

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 2019.

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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- **Banking**

France - Hong Kong cooperation on Undertakings for Collective Investment (UCI)

Publication in the French Official Journal of 16 April 2019 of the Memorandum of Agreement between the Hong Kong Securities and Futures Commission (SFC) and the Autorité des Marchés Financiers (AMF) on the mutual recognition of covered funds, management companies and associated cooperation dated 10 July 2017

This agreement between the AMF and the SFC, entered into on 10 July 2017 (AMF - SFC MoA, NOR : AMFP1910156X, JO 16 apr.), the first of its kind between a member of the European Union and Hong Kong, provides for:

- a fast-track authorisation procedure for the marketing of eligible French or Hong Kong UCITS to retail investors on each of the French and Hong Kong markets; and
- cooperation between the AMF and the SFC in the supervision of covered entities that may offer, market and distribute shares of UCIs on a cross-border basis, including in particular consultation, exchange of information and cross-border on-site visits.

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- **Commercial**

France – Egalim Act : publication in the Official Journal of the five ordinances adopted by the Council of Ministers

Five ordinances related to the provisions of [Act No. 2018-938 of 30 October 2018 on the balance of trade relations in the agricultural and food sector and healthy, sustainable and accessible food for all](#) (the "Egalim" Act) were published on 25 April 2019 in the Official Journal.

The first three ordinances were submitted by the Minister of Agriculture and Food. The [ordinance No 2019-361](#) concerns the independence of advisory activities on the use of plant protection products and the system of certificates for the saving of plant protection products. The [ordinance 2019-362](#) concerns agricultural cooperation. Finally, the [ordinance No. 2019-363](#) concerns the extension of the judicial police powers of the officers mentioned in Article L205-1 of the Rural and Maritime Fisheries Code and Article L511-3 of the Consumer Code.

The two other ordinances are specifically related to commercial relations. The [ordinance 2019-359](#) is a recast of Title IV of Book IV of the French Commercial Code on transparency, restrictive practices and other prohibited practices. The [ordinance No. 2019-358](#), on the other hand, deals with liability claims for abusively low prices.

The purpose of the ordinance No. 2019-359 is to redraft and simplify the thirteen restrictive business practices listed in Article L442-6 of the French Commercial Code on the three main concepts: 1) significant imbalance between business partners, 2) advantage without compensation and 3) sudden termination of established business relationships.

Concerning the sudden termination of established business relationships, the system is modified. Indeed, the author of the termination can no longer be held liable for insufficient notice if a notice period of at least eighteen months has been granted.

In addition, the new Article L442-4 increases the cap of a civil fine for a restrictive practice which is the highest of the following three amounts: 5 million euros, 5% of turnover or three times the amounts unduly collected or obtained.

Finally, the numeration of the articles relating to payment terms and invoicing has been modified. The amount of the penalty for the violation of invoicing rules has officially increased to €375,000 for legal entities and is doubled in the event of a reoccurrence.

Ordinance No. 2019-358 deals with the prevention of predatory prices. The ordinance amends the provisions of Article L442-9 of the French Commercial Code and now authorizes a supplier of agricultural products or foodstuffs to hold the buyer liable if the latter imposes a price considered to be unfairly low.

To become law, the ordinance must be ratified by the parliament. The Bill ratifying the ordinance must be submitted within 3 months in accordance with Article 17.III of the Egalim Act.

- **Competition**

France – Adoption of decree simplifying the notification form which has to be submitted to the French Competition Authority ("FCA")

[Decree No. 2019-339 simplifying the notification form which has to be submitted to the FCA](#) came into force on 21 April, 2019.

The decree removes the obligations to submit four copies of notification forms, one copy being now sufficient. In addition, by the end of the first semester of 2019, notifications to the FCA under the simplified procedure may be submitted solely electronically.

