

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 May 2011.

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Summary of miscellaneous French draft legislation

- **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 on commercial planning**, n° 2490, filed on 3 May 2010 - adopted on first reading by the *Assemblée nationale* on 15 June 2010 - adopted on first reading by the *Sénat* on 31 March 2011
- **Bill on bioethics**, n° 2911, filed on 20 October 2010 - adopted on 2nd reading by the *Assemblée nationale* on 31 May 2011

Enacted laws

- **Law n°2011-525 du 17 May 2011 to simplify and improve the quality of the law** published in the OJ on 18 May 2011
- **Law n°2011-590 of 26 May 2011 relating to the price of digital books** published in the OJ of 28 May 2011
- **Ordinance n°2011-504 of 9 May 2011 codifying the legislative part of the Code of Energy** published in the OJ on 10 May 2011

1. Competition

France - Method for calculating fines

On 16 May 2011, the Competition Authority published its [notice](#) on the method for calculating fines for undertakings or organisations guilty of

infringing competition rules.

2. Consumer law

France - Simplification and improvement of the quality of law

Law n°2011-525 of 17 May 2011 to simplify and improve the quality of law was published in the OJ of 18 May 2011. In particular, Article 47 provides for single dates for e-commerce sales, aligned with the dates of national traditional trade, and Article 45 (3) introduces criminal penalties for unfair sales with premium.

3. Corporate

France - Simplification of French corporate law

The Bill to simplify and improve the quality of law was definitively adopted by French Parliament on 14 April 2011.

Law n°2011-525, which came into force on 19 May 2011, contains various provisions relating to corporate law (articles 55, 58 to 62 and 64). In particular, the law:

- simplifies share capital increase procedures for stock companies by:
 - exempting stock companies with no employees from the requirement to hold an extraordinary general meeting to decide on mandatory proposed share capital increases in favor of employees, in accordance with article L.225-129-6 of the French Commercial Code;
 - exempting "controlled" subsidiaries (within the meaning of article L.233-16 of the French Commercial Code) from the obligation (i) to have the shareholders in extraordinary general meeting deliberate on the question of employees' stock ownership in case of a share capital increase and (ii) to convene an extraordinary general meeting every three years to decide on a proposed share capital increase reserved to the employees when employee stock ownership represents less than 3% of the share capital;
 - removing the Statutory Auditor's obligation to issue a special report to the board of directors or the management board (or to other directors), when the board of directors or the management board decides, on the basis of a general delegation of authority from the EGM (*i.e.* a delegation of the authority to determine the terms of the share capital increase), to remove the shareholders' preferential subscription right in the context of a share capital increase;
 - specifying that the only cases in which the Statutory Auditors are obliged to issue a report to the extraordinary general meeting ruling on a share capital increase without the preferential subscription right, are (a) when the extraordinary general meeting itself decides on the terms of the share capital increase, or (b) when the extraordinary general meeting delegates to the board of directors or management board the limited authority to implement the share capital increase pursuant to terms set by the extraordinary general meeting.(competence to be distinguished from the general delegation of authority mentioned above);
- removing the reporting requirements for stock company directors, statutory auditors and shareholders in the case of agreements relating to current operations entered into on normal terms and conditions.

France - Codification of the directive on mergers of public limited liability companies

Directive 2011/35/EU of 5 April 2011 concerning mergers of public limited liability companies was published in the Official Journal of the European Union on 29 April and will be in force as of 1 July 2011. It codifies the directive of 9 October 1978 concerning mergers of public limited liability companies (or « Third Directive on Mergers »), which has since been significantly amended. The last amendment was made on 16 September 2009

and related to reporting and documentation obligations in case of merger or demerger.

4. Employment

France - A new case for terminating a fixed-term employment contract

The law to simplify and improve the quality of law (n°2011-525), dated 17 May 2011 and published on 18 May 2011, introduced into Article L.1243-1 of the French Labour Code a new possibility for early termination of fixed-term employment contracts: when the company doctor concludes the employee is unfit to work, for work-related or other reasons.

France - Creation of two new employment financial incentives

Two new employment financial incentives have just been created by two Decrees n°2011-523 and n°2011-524 dated 16 May 2011.

The first rewards companies with fewer than 250 employees that hire a person under the age of 26, thus increasing the number of employees hired as apprentices or on a training scheme, for the period from 1 March to 31 December 2011. The size of the incentive depends on the type of contract, the company's size and its location.

