Assembly at first reading on 9 October 2018 (PL AN n°179). Among the key measures planned, the Bill sets out major changes regarding payment terms in order to generalize "*name and shame*" in keeping with the French Act dated 9 December 2016 known as the "Sapin II" Act. Thus, the Bill plans to amend point V of Article L. 470-2 of the French Commercial Code on the following 3 points:

- The possibility for the General Directorate for Fair Trading, Consumer Affairs and Fraud Control (DGCCRF) to publish the decision, naming the sanctioned company, on its website (<https://www.economie.gouv.fr/dgccrf/sanctions-delaipaiement>) and/or using other communication channels including the press.
- Regarding payment terms: the obligation to systematically publish the decision twice (on the administrative authority's website and on a channel authorized to publish legal announcements).
- In the event of failure by the sanctioned person to comply with the publicity measures: a daily penalty of 150 euros will be imposed.

France – Act n°2018-938 of 30 October 2018 "for the balance of trade relations in the agricultural and food sector and healthy, sustainable and accessible nutrition for all", known as the "EGalim" Act, and its impact on competition law and distribution law

The EGalim Act was enacted on 1 November 2018. Its purpose is to rebalance trade relations between agricultural producers and major distributors and thus draws up specific rules for the agricultural sector in terms of competition law and distribution law.

These include:

- Securing the contractual relationship and in particular: the obligation to introduce a proposal by the producer (prior to the conclusion of a written purchase contract between the producer/producer organisation and the first buyer) containing several mandatory elements (regarding the price for example), the establishment of new rules on “subcontracts in series” (regarding prices) and on penalties in the event of failure by the producer or buyer to comply with these provisions, the impossibility (except in the event of non-performance or force majeure) to terminate contracts concluded with young farmers or with a farm corporation having integrated a new shareholder before the defined term.
- Strengthening the framework for commercial practices, in particular: strengthening the powers of the mediator and new rules on renegotiation clauses in certain contracts.

- **Corporate**

France – Update of AMF recommendation DOC 2012-05 on shareholder's meeting of listed companies

The AMF added to the [AMF 2012-05 recommendation](#) 7 proposals, made by the working group composed of the retail investors and issuers consultative commissions, in its [July 2018 report "Shareholder right and voting at general meetings"](#). These recommendations were made with a view to transposing [European Directive 2017/828 of 17 May 2017 called "Shareholder's Right"](#), aiming at promoting the so-called long-term shareholders' commitment.

Through these concrete recommendations, aimed at issuers, securities professionals or shareholders, the AMF is seeking to:

- remind issuers of the need to take account of all votes expressed via a voting document or form compliant with legal and regulatory requirements;
- recommend to shareholders and issuers using the services of a bailiff at general meetings that they require this last to specify in her/his report the extent and limits of her/his assignment;
- make it easier for proxy holders to carry out the instructions received from their clients, by recommending that issuers provide a reasonable number of voting boxes at general meetings to proxy holders requesting such devices;
- fight against the billing of fees that dissuade shareholders from voting or registering their shares;
- strengthen the trust of market participants in the management of votes, by recommending that the players involved produce a methodological guide on how votes are processed at general meetings;
- strengthening the transparency of voting by proxy and by correspondence, by recommending, for example, in the case of electronic voting, that any vote by proxy or by correspondence be time-stamped and that its reception be confirmed electronically, and, for all types of vote, that shareholders may obtain confirmation that their votes have been taken into account at the general meeting or the reason why they have not been taken into account; and
- strengthening the transparency of rejected votes, by recommending that the total number of rejected voting rights of which the issuer is aware on the day of the general meeting be publicly disclosed when the results of the vote are

announced.

France – Competence of AMF regarding certain breaches of the rules on share buyback programs

In its [Sanction Commission decision No. 17-05 of 5 July 2018](#), AMF clarified its scope of responsibility with regard to breaches of the rules on share buyback programs.

