

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 October 2012

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Summary of miscellaneous French draft legislation

- **Draft Law on Financing of Works, n°4090**, filed on December 14, 2011 - adopted on first reading by the National Assembly on January 26, 2012
- **Draft law on net neutrality, n°190, filed on September 12, 2012**, before the National Assembly
- **Draft law on finance for 2013, n°235, filed on September 28, 2012, before the National Assembly** – first reading from October 16 to November 20, 2012
- **Draft law on the financing of Social Security for 2013** – filed on October 10, 2012 – adopted on first reading by the National Assembly on October 30, 2012
- **Draft law on public finance programme planning for the period 2012 to 2017, n°234**, filed on September 28, 2012, adopted on first reading by the National Assembly on October 23, 2012
- **Draft law on tiered pricing of energy, n°150**, filed on September 6, 2012 – Emergency procedures on September 10 – Adopted on first reading by the Senate on October 30, 2012
- **Draft law on the creation of a public investment bank, n°298, filed on October 17, 2012** – Fast track procedure on October 17, 2012

Enacted laws

- **Law n°2012-1189 of October 26, 2012 for the creation of jobs of the future** – OJ of October 25, 2012

1. Audiovisual

France - French CNC's aid to the creation of innovative cinematographic and audio-visual works amended

Decree n°2012-1155 of 15 October 2012 relating to aids to the creation of innovative cinematographic and audio-visual works repeals Decree n°2005-1396 of 10 November 2005 in view of extending and strengthening the selective aids granted by the Centre National de Cinéma et de l'image animée (National Center of Cinematography and the moving image - CNC) to authors and audio-visual works' production companies.

The creation of the aid to concepts and of the aid to the rewriting for works of fiction and animation intended to television aims at expanding CNC's support to authors throughout the creative process. The financial aid to documentaries is expanded to cinematographic works and is completed by the creation of the strengthened development aid, that aims at backing audio-visual works' production companies for the first shooting and the pre-editing of the work.

These different selective aids are granted by the CNC, as subsidies, to authors and audio-visual works' production companies settled in France, according to the innovative nature of the format, the dramaturgy and the direction of the work.

France - French CSA forbids simulcasts on national terrestrial channels

The decision of the Conseil Supérieur de l'Audiovisuel (Superior Council of Audiovisual - CSA) dated 16 October 2012 forbids national terrestrial channels to simultaneously broadcast all or part of the same program, unless prior written consent of the CSA. Programs whose characteristics in terms of images and sounds are identical are to be considered as being a same program. The CSA also indicates that two broadcasts of the same program in less than one hour shall be considered as a simulcast. This decision was taken under the principles of programs' diversity and sociocultural expression opinions' pluralism, of which CSA is the guarantor, pursuant to Law n°86-1067 of 30 September 1986.

However the prohibition of simulcasts shall not apply to the broadcasting of debates, declarations of public figures and ceremonies of a particular interest to the public.

2. Banking

France - Thresholds of usury

The notice (*avis*) dated 24 September 2012 on the implementation of Articles L.313-3 of the Consumer Code and L.313-5-1 of the Monetary and Financial Code concerning usury (JORF n°0227 dated 29 September 2012) fixed the sixteen usury thresholds corresponding to the sixteen categories of loans.

These thresholds are applicable from 1st October 2012.

3. Capital Markets

European Law - New European regulation about short selling

In a [press release](#) dated 17 October 2012, the AMF draws the attention of the investors to the entry into force on 1st November 2012 of the European Regulation n°236/2012 regarding short selling and the abrogation of the instructions n°2010-08 et 2011-03 accordingly.

The text strengthens and harmonises the rules that applies to short positions in shares and in sovereign debt.

Since 2011, France had transparency rules on short positions in shares that were traded on a French regulated market or an on organised multilateral trading facility. The new European rules do not substantially modify the rules set out by the AMF. However, what is new is the extension of these transparency obligations to short positions in all shares admitted to trading on European markets and as well as in the sovereign debt issued by member States of the European Union.

