

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 2012

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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 - Authorisation of foreign investments

[Please refer to the Corporate section.](#)

2. Capital Markets

France - Instruction of the French AMF n°2011-15 : Calculation of global exposure for collective investment schemes

The French Financial and Markets Authority (*Autorité des marchés financiers* or "**AMF**") has implemented from 25 May 2012 ESMA's guidelines on risk evaluation and calculation of global risk for structured collective investment schemes by supplementing the AMF instruction n° 2011-15.

These guidelines were published in July 2010, and result from the Final Report of the ESMA (then CESR) and intend to complete the applicable requirements for risk evaluation and calculation of global risk in relation to derivatives.

3. Competition

France - Investigations conducted by the French General Directorate for Competition Policy, Consumer Affaires and Fraud Control (*Direction Générale de la Concurrence, de la Consommation et de la Répression des fraudes*)

[Please refer to the Procedure section.](#)

European Law - Communication on State aid modernisation ("SAM")

The European Commission passed on 8 May 2012 a Communication on State aid modernisation. This Communication states the three aims of the SAM: (i) fostering growth in a strengthened, dynamic and competitive internal market (especially through the definition of common principles and through the revision and streamlining of state aid guidelines), (ii) focusing enforcement on cases with the biggest impact on internal market (especially through the review of the *de minimis* Regulation, through the extension of Council enabling Regulation which allows the Commission to declare certain categories of aid compatible with the internal market and exempt them from ex ante notification, and through the revision and possible extension of the general block exemption Regulation), and (iii) simplifying rules and accelerating the process of decisions (especially through clarification and better explanation of the notion of state aids and through a modernisation of the State aid procedural Regulation).

European Law - State aid in the context of the EU Emissions Trading Scheme

The European Commission passed on 22 May 2012 some Guidelines on certain State aid measures in the context of the greenhouse gas emission allowance trading scheme ("ETS") post 2012. These aids regard to (i) aids to undertakings in sectors and subsectors deemed to be exposed to a significant risk of carbon leakage due to EU ETS allowance costs passed on in electricity prices, (ii) investment aids to highly efficient power plants, (iii) aid involved in optional transitional free allowance for the modernisation of electricity generation and (iv) aid involved in the exclusion of small installations and hospitals from the EU ETS.

European Law - Protection of leniency material in the context of civil damages actions

The European Competition Network passed on 23 May 2012 a Resolution in which the European Competition Authorities restated the importance of the protection of leniency materials in regards to civil damages actions brought by victims of anticompetitive practices, in order to ensure the effectiveness of leniency programmes in the frame of cartel discovery.

European Law - Public consultation on the future of Maritime Antitrust Guidelines

[Please refer to the Transport section.](#)

4. Corporate

France - Amendment of the regulation on the prior authorization of foreign investments in France

The [decree n°2012-691 dated 7 May 2012](#) amends the list of foreign investments subject to prior authorization excluding the transactions regarding (i) the indirect purchase of a branch of activity, and (ii) the crossing of the threshold over 33,33% of indirect shareholding of companies whose headquarters are located in France. This softening does not apply to purchases of branches of activity in sensitive sectors (national defence, in particular). The decree also excludes casinos of the sectors subject to the prior authorization.

This decree has entered into force on 9 May 2012.

France - Communication by the French Administrative Authority in charge of capital markets (*Autorité des Marchés Financiers – AMF*) of the synopsis of the answers relating to its previous public consultation launched on December 9, 2011 regarding the modification proposals of the AMF General Regulation (*règlement général AMF*) on take-over public offers

In a [press release dated 24 April 2012](#), the AMF published the synopsis of the answers relating to its previous public consultation on takeover bids.

The options taken by the AMF include the following, proposed to the French Minister in charge of Economy, Finances and Industry:

- with respect to the derogation of the obligation of registering a public offer project when exceeding the 50% thresholds of the share capital or rights to vote on the Alternext market, the derogation will apply to the exceeding of those 50% thresholds resulting from (i) *“the subscription exercise to a reserved share capital increase, requiring the Shareholders' General Meeting approval”* and, (ii) *“the exercise of shares attribution rights attached to securities allowing access to share capital when the reserved issue of those securities has obtained the prior Shareholders' General Meeting approval”*;

- with respect to the condition precedent relating to the control procedures of concentrations, the AMF decided *“to extend to the control procedures of concentrations resulting from States other than France, European Union and United States of America the offeror's ability to add to its offer an antitrust condition precedent as provided in article 231-11, subject to the fact that the procedure period must be compatible with a ten weeks period starting from the opening of the public offer, except in the event the AMF decides the offer timing is to be extended”*.

