

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 2011.

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For additional information, please speak to your usual contact.

Contact

Bruno Knadjian

Avocat à la Cour

Hogan Lovells (Paris) LLP
6 avenue Kléber
75116 Paris
Tél. : +33 1 53 67 47 47
Fax : +33 1 53 67 47 48

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Summary of miscellaneous French draft legislation

- **Proposed legislation to strengthen consumer protection in distance selling, No. 1940, filed September 29, 2009** - adopted on first reading by the National Assembly 20 January 2010
- **Draft Law on commercial zoning, No. 2490, filed May 3, 2010** - adopted on first reading by the National Assembly June 15, 2010 - adopted on first reading March 31, 2011
- **Bill on enhancing the safety of drug and health products, No. 3714, filed August 1, 2011** - first reading by Parliament October 27, 2011 - CMP pending
- **Bill strengthening consumer rights, protection and information, No. 3508, filed June 1, 2011** - first reading by the National Assembly 11 October 2011
- **Proposed legislation to strengthen consumer rights with regard to telephone canvassing, No. 354, filed Mar. 11, 2011** - adopted on first reading by the Senate April 28, 2011
- **Project Finance Act 2012, No. 3775, filed September 28, 2011** - Discussion in the National Assembly 18 to 16 November 2011
- **Bill on social security financing for 2012, No. 3790, filed October 5, 2011** - first reading by the National Assembly November 2, 2011
- **Draft Law on the simplification of the law and the easing of administrative procedures, No. 3706** - first reading by the National Assembly 18 October 2011
- **Bill on remuneration for private copying, No. 3875, filed October 26, 2011**. Discussion on first reading before the National Assembly of 23 to 25 November 2011

Enacted laws

- **Law n ° 2011-1416 of November 2, 2011 supplementary budget for 2011** - Official Gazette of November 3, 2011
- **Ordinance No. 2011-1328 of 20 October 2011 transposing EU Directive 2009/38/EC of 6 May 2009** on the establishment of a European Works Council or a procedure in Community-scale undertakings and groups of undertakings for the purposes of informing and consulting employees - OJ of 21 October 2011

1. Capital Markets

France - Finalisation of UCITS IV Directive transposition

An [Order of 3 October 2011](#) has approved the modifications to the AMF general regulations, made under Order n°2011-915 transposing the UCITS IV Directive. These modifications have been made to Books III and IV of the AMF general regulations and include, for instance, the terms on which portfolio management companies may invest their capital or the conditions for replacement of the simplified prospectus by a clear, easily understandable document known as the key investor document (or KID).

France - Instruction No. 2011-15 of the AMF relating to the method of calculation of the global risk of collective investment schemes

The AMF has published [instruction No. 2011-15](#) relating to the method of calculation of the global risk of collective investment schemes contemplated in articles 411-72 to 411-80 of the AMF general regulations. Among other provisions, this instruction details the following three elements that must be taken into account for the calculation of the global risk of collective investment schemes: (i) financial contracts, including embedded derivatives (that is to say financial contracts embedded in other securities), (ii) the techniques and instruments aimed at enhancing the leverage of exposure to market risk, including repurchase agreements or securities lending and (iii) for collective investment schemes with streamlined investment rules, cash borrowings. The instruction also mentions that the calculation of the global risk must be carried out every day, and if necessary, several times per day.

2. Competition

France - Public consultation on draft guidelines regarding compliance programmes and settlement procedure

On 12 October 2011 the French Competition Authority launched a public consultation on two new long-awaited draft documents: a [Framework document](#) concerning compliance programmes and a [Guidance](#) document relating to its settlement procedure. The consultation will last until 14 December 2011, 6 pm.

European Law - Antitrust procedure reform

On 17 October 2011, the European Commission adopted a package of measures aimed at increasing interaction between the parties and the Commission in antitrust proceedings and strengthening the mechanisms for safeguarding parties' procedural rights. These texts were published in the O.J. of the E.U. of 20 October 2011.