The second rewards companies that hire job-seekers aged 45 and over on a training scheme, starting from 1 March 2011. This subsidy amounts to 2,000 Euros.

France - Statutory profit sharing special reserve: recognition of deficits

Please refer to the Tax section.

5. Energy

France - Regulated access to the historic nuclear energy

Decree n°2011-466 of 28 April 2011 setting out the conditions of regulated access to historic nuclear energy (ARENH) was published in the OJ on 29 April 2011.

The Decree is based on law n°2010-1488 of 7 December 2010 relating to the new organisation of the electricity market and sets out the rules and procedure allowing any electricity supplier to access the historic nuclear energy produced by EDF.

Two implementing orders were adopted on 28 April 2011 and published in the OJ on 29 April 2011. The first sets the overall maximum volume of historic nuclear energy to be sold by EDF to interested suppliers: 100 TWh. The second establishes a model agreement between EDF and these suppliers.

Two orders of 17 May 2011 price access to historic nuclear energy. The first one sets the price at 40 Euro per MWh for the period between 1 July 2011 and 1 January 2012. The second one sets it at 42 Euro per MWh from 1 January 2012.

Through publication of this decree and these orders, the new organisation of the electricity market will be effective from 1 July 2011.

France - Codification of the legislative part of the Code of Energy

Ordinance n°2011-504 of 9 Mai 2011 relating to codification of the legislative part of the Code of Energy was published in the OJ on 10 May 2011.

This Ordinance codifies all the legislative provisions relating to gas and electricity and implements in French law the European directives known as the « third energy package », namely directives 2009/72/EC and 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in, respectively, electricity and natural gas.

The Ordinance will come into force on 1 June 2011. Codification of the regulatory part is scheduled for the end of 2011.

6. Insurance

France - Extent of recourse for guarantee insurers

Following implementation of [Law n°2010-737 of 10 July 2010](#) on consumer credit reform, the French Insurance Code was amended to include a new Article L.443-1 on guarantee commitments. This new provision came into force on 1 May 2011, and sets out the extent of the recourse enjoyed by guarantee insurers. It reproduces the general principle of the right to subrogation and specifies against whom the insurer may take action to obtain repayment of the guarantee paid by it.

France - Recommendations on the marketing of life insurance contracts composed of unit-linked debt securities issued by an entity related financially to the insurance undertaking

The French regulator, the *Autorité de Contrôle Prudentiel* ("ACP") has published a recommendation of best practice rules intended to manage conflicts of interest arising from the distribution to policyholders of unit-linked life insurance contracts of debt securities issued by an entity linked financially to the insurance undertaking. The rules adopted apply to both insurance companies and intermediaries, including those marketing such unit-linked contracts in France by means of a European passport. The measures adopted by the ACP are designed to encourage an objective valuation of the security offered to the policyholder both at the time of issue and during the term of the contract. They also serve to inform the policyholder, before selection of the relevant units of account, that, in case of request for repurchase or arbitration or settlement of the contract before maturity, the issuer or a related financial entity may decide to acquire the debt. Such information must take the form of a provision expressly stating the risk of a conflict of interest. This recommendation applies to distributions after 30 July 2011.

7. Intellectual Property

France - Fight against counterfeiting: a bill to strengthen the provisions of the 29 October 2007 Law

On 17 May 2011, senator Béteille introduced [bill n°525 aiming to strengthen the fight against counterfeiting](#). The bill is designed to clarify, amend and supplement the provisions of Law No. 2007-1544 of 29 October 2007 against counterfeiting, which implemented Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights. The proposed amendments mainly relate to the designation of civil and criminal courts with jurisdiction for intellectual property right infringements, the calculation of remedies for infringements, the right of information procedure and the law of proof. They also aim to strengthen customs' means of action against counterfeiting, and in particular the procedure for detention under customs control.

This bill ensues from the [information report communicated to the Senate on 9 February 2011](#), assessing the implementation of the 29 October 2007 Law. In addition to its observations on the implementations, the report made a number of recommendations to improve the efficiency of the law. Most of them have been included in the bill.