The sanctions relating to the rules in relation to (i) the requirement of prior approval of the general meeting of shareholders for the implementation of the share buyback programs ([Article L225-209 of the French Commercial Code](#)), (ii) the prohibition for the company to hold more than 10% of its own shares ([Article L225-210 of the French Commercial Code](#)) and (iii) the obligation to sell or cancel shares held above this threshold ([Article L225-214 of the French Commercial Code](#)), do not fall within AMF's disciplinary competence. Indeed, these provisions concern respect for the prerogatives of the general meeting and the proper functioning of the company. They are not likely to prejudice the market.

However, the sanctions relating to the rules in relation to the company's obligation to inform the AMF and the market before implementing the share buyback programs ([Article L225-212 of the French Commercial Code](#) and [Article 241-2 of the AMF General Regulation](#)), fall within the AMF's disciplinary competence because their purpose is to ensure that the market is properly informed and to prevent market abuse.

France – Verification by an independent third party of the information contained in the non-financial performance declaration

[Article L225-100](#) and [L225-102-1 of the French Commercial Code](#) requires certain companies (indicated below) to prepare a declaration of non-financial performance in their management report. Article L225-102-1 of the French Commercial Code provides for the involvement of an independent third party body to verify the social, environmental and societal information contained in the reports of the Board of Directors or the Management Board.

[The decree of 14 September 2018](#) amends the terms under which the independent third party agency carries out its mission, previously defined by Article [A 225-105-2 of the French Commercial Code](#).

As a reminder, only unlisted companies with a balance sheet total or net turnover exceeding EUR 100 million and a number of employees exceeding 500, and listed companies with a balance sheet total exceeding EUR 20 million or a net turnover exceeding EUR 40 million and a number of employees exceeding 500, are subject to the obligation to prepare a non-financial performance declaration.

[The decree of 14 September, 2018:](#)

- deletes the certificate that must appear in the report of the independent third party agency in order to retain only the reasoned opinion and diligences taken by this agency ([Article R 225-105-2 of the French Commercial Code](#));
- specifies that the independent third party agency must express its reasoned opinion by declaring ([Article A 225-3,II of the French Commercial Code](#)) :

- "either that it has not identified any material misstatement likely to call into question the compliance of the declaration with the provisions of Article R. 225-105 and the fairness of the information provided;
- either that the conformity of the declaration or the sincerity of the information provided requires reservations described in its report;
- that it is impossible for the independent third party agency to express a conclusion on the declaration".

These provisions shall apply from 22 September 2018.

- **Data Protection**

France – French TES file approved by the Conseil D'Etat

The French Conseil d'Etat approved the "secure electronic documents" file (in French "TES") created in 2016 in order to facilitate the issuance and renewal of ID documents ([Decree n°2016-1460, October 28th, 2016](#)). The TES file contains personal data of passport or identity card holders, such as their names, fingerprints, home addresses, digital signatures, photographs, etc.

In a decision dated October 18th, 2018 ([CE October 18th, 2018, n°404996](#)), the Conseil d'Etat dismissed claims for cancellation of the decree brought by several organizations, claiming that the TES file violated individuals' right to privacy. According to the Conseil d'Etat, the TES file, which can only be accessed by people authorized by the decree, is a tool of "*public interest*" useful for authentication and anti-fraud purposes, which does not constitute a "*disproportionate breach*" of individuals' privacy rights.

France – Certification of DPO skills: the CNIL adopts two reference frameworks

Following a public consultation held from May to June 2018, the CNIL [adopted](#) on October 11th, 2018, two reference frameworks for the certification of Data Protection Officers (DPOs): one concerning [certification](#), which lists the skills required from a candidate for certification, and the other for [accreditation](#) addressed to the bodies responsible for issuing this certification. Nevertheless, this certification is not required in order to perform the functions of DPO and any certification body may still certify DPOs on the basis of its own standards.

