

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 February 2012.

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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Summary of miscellaneous French draft legislation

- **Draft legislation to strengthen consumer protection in distance selling**, n°1940, filed 29 September 2009 - adopted on first reading by the National Assembly 20 January 2010
- **Draft legislation relating to commercial zoning**, n°2490, filed 3 May 2010 - adopted on first reading by the National Assembly on 15 June 2010 - adopted on first reading by the Senate 31 March 2011
- **Draft legislation to strengthen the rights and protections of consumer information**, n°3508, filed on 1 June 2011 - first reading by the National Assembly on 11 October 2011 and by the Senate on 22 December 2011
- **Draft legislation to strengthen consumer rights regarding telephone solicitation**, n°354, filed on 11 March 2011 - adopted on first reading by the Senate on 28 April 2011
- **Draft legislation on the simplification of law and the easing of administrative procedures**, n°3706 - adopted on first reading by the National Assembly on 18 October 2011 and the Senate on 10 January 2012 - CMP (Disagree) - New first reading before the National Assembly from 31 January to 2 February 2012 - adopted on 29 February - Referral to the Constitutional Council on 5 March 2012
- **Draft legislation on the financing of work councils**, n°4090, filed on 14 December 2011 - adopted on first reading by the National Assembly on 26 January 2012
- **Draft legislation on identity protection**, n°682, filed on 27 July 2010. - CMP adopted on 10 January 2012 and rejected by CMP reading by the Senate on 26 January - New first reading before the National Assembly (text filed on 26 January 2012)
- **Draft Law on measures regarding backup procedures, receivership or liquidation and assets** n°4400, filed on 22 February 2012 - adopted on first reading by the Assembly National on 28 February 2012 and by the Senate on 1 March 2012 - Pending enactment

- **Draft legislation on the increase in fees for construction**, n°4335, filed on 8 February 2012 - first reading by Parliament on 29 February - CMP (Disagree) - New Bill mobilization of land in favor of Housing filed on 1 March and adopted on 5 March by the National Assembly - First Reading in the Senate on 6 March 2012
- **Draft supplementary budget for 2012**, n°4332, filed on 8 February 2012 - rejected after disagreement CMP on 22 February - filed for new reading on 28 and 29 February in Parliament - finally adopted on 29 February – pending official announcement
- **Draft legislation on the organization of the service provided and information given to airline passengers**, n°3991, filed on 22 November 2011 - rejected on first reading following a disagreement in CMP - again rejected in new first reading on 21 February 2012 - Reading and final adoption on 29 February - awaiting promulgation

Enacted laws

- **Domestic Law n°2012-208 of 13 February 2012 containing various provisions relating to the status of the judiciary** - OJ of 14 February 2012
- **Act n°2012-260 of 22 February 2012 on the reform of overseas ports of the State and various provisions concerning adapting EU legislation regarding transport** - OJ of 25 February 2012
- **Act n°2012-281 of 29 February 2012 to relax the rules on the adjustment of the "communal-map"** - OJ of 1 March 2012
- **Act n°2012-289 of 1 March 2012 on civil aviation safety**- OJ of March 2, 2012

1. Banking

France - Legal interest rate

Statute n°2012-182 dated 7 February 2012 ([OJ n°0033 dated 8 February 2012](#)) set the French legal interest rate at 0.71% for 2012.

This rate is to be applied from 1st January 2012 onwards.

France - "*Livrets A*" and "*livrets de développement durable*" rates of interest

An Order dated 13 February 2012 ([OJ n°0038 dated 14 February 2012](#)) determined the rates specified in Regulation n° 86-13 dated 14 May 1986 by the *Comité de la réglementation bancaire et financière* (as amended) and relates to the repayment of funds received by credit institutions. This Order set the rates of the French accounts "*livrets A*" and "*livrets de développement durable*" at 2.25%.

These rates are applicable from 1st February to 31st July 2012 with a possible adjustment to take place on 15 April 2012, to accommodate any important variations in the inflation index or the currency markets.