Moreover, the regulation regulates the speculative devices linked to short selling. So, the locate requirements for short-sold securities are bolstered in order to prevent delivery failures. The buy-in procedures for clearing houses are harmonised and the timeframe is shortened.

Finally, the purchase of sovereign CDS (Credit Default Swaps) which allow buyers to cover themselves against the risk of the issuer defaulting is prohibited unless the purpose is to hedge a correlated exposure.

The AMF also publishes a [document](#) which provides details about the implementation of these main measures and among others the methods for calculating short positions and for transmitting them to the competent authorities. As a conclusion, a [Q&A](#) drafted by the ESMA and available on its Website is referred to.

European Law - Entry into force of EMIR regulation

The European Regulation on OTC derivatives (the "European Market Infrastructure Regulation") (herein after "EMIR") n°648/2012 dated 4 July 2012 and published in the Official Journal of the European Union came into force on 16 August 2012.

Following the economic and financial crisis of 2008, the European Member States decided to introduce supervisory regulations to the derivatives market within the European legal framework, for the purpose of transparency.

The EMIR Regulation is directly applicable in the Member States and does not require any further implementation. However it must be completed by technical standards which have been sent by the European Securities and Markets Authority (herein after "ESMA") to the European Commission. The European Commission then has three months to approve them.

The Emir Regulation has, inter alia, established the following rules:

- The clearing of standardised derivatives that are eligible according to the ESMA;
- The implementation of risk management procedures for non-eligible Central Counterparties;
- An obligation to report OTC transactions.

The ESMA has until 31 December 2012 to publish the guidelines and recommendations related to the application of the regulations. Furthermore

Central Counterparties have six months to comply with the EMIR regulations' provisions.

4. Competition

European Law - State aids: Commission prolongs guidelines on state aid for rescuing and restructuring firms in difficulty

The Guidelines on State aids for rescuing and restructuring firms in difficulty, adopted in 2004, should have expired on 9th October 2012. They have been prolonged until new guidelines are adopted (sine die). The review of these guidelines is part of the State Aid Modernisation of the European Union.

European Law - Electronic communications: public consultation on the review of the Recommendation on relevant product and services market

On 16 October 2012 the European Commission launched a [Public consultation](#) on the review of Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services. The concerned persons are invited to answer to a questionnaire by 8 January 2013.

European Law - Communication on online gambling

On 23 October 2012 the Commission adopted a [Communication](#) on online gambling which sets out an action plan aiming in particular at (i) ensuring compliance of national regulatory frameworks with EU law, (ii) enhancing supervision, administrative cooperation and efficient enforcement, (iii) protecting consumer and citizens, (iv) preventing fraud and money laundering and (v) safeguarding the integrity of sports and preventing match-fixing. A [Staff Working Paper](#) is attached to the Communication.

5. Consumer law

France - Public Consultation on class action

The Minister in charge of Consumption has launched a large consultation on the introduction of class action in French law. The concerned persons are invited answer to a [Questionnaire](#) by the 1st of December 2012.

6. Corporate

France - Approval of the amendments to the General Regulation of the AMF in respect of the notification of major holdings

Pursuant to the Law n°2012-387 dated 22 March 2012 relating to the simplification of law and administrative formalities, cash-settled derivatives are taken into account, since 1 October 2012, in the calculation of holdings for the purposes of the notification of major holdings. Certain provisions of the General Regulation of the AMF were modified accordingly and these changes were approved by a [ministerial order dated 27 September 2012 \[Press release available in English\]](#).

[Please refer to the Legal and regulatory update - September 2012.](#)

7. Employment

France - 2013 Social security budget bill: submission of conventional breach indemnities to special social tax

The 2013 Social Security Budget Bill intends to submit the portion of conventional termination indemnities below twice the annual Social Security ceiling (i.e. 72,744.00 euros for 2012) to a special tax (with a 20% rate).

