

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 September 2015.

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Summary of miscellaneous French draft legislation

- **Draft constitutional law to amend the Environment Chart to specify the scope of the precautionary principle**, filed at the Senate on December 3, 2013 – Adopted in first reading by the Senate on May 27, 2014.
- **Draft law on class actions for discrimination and fight against inequalities**, n°1699, filed before the National Assembly on January 14, 2014 – Adopted in first reading by the National Assembly on June 10, 2015.
- **Draft law relating to biodiversity**, n°1847, filed on March 26, 2014 – Adopted in first reading by the National Assembly on March 24, 2015.
- **Draft law relating to health**, n°2302, filed on October 15, 2014 – Adopted by the National Assembly on April 14, 2015 – In debate before the Senate from September 14 to 16, 2015, from September 28 to October 2nd and on October 6, 2015.
- **Draft law relating to duty of vigilance of mother companies and companies placing orders**, n°2578, filed on February 11, 2015 – Adopted in first reading by the National Assembly on March 30, 2015 – In discussion in public session at the Senate on October 21, 2015.
- **Draft law relating to the fight against discrimination at the rate of social precariousness**, n°378, filed at the Senate on March 31, 2015 – Adopted in first reading by the Senate on June 18, 2015.
- **Draft law relating to the second digital dividend and the pursuit of the modernisation of digital television transition**, n°2822, filed at the National Assembly on May 28, 2015 – Joint committee's text adopted on September 15, 2015 – Adopted by the National Assembly on September 30, 2015 – In discussion by the Senate on October 5, 2015.

- **Draft law relating to freedom of creation, architecture and heritage**, n°2954, filed at the National Assembly on July 8, 2015 – Under examination in first reading from September 28 to October 1, 2015.
- **Draft law relating to various provisions in connection with risk prevention for the transposition of EU Law into French Law**, n°2982, filed at the National Assembly on July 15, 2015 – Adopted in first reading by the National Assembly on September 16, 2015.
- **Draft law which ratifies ordinance n°2015-378 dated April 2, 2015 that transposes directive 2009/138/CE on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)**, n°3005, filed at the National Assembly on July 22, 2015.
- **Draft law for the enforcement of measures relating to the 21st century justice**, n°661, filed at the Senate on July 31, 2015.
- **Draft law for the surveillance of international electronic communications**, n°3042, filed at the National Assembly on September 9, 2015 – In discussion in public session on October 1, 2015.
- **Draft finance law for 2016**, n°3096, filed at the National Assembly on September 30, 2015.

Enacted laws

- **Ordinance n°2015-1174 of September 23, 2015 relating to the legislative part of Book I of the urban planning Code** - OJ of September 24, 2015.
- **Ordinance n°2015-1127 of September 10, 2015 on the reduction of minimum number of shareholders in non-listed joint stock companies** – OJ of September 11, 2015.

1. Banking

France - Transposition of the directive 2014/59/UE dated 15 May 2014

The decree n°2015-1160 dated 17 September 2015 ([J.O n°0218 du 20 September 2015](#)) set forth various provisions necessary for the transposition of the directive 2014/59/UE dated 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms. The decree specifies the provisions relating to the resolution of banking crisis and, in particular the provisions relating to preventative recovery plan and to the minimum requirement for own funds.

Four ministerial decrees (*arrêtés*) dated 11 September 2015 also transpose some provisions of the directive 2014/59/UE dated 15 May 2014. They specify:

-the content of the preventative recovery plan ([J.O n°0218 dated 20 September 2015](#));

-information that resolution authority may request institutions to provide for the purposes of drawing up and maintaining resolution plans ([J.O n°0218 du 20 September 2015](#));

-the resolvability assessment criteria ([J.O n°0218 du 20 September 2015](#));

-the intervention of the deposit guarantee and resolution funds ([J.O n°0218 du 20 September 2015](#)).

The decree n°2015-1160 and the four ministerial decrees entered into force on 21st September 2015.

France - Interest rate of the sums deposited at the *Caisse de dépôts et consignations*

The ministerial decree (*arrêté*) dated 24 September 2015 ([J.O n°0226 dated 30 September 2015](#)) provides that the interest rate paid by the *Caisse des dépôts et consignations* to the beneficiaries for the sum deposited is 0,75%.

