

The Paris office of Hogan Lovells LLP 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 2011.

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## Summary of miscellaneous French draft legislation

- **Bill to maintain and create jobs** - adopted on first reading by the *Assemblée nationale* on 9 June 2009
- **Bill aiming for greater transparency and fairness in remuneration policies for business managers and market operators** - filed on 2 September 2009 - adopted on first reading by the *Assemblée Nationale* on 20 October 2009
- **Bill aiming to reinforce consumer protection in distance selling**, n°1940 - filed on 29 September 2009 - adopted on first reading by the *Assemblée Nationale* on 20 January 2010.
- **Bill relating to equal representation of woman and men on boards of directors and supervisory boards and to professional equality**, n°2140, filed on 3 December 2009 - adopted on first reading on 27 October 2010
- **Bill to modernise the regulated judicial and legal professions**, n°2383, filed on 17 March 2010 - adopted on first reading by the *Assemblée Nationale* on 30 June 2010 and by the *Sénat* on 8 December 2010
- **Bill on commercial planning**, n° 2490, filed on 3 May 2010 - adopted on first reading by the *Assemblée Nationale* on 15 June 2010 and by the *Sénat* on 15 December 2010
- **Bill in relation to police custody**, n° 2855, filed on 13 October 2010 - adopted on first reading by the *Assemblée nationale* on 25 January 2010
- **Bill orienting and organising internal security performance**, n°1697, filed on 27 May 2009 - adopted in *Commission Mixte Paritaire* on 26 January 2011 - awaiting public reading and enactment
- **Bill to simplify and improve the quality of the law**, n° 1890, filed on 7 August 2009 - adopted on first reading by Parliament on 14 December 2010

## Enacted laws

- **Law n°2011-94 of 25 January 2011 to reform representation before the courts of appeal** - OJ of 26 January 2011
- **Law n°2011-12 of 5 January 2011 adapting legislation to European Union law** - OJ of 6 January 2011

<sup>1</sup> The English translation of the instruction is not yet available on the AMF website.

<sup>2</sup> The English translation of the instruction is not yet available on the AMF website.

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## 1. Banking

### France - Modernization of TRACFIN

Decree n°2011-28 and an order, both dated 7 January 2011, modify the organisation of TRACFIN (*Intelligence Treatment and Action against Underground Financial Circuits*). The operational activity of this entity is henceforth based on two departments: (i) the Analysis, Intelligence and Information Department (DARI), in charge of suspicious activity reports and relationships with professionals and (ii) the Investigation Department (DE), in charge of further investigation in complex cases. The new organisation also includes a unit to handle terrorism financing cases. Finally, the order dated 7 January 2011 provides a specific role for the legal advisor of TRACFIN whose advisory opinions will be mandatory for all matters conveyed to the judicial authority.

### International - Basel III Regulations

The Basel Committee has issued loss-absorbency criteria which will lead to instruments included in Tier 1 and Tier 2 capital being considered part of regulatory capital. As of 1 January 2013, all instruments issued by a bank will have to include a provision requiring them to be written off or converted into common equity when the bank faces financial difficulties. This mechanism will be implemented when (i) a bank is required to impose a write-off on its subordinated creditors, or when (ii) the State decides to inject public sector capital into the bank.

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## 2. Capital Markets

### France - Completion of the securitisation legal regime by the AMF

The *Autorité des marchés financiers* ("AMF") has completed the reform of the legal framework for securitisation initiated by Order n° 2008-556 of 13 June 2008 and Decree n° 2008-711 of 17 July 2008. Thus, the AMF has added to its General Regulations (i) a new article 315-75 establishing the means of calculating the minimum amount of capital for a portfolio management company managing at least one securitisation fund and (ii) a chapter 1 bis in book IV which deals with rules to be followed by securitisation funds whose securities are offered to the public or admitted to trading on a regulated market or organised multilateral trading facility.

This is supplemented by an instruction of the AMF n° 2011-01<sup>1</sup> dated 11 January 2011 which specifies the conditions and procedures for approval of the prospectus, the terms of distribution of securities issued by securitisation funds and the content and distribution terms of the prospectus.

The AMF has also published a series of questions and answers on securitisation funds<sup>2</sup> which mainly address the role of the management company and the depositary, offerings to the public, admission to trading and distribution of securities.

### France - Revision of calls for margin on regulated derivative markets in respect of professional investors' transactions

Article 516-15 of the AMF General Regulations sets out the principle by which an investment services provider may only accept an order for execution on a regulated market in derivative financial instruments if it obtains a sufficient margin deposit from the investor.