5. Employment

France - Press release on discriminations from the French data protection agency

Data Protection Agency's press release of May 11, 2012

[Please refer to the New Technologies section.](#)

France - Repeal of sexual harassment by the constitutional council : The Chancery tries to "limit damages"

Following the repeal of Article 222-33 of the French Criminal Code prohibiting sexual harassment by the Constitutional Council in its decision of May 4, 2012 (n°2012-240 QPC: OJ 5 p. 8015), no fact can be criminally prosecuted on the basis of this text.

It is applicable to all cases without final judgment as of May 5, 2012.

Only decisions pronounced and having become final on that date are not challenged, both for their execution as for their criminal record.

In a Circular of May 10, 2012 ([Circular CRIM-AP, May 10, 2012, n°10-780-D2](#)), the Department of Justice reported on the consequences of such repeal, during the time before the adoption of a new law defining clearly the sexual harassment in the next legislature.

France - Terms for funding and management of the collective pension savings plan ("PERCO")

An Inter-ministerial Circular of April 19, 2012 ([NOR: ETST1221259C](#)), taking the form of a Q&A, discusses the new ways of funding and management of the collective pension savings plan ("PERCO").

The Circular underlines on three measures:

- The possibility for employee who are not benefiting from a time savings account ("*compte épargne temps*") to assign days off not taken on a PERCO (five days maximum per year);
- The payment, by default, of half of the profit-sharing ("*participation*") in PERCO;
- The obligation to implement a management-led plan.

6. Environment

France - Extension of the financial guarantees mechanism under the Environmental Code

[Decree n°2012-633](#) dated 3 May 2012 published in the Official Journal of 5 May 2012 extends the requirement to set up financial guarantees to some installations that were previously outside the scope of the mechanism. This Decree also increases the ways of setting up those financial guarantees.

The provisions of this Decree, which will come into force on 1st July 2012, will be completed by a Ministerial order which is expected in the meantime.

7. Insurance

France - Solvency II – Towards a new postponement of the date of application

On 16 May the European Commission has issued a [proposal for a Directive](#) amending the Solvency II Directive (2009/138/CE) as regards the dates of its implementation and application and the date of repeal of certain Directives. Pursuant to this proposal it is proposed to postpone the date of implementation to 30 June 2013 (which originally was set for 31 October 2012) and to set the date of first application of Solvency II for 1st January 2014.

8. Intellectual Property

European Law - The OHIM in charge of the European Observatory on Infringements of Intellectual Property Rights

The EU regulation n°386/2012 of 19 April 2012 on entrusting the Office for Harmonization in the Internal Market (OHIM) with tasks related to the enforcement of intellectual property rights, including the assembling of public and private-sector representatives as a European Observatory on Infringements of Intellectual Property Rights, has been published in the Official journal of the European Union on 16 May of 2012. This Observatory was previously managed by the European Commission under the name European Observatory of Counterfeit and Piracy. Within the Observatory, the OHIM is entrusted with different tasks aimed at facilitating and supporting the activities of national authorities, the private sector and the

European Union institutions in the fight against infringements of Intellectual Property rights, in particular enhancing knowledge of technical tools to prevent and tackle infringements of intellectual property rights.

9. Life sciences

France - Decrees implementing the French Law n°2011-2012 dated 29 December 2011 relating to the strengthening of sanitary safety of medicine and health products

Several decrees implementing the *French Law n°2011-2012 dated 29 December 2011 relating to the strengthening of sanitary safety of medicine and health products* (so-called "Bertrand Law") were published in the Official Journal of 10 May 2012. Four of these decrees are briefly described below.