The Commission's [Notice](#) on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU introduces (i) information about parties in the Statement of Objections of the main relevant parameters for the imposition of fines, (ii) an extension of state of play meetings to cartel cases and complainants in specific circumstances, (iii) greater access of the parties to non-confidential "key submissions", such as economic studies, prior to the Statement of Objections, (iv) a publication of rejection of complaints.

A [decision](#) on the function and terms of reference of the Hearing Officer in certain competition proceedings strengthens the role of the Hearing

Officer as the guardian of procedural rights.

Finally, Best Practices on the submission of economic evidence outline the criteria that economic and econometric analysis should fulfil.

3. Corporate

France - Adoption by the French National Assembly of the "Warsmann II" bill on the simplification of French law.

On 18 October 2011, the French National Assembly adopted on first reading the "Warsmann II" bill on the simplification of French law and easing administrative procedures. The bill was sent to the Senate the same day. Many of the provisions relate to company law, yet no particularly significant measure emerges.

Some examples are, however, quoted below:

-the extension of the deadline to convene the extraordinary general meeting of a "*société anonyme*" for draft resolutions aimed at realising capital increase reserved for employees of 3 to 5 years, when such a capital increase took place less than three years ago, and

-the contributions auditor of a "*société à responsabilité limitée*" may now be appointed unanimously by the shareholders and not only through the courts, in the case of a capital increase in kind.

European Law - Adoption by the European Commission of a draft regulation on insider trading and market manipulation and of a draft directive relating to the harmonization of penalties for market abuse

On 20 October 2011 the European Commission adopted a draft regulation on insider dealing and market manipulation (COM (2011) 651). This proposal aims to strengthen the provisions of the "Market Abuse" Directive No. 2003/6/EC dated 28 January 2003. In particular it extends the scope of this Directive to the commodity markets and derivatives. In case of penalties, the fine can no longer be less than the profit earned. The new scheme also proposes to strengthen the investigative and sanctions powers of regulatory authorities.

In addition, the Commission adopted a draft directive on the same day which aims to harmonize the penalties for market abuse across the EU. These must now be considered as criminal offenses if they are committed intentionally. Similarly, the intentions to commit market abuse, complicity in the act, or the attempt to commit the crime, will also be subject to criminal penalties.

Both proposals should take effect twenty-four months after their adoption.

4. Employment

France - Provisions on the information consultation process of European Works councils

A decision dated 20 October 2011 adapts the European Directive of 6 May 2009 which aims to improve employees' rights to be informed and consulted in international companies or groups in the European Works Councils.

These provisions concern the companies or groups of companies that employ at least 1.000 employees in the EU member states or in the European Economic Area and that have at least one establishment of more than 150 employees in at least two of these states.

The decision details the European works council expertise, the articulation with the other staff representatives, the practical details of the European works council's constitution and the attributions and resources of its members.

These provisions do not apply to agreements signed before 5 June 2011 that established a European working council.

France - End of pre-retirement - Economic Dismissal plans

In a DGEFP directive n°2011-23 dated 10 October 2011, the administration has announced that it will no longer sign conventions on pre-retirement economic dismissal plans subsequent to the notification of the directive dated 10 October 2011 to the Regional Directorate of Companies and to the prefects.

France - Consequences of the retirement legal age report on reversion rights

A circular from the French old age pension institution n°2011/69 from 7 October 2011 details how the reform of the legal age for entitlement to a pension and the age required for obtaining a full pension has affected the legal age of the last revision of the survivor's benefits, the legal age at which it is offered and the latest revision of the increase of the survivor's pension, the attribution of a lump sum if a child is in their care and on the methods of control of survivor benefits.

5. Energy

France - New master agreement for regulated access to the historical nuclear energy

An [Order of 4 July 2011](#) amending the Order of 28 April 2011 implementing Article L. 336-2 of the Energy Code was published in the Official Journal on 6 October 2011.

This Order relates to regulated access to the historical nuclear energy introduced by the law No. 2010-1488 of 7 December 2010 relating to the new organisation of the electricity market. This mechanism is set out in Articles L. 336-1 *et seq.* of the Energy Code.

This Order amends the master agreement that any electricity provider seeking to access the historical nuclear energy is required to conclude with EDF.

