

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 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

Hoganlovells.com

Summary of miscellaneous French draft legislation

- **Proposed legislation to strengthen consumer protection in distance selling**, n°1940, filed September 29, 2009 - adopted on first reading by the National Assembly 20 January 2010
- **Draft law on commercial planning** n°2490, filed May 3, 2010 - adopted on first reading by the National Assembly 15 June 2010 - passed on first reading by March 31, 2011
- **Bill n°3714, concerning enhancing the safety of drug and health products** introduced on 1st August 2011 - first reading by the National Assembly October 4, 2011
- **Bill n°3508, strengthening the rights, protection and information for consumers** filed June 1, 2011 - discussion in the National Assembly in public session from September 29 to October 11, 2011
- **Proposed legislation to strengthen consumer rights with regard to telephone canvassing**, n°354, filed March 11, 2011 - adopted on first reading by the Senate April 28, 2011
- **Project Finance Act 2012**, n°3775, filed September 28, 2011 - Discussion in the National Assembly of 18 to 25 October 2011

Enacted laws

- **Law n°2011-1117 dated 19 September 2011** concerning the Supplementary Budget for 2011 - Official Journal September 20, 2011
- **Order n°2011-1068 dated 8 September 2011 concerning the owners of public buildings, the institutions responsible for State Planning and the "Agence Foncière et Technique de la Région Parisienne" (AFTRP)** - September 9, 2011 JO

1. Banking

France -Disciplinary committee of French Supervisory Authority (ACP)

The decree n°2011-769 dated 28 June 2011 relating to certain powers of the *Autorité de contrôle prudentiel* (French supervisory authority for credit institutions and insurance companies) ([JORF n°0150 dated 30 June 2011](#)) creates a secretariat to assist the reporter of the disciplinary committee. This decree also states the procedures for notifying the defendant of objections as well as the procedure for informing a person of the initiation of disciplinary proceedings. In addition, the decree clarifies how a hearing should be conducted. Finally, it sets various procedural deadlines such as the deadline for approval by the disciplinary committee of a "code of good practice" as defined in Article L. 612-29-1 French Monetary and financial code.

This decree came into force on 1st July 2011.

2. Capital Markets

France - Position of the Autorité des marchés financiers ("AMF") relating to the classification of UCITS as "cash equivalent"

Professional associations of the portfolio management industry (AFG, AFTE and AF2I), in a memorandum relating to the classification of UCITS as "cash equivalent", have stated that UCITS which are classified by the AMF as "monetary" and/or "short-term monetary" are presumed to comply with the eligibility criteria for classification as "cash equivalent" (i.e. a short-term investment, liquid, convertible into a determined amount of cash and subject to insignificant risk of change in value).

In its position, the AMF confirms this analysis and adds that, for UCITS benefiting from the presumption of eligibility, a regular check of the historical performance is important to confirm the negligible risk of a change in value. However, for the other UCITS, it is imperative to update the analysis of all criteria.

3. Competition

France -Merger control - First application of article L. 430-8 IV 1° of the French Commercial Code

In its [Decision](#) n°11-D-12 on 20 September 2011 the French Competition Authority applied Article L. 430-8 IV 1° of the French Commercial Code for the first time, by withdrawing the authorization given by the Minister of Economy in 2006 for the acquisition of TPS and Canal Satellite by Vivendi Universal and Canal Plus Group, and asking the parties to re-notify the transaction within a month, i.e. before 20 October 2011.

The Authority considered that the merged entity did not comply with ten of the fifty-nine commitments made in 2006 to ensure effective competition in the downstream market of pay-TV distribution. It also imposed a fine of EUR 30 million on Canal Plus.

European Law - State Aids - Services of General Economic Interest

Draft Proposals for new texts regarding the application of State aid rules to Services of General Economic Interest were made public by the European Commission in mid-September. They include four texts: two draft Communications (see first [draft](#) and second [draft](#)) and a draft [Decision](#) on the application of the European Union State aid rules on compensation granted for the provision of Services of General Economic Interest, as well as a draft [Regulation](#) on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing Services of General Economic Interest.

They will be submitted for public consultation, and then discussed with Member States.

4. Consumer law

European Law - Proposal for a Directive on Consumer rights

A proposal for a Directive on Consumer Rights 2008/196 was approved by the European Parliament on 23 June 2011. It simplifies four existing EU consumer rights directives into one set of rules and targets e-commerce. It provides for, inter alia, an extension of the period under which customers can withdraw from a contract (to 14 days rather than 7), increased price transparency, a ban on pre-ticked boxes on websites and the elimination of surcharges for the use of credit cards and hotlines.