2. Capital Markets

France - AMF's publication no. 2012-01 concerning the organisation and the management of collective investment schemes ("OPCVM") or real-estate collective investment schemes ("OPCI") and third-party risk management.

On 1 February 2012, the French Markets Authority (*Autorité des marchés financiers* or *AMF*) issued a publication concerning the organisation and

the management of collective investment schemes (“OPCVM”) or real-estate collective investment schemes (“OPCI”) and third-party risk management. According to articles 313-53-3 of AMF's general rules (*le règlement général de l'AMF*), the directive is applicable to counterparty risks, liquidity risks, market risks and the operational risk and its impacts on financial management. Various elements of risk management and valuation problems are also addressed. In addition, article 4 of the directive describes in detail the AMF's position regarding third-party managing activities.

France - The end of the short selling ban of French securities in the financial sector

The French stock market watchdog has ended the ban in short selling which began last August following the rapid decline in the price of many banking shares.

The ban was originally implemented on 11 August 2011 at the request of the Jean-Pierre Jouyet, president of the AMF (the French Regulator). On 10 November 2011 the ban was extended for a further three months, this time at the request of the finance minister. Similar bans were adopted across Europe, namely in Italy, Germany and Spain.

The provisions prohibiting the creation of any net short position and increase of an existing short position in relation to French equity securities in the financial sector came to an end on Saturday 11 February 2012.

After six months of the short selling ban, investors are once again authorised to take short positions in the market.

3. Competition

France - Competition settlement procedure

On 10 February 2012, the French Competition Authority published a Notice relating to the antitrust settlement procedure. As set out in the draft Notice, dated October 2011, the Authority considers that if the undertaking wishes to benefit from a fine reduction, the company must give up contesting the reality of practice they have been found guilty of, the legal restraints, the processes followed and the validity of any complaints made by the Authority.

The company can get its fine reduced by up to 10% if they comply with this, and an additional reduction somewhere between 5% and 15% if they agree to make behavioral or structural commitments to the Competition Authority.

France - Compliance programmes

On 10 February 2012, the French Competition Authority published a Framework-document on competition law compliance programmes. The Framework-document maintains the key principles which were found in the draft submitted for public consultation in October 2011, in particular the five key features which are considered necessary for an efficient compliance programme: (i) a clear, firm and open position adopted by the company's management to comply with competition law, (ii) a commitment to appoint one or more persons to ensure compliance with the programme, (iii) a commitment to put in place and make information, training and awareness of the programme available to employees (iv) a commitment to set up effective control, audit and whistle-blowing systems, (v) a commitment to set up an effective oversight system. A company implementing a compliance programme such as this can obtain a reduction of any fines of up to 10%, should they subsequently be deemed guilty of anticompetitive practices.

4. Corporate

France - Publication of a document on corporate governance and executive compensation for companies referring to AFEP/MEDEF code

On 9 February 2012, the AMF published a single document entitled "recommandation AMF n°2012-02" that consolidates most of the recommendations on corporate governance and executive compensation for companies that follow the AFEP/MEDEF code, published by the AMF

since 2009.

France - Publication of the AMF report on general meetings held by listed companies and launch of a public consultation

On 7 February 2012, the AMF published its report on general meetings held by listed companies. The report is broadly positive about the operation of general meetings in France and makes a number of proposals, largely focused on four issues:

-*Voting*, the AMF proposes that shareholders be given a third option by way of the official recognition in French law of "abstention", as distinct from voting "against";

-*Voting on regulated agreements*, the AMF encourages boards of directors to provide reasons for their decisions to approve regulated agreements and proposes that agreements entered into by wholly-owned subsidiaries be excluded from the scope of this definition of regulated agreements;

-*Dialogue between shareholders and issuers*; and

-*General meeting's executive committees*.

The public consultation will run until 31 March 2012. Following the public consultation, the AMF's proposals - which do not entail any amendments to existing legislation or regulation – should become applicable to general meetings from 1 January 2013.