The AMF has introduced an exception to this principle when the investor is a professional. Article 516-15 of the AMF General Regulations as amended provides that the investment services provider can give the professional investor a specified period of time to constitute the margin.

### France - Certification by the AMF of the rating agency Japan Credit Rating Agency ("JCRA")

Pursuant to European Regulation n°1060/2009 on Credit Rating Agencies, the AMF has certified the Japanese agency JCRA. Therefore, ratings issued by JCRA may now be used for regulatory purposes within the European Union.

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### 3. Competition

#### France - Calculation of antitrust fines

The [Draft guidelines](#) of the French Competition Authority on the method for calculating antitrust fines for cartel cases, bid-rigging and abuses of a dominant position were published on the website of the French Competition Authority on 17 January 2011. This publication marks the start of a wide public consultation until 11 March 2011 that will be followed by a roundtable on 30 March 2011, before the final guidelines are published.

#### European law - Horizontal cooperation agreements

The [Guidelines](#) of the European Commission on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements were published in the O.J. of the EU on 14 January 2011.

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### 4. Corporate

#### France - Gender equality on boards of directors and supervisory boards of some *sociétés anonymes*

French Parliament definitively adopted, on 13 January 2011, a [law](#) relating to balanced representation of women and men on boards of directors and supervisory boards and professional equality (please refer to Legal and regulatory update January and November 2010). However, the law has not yet been enacted and therefore is not yet in force.

Concerning French *sociétés anonyme* and *sociétés en commandite par actions* (i) whose shares are traded on a regulated market or (ii) which will have employed more than 500 persons and had turnover or total assets and liabilities of more than 50 million Euros for at least three consecutive financial years by 1 January 2017, the proportion of directors or members of the supervisory board of each gender must be at least 40% after the first ordinary general meeting held after 1 January 2017.

As transitional measures, it is provided that on the date of publication of the law, if one gender is not represented on a board of a company, at least one representative of that gender must be appointed at the next ordinary general meeting. For such companies, the proportion of each gender must be at least 20% after the first ordinary general meeting held after 1 January 2014.

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### 5. Employment

#### France - Change to the social security treatment of severance pay

Article 18 of the [Social Security Financing Act for 2011 n°2010-1594](#) amends the social security regime for severance pay upon termination and forced termination of an employee or a director of a company or any person listed in article 80 (3) of the French Tax Code.

#### France - The new regime

Severance pay is subject to Social security contributions as follows:

- to the extent it exceeds 3 times the applicable annual Social Security ceiling at the time of the payment (i.e. €106,056 for 2011). In such cases, the excess above this amount will be subject to contributions. Indemnities paid pursuant to a redundancy plan are now also subject to contributions.
- when severance pay exceeds 30 times the annual Social Security ceiling (and is classed a "golden parachute"), it is subject to contributions in relation to the whole of the amount.

#### France - Transitional regime for severance payments in 2011

As a transitional measure, the cap beneath which Social Security contributions are not due will be maintained at 6 times the annual Social Security ceiling in the following cases:

- severance payments made in 2011 further to a termination which came into effect on 31 December 2010 at the latest;

- severance payments made in 2011 further to a termination forming part of a redundancy plan that was notified on 31 December 2010 at the latest;
- severance payments made in 2011 further to a termination taking effect in 2011, up to the limit of the amount set by a collective bargaining agreement applicable on 31 December 2010.

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## 6. Energy

### France - Codification of the Mining Code

Ordinance n°2011-91 dated 20 January 2011 regarding the codification of the legislative part of the Mining Code was published in the OJ on 25 January 2011.

The Ordinance, adopted pursuant to the law dated 12 May 2009 regarding the simplification and clarification of the law and the reduction of procedural requirements, aims to modernise and simplify the provisions governing mining operations while ensuring they are in harmony with the environment. It also aims to involve interested parties in the granting of mining titles. This new code will facilitate the exploitation of French underground resources.

The codification should be finalised before the end of 2011.

### France - Extension of emission quotas for aerial activities

Decree n°2011-90 dated 24 January 2011 regarding the integration of aerial activities into the greenhouse gas emission trading scheme was published in the OJ on 25 January 2011.

This decree, which follows publication of ordinance n°2010-1232 dated 21 October 2010, contains regulatory provisions incorporating and regulating aerial activities within the greenhouse gas emission trading scheme.

The decree states that for 2012, aerial operators will have until 31 March 2011 to send the Minister in charge of civil aviation their requests for free quotas.

