

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 April 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

- 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
- Proposed law relating to commercial zoning, n°2490, filed May 3, 2010 - adopted on first reading by the National Assembly June 15, 2010 - adopted on first reading by the Senate March 31, 2011
- Bill strengthening the rights, protection and consumer information, n°3508, filed June 1, 2011 - first reading by the National Assembly 11 October 2011 and by the Senate December 22, 2011
- Proposed legislation to strengthen consumer rights regarding telephone solicitation, n°354, filed Mar. 11, 2011 - adopted on first reading by the Senate April 28, 2011
- Draft Law on Financing of Works, n°4090, filed December 14, 2011 - adopted on first reading by the National Assembly 26 January 2012

#### 1. Banking

##### France - Licence to microfinance institutions

The [decree n°2012-471 dated 11 April 2012](#) specifies the conditions (i) of the licence to the associations and foundations recognized as being in the

public interest to grant micro-loans, that is from now on issued by the Prudential Supervisory Authority (*Autorité de Contrôle Prudentiel – ACP*), and (ii) the authorization to companies to grant guarantees supporting loan transactions for development projects to companies located in priority employment areas, that is issued by the Minister in charge of Economy after advice from a special committee. These licenses will be given without a time limit.

This decree has entered into force on 14 April 2012. All previous authorizations will remain valid until their expiry date.

### **France - Intermediaries in banking transactions and payment services**

Issued pursuant to article R.519-12 of the Monetary and Financial Code, the Order dated 4 April 2012, prepared in cooperation with the representative organizations for the profession, approves the training program for the intermediaries in banking transactions and payment services.

Attached to this Order, the basic training program provides for three levels, determined according to the tasks performed by the intermediary and based on a common training including among others, courses about the global context of an intermediary's activity, the basic principles of law, the customer protection and the general knowledge of credit and guarantees.

This Order has entered into force on 14 April 2012.

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## **2. Capital Markets**

### **France - Position of the French Autorité des Marchés Financiers (AMF) n°2012-03 on organisation and control of automatised trade facilities**

The French AMF published on 5 April 2012 its position based on the ESMA's orientations dated 24 February 2012 on automatised trade facilities, in particular for high-frequency trading.

These guidelines, based on the provisions of the Markets in Financial Instruments Directives (MIFID) and market abuse directives will come into force on 7 May 2012, and relate to the organisation of the electronic trade facilities, the preservation of a fair and orderly negotiation within an electronic trade facility and the prevention of market abuses.

These guidelines will apply to (i) operations on an electronic trade facility on a regulated market or a multilateral trading platform, (ii) algorithmic trading by an investment company and (iii) the supply of direct and sponsored access to market by an investment company in relation to execution of third party orders.

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## **3. Competition**

### **European Law - Regulation *de minimis* for aid granted to undertakings providing services of general economic interest**

The Regulation EU n°360/2012 of the Commission of 25 April 2012 on the application of Articles 107 and 108 of Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, has been published in the O.J.E.U dated 26 April 2012. This Regulation sets to 500 000 euros the threshold under which the sums granted to an undertaking over a 3 years period for providing services of general economic interest are not considered as a State aid. This Regulation will stay in force until 31 December 2018.

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## 4. Consumer law

### European Law - Injunctions for the protection of consumer's interests

The Communication from the Commission concerning Article 4(3) of the Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumer's interests concerning the entities qualified to bring an action under Article 2 of this Directive, has been published in the O.J.E.U dated 31 March 2012. This Communication lists, Member state by Member State, the entities qualified to bring action for protection of consumer's interest.

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## 5. Corporate

### France - Publication of the decree implementing the Grenelle 2 law and Warsmann 2 law relating to the companies' transparency obligations in social and environmental field

The 2012-557 decree dated 24 April 2012 relating to companies' transparency obligations in social and environmental fields has been published in the Official Journal on April 26, 2012. This decree states the companies concerned as well as the list of information which shall be included in the management report and gives details about the conditions of their verifications by an independent third party organisation.