The decree also increased, from 25% to 30% of the parties' combined market shares, the threshold above which a market is deemed to be affected for the analysis of the vertical effects of an operation.

Finally, the decree significantly reduced the data which must be provided by the parties in financial data tables. Parties to an operation now only have to provide information relating to their turnover and net income.

France - Egalim Act : publication in the Official Journal of an ordinance on liability proceedings for unfairly low prices and of an ordinance recasting Title IV of Book IV of the French Commercial Code on transparency, practices restricting competition and other prohibited practices

Please refer to the [alert](#) above from the Commercial Law Department.

France - FCA sectorial opinion on the functioning of competition in the pharmaceutical sector

Following a wide public consultation, the FCA delivered on April 4, 2019, its [opinion No. 19-A-08 on the functioning of competition in the pharmaceutical sector](#). As this sector is facing major changes, the FCA recommends various solutions in order to maintain a high level of public health protection and the quality of the pharmaceutical network. Hogan Lovells has published a [client alert](#) on this opinion.

- **Data Protection**

France – Adoption of decree regarding processing of social security numbers

On 19 April 2019, the government adopted [Decree No. 2019-341](#) on the implementation of processing operations involving the use of the registration number in the national identification register (the social security number) of natural persons, or access to the register.

The decree was issued pursuant to Article 22 of the amended French Data Protection Act. This article provides that a decree shall *"determine the categories of controllers and the purposes of such processing operations in the light of which they may be carried out when they pertain to data containing the registration number of persons in the national register for the identification of natural persons"*.

The decree lists nine fields of activity, including social protection, health and employment. For each field of activity, the decree lists the purposes for which controllers may process the social security number of the data subjects, such as employers' reporting obligations, invoicing or the financial coverage of health expenses.

France - Adoption of decree on transparency obligations of online platform operators during election periods

On 10 April 2019, the government adopted [Decree No. 2019-297 on the information obligations of online platform operators promoting information content related to a debate of general interest](#).

The decree was issued pursuant to law No. 2018-1202 regarding the fight against the manipulation of information which imposes, during the three months preceding the first day of elections and until elections end, certain obligations to operators of online platforms whose activity exceeds a certain amount of connections on the French territory.

As such, operators must provide users with fair, clear and transparent information on the identity of the persons remunerating the operator for the promotion of information content related to a public interest debate, and on the use that is made of their personal data in such context. Operators also make the amount of remuneration public when it exceeds a specific threshold.

The decree sets the threshold of connections to five million unique visitors per month. It provides that the abovementioned information must appear close to the contents involved. All remuneration above 100 euros excluding tax must be disclosed.

European Union – Publication of EDPB guidelines on the "performance of contract" legal basis"

On 9 April 2019, the European Data Protection Board adopted [guidelines on the processing of personal data under Article 6\(1\) \(b\) GDPR in the context of the provision of online services to data subjects](#).

Any processing of personal data must be based on one of the six legal bases provided under Article 6 of the GDPR. The purpose of these guidelines is to clarify the application of the legal basis of performance of contract or pre-contractual measures at the request of the data subject.

Processing of personal data may only be carried out on such legal basis if such processing is objectively necessary for the performance of the contract or pre-contractual measures in question. "Necessity" implies that the main object of the contract could not be performed without such processing. Necessity partly depends on the intentions of the controller and the data subject when the contract is formed.

Finally, the guidelines provide guidance on the application of this legal basis for specific situations such as "service improvement", "fraud prevention", "online behavioral advertising" and "content personalization".

These guidelines are subject to public consultation until 25 May 2019.

- **Employment**

France – Adjustment of the procedure for the recognition of work accidents and occupational diseases

[Decree n°2019-356 dated 23 April 2019](#), which will enter into force on 1 December 2019, amends the procedure for the recognition of work accidents and occupational diseases by simplifying the formalities for declaring them. In addition, the possibility for the employer to formulate justified objections to the Public Health Insurance Body will be restricted to a period of 10 clear days from the day on which the employer has drawn up the declaration of work accident or from the date on which he receives a copy of the declaration transmitted by the sickness insurance primary fund when it is sent by the employee.