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## 7. Insurance

### France - European Insurance and Occupational Pension Authority - Installation

The new European supervisory authority for the insurance sector, the European Insurance and Occupational Pension Authority ("EIOPA") came into being on 1 January 2011. It replaces the former Committee of European Insurance and Occupational Pensions Supervisors ("CEIOPS"). Its principal tasks are to support the stability of the financial system, market transparency and financial products, and to protect policyholders, pension scheme members and beneficiaries. It is also in charge of implementing the Solvency II directive ([please refer to the Legal and regulatory update - August/September 2010](#)).

### France - Solvency II Directive - Transitional measures

On 19 January 2011, the European Commission published a proposal for a directive completing the framework for financial supervision in Europe which, to this end, would amend certain insurance rules. The proposal includes the possibility of adopting certain transitional measures in the specific context of implementation of the Solvency II Directive. The proposal also confirms that the said Directive's entry into force has been postponed for two months and is intended to provide the new European Insurance and Occupational Pension Authority, in place since 1 January 2011, with the means of performing the tasks assigned to it. The proposal must now be sent to the Council and European Parliament for consideration.

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## 8. Intellectual Property

### France - New penalties for infringing economic information confidentiality

Following the announcements of French Minister for Economic Affairs and Finance Christine LAGARDE promoting economic intelligence and the

protection of business, against the background of the Renault "industrial espionage" case, a bill No. 3103 relating to economic information protection was filed with the *Assemblée Nationale* on 13 January 2011.

The bill provides special penalties for infringements or attempted infringements of the confidentiality of protected economic information, defined as information "*which does not form part of the general knowledge freely available to the public, which has (...) economic value for the undertaking, and for whose protection the legitimate owner has implemented substantive measures (...) in order to keep it secret*".

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## 9. New technologies

### France - Protection of consumers' personal data

Frédéric Lefebvre, State secretary in charge of Consumer Affairs, Alex Türk, President of the French data protection authority (CNIL) and Nathalie Homobono, Chief executive of the General Directorate for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF) signed on 6 January 2011 a protocol of cooperation to improve protection of consumers' personal data. The protocol will allow the CNIL and the DGCCRF to exchange information in order to reinforce their control activities.

### France - HADOPI warning emails

The High Authority for the distribution and protection of protected works on the Internet (HADOPI) is soon to enter the second stage of the staged warning process. This involves the sending of a second warning email followed by a registered letter with recorded delivery, in the case of continuing illegal Internet downloading.

### France - Social networks

After several dismissals of employees in connection with comments posted on social networks, the CNIL published on 10 January 2011 a series of questions and answers on the need to control information published on social networks. The CNIL refers to recent case law and recommends in particular that social network users have separate contact lists to distinguish their private and professional contacts.

### France - Presidency of the CNIL

As part of the bill relating to the defence of rights, the French government has suggested prohibiting the president of the CNIL from combining this function with a parliamentary mandate and with other functions such as authorizing visits by CNIL agents to private premises.

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## 10. Procedure

### France - Civil procedure

By means of a Decree adopted on 28 December 2010 and published in the OJ of 29 December 2010, the procedure before French civil courts of appeal was reformed and, as a result, the French code of civil procedure was amended. The reform affects the criteria for invalidity for statements of appeal and for inadmissibility for appeal submissions.

An order published the same day imposes requirements on electronic communications between lawyers and eleven courts of appeal in relation to cases involving compulsory representation in the appeal court.

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## 11. Public law

### European Law - Green Paper on the modernisation of the European Public Procurement Market

The European Commission published on 27 January 2011 a Green Paper on the modernisation of the European Public Procurement Market. It invites comments on possible legislative changes, dealing in particular with the access of smaller companies to procurement markets, reducing red

tape and promoting European cross-border procurement. The deadline for responses to the Green Paper is 18 April 2011.

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## 12. Real estate

### France - Smoke detectors

Decree n°2011-36 of 10 January 2011 published in the OJ of 11 January 2011 concerning the installation of smoke detectors in residential premises defines the characteristics of smoke detectors.

The Decree specifies the conditions for installation, maintenance and operation of smoke detectors and determines the circumstances in which these obligations are the landlord's responsibility.

The Decree also outlines the fire prevention measures to be implemented by landlords in the common parts of residential buildings.

These obligations must be met before 8 March 2015.

