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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 June 2018.

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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## 1. Capital Markets

### ISDA publishes new French Law ISDA Master Agreement

In the European Union, most OTC derivatives are governed by a Master Agreement published by the International Swaps and Derivatives Association, Inc. (**ISDA**) and governed by English law.

In light of the UK's withdrawal from the EU (**Brexit**) some derivative counterparties located in the EU 27 may want their derivatives contractual documentation to be governed by the laws of an EU member state. English law would become a third-country law after Brexit, which means that English court decisions would not be automatically recognized and enforced across the EEA.

As a result, the ISDA, at the request of its members, has published new French and Irish law ISDA Master Agreements.

There are some benefits in relation to contractual arrangements between EU-based counterparties provided under EU law. For example, the automatic recognition of jurisdiction and judgments under the Brussels I Recast Regulation and the recognition of bail-in under the Bank Recovery and Resolution Directive (**BRRD**) for contracts governed by the law of an EEA member state. After Brexit, the United Kingdom will no longer benefit from the automatic recognition of court decisions under the Brussels 1 Regulation (recast). An English court decision will have to go through the *exequatur* procedure, which will delay the procedure and may potentially cause legal uncertainty. In addition, some EU national insolvency rules require contracts to be subject to EU/EEA law to qualify for safe harbour provisions following bankruptcy.

### Contact

#### Bruno Knadjian

Avocat à la Cour, Partner

Hogan Lovells (Paris) LLP

17, Avenue Matignon

CS 60021

75008 Paris

Tél. : +33 1 53 67 47 47

Fax : +33 1 53 67 47 48

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As a result, the ISDA, at the request of its members, has [published](#) two new 2002 ISDA Master Agreements:

- one civil law ISDA Master Agreement, governed by French law; and
- one Common law ISDA Master Agreement governed by Irish law.

ISDA has also updated the relevant netting opinions.

The 2002 ISDA Master Agreement, governed by French law is fairly similar to the 2002 ISDA Master Agreement, governed by English law. Some provisions have been modified, including the below.

- The Flawed Assets clause and the "equity" representation have been adapted, as they have no legal basis under French law.
- The Netting of Payments provision has been amended to reflect that it is not a novation under French law.
- French law has been elected as the governing law and the competent jurisdiction shall be the Paris Commercial court and the Paris Court of Appeal.

In order to adapt French law to this new ISDA Master Agreement governed by French law, the PACTE ("*Plan d'Action pour la Croissance et la Transformation des Entreprises*") bill, published on 19 June 2018:

- extends the scope of *close-out netting* in order to include FX spots and transactions in precious metals; and
- modifies the French legal framework for compound interests ("*anatocisme*") by allowing compound interests for interests due for less than a year in ISDA Master Agreements.

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## 2. Corporate

### France – New version of the AFEP – MEDEF code

On June 2018, AFEP and MEDEF issued an amended version of the corporate governance code for listed companies.

The new version of the code introduces new progress on remuneration as well as a stricter framework for clauses relating to the departure of corporate officers. The conclusion of a non-competition agreement at the time of the director's departure must be excluded. For pre-existing clauses, the indemnity cannot be paid in the event of retirement and beyond an age limit that the code sets at 65 years. In addition, the granting of benefits or remuneration intended to constitute a supplementary pension scheme must be subject to performance conditions.

The new version of the code strengthens companies' commitments to non-discrimination and diversity in governing bodies and incorporates new CSR provisions. The Code recommends that the Board of Directors strive to promote long-term value creation by considering the social and environmental issues of its activities.

Finally, to ensure the representation of employee directors where strategic decisions are taken within a group, the new version

of the code provides that the latter will chair at the company's board of companies which declare referring to the provisions of this code.

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### 3. Data Protection

#### France – Publication of the updated French data protection law

[Law n°2018-493 of June 20<sup>th</sup>, 2018](#), published in the Official Journal, on June 21<sup>st</sup>, 2018, amends the French Data Protection Law in order to adapt French law to the [General Data Protection Regulation \(GDPR\)](#) and transposes the ["police-justice" Directive](#) into French law.

The law had previously been subject to review by the French Constitutional Council, which declared, in its [decision n°2018-765 DC](#) of June 12<sup>th</sup> 2018, that the text did not violate the Constitution. However, the French data protection authority ("CNIL") has already [noted](#) that the law is likely to "mislead the readers". A complete rewrite of the law has been ordered to resolve these legal clarity issues within six months.