- French Decree n°2012-745 dated 9 May 2012 relating to the public declaration of interests and transparency with regards public health and sanitary safety identifies the persons who are subject to this obligation, and specifies the contents of this declaration, the conditions under which it is to be made public, and how it is to be submitted, updated and preserved. The decree will enter into force on 1st July 2012.

- Decree n°2012-741 dated 9 May 2012 relating to advertising of medical products for human use notably specifies how advertising to healthcare professionals is now subject to prior authorization, based on the same model as the current authorization process applicable to how advertising to the public is implemented. A timetable for the periods during which authorisations are to be submitted for advertising to healthcare professionals and for those to the public is set each year by the director of the national agency of safety of medicines and health products (*Agence Nationale de Sécurité du Médicament et des produits de santé*). For 2012, authorisations for advertising to healthcare professionals can be submitted from 1st to 15th June 2012 and from 1st September to 31st October 2012.

- Decree n°2012-743 relating to the advertising of medical devices and Decree n°2012-744 relating to the advertising of medical devices of in vitro diagnosis which will enter into force on 1st January 2013 specify provisions regarding the prior authorization mechanism for the advertising of non-reimbursed medical devices, and *in vitro* medical devices, which will present a high risk for human health. Moreover, the decrees list the conditions which govern any advertisements made available to the public or to healthcare professionals, as well as the minimum compulsory statements which the advertising must contain.

10. New technologies

France - Fight against discrimination

The CNIL and the *Défenseur des Droits* (the French Ombudsman) have published a methodological guide intended for human resources departments. This guide sets forth the general conditions to be complied with before implementing any personal data processing and contains the rules allowing to size up potential discrimination within a company or administration, and to evaluate the corrective actions implemented.

11. Procedure

France - Investigations conducted by the French General Directorate for Competition Policy, Consumer Affairs and Fraud Control (*Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes*)

Decree n°2012-610 of 30 April 2012 relating to the organisation of the investigations conducted by the agents of the French General Directorate for Competition Policy, Consumer Affairs and Fraud Control has come into force on 4 May 2012. It aims at reorganising the investigations conducted by the agents of the French General Directorate for Competition Policy, Consumer Affairs and Fraud Control (hereafter "DGCCRF"). For this purpose, this Decree extends the list of persons entitled to assist the DGCCRF's agents to include civil servants, trainee civil servants as well as officials working for the Administration under a contractual basis who do not directly belong to the DGCCRF but have been appointed to work for the DGCCRF in the latter's different Divisions throughout the country. Yet, as it was the case previously, the agents assisting in the scope of

investigations cannot take any administrative or criminal actions and are not entitled to disclose information of which they may have become aware during the investigations.

France - Constitutionality of the mandate of Judges of Commercial Courts

A decision handed down on 4 May 2012 by the French Constitutional Council (Cons. Const. 4 May 2012, n°2012-241-QPC) ruled that the mandate of Judges of Commercial Courts was constitutional. Indeed, the constitutionality of their appointment process as well as their disciplinary regime, pursuant to Articles L. 722-6 to 722-16 and L. 724-1 to L. 724-6 of the French Commercial Code, had been challenged through a "Priority Preliminary Ruling on Constitutionality" (*Question Prioritaire de Constitutionnalité*). With respect to the mandate of Commercial Court Judges, the French Constitutional Council ruled that there were sufficient guarantees to avoid any conflicts of interests, even indirect. Furthermore, the claimants argued that the fact that citizens could not file a claim against these Judges before a disciplinary body breached the principle of equality with respect to the disciplinary regime applicable to ordinary Judges. The French Constitutional Council recalled that Commercial Court Judges are not subject to the ordinary regime applicable to judges in France. As a result, the Constitutional Council dismissed this argument.

12. Public law

France - Public-private partnerships concluded by local authorities

Circular dated 9 May 2012 (NOR: EFIT1206010C) updates all information needed by local authorities in order to implement public-private partnerships (*contrats de partenariat*). It deals in particular with the conditions under which such contracts are chosen, concluded and written. This Circular replaces the circular dated 29 November 2005 on the same matter.

13. Tax

France - Measures against fraud and tax evasion

The Official Administrative Guidelines n°14 A-5-12 dated 10 May 2012 comments all the measures taken against Non-Cooperative States and Territories (the "NCST") and specifies the notion of NCST, the measures applicable to transactions performed by French residents with NCST and measures applicable to transactions performed by NCSTs' residents or entities located in these states and territories.