The companies concerned are those whose securities are admitted on a regulated market and unlisted French *Sociétés Anonymes* and French *Sociétés en Commandite par Actions* which exceed some cumulative thresholds (the total of their balance sheet or net amount of their turnover are equal to or greater than EUR 100 million and their average number of permanent employees during the financial period are bequal to or greater than 500).

The list of the information required is common to all the companies concerned and includes additional information required for listed companies.

The information required shall be checked by an accredited independent third party organisation appointed, as the case may be, by the Managing Director or the President of the *Directoire* for a maximum period of six financial years.

Those provisions shall apply:

-with respect to listed companies, for the financial years which started after December 31, 2011;

-with respect to unlisted companies, for the financial years following December 31, 2011, December 31, 2012 or December 31, 2013 as the case may be regarding the obligation of information and for financial years ending on December 31, 2016 regarding the verification of information.

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## 6. Employment

### France - Backing of the participation agreement to an employees' savings plan

An Interministerial Bill NOR ETST1221259C of April 19, 2012, indicates that participation agreements which did not include employees' savings plan in order to allow them to management their share of participation must be in compliance no later than January 1, 2013.

The Bill reminds that a participation agreement must provide at least a mandatory employees' savings plan with a five-year block time period (PEE, PEI, PEG). A collective pension savings plan ("PERCO") or escrow account may only be provided in addition to these savings plans.

Failure to comply with these provisions, social security and tax exemptions attached to participation shall no longer be applicable.

#### **France - Arrangements of the social system for supplementary pension schemes with defined benefit**

It is recalled that the irrevocable option of the employer for paying the specific contribution on either rental basis or on employer funding shall be made no later than June 30, 2012. In a letter-bill ACOSS, n°2012-0000043 of April 3, 2012, the procedures for exercising the option, payment and collection of contributions are recalled.

#### **France - Implementation of training scheme in temporary employment agencies**

The conditions of supplying an apprentice by a temporary employment agency ("ETT") have been clarified by a Decree n°2012-472 of April 11, 2012.

The Decree is detailing the contents of the three contracts that are necessary for the implementation of training scheme within an ETT and the role of designated training teacher within the ETT and the client company.

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## **7. Environment**

#### **France - Simplification of the law and reduction of administrative procedures**

Law n°2012-387 dated 22 March 2012 published in the Official Journal of 23 March 2012 modifies the obligation of environmental reporting concerning the subsidiaries and controlled companies exceeding certain thresholds defined by Decree.

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## **8. Insurance**

#### **France - Anti-money laundering ("AML") – Consultation for the preparation of a fourth Directive**

On 11 April 2012, the European Commission adopted a report relating to the application of the Directive 2005/60/CEE of the European Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (the "**Third Directive**"). This report analysed the implementation of the Third Directive and studied the need for amendments regarding, among other things, the recently adopted International standards (see March publication). The publication of the report will be followed by a public consultation which shall remain open to the public until 13 June 2012.

#### **France - Modification of insurance companies statistic statements**

The Decree n°2012-454 dated 4 March 2012 amends the requirements of the statistic statements that insurance undertakings, mutual and security institutions for complementary social protection shall provide to the Supervising Prudential Authority (*Autorité de Contrôle Prudentiel*). In particular, the Decree amends the statistic statement E5 relating to management costs that supplementary insurance undertakings shall fulfil, and also to statistic statements E1, E2 and E3 in order to obtain more information on insurance guarantees provided by insurance undertakings regarding the persons covered and the financial guarantees provided. Article D. 344-5 of the French Insurance Code shall be amended. These provisions will enter into force following the 2011 statistic statements released on 30 April 2012.

#### **France - Intermediaries in banking operations and payment services ("IOBSP") – Training program**

The Order dated 4 April 2012 approving IOBSP training programs was published in the Official Journal on 13 April 2012. In accordance with article

R. 519-12 of the French Monetary and Financial Code, it defines, the minimum training program that IOBSPs shall undergo, prior to exercising their roles as intermediaries, regarding legal, economic and financial competences. This order entered into force on 14 April 2012.

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## 9. New technologies

### France - Notification of breaches of security

A decree of 30 March 2012, published in the *Journal Officiel* of 31 March 2012, includes provisions which determine the conditions under which entities providing access to online communication services must inform the French data protection authority (the CNIL) of breaches of security affecting personal data, in accordance with the order relating to electronic communications implementing the European Directive relating to the protection of personal data in electronic communications ([please refer to the Legal and regulatory update - July / August 2011](#)).