#### France - Creation by the CNIL and the CNOM of a practical guide for doctors

On June 20<sup>th</sup>, 2018, the French data protection authority ("CNIL"), in partnership with the French Medical Board ("CNOM"), published on its website a [practical guide](#) to assist doctors in their implementation of personal data protection measures for the purposes of complying with the [General Data Protection Regulation \(GDPR\)](#).

This guide contains six thematic fact sheets pertaining to patient files, appointments, electronic messaging, use of mobile phones and tablets, research and telemedicine. Two appendixes complete the guide by providing an example of an information notice for management of a medical practice, and a register of activities processed.

#### European Union - The EU publishes a new directive regarding prevention of money laundering or terrorist financing

The European Parliament and the European Council published, on June 19<sup>th</sup>, 2018, a new [directive](#) on the prevention of the financial system's misuse for purposes of money laundering or terrorist financing.

The directive is due to enter into force on July 9<sup>th</sup>, 2018 and amends [Directive \(EU\) 2015/849](#). It aims to improve the current prevention framework in order to tackle terrorist financing more effectively.

The new directive has four main objectives: increase transparency in companies and trusts' ownership; addressing risks linked to prepaid cards and virtual currencies; strengthen cooperation between financial intelligence units; and improve checks regarding high-risk third countries.

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## 4. Employment

### France - Harmonization of contribution bases and social contributions as from September 1<sup>st</sup>, 2018

According to the relating report of the President of the Republic, [Ordinance n° 2018-474 dated June 12<sup>th</sup>, 2018](#) provides for a "harmonized and unified definition of income from activity and replacement which serve as a basis for the definition of contribution basis."

New Article L. 136-1-1 of the Social Security Code focuses the definition of the CSG's base on the term "income from activity". According to this article, CSG "is due on all the sums, as well as the benefits in kind which are associated therewith, due in consideration of a work, an activity, a corporate office or an elective office, whatever the name and the quality of the one who attributes them, whether this attribution is direct or indirect".

From September 1<sup>st</sup>, 2018, the term "income from activity" will replace all the other terms currently in force (wages, allowances, salaries, earnings, etc.), highlighting the principle of common law that all Income from activity is subject to the CSG.

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## 5. Insurance

### France – AML-FT – Modalities of information of the ACPR

The French Regulatory Authority ("ACPR") published an [instruction n° 2018-I-05](#) dated 7 June 2018 modifying the instruction n° 2017-I-11 on the information on the system for the prevention of money laundering and terrorist financing ("Instruction"). The Instruction amends the list of tables to be provided by the liable undertakings, the modalities of such provision and the list of documents to be provided by the branches of insurance undertakings having their registered office in a Member State of the European Union or of the European Economic Area. The Instruction entered into force on 15 June 2018.

### France - Statutory auditors – Modalities of information of the ACPR

The ACPR published an [instruction n° 2018-I-04](#) dated 7 June 2018 modifying the instruction n° 2016-I-07 relating to the information to be provided to the ACPR with regards to statutory auditors ("Instruction"), previously amended by instruction n° 2018-I-03 mentioned in the [March 2018 newsletter](#). Regarding the liable undertakings of the insurance sector, the Instruction delays the use of the "OneGate" portal to 1<sup>st</sup> January 2020 and requires until then an electronic provision of the declarative form on the identity of the statutory auditors, enclosed to the Instruction. The Instruction entered into force on 15 June 2018.

### France - Single registry of intermediaries – Update of the required information

The [Ministerial Order](#) dated 29 June 2018 modifying the ministerial order dated 9 June 2016 on the single registry provided for by article L. 512-1 of the Insurance code and article L. 546-1 of the Monetary and Financial code ("Ministerial Order"), published in the French Official Journal on 30 June 2018, takes into account the implementation of Directive n°2016/97/EU on

the insurance distribution and completes the Insurance Code and the Monetary and Financial Code in order to align the requested documents and the information about the intermediaries for the purpose of their registration. In particular the registration application file shall indicate the existence of close links with legal or natural persons of third party countries. Also, in the context of the notification of the intention to operate on a freedom of establishment basis or on a freedom of exercise basis, the register now indicates the category of exercise by the intermediary. The Ministerial Order will enter into force on 1<sup>st</sup> October 2018.