Beyond this threshold, those specific indemnities will continue to be subject to social contributions.

France - Draft Decree: plan of action for equality between men and women

According to a Draft Decree, the plan of action for equality between men and women would now have to be registered under the same conditions as collective agreements, notably company or establishment ones.

It would then have to be registered to the French labour administration ("DIRECCTE"), in duplicate, including a paper version signed by the parties and an electronic one. Moreover, a copy would have to be given by the most diligent party to the Employment Tribunal competent for the location where the agreement has been entered into.

The Draft Decree also provides details on the indicators on the respective situation of men and women (remuneration, promotions, etc) to be mentioned within the synthesis of the plan of action. It would be indicators relating to "professional category" and therefore more accurate than they are today.

France - Interministerial circular: implementation of the 1% penalty regarding seniors agreements

The Interministerial Circular n°2012-17 dated October 2, 2012 provides that companies which, on September 4, 2012:

-are covered by an industry-wide or company-wide agreement or plan of action regarding seniors employment are considered as respecting their obligation regarding article L.138-24 of French social security Code.

-would fall within the scope of the provisions relating to agreements on employment of elderly workers (notably because of a threshold crossing) are also regarded as complying with the said obligation.

Consequently, they do not have to declare or pay a penalty of 1% of the remuneration paid to the employees and they cannot be subjected to an adjustment based on lack of coverage by an agreement or plan of action during this period. This applies until the deadline for negotiating "generations contracts" agreements to be determined by the provisions of a coming law.

8. Insolvency proceedings

France - Implementation of conservatory measures

Decree n°2012-1190 dated 25 October 2012 (JORF n°0251 dated 27 October 2012) issued for the implementation of Law n°2012-346 dated 12 March 2012 sets out the rules for implementing conservatory measures within safeguard, reorganisation or liquidation proceedings. This decree sets out in particular that the measures are proportional to the debt filed by company subject to insolvency proceedings and specifies the procedure for the sale of assets subject to these measures.

The decree has entered into force on 26 October 2012.

European Law - Extension of the guidelines on State aid for rescuing and restructuring companies facing financial difficulties

In a press release dated 28 September 2012 ([press release IP/12/1042](#)) the European Commission announced the extension of the guidelines on State aid for rescuing and restructuring companies facing financial difficulties that were adopted in 2004 and continued for the first time in July 2009. These guidelines will apply until the adoption by the Commission of new rules within the context of the modernization of the State aid policy.

9. Insurance

France - Project of Law – Implementation of Omnibus I Directive

On 26 September 2012, the draft law containing various provisions adapting legislation to the law of the European Union in economic and financial matters was adopted on first reading by the Senate. It aims at implementing into French law Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 on the powers of the European Supervisory authorities called "Omnibus I" which aims to adapt financial sector directives (banking, insurance and financial markets) to the new European supervisory architecture adopted in late 2010. It strengthens the exchange of information between national supervisory authorities and the European authorities with a view to improving the effectiveness of the supervision of financial market participants. The project of law was transmitted to the National Assembly on 27 September 2012.

France - ACFS – Progress report on loan insurance

On 24 September 2012, the Advisory Committee of the Financial Sector – "ACFS" ("*Comité Consultatif du Secteur Financier*") issued a report on the impact of the entry into force of Law dated 1st July 2010 on the reform of consumer credit. This report includes in particular an assessment and areas for improvement in the field of loan insurance. It recommends in particular that the standardized information sheet which aims at informing prospective customers on the modalities of insurance be disclosed in advance, thus enabling prospective customers to effectively compare the offers.

European Law - Solvency II transposition and application dates

[Directive 2012/23/EU](#) of the European Parliament and of the Council of 12 September 2012 amending the transposition and application dates of the Solvency II Directive was published in the Official Journal of European Union on 14 September 2012 and entered into force on 15 September 2012 (please refer to the Legal and regulatory updates - [May](#) and [July / August](#) 2012).