European Law - The European Commission launches a public consultation on the future of European company law

On 20 February 2012, the European Commission launched an in-depth consultation on the future of European company law. The public consultation covers:

-Objectives and scope of European company law;

-Codification of European company law;

-The future of company legal forms at a European level;

-Cross-border mobility for companies;

-Groups of companies; and

-Capital regime for European companies.

The consultation will be open until 14 May 2012.

5. Employment

France - Details on the design and intervention of the role of the assistant in preventing occupational risks and hazards

Two directives, n°2012-135 and n°2012-137 both dated 30th January 2012 imposed an obligation on the employer to ensure they are assisted by one or more competent employees or by a consultant whilst carrying out their role in to prevention of occupational risks. The directives also specify the procedures for appointing the assistant.

France - New legislation for employees returning to work after cases of illness or unfitness for work

Directive n°2012-135 dated 30th January 2012 now means that employees who have been on sick leave for more than three months will now be

required to attend a pre-return-to-work visit. However, the directive also reduces the number of cases in which this visit will be mandatory. Furthermore, it provides that from now on, one visit would be sufficient to declare an employee unfit for work if keeping him/her at work would create an immediate threat to their health or safety or that of a third party.

France - Job retention and training activities for part-time employees within the framework of long term legislation for part-time employees

Directive [n°2012-183](#) dated 7th February 2012 indicates that the employer must commit to retaining employees who have had their hours reduced for a period twice the length of their full time employment contract.

6. Environment

France - Classified installations

[Directive n°2012-189](#) dated 7 February 2012 published in the OJ on 9 February 2012 suspended time lapse for the period of classified installation authorisation orders, registration orders or declarations of recourse against these or against a building permit filed at the same time.

These provisions apply to authorised classified installations, which have been registered or declared from 1 February 2009, and for building permit orders which were valid on 9 February 2012.

7. Insolvency proceedings

France - EIRL (Limited Liability Proprietorship)

Directive n°2012-122 dated 30 January 2012 relates to Limited Liability Proprietorships (EIRL) ([OJ n°0026 dated 31 January 2012](#)) amends Article R. 526-3-1 of the French commercial code and defines the "*assets, rights, obligations and security interests necessary to carry out the professional activity*" as those which "*by nature, can only be used as part of this activity*".

This directive also requires information to be reported to third parties which relates to the place of the initial declaration of any special purpose assets when the "*EIRL*" was first registered, especially in case of transfer of registered office.

This Directive came into force on 1st February 2012.

8. Insurance

European Law - Eiopa – Key consumer trends in the EU

On 6 February 2012 the European Insurance and Occupational Pensions Authority ("*EIOPA*") published a document setting out an initial view of consumer trends in the insurance and pensions sectors. The document reports on consumer protection issues relating to the sale of payment protection insurance. It also highlights the complexity of underlying assets in life insurance products. Another matter for concern is in relation to the insurance comparison websites where EIOPA flags the potential risks of conflicts of interest between these websites and insurers given their close commercial links, and the absence of knowledge by the comparison websites themselves of their regulated status and their corresponding obligations.

9. Intellectual Property

France - Two exceptions to intellectual property rights on medicines under the statute on the Law of Medicine safety and Health Products

As announced in the [Legal and regulatory update - December 2011](#), the French [Act n°2011-2012 of 29 December 2011](#) on the safety of drugs and health products has introduced various provisions aimed at strengthening the transparency of the French Public Health Code, the monitoring of drugs and the governance of health products. Two provisions of this Act also introduce exceptions to intellectual property rights on drugs.

On the one hand, the Act introduces a new Article L. 5121-10-3 of the French Public Health Code which provides that "*the owner of an intellectual property right protecting the appearance and texture of speciality oral pharmaceutical forms [...] shall not prohibit the oral pharmaceutical forms of a substitutable generic speciality [...] from showing identical or similar appearance and texture*". These provisions have been censored twice by the French Constitutional Council on the grounds that they have been introduced in Acts with which they did not bear any relation. However the Constitutional Council has not prohibited them this time.