8. Life sciences

European Law - Herbal medicines

Entry into force, on 1 May 2011, of [Directive 2004/24/EC on traditional herbal medicines](#). The Directive introduces a simplified marketing

authorization procedure for traditional herbal medicines through registration and provides for a seven-year transition period for the registration required of manufacturers of herbal medicines already on the market. Consequently, herbal medicines that were not registered or authorized before 30 April 2011 cannot be placed on the market after this date but traditional herbal medicine manufacturers can request their registration according to the simplified procedure.

European Law - Price and reimbursement of healthcare products

Ending of the public consultation on a possible revision of "Transparency Directive" 89/105/EEC. This consultation, initiated on 28 March 2011 by the DG Enterprise and Industry, should allow the European Commission to determine whether, due to changes to healthcare systems, national policies to control pharmaceutical expenditure and the pharmaceuticals market, the Directive needs to be modernised and adapted to new pricing and reimbursement schemes and new types of products (including medical devices). The consultation came to an end on 25 May 2011.

European Law - EHealth

Ending of the public consultation on the eHealth Action Plan. This consultation, initiated on 12 April 2011, aimed to provide more thorough information on the advantages and possibilities offered by eHealth, to solve the problems of interoperability of online health technologies and to support innovation and research in the area. It should allow the European Commission to adjust its next eHealth action plan for 2012-2020. The consultation ended on 25 May 2011.

9. New technologies

France - National Council for digital technologies

The decree creating the National Council for digital technologies ("*Conseil du Numérique*") was published in the OJ on 30 April 2011. The Council will have 18 members with proficiency in the digital field and its role will be to advise the French government on the enactment of statutes relating to digital technologies and to submit recommendations and opinions for the development of the French digital economy.

France - The CNIL authorises an anti-counterfeiting system

The French data protection authority (CNIL) decided, on 28 April 2011, to authorise the company CHANEL SAS to implement a system for processing personal data for the purpose of fighting counterfeiting. Although in principle individuals whose data is processed must be informed of the processing by the data controller as soon as their data is recorded, the CNIL considered that wording appearing on the various websites and in the cease and desist letters of CHANEL SAS would be sufficient in this case.

France - Good practices relating to geolocation

On 5 May 2011, the CNIL published an article setting out good practices relating to the processing of information obtained from Wi-Fi hotspots and used to provide geolocation services. The CNIL considers in particular that the creation of a cartographic base of Wi-Fi hotspots requires prior notification. In addition, according to the CNIL, users of smartphones should be provided with the option to delete location data relating to them.

10. Public law

France - Construction of stadiums for Euro 2016

The Law on organization of the 2016 UEFA European Football Championship (Euro 2016) was passed on 27 April 2011. Its main purpose is to allow stadium projects subject to a long-term administrative lease (*bail emphytéotique administratif*) to receive public subsidies. It also authorizes arbitration for public contracts relating to the organization of Euro 2016.

11. Real estate

France - Adoption of the rent index for service industries (ILAT)

Law n°2011-525 of 17 May 2011 published in the OJ of 18 May 2011 enacts ILAT.

ILAT will apply to leases for business premises for exclusive use as offices, logistics platforms or industrial premises, and for professional tenants.

ILAT is an index calculated as follows: 50% of the average annual CPI (Consumer Prices Index, excluding tobacco and rent), 25% of the average annual index of construction cost (ICC) and 25% of average annual nominal GDP.

As there is no automatic statutory substitution of ILAT for ICC, the parties would have to agree to replace ICC with ILAT.

ILAT will be published by the National Institute of Statistics and Economic Studies on conditions fixed by decree.

France - Building permits and thermal regulation

Decree n°2011-544 of 18 May 2011 published in the OJ of 20 May 2011 sets out the rules for issuing certificates stating that thermal regulations have been taken into account, which must be attached to applications for building permits and to the notification of completion of new buildings. It also details the procedures for carrying out the feasibility study on energy supplies which must be attached to applications for building permits for new buildings.

These provisions apply to building permit applications filed from 28 October 2011 for buildings for use for office, educational or childcare purposes and for residential use in urban renewal zones, and from 1 January 2013 for other buildings for residential use.

France - Sale in a future state of completion: declaration of completion of the building

Decree n°2011-550 of 19 May 2011 published in the OJ of 21 May 2011 amends the procedures relating to the declaration of completion of a building for residential or for professional and residential use sold in a future state of completion by extending the list of persons entitled to declare completion of the building.