The ministerial decree dated 24 September 2015 entered into force on 1st October 2015.

2. Capital Markets

France - EMIR – Clearing obligation for certain CDS

ESMA published on 2 October 2015 a draft regulatory technical standard for the central clearing of CDS (credit default swaps). The publication of this standard follows the release by the European Commission of a regulatory technical standard on 6 August 2015 on interest rate derivatives which have to be centrally cleared.

The draft published by ESMA defines the type of CDS contracts subject to central clearing, the categories of counterparties subject to this obligation and the dates by which this obligation will enter into force.

The European Commission has three months to endorse the draft regulatory technical standard.

France - AMF - Amendment of Book II of the General Regulation

The decree dated 2 September 2015 was published on the official journal on 16 September 2015 amended Book II of the general regulation of the AMF.

Notably, the amendments relate to the list of information to which the regulation applies, the removal of the reporting of quarterly financial information and the definition of home member state. Finally, the obligation to make the new loan issues public is removed as well.

3. Corporate

France - Reduction of the minimum mandatory number of shareholders in non-listed joint stock companies

Ordinance n°2015-1127 of 10 September 2015, published at the Official Journal on 11 September 2015, lowers the minimum number of shareholders in non-listed joint stock companies (*sociétés anonymes*) from seven to two. Nonetheless, the minimum number of shareholders in listed joint stock companies remains seven. As a consequence, the claim for dissolution of a company on the basis of non-compliance with this minimum is now distinguished according to the situation: for non-listed joint stock companies, any interested party shall now be entitled to bring such a claim in court in the sole case where the company is not held by two shareholders at least.

These provisions came into effect on 12 September 2015.

France -Strengthening of the regime of employees' mandatory representation at board of directors or supervisory board

Law n°2015-994 of 17 August 2015 for social dialogue and employment, published at the Official Journal on 18 August 2015, extends the obligation of employees' representation at administrative or supervisory board to smaller joint-stock companies (*sociétés anonymes*) and limited stock partnerships (*sociétés en commandite par actions*).

First, the Law reduces the workforce size thresholds triggering such obligation to 1,000 permanent employees in France – instead of the previous 5,000 – or 5,000 permanent employees worldwide - instead of the previous 10,000. Besides, the Law removes the condition of an existing workers' council.

In order to be compliant with this new employees' representation, the Law provides that a general meeting shall decide the statutory amendments necessary to the election or appointment of the employees' representatives within six months following the close of (i) the 2016 financial year for the companies employing more than 5,000 employees in France or more than 10,000 employees worldwide, or (ii) the 2017 financial year for the companies employing more than 1,000 employees in France or more than 5,000 employees worldwide. Such representatives must start their office no later than six months following the above mentioned general assembly. For the companies that have not been subject to such obligation so far, but subsidiary of which has been subject to it, the employees' representatives must start their office no later than the date on which the office of representatives in the subsidiary terminates.

Finally, the Law extends the obligation to comply with the gender parity in the event of appointments of employees' representatives by the workers' council, the central workers' council or the group workers' council. Such obligation came into effect on 19 August 2015.

France - New disclosure requirements for large size joint stock companies

Law n°2015-992 on energy transition for green growth of 17 August 2015, published at the Official Journal on 18 August 2015, completes the social and environmental disclosure requirements for large size joint stock companies (*sociétés anonymes*) and limited stock partnerships (*sociétés en commandite par actions*).

These companies must (i) as soon as the next management report is completed, state in it the undertakings of the company in favour of the circular economy, and (ii) as from the financial years ended 31 December 2016, mention in their management report the consequences of their activity and the use of goods and services they produce on the climate change.

4. Employment

France - Sunday work: geographical areas delimitation criteria

The Decree dated 23 September 2015 n°2015-1173 adopted in application of the "Macron" Law sets out criteria for determining commercial areas, tourist areas and international tourist areas.

-Commercial areas: determined by a supply of services and a potential increase of the demand.

-Tourist areas: containing a significant additional population during specific periods of the year because of its natural, artistic, cultural or historical features, or the existence of recreational or thermal facilities highly frequented.