Furthermore, the Act adds a paragraph d bis) to the Article L. 613-5 of the French Intellectual Property Code including a new restriction on the scope of the rights conferred by a patent. In this regard, pursuant to this new paragraph d bis), the rights conferred by a patent shall not extend to the acts necessary to obtain the authorization required by the article L. 5122-9 of the French Public Health Code for the distribution of an advertisement of a drug to members of health professions and granted by the French National Safety Agency for Medicines and Health Products.

10. Life sciences

France - A new French bill on research involving human subjects, entitled "Jardé bill"

Further to the French Senate's vote. A new French [law on research involving human subjects](#) was published in the Official Journal on 6 March 2011.

The legislation reorganizes the categories of research in this area in order to provide a common platform through a single legislative framework, and simplifies the development of the research while guaranteeing the safety of any trial subjects. Most notably, the law applies to studies relating to medicines and medical devices.

The statute identifies three broad categories of research: intervention research; interventional research not related to drugs and with only minimal risk (this category corresponding to the former category of research "covering routine care") and non-interventional research.

French law no more refers to the term "Biomedical research".

The basis for the common regulatory platform for all types of research is the mandatory opinion which must be provided by one of the committees for the protection of human subjects (*comité de protection des personnes*). This independence should be strengthened via a new procedure ensuring that the protocol is randomly distributed between the committees after a transition period ending no later than 1st July 2014.

Regarding the protection of trial subjects, the bill maintains the general principle of the need to obtain the consent of the individuals, except in the case of non-interventional trials for which the consent is substituted by a right to object.

Among the other innovations brought in by the law, a national commission of research involving human subjects has been created which will be in charge of coordination, harmonization and evaluation of the committees responsible for the protection of human subjects. This commission will provide the Minister of Health with recommendations relating to the consequences of the results of the research in terms of health care organization.

France - Ministerial order of 1 February 2012 on the process of obtaining approval for the management of waste resulting from health-care activities which present a risk of infection

The ministerial order of 1 February 2012 adopted pursuant to Articles R. 1335-8-7 and R. 1335-8-11 of the French Public Health Code lays down the conditions for the approval of individual and collective bodies that are in charge of the management of waste concerning risks relating to infection from the needles of self-treating patients.

11. New technologies

France - Decision from the commission on copy right levies

On 9 February 2012, the commission in charge of the implementation of the copyright levy which is applicable on blank media (as provided for in article L.311-5 of the French intellectual property code) issued a decision setting out the applicable scale of levies for digital and multimedia tablets equipped with portable player functionalities including an operating system for mobile terminals on a self-operating system.

12. Public law

France - New circular implementing procurement code

A circular dated 14 February 2012 about the best practice in public procurement matters was published in the OJ of 15 February 2012. This Circular, which repeals the circular dated 29 December 2009, incorporates the amendments made to the rules governing public procurement contracts since 2009.

13. Real estate

France - Tax: sale of vacant land

French official administrative guidelines 8 M-1-12 dated 23 February 2012 specified the new method to calculate the base rate of tax on undeveloped land sales which have subsequently become available to build on. These have been put in place in by some municipalities.

14. Tax

France - Corporate taxation

VAT

-The Official Administrative Guidelines n°3 C-1-12 published on 10 February 2012, comments that the new VAT rate increased from 5.5% to 7 %.

-The Official Administrative Guidelines n°3 D-1-12 published on 9 February 2012 reiterates the decision taken on 22 December 2011 by the French Administrative Supreme Court n°330608, *Ministre c./ S.A. Subtil France* concerning the so called "filet de sécurité" mechanism applicable for VAT. In triangular European transactions, the VAT on intra-Community acquisitions is not immediately deductible when the member state being taxed for the sale is not deemed to be the state for the importation of the goods, but rather the member state which attributed a VAT identification number under which the intra-Community acquisition was done.