It also provides that the payment guarantee required to be given by any electricity provider seeking to access the historical nuclear energy may consist of consignment of the necessary monies at the "Caisse des Dépôts et Consignations" and sets its modalities.

6. Insurance

France - Life Insurance in units of account - Pre-contractual Information

A [ministerial order dated 3 October 2011](#) has amended the provisions of the French Insurance Code which impose obligations on the insurer to inform the policyholder or members of unit linked life insurance contracts about the main characteristics of the units of account which are established as a unit or share of an Undertaking for Collective Investment ("**UCI**"). Depending on the nature of the UCI, this information can now be validly made by delivery of the key investor information document or in the form of a detailed note. These documents replace the former simplified prospectuses. If there is no delivery of the key investor information document or the detailed note, the insurers must inform the policyholders and members of the means of obtaining these documents and of the email address from which these documents can be obtained. Insurers have until 1st July 2013 to comply with the new regulation.

France - ACP - Treatment of claims in banking and Insurance

The French Prudential Control Authority ("**ACP**") has examined three draft recommendations for remedying deficiencies in the claims processing systems existing in the banking and insurance sector, which are currently deemed too complex and inefficient. Currently claimants are not always informed of the treatment of their claims and rarely receive accurate contact information for the services responsible for processing claims. To address the situation, the ACP wishes to establish a clear and homogeneous organisation, as well as a processing tool for more rigorous reporting to

improve the system, and the development of accurate information for customers.

France - Consumer Credit and loan Insurance

The disjunct between mortgage and loan insurance (namely the opportunity for a customer to purchase insurance from the insurer of its choice in the course of an application for a mortgage) is laid down in Articles L. 312-8 (and following) of the French Consumer Code. As part of the review of the draft bill strengthening the rights, protection and information for consumers, an amendment was adopted by the deputies. It is designed to strengthen this provision and states that taking out loan insurance other than that proposed by the credit institution should involve no additional cost to the borrower. The draft bill is currently under review by the Senate.

France - Anti Money Laundering ("AML") - Guidelines of the ACP concerning beneficial owners

This month the ACP published guidelines on its website concerning the requirements for entities which are subject to its control in relation to their beneficial owners (*bénéficiaires effectifs*). As part of the French AML obligations, financial institutions including insurers are required to identify their clients and beneficial owners. In this document the ACP provides guidance on the definition of beneficial owners and on the obligations relating to due diligence, reporting suspicious transactions, record keeping and internal control (illustrated by practical examples). This document applies to all financial institutions which are subject to the French AML requirements.

7. Intellectual Property

France - The Senate passes a bill to reform plant variety rights

On 8 July 2011, the French Senate adopted bill No. 165 (2010-2011) on plant variety rights, proposed by Senator Christian Demuyinck. This bill introduces a fundamental change in the French Code of Intellectual Property in order to harmonize internal law with European and International law and modernize the French system. In particular, the bill provides a new legal definition of a plant variety, which has not existed before. The new system will be applicable to plant variety rights which have already been granted. The text is now being discussed in its first reading at the *Assemblée nationale*.

France - France among the 12 first signatories of the Council of Europe Convention on Counterfeiting of Medical Products and Similar Crimes involving Threats to Public Health

On 29 October 2011, 12 States, including France, signed the Council of Europe Convention on Counterfeit Medical Products and Similar Crimes involving Threats to Public Health (Medicrime Convention). The Convention was adopted by the Council of Europe on 8 December 2010. In particular this Convention compels signatory States to criminalize manufacturing and distribution of counterfeited medical products. It also establishes a principle of international criminal cooperation.

France - Unitary patent: draft agreement on a unified patent court

In order to cure the incompatibilities highlighted by the Court of Justice of the European Union in its Opinion 1/09, the EU Council has presented a new draft agreement on the European and EU Patents Court, under the Hungarian presidency, and then, on 7 October 2011, under the Polish presidency. It would be adopted under the form an international agreement concluded by Member States of the European Union. The agreement, in particular, includes a provision on the primacy of European Union Law, and possible requests for ECJ preliminary rulings.