It must now be formally approved by the EU Council of Ministers and then implemented by Member States within two years after its publication in the O.J. of the E.U.

5. Employment

France - Enforcement of the securing professional contract

A Ministerial Decree, dated September 1, 2011, concerning the implementation of the "Contract of Professional Security" ("Contrat de Sécurisation Professionnelle"), , makes it obligatory for companies employing less than 1000 employees to offer a "Contract of Professional Security" to each employee who is dismissed for an economic reason.

This system, created by Law n°2011-893, dated July 28, 2011, succeeds the Professional Transition Contract ("*Contrat de Transition Professionnelle*") and the Individual Redeployment Agreement ("*Convention de Reclassement Personnalisé*") mechanisms.

The forms necessary for signing a "Contract of Professional Security " are posted on the Unemployment Fund's web site (www.pole-emploi.fr).

France - Details on the revitalisation obligation in case of redundancy

Decree n°2011-1071 dated September 7, 2011 extends the cooling off period granted to the administrative authority to 3 months. Within this period, the administrative authority has to tell a company which employs more than 1000 employees, which is making redundancies, whether or not it is required to revitalize the employment area.

France - Bringing proceedings before the Labour Court is no longer free

Law n°2011-900, dated July 29, 2011 establishes a payment of €35 for filing claims in the Labour Court, with effect from 1 October 2011.

The beneficiaries of legal aid are exempt.

6. Insurance

France - Mutual insurance societies, unions & federations – registration

A ministerial order dated 21 January 2010 relating to the establishment of the French Supervising Prudential Authority ("*Autorité de Contrôle Prudentiel*") came into force on 1st January 2011 and abolished the "national register of mutual insurance companies" with which the mutual societies, unions and federations previously had to be registered. Decree n°2011-1192 dated 26 September 2011 has established a new registration process for these entities. The secretary general of the "Superior Council of mutuality" will now be responsible for the registration of mutual insurance companies, unions and federations.

France - Mutual societies - duty to advise

Decree n°2011-1064 dated 6 September 2011 has specified the terms of the duty to inform, advise and warn, which is imposed on mutual insurance companies. Like insurers, they now have to obtain and state the requirements and needs expressed by their members in respect of their life insurance contract, prior to the signing of such contract. These obligations are provided for in the new Article R. 223-6 of the French Mutual Insurance Societies Code.

7. Intellectual Property

European Law - The scope of protection of the "investment" function of a trade mark according to the ECJ

On 22 September 2011, the European Court of Justice (ECJ) issued its decision in the context of the *Interflora v Marks & Spencer* case. The ECJ considered certain issues referred by the High Court of Justice of the United Kingdom regarding the unauthorized use by Marks & Spencer of keywords identical to the registered trade mark *Interflora*. For the first time, the Court took into account the protection of the trade mark's investment function. According to the Court, a competitor's use of a sign identical to the trade mark in relation to identical goods or services has an adverse effect on that function where such use substantially interferes with the proprietor's use of its trade mark to acquire or preserve a reputation capable of attracting consumers and retaining their loyalty. In a situation where the trade mark already enjoys a reputation, the investment function is adversely affected where such use affects that reputation and thereby jeopardizes its maintenance.

In this context, the Court also held that the proprietor of a trade mark can prevent the use of keywords by a competitor if he imitates the goods concerned, but not if he offers an alternative.

European Law - Extension of the term of protection of the intellectual property rights of performers from 50 to 70 years

On 12 September 2011, the Council adopted by qualified majority a directive which amends directive 2006/116 on the term of protection of copyright and certain related rights. That directive extends the term of protection of the rights of performers and phonogram producers on music recordings within the EU from 50 to 70 years. It intends to increase the level of protection for performers by acknowledging their creative and artistic contributions.

In particular the directive harmonises the method of calculating the term of protection of songs and other musical compositions with that for works created by several authors. The term of protection will expire 70 years after the death of the last surviving co-author.

Member states will have to incorporate the new provisions into their national legislations within two years.

8. New technologies

France - Administrative notice relating to CCTV cameras

An administrative notice relating to CCTV cameras was adopted on 14 September 2011 and published in the *Journal Officiel* on 15 September 2011. This circular defines the procedure which has to be followed prior to installing CCTV cameras in order to satisfy the French data protection authority (the CNIL).