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## 13. Tax

### France - Wealth tax (ISF)

The French Tax Authorities issued a statement of practice dated 4 January 2011 (**statement of practice n° 7 S-9-10**) regarding the calculation and taxation threshold of wealth tax for 2011 (taxation threshold set at EUR 800,000 for 2011).

### France - Transfer pricing

The French Tax Authorities issued a statement of practice dated 4 January 2011 (**statement of practice n° 4 A-10-10**) regarding the documentation requirements to be met by companies in connection with their intra-group transactions.

### France - Social security charges

The French Tax Authorities issued a statement of practice dated 11 January 2011 (**statement of practice n° 5 I-5-10**) regarding the social security charges to be paid upon disposals of shares and securities.

### France - Tax deductible interest

The French Tax Authorities issued a statement of practice dated 18 January 2011 (**statement of practice n° 4 C-1-11**) regarding the maximum deductible interest rate for tax purposes (maximum annual rate of 3.82% for 2010 for financial years ending closing between 31 December 2010 and 30 January 2011).

### France - Annual returns regarding payments of interest or dividends (IFU)

The French Tax Authorities issued a statement of practice dated 24 January 2011 (**statement of practice n° 5 A-1-11**) regarding the filing requirements to be met in connection with IFUs.

### France - Disposal of receivables

The French Tax Authorities issued a ruling dated 28 December 2010 (**RES n° 2010/71 (TCA)**) regarding disposals of receivables made to refinance a financial activity. Disposals of receivables by a company within the context of its business, for instance the transfer of receivables by a factoring company to a securitisation fund or the sale by a bank of its receivables to another financial institution, fall within the scope of VAT but are VAT exempt pursuant to section 261 C of the French Tax Code, without any possibility to opt for VAT in accordance with section 260 C, 8° of the French Tax Code.

## International - Double tax treaties and bilateral agreements

- **Decree n° 2011-29** dated 7 January 2011: Bilateral agreement regarding exchange of information in tax matters between France and British Virgin Islands (BVI) signed in Paris on 17 June 2009;
- **Decree n° 201-33** dated 7 January 2011: Addendum to the tax treaty between France and Malaysia signed in Putrajaya on 12 November 2009;
- **Decree n° 201-84** dated 20 January 2011: Bilateral agreement regarding exchange of information in tax matters between France and Saint-Christophe-et-Niévès signed in Paris on 22 March 2010.

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## 14. Telecoms

### France - Decree dated 10 January 2011 ratifying decision n°2010-1312 of 14 December 2010 adopted by ARCEP setting the regulatory framework for FttH rollouts across France, outside high-density areas

Decision n°2010-1312 adopted by ARCEP setting the regulatory framework for Fibre-to-the-home (FttH) rollouts in low-density-areas was ratified by a decree dated 10 January 2011. This decree was published in the OJ of 18 January 2011. With this ratification, France becomes the first EU country to have its regulatory framework for FttH rollouts entirely settled. This should give actors in the sector the legal certainty they need to plan their first investments.

### France - Publication by France Telecom on 24 January 2011 of its new reference offers containing the tariffs for wholesale offers for 2011

The market for wholesale offers of France Telecom is regulated by ARCEP. Around 75% of this market concerns services for which France Telecom is obliged to practise cost-oriented prices (e.g. for civil engineering access). For these services, the new tariffs published by France Telecom are down 3.8% on 2010. This reflects both the decrease in network costs and the effects of recent tax reforms. The tariffs of other wholesale services regulated by ARCEP remain stable.

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## 15. Transports

### France - Limit on total permitted combined weight of heavy vehicles used for the carriage of goods

Decree No 2011-64 of 17 January 2011 relating to the total permitted combined weight of motorised road vehicles, completed by the Order of 17 January 2011 relating to the total permitted combined weight of motorised road vehicles used for combined transport, access to sea and river ports and transportation of certain agricultural and agri-food products, was published in the OJ. of 18 January 2011. It amends article R. 312-4 of the Traffic Code relating to the limit on total permitted combined weight for heavy vehicles, which increases from 40 to 44 tonnes, in order to improve the competitiveness of the transport sector and reduce the number of heavy goods vehicles used for the transport of bulky cargoes, as well as CO2 emissions.

### France - Issuance of the driver qualification card for road vehicles carrying goods and passengers

The Order of 31 December 2010 setting the conditions for obtaining a driver qualification card and the standard certificate relating to the basic and vocational training of drivers of goods and passenger vehicles was published in the OJ of 20 January 2011. Certificates relating to the basic and vocational training of drivers of goods and passenger vehicles must be replaced by the new standard certificates by 1 March 2011.

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