8. Life sciences

France - Draft Bertrand bill before Parliament

The so-called Bertrand bill, or bill on the increase in health and safety standards for medicinal and health products, has been adopted by the

Assemblée Nationale on 21 September 2011 by 309 votes against 31, after the Government initiated the accelerated procedure. The text was approved by a vote in the Senate on 27 October 2011, after significant amendments. The text must now be examined by a mixed joint commission. Should both Chambers disagree, the *Assemblée Nationale* will have the last word. The purpose of this bill is notably to improve transparency in relations between health professionals and the pharmaceutical industry. It compels pharmaceutical companies to publish all agreements concluded with health professionals. The bill also provides for the reform of the Afssaps, renamed French Agency for the Safety of Health Products (*Agence Française de Sécurité des Produits de Santé* – AFSEPS), with increased powers. The text also covers advertising relating to medical devices, the regime for which is now identical to the one governing medicines reimbursed by Social Security. The Senate has amended the text to authorise class actions relating to the side-effects of medicines, proceedings that would be entirely new in France but which should be dismissed by the *Assemblée Nationale*.

9. New technologies

France - Draft Act relating to the private copy levy system

On 26 October 2011, the government introduced a draft act relating to the private copy levy system before the National Assembly. This draft act, which follows recent case law from the Court of Justice of the European Union (ECJ), first provides that the levy incurred on blank media acquired "for, notably, business purposes, and for which the conditions of use do not create a presumption of use for privacy copying" will be refunded. The draft act sets out how this presumption will be implemented and applicable sanctions in case of fraudulent use of this refunding system. In addition, the text requires that buyers of blank media be informed of the amount of the private copy levy imposed on the media acquired and provides that the current rules on private copies will remain in force until the next meeting of the Commission for the private copy levy (the French "*Commission sur la Rémunération pour Copie Privée*") takes place (within two years at the latest).

10. Procedure

France - Criminal Procedure

-Jury and Justice for minor citizens

Publication of the 10 August 2011 Act (n° 2011-939) establishing citizens' service as co-magistrates in lower court criminal trials and reforming young offenders' judicial treatment. The French Constitutional Council, acting in its capacity as Supreme Constitutional Court, had censored part of the Act in its 4 August 2011 decision. The Council found certain provisions unconstitutional which enable citizens to enter a judgment based on points of law rather than fact. Thus citizens may not sit on the bench when Penal Code Title 4 or environmental law infractions are being prosecuted. Furthermore, 13 to 16 year-old minors may not be confined to their homes under electronic surveillance.

11. Real estate

France - Rents: index

The Cost of construction index (ICC) for the second quarter of 2011 published by the National Institute of Statistics and Economic Studies (INSEE) (Information Rapide INSEE, n°245, 7 October 2011) amounts to 1593, which corresponds to an increase of 5.01% over one year.

The commercial rents index (ILC) for the second quarter of 2011 published by the National Institute of Statistics and Economic Studies (INSEE) (Information Rapide INSEE, n°246, 7 October 2011) amounts to 104.44 which represents an increase of 2.56 % over one year.

12. Tax

France - International taxation

-Law n°2011-1283 dated 13 October 2011 authorizes the approval of the tax treaty between the Government of the French Republic and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the avoidance of double taxation on income and capital and the prevention of tax evasion signed in Paris on 21 October 2010.

-The amendment to the France-Belgium tax treaty entered into force on 17 December 2009 has been commented on by French tax authorities in an Official Administrative Guidelines 14 B-2-11 dated 19 September 2011.

The amendment provides for the phasing out of the regime of frontier workers.

Thus, as of 1 January 2012, only frontier workers resident of France, who will be receiving benefits on 31 December 2011 from the regime of frontier workers, will retain the benefit of this regime for the taxation of wages received during the years 2012-2033, provided they meet all the requirements for its application without interruption. Therefore, there will be no new frontier workers from 1 January 2012.

France - Corporate taxation

-Deductibility of the profit share premium for taxable income

For corporate income tax purposes the profit share premium introduced by article 1 of the amended social security financing law no. 2011-894 of 28 July 2011 is deductible from a company's taxable income provided that this premium corresponds to effective work and its amount is not excessive (*Tax ruling decision dated 18 October 2011 No. 2011/28*).