European Law - European Parliament working document

On 29 October 2012, the European Parliament's Economic and Monetary Affairs Committee published a [working document](#) on the proposal for a directive on insurance mediation ("**IMD2**"). The document gives a summary of the proposed directive together with various questions arising from its provisions. These include whether the appraisal of claims should be included within the scope of the IMD 2, given that, from the perspective of policyholder protection, the interest is not immediately obvious and questions about the proposals with regard to fee systems (please refer to the Legal and regulatory updates - [May](#) and [July / August](#) 2012).

European Law - International regulators – Identification of systemic insurers

On 17 October 2012, the International Association of Insurance Supervisors released for consultation Policy Measures for Global Systemically

Important Insurers. These measures take account of the specific nature of the insurance business model. It is mainly proposed to enhance supervision on Global Systemically Important Insurers, to separate traditional insurance activities from non-traditional, non-insurance activities and to adopt a cascading approach in relation to higher loss absorption capacity. Supervisors, insurers and other interested parties are encouraged to submit comments on the proposed policy measures by 16 December 2012 at the latest ([please refer to the Legal and regulatory update - June 2012](#)).

10. Intellectual Property

European Law - European Directive on certain permitted uses of orphan works

The [Directive 2012/28/UE of 25 October 2012](#) on certain permitted uses of orphan works creates a system of mutual recognition of orphan works within the EU and provides for an authorization of use of these works by some public institutions in order to achieve aims related to their public-interest missions, such as libraries, educational establishments and museums.

The Directive defines orphan works as works that are still protected by author rights but whose right holders cannot be identified or located. The Directive provides for a harmonized definition of this concept and for the creation of a central database of orphan works. This database will be available online and managed by the Office for Harmonisation in the Internal Market (OHIM). Prior to be listed and then used, a search for rightholders shall be carried out by the concerned institution(s).

Member States shall provide in their national law for an exception or limitation on the rights of reproduction and representation of authors in order to authorize the public institutions at stake to make the works available to the public and to reproduce the same, in particular for the purpose of their digitization, indexation, restoration or preservation.

Member States shall implement the Directive into their national law by 29 October 2014.

11. Life sciences

France - Decree n°2012-1095 of 28 September 2012 on various financial penalties which can be applied to companies operating medicines, and to manufacturers or distributors of medical devices

This Decree, which entered into force on 1 October 2012, relates to the implementation of three financial penalties applicable to companies manufacturing medicines or medical devices, reimbursable by medical insurance, and to distributors of medical devices in case of failures.

Two of these penalties can be imposed by the Economic Committee for Health Products ("CEPS"). The first one is imposed on pharmaceutical companies which failed to comply with the commitment they had agreed on with the CEPS in respect of the implementation of means to limit the unjustified use of their medicines outside the marketing authorisation's instructions. The second penalty concerns pharmaceutical companies which have not met the annual targets to reduce medical visit.

Finally, the Ministers of Health and Social Security may sanction a manufacturer or a distributor of medical devices which has not conducted the complementary study (failure to file the study within the timeframe or filing of a study manifestly lacking the requested elements), to which may be subordinated the reimbursement of some devices used in health care institutions.

When the authorities (the CEPS or the Ministers, as the case may be) consider imposing a penalty on a company, they inform the company and specify their motives for considering such a penalty. The Company shall submit, within one month, its written observations as well as the details of its

turnover which are necessary to the calculation of the fine. As of the day of the notice from the authorities informing the company of the motives and the amount of the imposed penalty as well as of the remedies and the period allowed for appeals, the concerned company must pay the penalty within one month.

France - Decision of 17 October 2012 setting the calendar and periods for filing, for the year 2013, the form and the content of visa applications for advertisements of medicine for human use

This decision of the General Director of ANSM, sets the timetable for 2013 concerning the filings of applications for authorisations to advertise to health professionals and to the public. These applications shall be prepared using the form which is attached to this decision and is available of the ANSM's website.