France - Employees' personal data protection

[Decree n°2019-341 dated 19 April 2019](#), which came into force on 22 April 2019, specifies the framework within which the social security number can be used, including by the employer. *For further details please refer to the [Data Protection](#) Section.*

- **Insurance**

France – Update of the ACPR instructions

On 18 April 2019, the ACPR has amended a number of its Instructions and related appendices to update the formalities relating to the

- provision of international legal entities identifier (“LEI”) by insurance companies ([Instruction n° 2019-I-09](#));
- filing of application for insurance or reinsurance authorisation or extension of insurance licence ([Instruction n° 2019-I-10](#));
- filing of application for prior membership declaration, withdrawal or exclusion of a mutual insurance group company (*Société de Groupe d’Assurance Mutuelle* – “**SGAM**”), mutual grouping union (*Union Mutualiste de Groupe* – “**UMG**”) or social protection insurance group company (*Société de Groupe Assurantiel de Protection Sociale* – “**SGAPS**”) ([Instruction n° 2019-I-11](#));
- transfer of information to the ACPR in the context of an acquisition or extension of shares in an insurance or reinsurance company or in an insurance group company ([Instruction n° 2019-I-12](#));
- filing of application for the conclusion or the amendment of a substitution agreement ([Instruction n° 2019-I-13](#));

- filing of application for the authorisation or transformation of administrative authorisation of occupational pension funds, institution for occupational retirements as well as occupational pensions mutual or union ([Instruction n° 2019-I-14](#)); and
- provision of documents relating to activities that are carried out on the basis of Freedom of Establishment or Freedom of Services in another Member State of the European Economic Area ([Instruction° 2019-I-15](#)).

In accordance with those Instructions, which entered into force on 1st May 2019, information and applications must, from now on, be submitted directly on the ACPR's website.

In addition, entities which are subject to the obligation to provide the ACPR with their LEI are, from now on, required to specify their LEI in any documents that are intended for the ACPR and that require their LEI, on the submission date of those documents. The scope of this obligation has also been extended to occupational pension funds, institution for occupational retirements as well as occupational pensions mutual or union.

- **Intellectual Property**

France – Adoption of the Government Bill relating to companies' growth and transformation (PACTE law)

On 11 April 2019, the Parliament adopted the [Bill of law relating to companies' growth and transformation](#).

This Law includes several major modifications in intellectual property rights (see [Legislative and regulatory update - January 2019](#) for further information on these modifications). After a deletion of the amendment at stake by the Sénat (see [Legislative and Regulatory update – February 2019](#)), the Law finally enables the French Intellectual Property Office (INPI) to reject a patent application on the basis of lack of inventive step.

On 16 April 2019, in accordance with Article 61(2) of the French Constitution, at least sixty senators and sixty deputies have asked the Constitutional Court to rule on the constitutionality of the Government Bill.

France - Signature of the charter of e-commerce stakeholders

On 26 March 2019, an [E-commerce charter](#) has been signed under the supervision of the French government between the online platforms or marketplaces and the professional organizations representing the companies that use these online platforms/marketplaces.

The charter provides guidelines of conduct between the parties, who wish to implement effective anti-counterfeiting measures. These measures require the online platforms to implement infringement report systems as well as corrective measures, and involve for the companies not to knowingly sell online a counterfeit product.

The charter specifies that in well-identified cases, such as the application of Law No. 2004-575 of 21 June 2004 on confidence in the digital economy (**LCEN**), the platform does not have to provide an explanation to the company whose products are removed. In other cases, such

as a service deemed to be below the platforms' standards, these platforms are encouraged to provide explanations on the reasons for removing the listing.