-International tourist areas: determined considering the international reach of these areas, the exceptional influx of tourists residing outside of France and the importance of their purchases.

-12 ministerial orders from the ministry of economy dated of September 25th, 2015 determine the international tourist areas for Paris.

France - Training: Training contracts will be dematerialized

The Decree dated 28 August 2015 n°2015-1093 provides that from September 1st, 2016, companies will have to update their training contracts in a dematerialized form for the accredited fund collecting and distributing agencies (Opca) on the online training portal, within 5 days after the beginning of each contract.

As well, the acceptance decision or the refusal decision to take over the training of the Opca will be notified to the employer and also the DIRECCTE in a dematerialized form.

Finally, the employer shall notify within 30 days to the DIRECCTE and the Opca, through the dematerialized service of any breach of the training contract before its term.

5. Insurance

France - Ratification of the Council of Europe Convention on Laundering

The Law n°2015-1197 of 30 September 2015, published in the Official Journal of the French Republic on 1st August 2015 (the "**Law**"), has authorised the French Parliament to ratify the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism of the Council of Europe of 16 May 2005. This Convention was signed by France in 2011 and aims at updating and expanding the previous Convention of 1990 notably by supplementing the section on terrorism financing.

European Law - EIOPA: opinion on group solvency calculation in the context of equivalence

EIOPA has issued an opinion concerning insurance groups which have their head office or carry out their business in countries outside the European Economic Area ("**EEA**") under solvency regimes which are considered equivalent to Solvency II regime. This opinion aims at securing uniform procedures and consistent practices for the calculation of the solvency position of such groups as well as to ensure that the supervisory assessment of the availability of the third countries undertakings eligible own funds is performed in a convergent manner. EIOPA also recommends national competent authorities to apply the highest level of capital requirement in the third country for calculating the group solvency position.

European Law - EIOPA: propositions concerning the identification and calibration of infrastructure investment risk categories

EIOPA addressed to the European Commission, on 29 September 2015, a series of proposals, published in its final report resulting from a consultation conducted until February 2015. Its advice concerns the identification and calibration of infrastructure investment risk categories held by insurers. EIOPA especially recommends the creation of a specific new asset class devoted to high-quality infrastructure investment integrated in the calculation of capital requirements applicable to insurers under Solvency II. These high quality infrastructures are qualified as such by EIOPA provided that they meet certain criteria. EIOPA also proposes that the risk charges change depending on the investment is made in equity or debt infrastructure.

European Law - Solvency II: Delegated Regulation on treatment of infrastructure and European Long Term Investment Funds

On 30 September 2015, the European Commission adopted a [Delegated Regulation](#) (the "**Regulation**") amending the Delegated Regulation relating to the calculation of regulatory capital requirements for several categories of assets held by insurer or reinsurer following the series of proposals made by the EIOPA in its final report. The Regulation mainly amends the way the rules apply to insurers' investments in infrastructure. The European Parliament and the Council of the European Union have three (3) months to object the Regulation, with the possibility to extend this period for another three (3) months. After the expiration of this objection period, the Regulation will be published in the Official Journal of the European Union and will enter into force the day following the date of its publication.

6. Intellectual property

France - Cigarettes plain packaging rejected by the Senate

On 3 April 2015, the French National Assembly ("Assemblée Nationale") adopted one of the main measures of the Bill relating to the modernization of our health system, aiming toward the standardization of the packing, packaging and additional wrappers for cigarettes and rolling tobacco, on the one hand, and for cigarette paper and paper to roll cigarettes, on the other hand. Said news had already been published in our [Legislative and Regulatory Newsletter](#) in March 2015.

As a reminder, the aim of this Bill was in particular to implement Article 24 of the [Directive 2014/40/EU of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products](#).

However, on 16 September 2015, the French Senate ("Sénat"), favorable to a strict implementation of this Directive, adopted an amended version of the Bill stating that "*the packaging units and the external wrapping for cigarettes and rolling tobacco shall carry, under conditions set by an order from the Minister of Health, sanitary warnings combining a warning message and a photograph or a corresponding illustration covering 65% of their external surface, front and back.*"

7. New Technologies

France - Healthcare sector

The French data protection authority (the CNIL) published, on 11 June 2015, a unique authorization relating to screening programs for breast cancer and colorectal cancer implemented by the management structures. It also adopted on 16 July 2015, a Reference Methodology governing the processing implemented in the context of non-interventional performance studies on *in vitro* diagnostic medical devices. On 11 September 2015, it announced its commitment to continue the simplification of the formalities in the healthcare sector.