## **European Union - AML-FT – Publication of the 5<sup>th</sup> AML Directive**

The text of [Directive \(EU\) 2018/843](#) of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU ("**Fifth AML Directive**") was published in the Official Journal of the European Union dated 19 June 2018. The Directive will come into force on 9<sup>th</sup> July 2018. Member States must bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 10 January 2020.

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## **6. Intellectual Property**

### **France - Details of the fees of a European Patent with Unitary Effect and the jurisdiction of the Unified Patent Court ("UPC")**

[Decree No. 2018-429 of 31 May 2018 relating to the European Patent with Unitary Effect and to the Unified Patent Court](#), issued pursuant to Ordinance No. 2018-341 of 9 May 2018, amends the Intellectual Property Code ("IPC").

Firstly, the Decree amends Article R. 614-16 of the IPC, which now provides for the rules applicable to the payment of fees for the maintenance of a European Patent in case of rejection of the request for unitary effect which is final.

Secondly, the Decree creates a new Section 1 entitled "Provisions on Jurisdiction" which includes two new articles.

Thus, new Article R. 615-1 of the CPI provides notably that the judge ex officio declares that he does not have jurisdiction when he considers that the claim falls within the exclusive competence of the JUB, including in the course of proceedings.

Article R. 615-2 of the IPC provides on the one hand, that the court seized of an action for infringement of a French patent must stay the proceedings when the UPC is concomitantly seized of a claim based on a Unitary Patent or a patent which is not the object of a derogation from its exclusive competence, where the French patent covers the same invention, was requested by the same inventor or issued with the same priority date and relates to the same facts between the same parties. The proceedings are stayed until the decision of the UPC is final. On the other hand, an application made in the context of the aforementioned action is inadmissible when the UPC has ruled on the same claim made on the same facts between the same parties by a decision having *res judicata*.

The Decree comes into force on the same date as Ordinance No. 2018-341. However, the first paragraph of Article R. 615-2 of

the IPC applies to actions initiated at the end of the transitional period provided for in the first paragraph of Article 83 of the UPC Agreement.

### **France - Implementation of the Directive on the protection of trade secrets**

On 21 June 2018, the Senate adopted in public session the conclusions of the mixed joint commission on the [Draft Law on the protection of trade secrets](#), thus considered as definitively adopted.

This Law which implements the Directive (EU) 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, created a new Title V in the Commercial Code.

Article L. 151-1 of the French Commercial Code provides, in particular, that any information which (i) is not, in itself or in the correct configuration and assembly of its elements, generally known or easily accessible to persons familiar with this type of information because of their sector of activity, (ii) has commercial value, actual or potential, because of its secrecy, (iii) the object of its legitimate holder of reasonable protective measures, in the circumstances, to maintain its secrecy.

On June 26 and 27, 2018, the Constitutional Council was seized of this Law by at least sixty senators and sixty deputies.

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## **7. Public Law**

### **France - Railway reform**

Law No. 2018-515 dated 27 June 2018, published in the OJRF dated 28 June 2018, relating to the railway reform, aims in particular at developing the public group constituted by SNCF and its subsidiaries, and authorizes the Government to adopt ordinances to ensure the transposition into national law of the European directives relating to the fourth railway package. The Law shall ensure the opening of rail passenger services to competition by the end of 2020 and contribute to the building of the single European railway area. The Law also contains provisions extending the powers of the Regulatory Authority for Railway.

### **France - Fees relating to the use of railway network**

Decree No. 2018-462 dated 7 June 2018, published in the OJRF dated 9 June 2018, relating to railway infrastructure fees, modifies the tariff mechanism SNCF Réseau shall apply to set and collect fees relating to the use of the national railway network. The Decree specifies, in particular, the structure of the fees, the rules concerning their payment and the market segments to be taken into account by SNCF Réseau in order to apply tariff increases. The Decree shall come into force as of the date of the beginning of 2019 timetable period.

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## **8. Real Estate**

## **France – Entry into force of the Order dated 27 June 2018 regarding zones which have a "radon potential"**

The Order dated 27 June 2018 determines which French cities have zones with a "radon potential" and categorizes them into 3 zones.