Reminder by the CNIL of the rules on processing conducted from audience and traffic measurement devices in public places

In addition to the obligation to carry out a privacy impact assessment whenever systematic monitoring of people happens, the CNIL recommends a number of [measures](#) regarding devices which collect personal data (such as location) from mobile terminals, used to compile measurement statistics on audience and traffic within publicly accessible areas.

The CNIL states that they can be used in different ways: either by basing data processing on legitimate interest, when it is combined with reliable pseudonymization then anonymization measures or destruction of the data after 24 hours, or with short-

notice anonymization measures (within 5 minutes of their collection); or by basing the processing on free, specific and informed consent obtained prior to the data collection.

France – Formal notice by the CNIL to obtain valid consent to the processing of data collected by mobile applications

Following on-site controls, the CNIL has issued a formal notice to French company SINGLESPOOT, by [Decision n°MED-2018-043 dated October 8th, 2018](#), urging it to comply with the [French Data Protection Act](#) within three months. In particular, the CNIL points to SINGLESPOOT's insufficient methods of obtaining consent and managing data storage and security, with respect to processing of geolocation data for the purpose of targeted advertising. SINGLESPOOT had been using technical tools integrated into the code of its partners' mobile applications, allowing it to collect data from smartphone users.

- **Employment**

France - Two decrees regarding the Social and Economic Council (SEC)

Limitation of the successive mandates number

[The Decree n° 2018-920 dated 26 October 2018 \(Journal officiel dated 28 October 2018\)](#) specifies that if the pre-election agreement protocol derogates the rule according to which the successive mandates number of SEC's elected representatives is limited to three, this derogation applies for an indefinite period, unless otherwise specified.

Financing of the social and cultural activities

[The Decree n° 2018-920](#) limits to 10% the share of the annual operating budget surplus that can be transferred to the financing of social and cultural activities. In addition, the Decree provides for the recording of this transfer in the annual accounts and in the annual report of the SEC.

Composition of the group committee

[The Decree n° 2018-921 dated 26 October 2018 \(Journal officiel dated 28 October 2018\)](#) specifies that the number of the group committee members shall not exceed twice the number of group companies with a SEC undertaking the extended capacity of companies with at least 50 employees.

Law regarding the fight against fraud

[Law n° 2018-898 dated 23 October 2018 \(Journal officiel dated 24 October 2018\)](#) provides for the reinforcement of the social security bodies communication right, in particular, by doubling the amount of the penalties in case of reiteration of refusal to communicate the documents and information requested by the agents of social security bodies. In addition, this law provides for the opening of access to data held by the Public Finances Directorate General (DGFip) to the employment inspection agents, the relevant institution in charge of collecting social security contributions (URSSAF), and the general social security funds.

Decree regarding the Social Security litigation procedure

[The Decree n° 2018-928 dated 29 October 2018 \(Journal officiel dated 30 October 2018\)](#) sets the procedural provisions applicable to the challenges of social security bodies decisions in the courts of first instance, the courts of appeal, the administrative courts, and the administrative courts of appeal, as from 1 January 2019, which is the date of suppression of the specific courts of social security general litigation, disability litigation, and social assistance.

Ministerial Decree regarding the additional appointment of employment tribunal judges

[The Ministerial Decree dated 8 October 2018 \(Journal officiel dated 10 October 2018\)](#) sets the timetable for the submission of applications and the list of vacant seats regarding additional appointments of employment tribunal judges for the term 2018-2021.

- **Insurance**

France – AML-FT – Publication of Joint Guidelines from the ACPR and TRACFIN on duty to report and to inform TRACFIN

The French Regulatory Authority (*Autorité de contrôle prudentielle et de résolution* – "ACPR") and Financial Intelligence Unit (*Traitement du renseignement et action contre les circuits financiers clandestins* – "TRACFIN") have updated on 5 November 2018 their [Joint Guidelines](#) on the duty to report and to inform TRACFIN, following the entry into force, on 1st October 2018, of Decree n° 2018-284 of 18 April 2018 strengthening anti money laundering and terrorist financing measures.