France - Children's privacy

Due to the results of a worldwide audit conducted by 29 data protection authorities showing that websites visited by children do not sufficiently protect children's privacy, the CNIL issued, on 2 September 2015, two sets of guidance to assist website publishers in complying with their obligations and also help parents guide their children to ensure a safer internet use.

European Law - Safe Harbor

On 6 October 2015, the Court of Justice of the European Union invalidated the European Commission's decision relating to the transfer of personal data from European Union countries to the United States on the basis of the so-called "Safe Harbor" scheme. The Court held that the European Commission could not merely analyse the scheme but had to appreciate whether the United States effectively ensure "*a level of protection of fundamental rights essentially equivalent to that guaranteed within the EU under the directive read in the light of the Charter*".

8. Procedures

France - Administrative procedure

-Amendment to the French code of administrative justice

Decree n°2015-1145 of 15 September 2015, published in the Official Journal on 17 September 2015, amended the regulatory part of the French code of administrative justice.

Many points of litigation procedure are amended. Thus, in case of related claims between a petition under the jurisdiction of a first-instance administrative court and another one under jurisdiction of an administrative court of appeal, the latter will have jurisdiction.

Moreover, the decree provides for an exemption from the two-month deadline to lodge an appeal before the French Supreme Court in the case of a decision handed down before examination of the merits. The deadline is extended until expiration of the deadline to lodge an appeal before the French Supreme Court against the decision that definitely settles the merits of the dispute.

Clarifications are also made as to the terms of enforcement of legal decisions.

9. Public Law

France - Modification of the thresholds related to public procurement

Decree n°2015-899 dated 17 September 2015, published in the O.J dated 20 September 2015, modifies the threshold below which public contracts can be awarded without competitive tender, by increasing the threshold from Eur 15,000 to 25,000 (without value added tax). Below this threshold, public authorities shall ensure that the selected offer properly fits their needs and shall not systematically award the contracts to the same economic operator. The Decree shall apply from 1 October 2015 onwards.

France - Operation of new rail passenger international services

Decree n°2015-1167 dated 22 September 2015, published in the O.J dated 23 September 2015 related to new rail passenger international services modifies the procedure applicable to the operation of new international passenger services prior to requesting infrastructure capacity from the infrastructure manager. The Decree implements into national law provisions of Directive 2012/34/UE dated 21 September 2012 establishing a single European railway area and Commission implementing Regulation 869/2014 of 11 August 2014 on new rail passenger services, and takes into account the changes introduced into national railway regulations by Law n°2014-872 dated 4 August 2014 relating to railway reform.

10. Tax

France - Corporation tax

-French research tax credit: validation by the French tax authorities of a minimum amount of eligible expenses

Depending on their annual turnover, certain SMEs may file a tax ruling request with the French tax authorities in order to obtain the validation of a minimum amount of eligible expenses to the French research tax credit. This ruling must be filed with the French tax authorities at least six months before the deadline date for submitting the research tax credit annual declaration (*i.e.*, *tax form n°2069-A-SD*).

The French tax authorities provided general guidelines with respect to the scope, the eligible entities and the requirements to be met with respect to ruling requests filed as from 1 September 2015 (*BOI-SJ-RES-10-20-20-20-20150902*; *BOI-SJ-RES-10-20-20-30-20150902*; *BOI-SJ-RES-10-30-20150902*; *BOI-LETTRE-000188-20150902* and *BOI-ANNX-000294-20150902*).

-Exceptional 40% deduction

The Law n°2015-990 dated 6 August 2015 enacted (*under Article 39 decies of the French Tax Code – the "FTC"*) the exceptional deduction of 40% in favor of the acquisition or the manufacturing of certain equipment, initially provided by the French tax authorities in their general guidelines.