This information will now have to be provided to the purchasers or tenants of real estate properties covered by those zones.

The Order entered into force on 1 July 2018.

## **France- Establishment of the indexes on tertiary activities' rents and on commercial rents for the 1<sup>st</sup> quarter 2018**

On 26 June 2018, the INSEE (French statistic institute) established these indexes for the 1<sup>st</sup> quarter 2018, i.e. :

For the index on commercial rents : 111,87

For the index on tertiary activities' rents: 111,45

## **France - Rescission of the decree dated 9 May 2017 regarding the obligations of energy performance improvement**

The French administrative supreme court ("Conseil d'Etat") rescinded on 18 June 2018 the decree dated 9 May 2017 regarding the obligations of energy performance improvement for tertiary buildings having a surface area equal or superior to 2.000 sqm, specifying that the timeframes given were too short.

Therefore, to date, tertiary buildings (hotels, offices, etc.) do not have a deadline to carry out works to improve their energy performance.

A new decree should be taken by the authorities to set another timeframe in this respect.

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## **9. Restructuring**

### **France - Adoption of Decree dated 5 June 2018 issued related to the enforcement of the EU Regulation on insolvency proceedings**

Regulation (EU) 2015/848 dated 20 May 2015 on insolvency proceedings entered into force one year ago, introducing significant advances in European insolvency law.

After the legislative part of the Chapter VI of the French commercial code published in November, this time the regulatory part is subject to an adaptation implemented by the [Decree n° 2018-452](#) dated 5 June 2018 related to the implementation of Regulation (EU) 2015/848.

Firstly, it provides for the inscription of new information related to insolvency proceedings in the trade and commercial register (*registre du commerce et des sociétés*) and the *BODACC* so as to allow the interconnection of the insolvency registers

(*registres d'insolvabilité*) of the Member States.

Furthermore, it defines the procedural arrangements of some tools created by the regulation, notably the undertaking of the insolvency practitioner in order to avoid the multiplication of secondary proceedings, the suspension of the realization proceedings in case of secondary proceedings, and the group coordination proceedings.

It also specifies the conditions of articulation between main insolvency proceedings and secondary insolvency proceedings as well as some arrangements related to the proofs of claims filed by creditors located in another Member State of the European Union.

The decree was published in the JORF on 7 June 2018, and entered into force on 8 June 2018.

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## 10. Tax

**France – Contribution on Added-Value of Enterprises ("*Cotisation sur la Valeur Ajoutée des Entreprises*" – the "CVAE"): the French tax authorities published their comments on the new mechanism to determine the applicable CVAE tax rate by consolidating the turnover of the companies belonging to the same group**

The French tax authorities (the "FTA") updated their official guidelines by modifying their comments on the mechanism to determine the applicable CVAE tax rate by consolidating the turnover of the companies belonging to the same group ([BOI-CVAE](#) ; [BOI-CVAE-LIQ-10](#) ; [BOI-CVAE-LIEU-10](#) ; [BOI-CVAE-DECLA-20](#)).

As a reminder, [Article 15 of the French Finance Act n°2017-1837](#) for 2018 dated 30 December 2017 modified the turnover consolidation mechanism provided for in [Article 1586 quater of the French tax code](#) ("the **FTC**") for the purposes of calculating the applicable CVAE effective tax rate for companies that meet the holding conditions for being a member of an integrated tax group, set out in [Article 223 A of the FTC](#).

In these new guidelines, the FTA specifies the scope and the conditions under which the turnover consolidation must occur.

**France - Real estate wealth tax : publication of the French tax authorities' official guidelines**

The French tax authorities (the "FTA") published their official guidelines relating to the implementation and application of the real estate wealth tax as from 1 January 2018 ([BOI-PAT-IFI-20180608](#)).

As a reminder, [Article 31 of the French Finance Act n°2017-1837](#) for 2018 dated 30 December 2017 introduced an annual real estate wealth tax (the "**IFI Tax**") applicable as from 1 January 2018. The IFI tax replaces the previous wealth tax (*impôt de solidarité sur la fortune*, "**ISF**"), from which it takes on a number of characteristics.

In its newly published official guidelines, the FTA specifies the procedures for the implementation of the IFI Tax (*i.e.*, *scope of application, determination of the tax basis, determination of the applicable rate, reporting obligations, etc.*).



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