European Law - Directive 2012/26/EU of the European Parliament and the Council of 25 October 2012 amending Directive 2001/83/EC as regards pharmacovigilance

The directive of 25 October 2012 amending directive 2001/83/EC as regards pharmacovigilance was published in the Official Journal of the European Union on 29 October 2012. Member States shall apply those provisions before 28 October 2013.

The main objective of this directive is to establish an automatic procedure in order to guarantee that a safety issue is addressed in all the Member States where the medicine is marketed. This directive also aims at clarifying and strengthening the regular procedure and the EU emergency procedure to ensure a better coordination and a quick assessment in case of emergency.

In particular, this text requires more transparency from companies. The holder of the marketing authorization shall inform Member States' competent authorities and the European Medicines Agency of the reasons which led him to withdraw a medicine from the market, stop marketing a medicine, request the withdrawal of a marketing authorisation or refrain from asking for its renewal.

12. Procedures

European Law - New Rules of Procedure for the Court of Justice of the European Union

On 25 September 2012, the Court of Justice of the European Union adopted new Rules of Procedure, which will enter into force on 1 November 2012. Various measures ensure that the Court's increasing caseload can more readily be disposed of, including the relaxation of necessary conditions for the adoption of a reasoned order. In addition, the Court is no longer obliged to hold a hearing when it has received sufficient information from the pleadings and observations. Further, the new rules of procedure abandon the requirement of a report for the hearing, and clarify the minimum essential content of any request for a preliminary ruling.

13. Profession and ethics of the profession

France - Decree of 3 October 2012 relating to the duty of care and disclosure to prevent the use of the financial system for the purpose of money laundering and terrorist financing

Decree n°2012-1125 of 3 October 2012 relating to the duty of care and disclosure to prevent the use of the financial system for the purpose of money laundering and terrorist financing entered into force on 6 October 2012. It increases the duty of care owed by various professionals, including lawyers, in high-risk situations. Indeed, the amended Article R 561-10 of the Monetary and Financial Code extends the duty of care to any funds transfer operations or physical exchange operations. The decree also modifies Article R 561-20 so as to provide for a more steady and plenary

follow-up of client files.

14. Public law

France - Compulsory financial assessment prior to national PPPs

Decree n°2012-1093 dated 27 September 2012, published in the OJ of 29 September 2012, provides that Government services and national and health public entities must, prior to the conclusion of public-private partnerships (partnership contract, complex land arrangements), make a preliminary study to assess the impact of the project on public finances and the availability of credits, as well as its compatibility with the property policy of the Government. These provisions apply to contracts for which a consultation is undertaken from 1st November 2012.

15. Real estate

France - Rents: index

The cost of construction index (ICC) for the second quarter of 2012 published by the National Institute of Statistics and Economic Studies (INSEE) ([Information Rapide INSEE, n°247, 5 October 2012](#)) amounts to 1666 which corresponds to a 4.58% increase over a year.

The commercial rents index (ILC) for the second quarter of 2012 published by the National Institute of Statistics and Economic Studies (INSEE) ([Information Rapide INSEE, n°248, 5 October 2012](#)) amounts to 107.65 which represents an increase of 3.07% over one year.

The tertiary activities rents index (ILAT) for the second quarter of 2012 published by the National Institute of Statistics and Economic Studies (INSEE) ([Information Rapide INSEE, n°249, 5 October 2012](#)) amounts to 106 which corresponds to an increase of 3.17% over one year.

16. Tax

France - Compensation paid for the contractual breach of an employment contract

In principle, compensation paid for the contractual breach of an employment contract is exempt from French income tax if the employee is not entitled to a pension of a legally binding regime. Certain persons wondered if it was possible to benefit from the exemption if the entitlement right to pension intervened during the same year as the breach of the employment contract.

The French Tax Authorities have specified that the above mentioned exemption is applicable when the liquidation of pension is realized after the date of effective breach of the employment contract ([BOI-RSA-CHAMP-20-40-10-30](#)).