France - Corporate taxation

Sub-combining entities' tax consolidation

The ruling n°2012/31 dated 24 April 2012 allows a sub-combining entity which establishes combined financial statements in accordance with Article L. 212-7 of the French Code of mutuality to form a tax group with the member entities of its combined-accounting perimeter provided that (i) the conditions of tax consolidation under Article 223 A of the French Tax Code are met, and (ii) the combining parent company does not already form a tax group with the member entities of its own scope of combination.

Adjustments on the new French tax regime of losses' carryover

The Official Administrative Guidelines n°4 H-6-12 dated 23 May 2012 develops the new French tax regime of losses' carryover provided by the second French amended finance act 2011 applicable on losses occurred for fiscal year ending on or after 21 September 2011.

French committee of the abuse of tax law annual report and opinions

- The Official Administrative Guidelines n°12 L-2-12 dated 7 May 2012 publishes the opinions provided by the committee of the abuse of tax law on 2 February 2012. The opinions in favour of the implementation of the abuse of law proceedings mainly concern saving plans and transfer-sale

operations.

- The Official Administrative Guidelines n°13 L-3-12 dated 9 May 2012 publishes the annual report of the committee's president for 2011.

France - Tax consequences of shareholders' changes for French quoted real estate investment companies ("SIIC")

The ruling n°2012/32 dated 24 April 2012 specifies the tax consequences and sanctions applicable in case of, sale in favour of a non-SIIC company, of the totality of the shares of a company which opted for the SIIC tax regime as a SIIC subsidiary.

14. Telecoms

France - Public consultation regarding the ARCEP draft report to Parliament on the neutrality of the Internet

On May 16, 2012, the ARCEP set up a consultation relating to its draft report to the parliament on the neutrality of the Internet.

This draft report follows the law dated 22 March 2011 under which the Parliament required the ARCEP to clarify the debate regarding Internet neutrality. Internet neutrality corresponds to the conciliation between basic internet principles (opening, freedom, transparency and non-discrimination) and the perseverance of allowing good quality access to the internet.

On September 10, 2010, the ARCEP published 10 propositions in order to establish a neutral and appropriate balance for the functioning of the Internet. Since this date, several initiatives and works have been initiated by the ARCEP in relation to various projects linked to Internet neutrality such as: competition and transparency, service quality, interconnection and traffic management.

The public consultation shall end on June 20, 2012. After this the ARCEP will have received the stakeholders' commentaries, and a definitive report shall be drafted and provided to Parliament.

15. Transport

France - Changes in the status of the Paris and Strasbourg harbours

The Decree n°2012-669 of 4 May 2012 on the harbour of Paris and on various harbours provisions was published in the O.J dated 6 May 2012. This Decree (i) brings the status of the harbour of Paris in line with the status of "large maritime harbours", (ii) authorises the harbour of Strasbourg to take financial stakes into legal entities which activities contribute to the development or modernisation of the harbour, and (iii) incorporates in the harbours accounts the railways and their accessories which has been transferred to the "large maritime harbours", to harbours or to RFF.

France - Increase in transport rates due to "Ecotax"

The Decree n°2012-670 of 4 May 2012 on rules for the increase in transport rates related of the introduction of the Alsatian tax and the national tax on vehicles used for carriage of goods was published in the O.J dated 6 May 2012. This Decree sets the conditions and terms of implementation of this price increase due to the Ecotax.

France - Access to the profession of road transport operator and access to the road transport market

A Circular on the access to the profession of road transport operator and access to the road transport market has been issued by the Minister of Ecology, Sustainable Development, Transports and Housing. This Circular describes the terms of implementation of Decree n°2011-2045 of 28 December 2011 on the access to the profession of road transport operator and access to the road transport market, and of its implementation Orders.

European Law - Public consultation on the future of Maritime Antitrust Guidelines

On 4 May 2012 the European Commission launched a public consultation on the suppression of the Guidelines on the application of article 101 TFEU to maritime transport services, which will lapse in September 2013. The interested parties have until 27 July 2012 to submit their observations.

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