Finally the Charter encourages the use of mediation in the event of a persistent dispute between the online platform and the company. In this context, it suggests the use of the Mediator of Companies and provides an example of a mediation clause in the annex.

The charter provides the establishment of a monitoring committee to ensure the distribution of its measures.

European Union – Approval of the Proposal for a Directive of the European Parliament and the Council on Copyright in the Digital Single Market

After its adoption by the European Parliament on 26 March 2019, the final [Proposal for the Directive on Copyright](#) was approved by the European Union Council on 15 April (see Legislative and regulatory update – [February](#) and [March 2019](#) for the substantive provisions of the Directive).

After its publication in the Official Journal of the European Union, the member States will have 24 months to implement the new Directive into their national legislation.

European Union – Adoption of the Proposal for the Regulation amending previous Regulation no. 469/2009 on the Supplementary Protection Certificate ("SPC") for medicinal products

On 17 April 2019, the [Proposal for the Regulation amending the previous Regulation No. 469/2009 on SPC](#) was adopted by the European Parliament.

The Regulation establishes two exceptions to the protection granted for the medicinal products by SPCs in order to allow manufacturers to produce a generic or biosimilar version of a medicinal product protected by a SPC for export purpose to countries outside the European Union, and stocking purposes (stockpiling) in the European Union six months before the SPC's expiration (see [Legislative and Regulatory update – February 2019](#)).

The Regulation imposes a strict obligation of information upon manufacturers for the benefit of national intellectual property offices and SPC holders.

Furthermore, a new logo will now have to be affixed on the packaging of products intended for export to a third market (see the logo in Annex I of the Regulation).

These exceptions will only apply to SPCs which:

- have been applied for on or after the entry into force of the Regulation ;
- have been applied for before the entry into force of the Regulation and which have not yet been issued.

A contrario, these exceptions will not apply to SPCs which have been issued before the entry into force of the Regulation.

The Regulation still needs to be formally approved by the ministers of the European Union before its publication in the Official Journal of the European Union. It will enter into force 20 days after its publication.

European Union – Approval of the Directive on laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organizations and retransmissions of television and radio programs

On 15 April 2019, the European Union Council approved the [Directive laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organizations and retransmissions of television and radio programs, and amending the Directive 93/83/EC dated 27 September 1993](#), i.e. the Satellite and Cable Directive.

This Directive aims at simplifying the distribution and retransmission of the television and radio programs across borders in the European Union.

To this purpose, the Directive extends the so-called "country of origin" principle: the rights necessary to make certain programs available on broadcasters' online services (e.g. the simulcasting or catch up television services) will have to be cleared only for the main country of establishment of the broadcaster (instead of all Member States in which the broadcaster wishes to make its programs available). The amount paid by the broadcasters to the intellectual property rights' owners shall reflect the audience.

The Directive also extends the collective management organization system – which are currently only applicable to cable retransmissions – to retransmission services using other means (such as online television or IPTV, satellite, digital terrestrial and online technologies), it will allow the operators of retransmission services to obtain the rights necessary in an easy manner with the broadcasting organization of which they do the retransmission of the programs and with the collective management organizations which represent many intellectual property owners.

The present Directive will enter into force 20 days after the publication in the Official Journal of the European Union and then the Member States will have 24 months to implement the Directive.

International – Notice from France regarding the amending rules of the Common Regulations under the Madrid Agreement Concerning the International Registration of Marks and the Protocol Relating to that Agreement

Following the entry into force, on 1 February 2019, of the new rules 27bis 6) and 27ter 2) b) of the Common Regulations amending the Madrid Agreement and the Protocol Relating to that Agreement, France has [notified](#), on 27 March 2019, its decision to not implement the new provisions of this Regulation.

These new rules include the possibility to make international divisional trademark applications and the possibility to merge international registrations where the same person has been recorded as the holder (see [Legislative and Regulatory update – November 2018](#)).