France - Interest rate

The average of annual interest rate on loans granted by financial institutions, which carry a floating rate and have a minimum term of 2 years, amounts to 3.07% for the third quarter of 2012.

France - Trust tax regime

The French Tax Authorities have specified the tax regime applicable to trusts ([BOI-DCJ-TRUST](#), [BOI-ENR-DMTG-30](#) et [BOI-PAT-ISF-30-20-30](#)). In

particular:

-Trusts created by a company or by a group of companies for their own account are out of the scope of trusts (it is the case of trusts created by companies in order to manage employee savings or employee shares);

-With respect to free transfer realized through a trust:

- (i) The existence of a trust does not affect the application of tax treaties;
- (ii) The later transfer of properties put in trust is not always qualified as a taxable transfer;

- Properties and rights of "pension trusts" are out of the scope of wealth tax.

17. Telecoms

France - Public consultation launched by ARCEP on PMR networks and their future spectrum needs

On October 8, 2012, ARCEP launched a [public consultation on PMR \(Professional Mobile Radio\) networks and their future spectrum needs](#) [Press release in English]. ARCEP observes that today PMR networks are mostly used for narrowband voice and data transmissions and wonders how these networks will evolve and in particular whether they could develop towards the supply of broadband and very-fast broadband services. Stakeholders can submit their comments of the desired developments of PMR networks by November 30, 2012.

France - ARCEP's position on the future of regulation

In the context of the public consultation launched by the French Prime Minister during the summer in order to receive proposals to ensure a coherent and effective regulatory framework for media and electronic communications in the Internet era, ARCEP published, on October 11, a [report setting forth its position on the future of television and electronic communications regulation in the Internet era](#) [Press release in English].

ARCEP underlines that an in-depth review of the principles and objectives of regulation, especially with regard to broadcasting regulation, is a prerequisite for any institutional reform and that such a reform deserves to be carefully thought through. Three scenarios for a review of broadcasting regulation are considered. Firstly, broadcasting regulation could remain mainly focused on content and be extended to new players. According to ARCEP, this would require an improved cooperation between the French broadcasting regulator, CSA, and ARCEP which could be achieved through the creation of a joint board. Secondly, the economic component of broadcasting regulation could be increased. ARCEP could be in charge of the enhanced economic regulatory function, while the CSA would continue to focus on traditional content issues. Thirdly, we could lean towards an essentially economic regulation of broadcasting. Merging the two regulators would require widening the scope of the new authority and extending its powers to the fields of competition and radio spectrum management.

This opinion will be coordinated with the position of CSA and with a report on the "*cultural exception*" conducted by Pierre Lescure. The conclusions of ministers are expected late November.

European Law - Public consultation on the list of relevant markets

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

18. Transport

France - Organisation and functioning of the "large maritime harbours" of Guyana, Guadeloupe, Martinique and La Reunion

The Decree n°2012-1102 of 1st October 2012 of the organisation and functioning of the large maritime harbours of Guyana, Guadeloupe, Martinique and La Reunion, has been published in the O.J. dated 2 October 2012. This Decree is taken in application of the Law of 22 February 2012 regarding the reform of State managed overseas harbours, which transforms the three harbours of national interest of Guyana, Martinique and La Reunion and of the independent harbour of Guadeloupe into "large maritime harbours".

European Law - Air transport - Technical requirements and administrative procedures related to air operations

Commission Regulation n°965/2012 of 5 October 2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) n°216/2008 of the European Parliament and of the Council has been published in the O.J. of the EU of 25 October 2012. The Regulation lays down detailed rules for commercial air transport operations with aeroplanes and helicopters and detailed rules on the conditions for issuing, maintaining, amending, limiting, suspending or revoking the certificates of operators of aircraft, the privileges and responsibilities of the holders of certificates as well as conditions under which operations shall be prohibited, limited or subject to certain conditions in the interest of safety.

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