France - A new President for the CNIL

Following M. Alex Türk's resignation as President of the CNIL in order to keep his seat as a Senator (a legislative reform in March 2011 now prohibits the President of the CNIL from also being a member of Parliament), on 21 September 2011, Mrs Isabelle Falque-Pierrotin was elected as the new President of the CNIL. Prior to this election Isabelle Falque-Pierrotin had been the Vice President of the CNIL since 2009.

International - .XXX Top-Level Domain

The registration of domain names under the .XXX extension ([please refer to the Legal and regulatory update - April 2011](#)) is now open until 28 October 2011 for owners of registered trade marks. Entities which operate a pornographic site or those which have a connection with the porn industry which do not own any trade mark rights will have to wait until 8 November 2011 before becoming eligible to register domain names under .XXX. On 6 December 2011, the .XXX top-level domain should be open to all for registration, and will be allocated on a "first come, first served" basis.

9. Public law

France - Contracts in the fields of defence and security

Decree n°2011-1104 dated 14 September 2011, published in the OJ of 15 September 2011, implements Directive 2009/81/EC dated 13 July 2009 which concerns contracts awarded by contracting authorities or entities in the fields of defence and security. It adds a third part to the public procurement contracts code dedicated to contracts in the fields of defence and security. It repeals Decree n°2004-16 dated 7 January 2004 concerning some contracts in the field of defence. These provisions came into force on 21 August 2011, but contract projects for which a consultation was undertaken before this date will be governed by a transitional regime.

10. Real estate

France - Expropriation, preemption and priority rights: Public institutions

[Ordinance n°2011-1068](#) dated 8 September 2011 published in the Official Journal on 9 September 2011 sets out the modalities for exercising the rights of expropriation, preemption and the priority of public land institutions, public planning institutions and the planning agency of the Paris region.

France - Assessment of the risk of lead exposure

[Order](#) dated 19 August 2011 published in the Official Journal on 1 September 2011 sets out the rules for carrying out the assessment of the risk of lead exposure.

These provisions apply from 1 January 2012.

France - Measuring the levels of asbestos dust

[Order](#) dated 19 August 2011 published in the Official Journal on 1 September 2011 sets out the rules for measuring the levels of asbestos dust in the air in buildings.

These provisions apply from 1 February 2012.

11. Tax

France

The Second 2011 Amended Finance Act, adopted on 8 September 2011 and promulgated on 19 September 2011, includes many tax changes aimed at reducing the government deficit.

France - Corporate tax aspects

Reform of the tax loss utilization rules for companies subject to corporate tax

-Reform of the rules regarding loss carry forward: losses suffered by companies subject to corporate tax can now be offset against subsequent taxable income up to a maximum limit of EUR 1,000,000. and where losses exceed this amount, 60% of the portion of that year's taxable income exceeding EUR 1,000,000.

There is still no time limit on carrying-forward tax losses, but the deductible amount will be capped as above in respect of each fiscal year.

-Reform of the rules regarding loss carry back: there is now a double limitation on the ability of a company to carry back losses: (i) carry back is allowed on the sole profit of the fiscal year preceding the one during which the losses have been realized and (ii) the amount is limited to either the profit of the previous year that was declared and EUR 1,000,000, whichever is the lower.

The option for loss carry back must be exercised during the year in which the losses are realized.

Increase of the lump sum relating to long-term capital gains realized upon the disposal of shares qualifying for the French participation-exemption regime (hereafter "Participation Shares") from 5% to 10%

The rate of the lump sum relating to long-term capital gains realized by companies subject to corporate tax upon the disposal of Participation Shares has been increased to 10% for the fiscal year beginning 1 January 2011.

The effective rate of taxation applicable to long-term capital gains realized upon the disposal of Participation Shares is thus increased from 1.72% to 3.44% (including social contribution).

France - Individual tax aspects

Reform of capital gain on real estate

The tax regime for capital gains arising on the disposal of privately held French real estate has been amended for disposals made on or after 1 February 2012 (and as an exception, retroactively to 25 August 2011, for contributions to "family property investment companies" made by real estate properties or rights representing real estate properties (*SCI familiales*)).

The reduction of ownership by 10% per year applicable beyond the 5th year is replaced by a reduction which is lower and progressive. This has the effect of doubling the timeframe within which one can benefit from a total exemption of capital gains, from 15 years to 30 years.

The other reduction amounting to EUR 1,000 has been cancelled.