Contracting states indeed have the right to notify WIPO that they will not present division / merger requests to WIPO if their local legislation does not provide for the division of trademark applications, which was the case of France.

Hence, France will not present to the International Bureau of the WIPO international divisional applications (Rule 27bis (1) of the Regulation) or merger requests (Rule 27ter (2) (a)).

- **Litigation**

France – The 2018-2022 Programming and Reform for Justice Law

While [the 2018-2022 Programming and Reform for Justice Law](#) concerns all procedural law, criminal provisions are the most important part of it. All phases of criminal proceedings are involved as well as sentencing law and prison laws. We will focus on the main provisions.

The reform first concerns the field of investigations. An interesting provision in the nullity of investigative acts matters is now provided for in the new article 802 of the French Code of Criminal Procedure. It will allow the judge in charge of custody and release to request the cancellation of a search or home visit should the concerned person not be prosecuted six years after the act has been carried out, within one year. The French Constitutional Council validated this provision on the condition that, when the contested decision has been ordered by the judge in charge of custody and release, such judge may not - without infringing the principle of impartiality - rule on the request for the cancellation of his/her decision.

As for acts of interception, the legislator aimed at generally authorizing the interception of correspondence issued by electronic communications during the *flagrante delicto* and preliminary investigations, with the authorisation of the judge in charge of custody and release for all crimes and offences punishable by at least three years' imprisonment. This provision was censured by the French Constitutional Council as the offences at stake were not particularly complex and the judge's authorisation, which does not have the full record of the proceedings, is not a sufficient guarantee. On the other hand, the use of geolocation is confirmed. It is now possible for all crimes and offences punishable by at least three years imprisonment, compared to five previously.

With a view to accelerating criminal proceedings, the legislator has extended the use of contractual lump-sum fines, which put an end to public proceedings without a court decision. It is now possible, under certain conditions, for offences such as the unauthorized sale of alcohol, the use of narcotics, etc.

In terrorism matters, French law gives exclusive jurisdiction to the Paris Civil Court in the area of compensation for acts of terrorism. The legislator also creates a national anti-terrorist prosecutor's office. In Paris, the future anti-terrorist public prosecutor may require any prosecutor to carry out or have carried out necessary acts for the investigation and prosecution of terrorist offences in places under his/her jurisdiction.

In the field of sentencing law, French law creates for offences the penalty of house arrest under electronic surveillance, which may last from fifteen days to six months, without exceeding the duration of the imprisonment incurred. In addition, as of 24 March 2020, the judge may not impose a fixed term of imprisonment of less than six months.

As for the consequences of the 2018-2022 Programming and Reform for Justice Law on civil procedure, please see the [March legal monitoring](#).

France – The decree of 25 April 2019 regarding the experimentation of a Criminal Court

The most important innovation of the Reform for Justice Law concerns the experimentation of a Criminal Court for a period of three years and to replace the Court of Assizes aiming at reducing and accelerating criminal proceedings.

The Criminal Court is solely composed of judges. Therefore, its originality lies in the absence of a jury and jurors. It deals with crimes punished by 15 to 20 years of criminal imprisonment, except recidivism by adults.

The consequences are significant for the traditional Court of Assizes, which, at least for the duration of the experiment and in the French departments concerned, has its jurisdiction reduced to crimes punishable by thirty years' criminal imprisonment or life imprisonment.

[The decree of 25 April 2019](#), published in the Official Journal of 26 April 2019, sets 13 May 2019 as the starting date for this experiment and lists the seven French departments in which it will take place: Ardennes, Calvados, Cher, Moselle, Réunion, Seine-Maritime and Yvelines.

France – Egalim Act : publication in the Official Journal of an ordinance on liability proceedings for unfairly low prices and of an ordinance recasting Title IV of Book IV of the French Commercial Code on transparency, practices restricting competition and other prohibited practices

Please refer to the [alert](#) above from the Commercial Law Department.