### France - The CNIL publishes its 2012 controls program

On 29 March 2012, the CNIL presented its controls program for 2012. This agenda aims at pursuing 450 controls in 2012, in particular regarding the issues relating to the use of smartphones, the security of health data, security breaches and police records.

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## 10. Real estate

### France - Rents: index

The cost of construction index (ICC) for the fourth quarter of 2011 published by the National Institute of Statistics and Economic Studies (INSEE) ([Information Rapide INSEE, n°90, 6 April 2012](#)) amounts to 1638 which corresponds to a 6.85% increase over a year.

The commercial rents index (ILC) for the fourth quarter of 2011 published by the National Institute of Statistics and Economic Studies (INSEE) ([Information Rapide INSEE, n°92, 6 April 2012](#)) amounts to 106.28 which represents an increase of 3.26 % over one year.

The tertiary activities rents index (ILAT) for the fourth quarter of 2011 published by the National Institute of Statistics and Economic Studies (INSEE) ([Information Rapide INSEE, n°91, 6 April 2012](#)) amounts to 104.60 which corresponds to an increase of 3.25% over one year.

### France - Simplification of the law and reduction of administrative procedures

[Law n°2012-387](#) dated 22 March 2012 published in the Official Journal of 23 March 2012 modifies notably the time period to deliver the notice within the framework of a commercial lease, the information to disclose and the time period to complete certain formalities in case of assignment of an on-going business, as well as the time period to handover an on-going business or a lease in case of pre-emption by the municipality.

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## 11. Tax

### France - Tax on systemic risk

The Official Administrative Guidelines n°4 L-4-12 dated 3 April 2012 specifies the scope, the basis and the control proceedings applicable to the tax on systemic risk due by banking companies which are (i) under the control of the *Autorité de contrôle prudentiel* and (ii) subject to a Euros 500.000.000 minimum equity requirement.

## **France - Capital gains on the sale of real estate properties: the comments of French tax authorities**

The Official Administrative Guidelines n°8 M-3-12 dated 17 April 2012 comments the amendments impacting real-estate capital gains tax regime occurred in 2011 especially with respect to the taxable basis of such capital gains and the creation of new exemptions.

## **France - Decrease of the maximum rate of deductible interests**

The Official Administrative Guidelines n°4 C-3-12 dated 2 April 2012 gives the average interests' rate charged by credit institutions from 1 April 2011 to 31 March 2012. After reaching 4.14% for the 3<sup>rd</sup> quarter 2011, the rate decreases to 4.01% for the 1<sup>st</sup> quarter 2012.

## **France - International taxation**

### **-Updated list of non-cooperative states and territories**

The order dated 4 April 2012 updates the French list of non-cooperative states and territories. The following States and territories are removed from the list: Anguilla, Belize, Costa Rica, Dominica, Grenada, Cook Islands, Turks and Caicos Islands, Liberia, Oman, Panama, Saint-Vincent and the Grenadines. Botswana is added to the list.

### **-Exit tax: new reporting obligation**

The decree n°2012-457 dated 6 April 2012 establishes a new reporting obligations related to unrealised capital gains and claims, debts or liabilities held by individuals in case of the transfer of the tax residency outside France.

### **-Tax credit on Greek-source dividends**

As from 1 January 2009, Greece removed its withholding tax exemption on dividends. The Official Administrative Guidelines n°14 B-1-12 dated 9 April 2012 re-establishes a tax credit in order to take into account Greek amended tax law.

### **-Event giving rise to taxation for money transfer to or from abroad**

The Official Administrative Guidelines n°13 K-2-12 dated 22 March 2012 draws the consequences of the decision held by the French Administrative Supreme Court on 26 July 2011 which specifies that the event giving rise to taxation in case of an undeclared money transfer to or from abroad is the transfer in itself and not the income's perception.