Increase in the rate of social security contribution (prélèvement social) from 2.2% to 3.3% applicable on income from property and investment products

The overall rate of social security contributions (CSG, CRDS and associated charges) on income from assets and savings has been increased from 12.3% to 13.5%.

France - Registration aspects

Formalisation and mandatory registration of disposal of interests in real estate companies concluded abroad

As of 1st November 2011, the disposals of interests in real estate¹ concluded abroad shall be made by deed and registered within one month.

¹ Company whose asset is mainly composed of real estate properties and real estate rights located in France.

Reduction of the timescale to publish a real estate act to the Land Registry to one month

As from 1st January 2011, the timescale within which the Land Registry must be notified of acts of real estate has been reduced from two months to one month (except for tenders).

France - Tax of 2% on certain hotels' accommodation services

As of 1st November 2011, the sums (excluding VAT) received by persons who operate a hotel establishment with hotel rooms which have a nightly rate of EUR 200 or more will be subject to an additional tax of 2%.

12. Telecoms

France - Publication of the ARCEP decision n°2011-1080 relating to the results of the award of the 4G mobile spectrum

Decision n°2011-1080 reveals the results of the auction process of the 2.6GHz band of the mobile spectrum. These frequencies will be used for the development of the 4G mobile network.

ARCEP retained 4 candidates: Bouygues Telecom, Orange France, Free Mobile and SFR for bids totalling 936 million euros. In the coming weeks, the regulator will issue formal licenses to the winning candidates together with positions within the 2.6 GHz band. With the exception of SFR, the operators made commitments to host MVNOs on their networks. Orange and Free mobile have each been allocated a duplex frequency bloc of 20 MHz; Bouygues telecom and SFR have each been allocated a duplex frequency bloc of 15 MHz. This decision appears in the [HL International Spectrum Review blog](#).

France - Publication of the ARCEP decision n°2011-0926 relating to the definition of the obligations of the main operator in the fixed line market dated July 26, 2011

On July 29, 2011 ARCEP published its final decision relating to its analysis of the fixed line market dated July 26, 2011 and to the obligations of the main operators regarding the price of call termination.

ARCEP set the maximum average price which can be charged by a fixed-line operator in France in respect of a call termination. As recommended by the European Commission in its May 2009 recommendation, this price shall on January 1st, 2013 be set at the incremental long term price of an efficient operator, being a mean price of 0.08 euros per minute.

France - Publication on July 28, 2011 of ARCEP decision n°2011-0846 dated July 21, 2011 and of the decision n°2011-0893 dated July 26, 2011 as regards disputes settlements between France Telecom and Free Infrastructure regarding development and sharing of optical fiber installations and networks

On July 28, 2011 ARCEP issued decision [n°2011-0846](#) and decision [n°2011-0893](#), respectively dated July 21 and 26, 2011. The French Telecom Regulator is responding to a request from Free Infrastructure and France Telecom regarding disputes relating to the price of sharing their infrastructures and the plans for development of optical fibers located directly inside the premises of the clients by the operators.

ARCEP is partially accepting several requests from Free Infrastructure regarding the price of sharing the France Telecom optical fiber lines. The Regulator also developed a regulatory framework for the installation of an optical fiber connection directly inside the final client's house.

France - Publication of the ministerial order for certification of the regulatory decision of ARCEP dated June 9, 2011 regarding the practical arrangements and the control of the information relating to the cover of the territory by the fixed lines internet access offers dated September 8, 2011

A ministerial order "[arrêté d'homologation](#)" was published in the Official Journal on September 8, 2011 certifying the [decision n°2011-0702](#) of the ARCEP dated June 9, 2011 relating to the practical arrangements of publication of the information relating to the geographical coverage of internet access provided by internet service providers.

This decision is binding for the internet service providers; they must publish information regarding the geographical coverage that their plans offer, using a single framework and a standard approach for all the operators under the control of the ARCEP.

13. Transports

France - Driving licence

Decree of 11 August 2011 amending Decree of 19 February 2010 relating to practical rules applicable to driving licences in category B and subcategory B1 was published in the O.J. on 30 August 2011. It sets, *inter alia*, a marking grid for skill levels and lists mistakes which would lead to failure of the driving test.

France - Watercrafts driving without a license

Decree of 21 July 2011 relating to driving of watercrafts loaded on professional yachts registered on the French international register was published in the O.J. on 4 September 2011. It provides the circumstances under which passengers over the age of 16 with no boat license can drive jet skis when renting or chartering a professional yacht registered in the French international register. .

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