-Transfer of assets and liabilities belonging to the head of a tax consolidation group to a foreign company with a permanent establishment in France

A tax ruling clarifies the conditions under which the head of a tax consolidation group can transfer all its assets and liabilities to a foreign company with a permanent establishment in France without breaking the tax consolidation group (*Tax ruling dated 2 August 2011 No. 2011/24*).

13. Telecoms

France - Publication on October 11, 2011 by the ARCEP of the formal licences to the winning candidates of the award process of 4G licences in the 2.6 GHz band

Publication of the decisions [n°2011-1168](#), [n°2011-1169](#), [n°2011-1170](#), [n°2011-1171](#) authorising the winning candidates to use their 2.6GHz frequencies to begin the deployment of their 4G network. Issuing these authorisations is the final step in the allocation procedure for frequencies in the 2.6 GHz band for the winning candidates selected as a result of decision n°2011-1080 dated September 22, 2011.

The next stage in the issuing of 4G licences will consist of the allocation procedure for the 800 MHz band, resulting from the digital dividend. The deadline for applications is December 15, 2011.

France - Publication on October 21, 2011 of the ARCEP market analysis of the voice termination maximum rates applicable to the new mobile network operator Free Mobile and to two new MVNO.

On October 21, 2011 ARCEP published its [market analysis](#) of voice termination maximum rates for the new operators entering the mobile market in 2012. ARCEP established the maximum rate for voice termination at 2 eurocents per minute in 2012. The future network operator Free Mobile

requested at least 3.4 eurocents, whereas the two new MVNO, Oméa Telecom and LycaMobile, both requested that there be no limit. This analysis has been sent to the Regulation Authority ("l'Autorité de la Concurrence") for approval.

European Law - Approval by the European Commission on October 19, 2011 of the French support scheme for the deployment of very high speed broadband networks (FttH)

A [Press release](#) was published in October 19, 2011 relating to the approval by the European Commission of a French support scheme for the deployment of ultra-fast broadband networks. State aid amounting to approximately 750 million euros will support the deployment of the fiber network infrastructures to bridge the digital divide between rural and urban areas. This aid will be divided between operators by conducting regional tenders for the support scheme only in areas for which no fiber network rollout is foreseen in the near future.

European Law - Publication of the European Commission's Proposals regarding the European funding for the deployment of very fast broadband networks in Europe through the "Connecting Europe Facility" ou "CEF"

A plan for a new financing [framework](#) for broadband infrastructure in Europe from 2014 to 2020 has been tabled by the European Commission. The future guidelines "Connecting Europe Facility" or CEF proposes investing over 9.2 billion euros for broadband infrastructure and digital services infrastructure, and will also will benefit companies and investors in this field. The Commission's proposals will now be submitted to the European Parliament and the EU's Council of Ministers for adoption.

14. Transport

France - Costs of car repair on motorways

A [Decree](#) of 30 September 2011 on the rate of repair of light vehicles on motorways and express roads has been published in the O.J. of 7 October 2011. It provides that the fixed price of repair by a certified car mechanic of vehicles with a permissible maximum load weight exceeding 3.5 tons is now 117 Euros on motorways and express roads. In case of towing of vehicles whose permissible maximum load weight is in excess of 1.8 tons but less than or equal to 3.5 tons, the price is increased to 144.50 Euros.

European Law - Prosecution of road offences committed in another EU Member State

The [Draft](#) Directive on cross-border exchange of information on road safety offences was adopted by the Council of European Union on 29 September 2011. It provides that a Member State in which an offence has been committed with a vehicle registered in another Member State will be able to ask for access to vehicle registration data, in order to identify the owner of the vehicle and investigate who is personally liable for the offence, so that sanctions can be enforced. The Directive covers the following offences: exceeding the speed-limit, driving under the influence of alcohol or drugs, failing to use a seat belt, failing to stop at a red light, failing to wear a safety helmet, use of a forbidden lane and illegally using a mobile phone while driving. In any case, it will depend on the Member State in which the offence has been committed and on its national law to determine whether and how the offence will be prosecuted.

The Directive must now be published in the O.J. of the E.U. and then implemented by Member States within two years.

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