France – Governance – Appointment and renewal of insurance undertakings' directors

The ACPR published on 29 October 2018 [Instruction n° 2018-I-19](#) amending Instructions n° 2015-I-02 and 2017-I-10 relating to the appointment and the renewal of directors of insurance undertakings which are not subject to the Solvency II regime ("Instruction").

As per the Instruction, which entered into force on 25 October 2018, the ACPR will now have to be notified with regards to the appointment and the renewal of insurance undertakings' directors through the authorisations portal "[OneGate](#)". The ACPR also aligned the modalities of data collection and data retention in relation to the above with the provisions of the general data protection regulation.

European Union – Insurance distribution – Cooperation between National Competent Authorities

The European Insurance Occupational Pensions Authority ("EIOPA") published on 10 October 2018 a [Decision](#) ("Decision") on the cooperation of the competent authorities of the Member States of the European Economic Area ("NCAs") with regard to the Insurance Distribution Directive (EU) 2016/97, replacing the Luxembourg Protocol (CEIOPS-DOC-02/06), and related [Appendices](#).

The Decision aims at strengthening the cooperation between NCAs with regard to insurance distribution activities, and notably

in terms of cooperation and exchange of information between NCAs, registration of insurance intermediaries, ongoing supervision of insurance and reinsurance distributors, and complaints handling.

European Union – PRIIPs – Consultation on proposed changes to the key information document

The European Supervisory Authorities ("ESAs") issued on 8 November 2018 a [Consultation Paper](#) ("**Consultation**") and the [corresponding template for comments](#) concerning amendments to the information to be included in the Key Information Document ("**KID**") provided for under Delegated Regulation n° 2017/653 supplementing Regulation n° 1286/2014 of 26 November 2014 on Packaged Retail and Insurance-based Investment Products ("**PRIIPs**").

Feedback is to be submitted to the EIOPA by 6 December 2018.

- **Intellectual Property**

France - The "PACTE" bill voted at first reading by the French National Assembly

[The action plan for business growth and transformation](#) (the "**PACTE Bill**") has been voted by the French Parliament on October 9th, 2018. This bill notably includes provisions regarding patent law in order to strengthen the attractiveness of French patents.

Inter alia, the PACTE Bill creates an opposition procedure against patents delivered by the French Industrial Property Office to allow third parties to request the revocation or modification of a patent through administrative proceedings. The aim is to reduce the number of cases pending before the specialized Chamber of the Paris Court (article 42).

Article 42 bis of the PACTE Bill also amends Article L.612-12 of the French Intellectual Property Code to strengthen the examination proceedings before the French Industrial Property Office, allowing the latter to dismiss a patent application for lack of novelty or inventive step (at the moment, only the "obvious" lack of novelty is likely to justify a rejection).

The amendment aimed at creating a provisional patent application (article 40) has been withdrawn, but the Government indicated that it will proceed by way of regulation to implement this measure.

Finally, it is provided to extend the current period of the utility patent from 6 to 10 years with the possibility to convert it in a patent at its term.

The PACTE Bill shall be presented to the French Senate in January 2019.

European Union - Ratification by the European Union Council of the Marrakesh Treaty to facilitate access to published works for persons, who are blind, visually impaired or otherwise print disabled.

[The Marrakesh Treaty](#) (the "**Treaty**") has been ratified by the European Union Council on October 1st, 2018. This Treaty provides two major exceptions to copyright law and related rights in order to facilitate the access to literary works (see

Legislative and Regulatory Newsletter- July and August 2017, September 2017).

The first exception is the possibility for authorized entities to perform a copy or to modify of books in accessible formats for visually impaired without any authorization from the copyright owner.

Then the second exception consists in facilitating the cross border circulation of copies in an accessible format between authorized entities and beneficiaries.