The French tax authorities provided in their general guideline the detailed rules to benefit from this optional deduction as well as the list of eligible equipment. The French tax authorities also specified the conditions to be met for companies which acquire equipment under a leasing contract in order to benefit from this exceptional deduction (*BOI-BA-BASE-20-10-10-20150902* and *BOI-BIC-BASE-100-20150902*).

-Removal of the obligation to register the certificate of incorporation

The French tax authorities draw the consequences of the removal of the obligation to register with the French tax authorities the certificate of incorporation of a company, applicable as from 1 July 2015 (*BOI-ENR-DG-10-20-20150902*; *BOI-ENR-AVS-20-60-40-20150902* and *BOI-ENR-AVS-40-20-20150902*).

France - Tax audit and litigation

-Foreign assets: application of a new statute of limitation

In principle, the statute of limitation applicable to the French tax authorities, with respect to corporation tax and individual income tax, is increased from 3 years to 10 years when the reporting obligations related to assets held in foreign countries are not respected by French individual and corporate taxpayers. The French tax authorities specified in their general guidelines the detailed rules as regards the application of this increased statute of limitation (*BOI-CF-PGR-10-20150915*; *BOI-CF-PGR-10-50-20150915* and *BOI-ANNX-000468-20150915*).

This increased statute of limitation will notably apply when the reporting obligations related to (i) structures incorporated in "*tax heavens*" (*Articles 123 bis, 209 B and 238 A of the FTC*) or (ii) foreign accounts, life insurance contracts held in foreign institutions or trusts (*Article 1649 A, 1649 AA and 1649 AB of the FTC*) have not been respected.

-Transfer pricing: conditions in order to benefit from the withholding tax exemption

The French tax authorities commented the provisions of Article L. 62 A of the French procedure code which entitles companies subject to tax reassessments related to transfer pricing to avoid the application of the French withholding tax on distributed income provided that such companies formally and unconditionally accept the tax reassessments notified by the French tax authorities ([BOI-BIC-BASE-80-20-20150902](#); [BOI-BIC-CHG-80-20-20150902](#); [BOI-CF-IOR-20-20150902](#); [BOI-CF-IOR-20-10-20150902](#); [BOI-CF-IOR-20-20-20150902](#) and [BOI-LETTRE-000236-20150902](#)).

As a reminder, pursuant to the transfer pricing theory (*provided by Article 57 of the FTC*), the French tax authorities might reassess the tax result reported by French companies with respect to income which was directly or indirectly transferred to related entities established in a foreign country, by mean of increase or decrease of the sale or purchase prices, or by any other means.

11. Telecoms

France - New law gives French telecom regulator (ARCEP) new powers

The Macron Act n°2015-990 dated 6 August 2015 for growth, activity and equality of economic opportunities, has adopted several important provisions in relation to the telecom sector:

-Right to amend mobile infrastructure sharing contracts

Article 122 of the Act creates a new Article L. 34-8-1-1 in the Postal and Electronic Communications Code (CPCE) that determines the conditions required to implement radio network sharing contracts. The ARCEP now has the power, after having consulted the Competition Authority, to amend such contracts unilaterally in order to limit their geographical perimeter, their duration or conditions of termination if the ARCEP considers that this is necessary further the objectives of the electronic communications regulatory framework. The reason for this extraordinary new power is to permit ARCEP to limit national roaming agreements and thereby force operators to build out their networks.

-Right to declare an entity as an "operator"

Article 121 of the Act adds a new paragraph in Article L. 33-1 CPCE, which empowers the ARCEP to unilaterally declare that an entity is an operator. The qualification of operator implies compliance with certain obligations, which include the routing of emergency calls and implementing the means required to perform legally ordered interceptions. This amendment was proposed to deal with service providers that ARCEP believes are operators but who refuse to register as an operator in France.

-Guidelines to determine the tariffs for access to municipal fiber networks

The deployment of fiber networks throughout the whole territory (as part of the "Enhanced Broadband for All" plan) should be finalised in 2022, and is subject to a particular attention from the Government. The Act has created a new section VI of Article L. 1425-1 of the General Local Authorities Code that empowers the ARCEP to release guidelines in order to determine the tariffs to access public-initiative networks. However, these guidelines will not be compulsory but will put pressure on the operators which would be tempted to lower the tariffs

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