- **Public Law**

France – Implementation of the railway reform regarding interoperability of the rail system and railway safety

In the context of the implementation of the railway reform, the [Ordinance n°2019-397 dated 30 April 2019](#) transposing the Directive (EU) 2016/797 of the European Parliament and of the Council of 11 May 2016 on the interoperability of the rail system within the European Union and the Directive (EU) 2016/798 of the European Parliament and of the Council of 11 May 2016 on railway safety and adaptation of the French law to the Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) n°881/2004, published in the OJRF dated 2 May 2019, makes the French Transport Code compatible with these three texts, which constitute the technical aspect of the fourth railway package. The Ordinance will enter into force on 16 June 2019.

- **Real Estate**

France – Ranking ("*classement*") procedure for tourism establishments

The [order dated 10 April 2019](#) determining the rules and procedure applicable to the ranking of tourist residences completes the applicable rules on the ranking procedure and related decisions for tourism residences.

On the same day, were also published :

- an order regarding the ranking of campgrounds, trailer parks and residential leisure park, and
- a decree n°2019-300 specifying the conditions applicable to the above-mentioned orders.

Although not compulsory, the ranking procedure allows tourism establishments to distinguish themselves based on various criteria such as the number of rooms available, their size, or the offered serviced. The criteria vary depending on the type of establishment: tourism residences, campgrounds or tourism hotels, for example.

Apart from an update of the criteria applicable for classification/ranking, these texts set out the framework for the procedure for modification or cancellation of the classification/ranking decisions to standardize these procedures with those applicable to tourism hotels.

They will enter into force on 1 July 2019.

France – Publication of the decree relating to the National council for property transaction and management

[Decree No. 2019-298](#) of 10 April 2019 taken in application of Articles 13-1 to 13-4 of the Hoguet Law of 2 January 1970, as amended by Article 151 of the Elan Law of 23 November 2018, specifies the composition and operating rules of the National Council for Property Transaction and Management (*CNTGI*) and of the commission for the control of property transaction and management activities.

Created by the Alur Law in 2014, the CNTGI's mission is "*to ensure the maintenance and promotion of the principles of morality, probity and competence necessary for the proper performance of the activities of real estate professionals*". Its opinion is requested for all laws and regulations relating to the conditions of exercise of the activities of real estate professionals. It draws up an annual activity report. The commission for the control of property transaction and management activities is responsible for investigating cases of abusive practices brought to the attention of the board.

The decree provides for a three-year exercise period for the members and the president of the CNTGI, whose mandate is only renewable once.

The members of the control commission are elected for 3 years, with the exception of their president who has a one-year non-renewable term.

European Union – According to ECJ’s advocates general, Maciej Szpunar, Airbnb's activity is not subject to the Hoguet Law

Maciej Szpunar, one of the ECJ’s advocates general, found on Tuesday 30 April 2019 that the electronic platform Airbnb could not be subject to the rules of the Hoguet Law applying to real estate agents.

[His opinion](#) was rendered in the context of the complaint brought, inter alia, by the *Association pour un hébergement et un tourisme professionnel (AhTop)* before the *Tribunal de grande instance de Paris* in 2017, which has led the investigating judge to make a reference to the Court of Justice, on 6 June 2018, for a preliminary ruling on whether (i) the services provided in France by Airbnb Ireland, via an electronic platform managed from Ireland, benefit from the freedom to provide services laid down by the directive on certain legal aspects of information society services, and (ii) whether the restrictive rules relating to the exercise of the profession of real estate agent in France are applicable to it

Within a detailed opinion, the advocate general concludes that a service consisting in connecting, via an electronic platform, potential guests with hosts offering short-term accommodation, in a situation where the provider of that service does not exercise control over the essential procedures of the provision of those services, constitutes an information society service within the meaning of Directive 2000/31 of the European Parliament and Council, dated 8 June 2000.