On September 13th, 2017, the European Union Council had already adopted the [Directive 2017/1564](#) and the [Regulation \(UE\) 2017/1563](#) to implement the measures provided by the Treaty.

- **Litigation**

France – The [Decree No. 2018-931 of 29 October 2018](#) amends the Decree No. 78-381 of 20 March 1978 on judicial conciliators.

From now on, judicial conciliators will have to comply with initial and continuing training obligations. In the event of non-compliance with these obligations, the first President of the Court of Appeal, after an adversarial procedure, may decide not to reappoint the conciliator.

The decree extends the appointment period for judicial conciliators from two to three years for appointments and reappointments made after 1 January 2019.

In order to facilitate the use of this alternative method of dispute resolution, the text provides for the establishment and publication of a list of judicial conciliators working in the jurisdiction of the courts of appeal, which will be made available to the public.

- **Tax**

France – Fight against tax fraud: publication in the French official gazette of the Act on the fight against fraud, which strengthens the means of control and the penalties in the field of tax fraud

[Act n° 2018-898 dated 23 October 2018](#) (hereafter the "**Act**"), published in the French Official Gazette on 24 October 2018, strengthens the French tax administration's (the "**FTA**") means of control and the related penalties, and also aims to provide for better coordination of tax and criminal procedures.

As a reminder, [Article 1741 of the French Tax Code](#) provides that any person who has fraudulently evaded or attempted to evade tax, in particular by concealing taxable amounts, organizing his insolvency, accounting irregularities or other manoeuvres obstructing tax collection, shall be found guilty of a tax fraud offence.

Among the measures introduced in the Act are mainly featured (i) the creation of a new fiscal police force, (ii) the strengthening

and increase of the means of control and penalties that may be applied by the FTA, in particular in cases of tax flagrance and cross-border transactions, and (iii) a softening of the FTA's monopoly on the initiation of criminal proceedings in tax matters (commonly known as the "Bercy lock").

France – Special merger regime: the FTA updated their official guidelines on the modification of the special merger regime

The FTA updated their official guidelines in order to align the conditions for applying the special merger regime with European Union law.

As a reminder, [Article 23 of the French first Amending Finance Act for 2017 \(n°2017-1775\)](#), amended the special regime applicable to restructuring operations on several points, in particular by abolishing the prior approval procedure for cross-border transactions and by transposing the general anti-abuse rule provided for in the 2009 UE Merger Directive.

In its new official guidelines, the FTA clarifies these new provisions, which apply to mergers, demergers or partial contributions of assets carried out on or after 1 January 2018 and to transactions involving the allocation of securities representing partial contributions of assets carried out on or after 1 January 2018 ([BOI-RPPM-RCM-10-20-30-30](#) ; [BOI-BNC-BASE-30-30-20-50](#) ; [BOI-IS-CHAMP-10-50-20-10](#) ; [BOI-IS-BASE-10-10-10-20](#) ; [BOI-IS-FUS](#) ; [BOI-IS-GPE-50-40](#) ; [BOI-CF-INF-20-10-20](#)).

France – Corporate income tax: the FTA updated their official guidelines in order to take into account the prohibition of deduction of taxes levied abroad in accordance with a double tax treaty

The FTA updated their official guidelines with respect to the general principle of expenses deductibility in order to take into account the new prohibition to deduct *"taxes levied by a State or territory in accordance with the provisions of a double tax treaty on the elimination of double taxation in the field of income tax concluded by that State or territory with France"*, which was introduced by [Article 14 of the French first Amending Finance Act for 2017 \(n°2017-1775\)](#).

As a reminder, [Article 39,1,4° of the French Tax Code](#) lays down a general principle of deductibility of taxes levied on companies for the purposes of computing their taxable income, provided that such deduction is not expressly prohibited by law.

The FTA therefore incorporates into their official guidelines the new adjustment provided in [Article 39,1,4° of the French Tax Code](#) with respect to tax levied abroad in accordance with a double tax treaty ([BOI-BIC-CHG-40-30](#)).

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