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## **12. Telecoms**

### **France - Information collection regarding the technical and pricing terms governing data conveyance and interconnection**

In the decision n° 2012-0366 dated 29 March 2012, the ARCEP, in consideration of the authority's need to have deep and regularly updated knowledge of the conditions of Internet peering and transit agreements and practices which might have an effect on the French territory, has set up a semestrial collection of information.

This information collection would firstly concern (a) electronic communications operators who are subject to registration within the ARCEP pursuant to article L. 33-1 of the French Post and Electronic Communications Code. On a targeted and occasional basis, the ARCEP shall assess and complete the information provided by the previous category of operators, by requesting information from (b) electronic communications operators not-subject to registration within the ARCEP which have a data interconnection relation with operators subject to registration and (c) on-line communication services providers which have, regarding data transportation, a minimum of one relationship with a registered electronic

communication operator and which endorse a proactive approach in order that their services or contents would be used or consulted by final users located in France.

The first responses to the questionnaire shall be provided in August 2012

In the periodic questionnaire, electronic communications operators (category a) shall transmit information regarding all independent systems they own, data relating to each individual agreement with a reasonable number of partners AS, which includes: the first 20 partners with regard to the global capacity of data interconnection and transportation superior or equal to 1 Gbit/s with the AS owned or owning AS marked "FR" or "EU" in Réseaux IP Européen ("RIPE") data base. Specific rules shall apply to other categories of persons referred to in the decision.

### **France - Transposition of the new European regulatory framework on electronic communications**

The decree n° 2012-436 dated 30 March 2012 incorporates into French law the amended European regulatory framework on electronic communications, known as the "telecom package", which will provide European customers with new rights regarding fixed telephone, mobile telephone services and Internet access.

The decree defines, among other things, the possibility for ARCEP to impose a functional separation remedy on SMP operators. The decree also provides for information regarding the ARCEP notification of local access network equipment or facilities transfer. Furthermore, the Decree provides operators with new requirements in order to strengthen the security of devices used for intercepting electronic communications and amends the French Post and Electronic Communications Code's provisions relating to the National Frequency Agency and to the allocation and management of Internet domain names. This decree also amends the decree dated 25 February 2011 relating to data conservation and communications which permit them to identify any person uploading online content.

The decree was published on 31 March 2012. It will enter into force on 1 April 2012. However, provisions related to the strengthening of security of electronics communications interceptions will enter into force on 1 July 2012.

### **France - Data communication to the States and territorial authorities regarding territorial infrastructures and networks.**

The decree n°2012-513 dated 18 April 2012 defines the process according to which the State and territorial authorities and their groups could communicate the data collected from electronic communication operators and from infrastructure managers to a third party willing to participate in the territorial development. The decree provides for obligations applying to operators regarding data format and structure. Operators and managers of electronic communication network infrastructure shall be able to communicate for free with the State, to territorial authorities and to their groups, and under request, the information related to the implementation and development of their infrastructures and networks established on the national territory.

The decree will enter into force on 1 July 2012. During a first period, the data collection of information related to interconnection would endorse a vector format. From 1 January 2014, the overall information shall be communicated.

An order was adopted on the same day, as regards to article D98-6-3 of the French Post and Electronic Communications Code, in order to define the data format and structure that shall be communicated by electronic communication operators and infrastructure managers by request of the State, territorial authorities or their groups, regarding their infrastructures and networks.

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## **13. Transport**

### **France - Information on the CO2 quantity issued while providing a transport service**

An Order of 10 April 2012 issued for application of Article 14 of Decree n°2011-1336 of 24 October 2011 has been published in the O.J. dated 18

April 2012. This Order sets 1<sup>st</sup> October 2013 the date where every legal entity providing or commercialising transport services (transport company, moving company, taxis, renting companies of cars with drivers, of motor vehicles with 2 or 3 wheels, travel agencies, territorial entities providing transport services or their groupings) will have to provide to the beneficiary of the transport service information regarding the carbon cost of the service.

Another Order of 10 April 2012 issued for application of Articles 5, 6 and 8 of Decree No 2011-1336 of 24 October 2011, has been published in the O.J. dated 21 April 2012. This Order specifies, for each mean of transport, the reference values to use in order to calculate the quantity of CO2 issued while providing the service.

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