Corporate income tax

-The Official Administrative Guidelines n°4 A-1-12 published on 2 February 2012 develops the implementing rules (declaration obligations, calculation of the tax basis) of the immediate refund of R&D tax credit as provided for SMEs.

-The Official Administrative Guidelines n°6 E-4-12 published on 14 February 2012 comments that the rules applicable to the CVAE (Contribution on Corporate Added Value) is applicable as from the 2010 taxation period for Companies whose turnover exceeds Euros 152,500.

France - Individual taxation

Individual income tax

-The Official Administrative Guidelines n°5 C-1-12 published on 9 February 2012 developed the applicable tax regime for "side pocket" UCITS which are investment funds created by the transfer of assets, which should not be sold, from an existing UCITS to a new one. According to tax law, the income paid by these UCITS are treated like income paid by venture capital mutual funds.

Registration duties

-A ruling published on 21 February 2012 develops the applicable provisions for registration of duties on the sale of shares when these sales are recorded by a deed (notion of deed, scope of application, exonerations etc.).

France - Litigation

-A ruling published on 14 February 2012 developed the penalty applicable for non-compliance with declaration obligations for companies which pay commissions, brokerages, fees, and gratuities (*DAS 2*). This penalty amounts to 50% of the non-declared sums. It does not apply when (i) it is the first infraction of the company in the last three years, and (ii) when the inaccuracy is corrected spontaneously or upon tax authorities' first request. The inaccuracy may be corrected for the last three years if the conditions stated above are met.

-A ruling published on 21 February 2012 specifies the cases of exemption of the penalty for non-compliance with declaration obligations applicable on non-taxed capital gains in cases of mergers (5% of the inaccurate or non-declared sums). Companies may regularise their position if (i) the correction is not made upon tax authorities' request, and (ii) if the company respects all its other declaration obligations.

-The Official Administrative Guidelines n°13 O-1-12 highlights the consequence of the decision held by the French Administrative Supreme Court on 21 March 2011 which totally withdrew the condition for the existence of a gross fault to engage the liability of the French State.

International - International taxation

-The Double Income Tax Treaties signed by French government with Panama and Hong Kong were published respectively on 2 February 2012 and in the Official Administrative Guidelines n°14 A-1-12 on 9 February 2012.

-The agreements in form of an exchange of letters signed by the French government with the Cook Islands and government of Grenada were published by two decrees dated 30 January and 15 February 2012 respectively.

15. Transport

France - Overseas harbours reform

The Law n°2012-260 dated 22 February 2012 regarding the reform of State managed overseas harbours and various provisions adapting legislation to European law in the transport field has been published in the O.J. dated 25 February 2012. The law aims to transform the four overseas harbours managed by the state – i.e. the harbours of Fort-de-France (Martinique), Degrad-des-Cannes (Guyane), Port-Réunion (La Réunion) and the harbour

of Guadeloupe - into "large maritime harbours", especially by creating a cooperation counsel between the harbours in the Antilles area and a prices and incomes watchdog.

France - Financial standing required for public road transport operators

The Order of 3 February 2012 regarding financial standing required for public road transport operators has been published in the O.J dated 11 February 2012. It specifies provisions of the directive n°2011-2045 regarding various provisions on the access to the profession of road transport operators and on the access to the road transport market with regard to the financial standing required from companies wishing to enter the market. The provisions deal in particular with the method for the reporting of the companies' financial standing, and with the accounting method that should be applied with regards calculating equity capital.

European Law - Statistical returns for road transport

The Regulation (EU) n°70/2012 of the European Parliament and the Council of 18 January 2012 deals with statistical returns in respect of the transport of goods by road and was published in the O.J.E.U., dated 3 February 2012. It requires each Member State to compile statistics on the carriage of goods by road by means of road vehicles that are registered in that Member State and on all journeys made by such vehicles. It specifies the variables to take into account and the methods of data collection and transmission.

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