The declaration of completion of the building terminates, as applicable, the completion guarantee or the reimbursement guarantee.

This provision applies to contracts which are in force.

12. Tax

France - Entrepreneurial investment bonds (*bons de souscription de parts de créateur d'entreprise "BSPCE"*)

The French Tax Authorities issued a statement of practice dated 11 May 2011 (**statement of practice n° 5 F-10-11**) on the amendments made by the Finance Bill for 2011 and the Amended Finance Bill for 2011 to the BSPCE tax regime and the tax treatment of capital gains realized upon disposal of shares.

France - Deductible interest rate for tax purposes

The French Tax Authorities issued a statement of practice dated 5 May 2011 (**statement of practice n° 4 C-3-11**) on the maximum interest rate deductible for tax purposes (for Q1 2011, the rate is 3.76%).

France - Profit sharing - Tax losses transferred

The French Tax Authorities issued a ruling dated 24 May 2011 (**RES n° 2011/13 (FE)**) on the possibility of offsetting income retained for the purpose of calculating profit sharing against tax losses transferred to a company (upon prior administrative authorization) in the context of a merger/acquisition.

France - Stock-options - Validity of the authorization to grant stock-options

The French Tax Authorities issued a ruling dated 24 May 2011 (**RES n° 2011/12 (FP)**) regarding the validity period for the authorization given by shareholders of a foreign company to the company to grant stock-options to the employees of its French subsidiaries or parent companies. Such authorization is valid for a maximum of 76 months.

France - Wealth tax (ISF) and investment in small companies (PME)

The French Tax Authorities issued a ruling dated 3 May 2011 (**RES n° 2011/10 (ENR)**) regarding the minimum employee requirement to be met at the end of the first financial year (at least 2 employees for most companies) introduced by the Finance Bill for 2011 to be able to benefit from the wealth tax rebate.

International - Double tax treaties and bilateral agreements

Decree n°2011-482 dated 2 May 2011: Tax bilateral agreement regarding exchange of information in tax matters between France and Sainte-Lucie signed in Paris on 22 March 2010.

Decree n°2011-483 dated 2 May 2011: Tax bilateral agreement regarding exchange of information in tax matters between France and Saint-Vincent-et-les-Grenadines signed in Paris on 22 March 2010.

Statement of practice n°14 A-4-11 dated 20 May 2011: List of the tax treaties signed by France in force on 1 January 2011.

13. Telecoms

France - ARCEP publishes its draft decisions on 800 MHz and 2.6 GHz frequency band allocations

Following the favourable response from the Parliamentary commission on the digital dividend, ARCEP published on 16 May 2011 draft decisions on the procedures for allocating the frequencies to be used for deploying ultra-fast mobile broadband (4G - frequency bands 800 MHz and 2.6 GHz) in Metropolitan France.

The final decisions should be adopted by ARCEP after the Electronic communications advisory committee (CCCE - *Commission consultative des communications électroniques*) has met, and will be submitted to the Government for approval with a view to a subsequent call for applications. Licences for the 2.6 GHz band could therefore be awarded in autumn 2011 and 800 MHz-band licences in early 2012.

European Law - The European Commission validates the methods used to award the fourth mobile telephony licence

Following the French Council of State's decision, the European Commission has validated the method used to award the fourth mobile telephony to Free for 240 million Euros licence at the end of 2009. Orange, SFR and Bouygues Telecom each had to pay 619 million Euros for their licences in the early 2000s and accused Free of benefiting from more advantageous conditions, in the form of State aid distorting competition. According to the European Commission, Free did not enjoy any economic advantage likely to constitute state aid.

European Law - European Parliament adopts amendments to the Radio Spectrum Policy Programme

On 11 May 2011, the European Parliament adopted amendments to the Radio Spectrum Policy Programme (RSPP) originally proposed by the

European Commission to set policy for spectrum management in the EU.

The RSPB covers a wide range of issues connected with use of spectrum by many different industries. While amendments impact all these elements, the emphasis is on mobile internet broadband.

14. Transports

European Law - Interoperability for passenger services on the trans-European rail system

Regulation n°454/2011 of 5 May 2011 on the technical specification for interoperability relating to the subsystem 'telematics applications for passenger services' of the trans-European rail system was published in the OJ of the EU on 12 May 2011.

The Regulation came into force on 13 May 2011.

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