Regarding the question as to whether a Member State other than that in whose territory a provider of an information society service is established (Member State of origin, i.e. Ireland) may, by means of rules such as those laid down in the Hoguet law, actually impose certain requirements on that service provider, the advocate general considers that the Directive must be interpreted as meaning that a Member State other than that in whose territory a provider of an information society service is established cannot, for reasons falling within the coordinated field, restrict the free movement of those services of a provider of an information society coming from another Member state.

The advocate general’s opinion, which aim at proposing to the Court, a legal solution to the cases for which they are responsible is not binding on the latter but is often followed by the Judges. Judgment will be given in the coming months.

To be continued.

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- **Tax**

France - Deduction of interest on loans between related parties: proof of the market rate

As a reminder, [Article 212, I, a of the French Tax Code](#) ("FTC") provides that interests paid by a company subject to French Corporate Income Tax ("CIT") to a related company within the meaning of [Article 39, 12 of the FTC](#), are only deductible up to the reference rate provided for in [Article 39, 1-3° of the FTC](#), unless the paying company can demonstrate that the interest rate applied is indeed an arm’s

length rate.

In practice, justifying the arm's length nature of an intra-group interest rate proves to be particularly difficult. Indeed, the standard of proof required by the French Tax Authorities (the "FTA") is particularly high, as in practice they tend to require the taxpayer to produce a firm loan offer from an "*Etablissement de credit*" (a bank). It is on this issue of proof that the French *Conseil d'Etat* ruled for the first time on the basis of Article 212, I, a of the FTC in its SNC Siblu decision ([CE, SNC Siblu Company, 18 March 2019, n°411189](#)).

In this decision, the French *Conseil d'Etat* ruled that the arm's length interest rate at which a company could have borrowed from independent financial institutions must be assessed in the light, on the one hand, of the characteristics of the loans and, on the other hand, of the company's own characteristics and not those of the group to which it belongs. In addition, the French *Conseil d'Etat* ruled that the arm's length character of an interest rate cannot be proven in the event that the company would not have been able to borrow from a bank due to the absence of available guarantees.

France - Management Package – recharacterisation of a capital gain into an employment income

As a reminder, by a decision "Barriere" dated 6 July 2017, the Paris Court of Appeal ruled that the capital gains realized by managers of a company in respect of the sale of share warrants should not be analyzed as a capital gain, but as employment income and thus be subject to employee and employer social security contributions, if it was demonstrated that such share warrants were acquired by the managers in connection with their functions as employees (or assimilated) of the company.

By a decision dated 4 April 2019, the 2nd Civil Chamber of the French *Cour de Cassation* ([Cour de Cassation, Barrière, 4 April 2019, 17-24.470](#)) confirmed the possibility to apply social security contributions to capital gains realized upon the sale of share warrants, when these share warrants had been made available for subscription to employees or managers in exchange for or in connection with work and, provided that such share warrants had been acquired on preferential terms.

Although the French *Cour de Cassation* finally overturned the Court of Appeal's decision on other grounds, it nevertheless confirmed the possibility for the French URSSAF administration to treat, under certain conditions, as employment income capital gains realized by an employee (or assimilated) upon the sale of securities. The issue which now arises will be to determine which kinds of "Management Packages", other than share warrants, may be impacted by this new case law.

France – Financial expenses: the French Tax Authorities updated the maximum rate of deductible interest from a tax standpoint

The FTA updated their guidelines by modifying the reference rate for the twelve-month periods ending from 31 March 2018 to 29 June 2019 used to calculate the limit of deductible interest in accordance with the provisions of [Article 39, 1-3° of the FTC](#).

As a reminder, Article 39, 1-3° of the FTC applies to interest payments made by a company to its shareholders in consideration for the sums they make available to such company.

The maximum deductible rates for this period are respectively 1,42%, 1,41% and 1,39% for fiscal years ended (i) between 31 March 2018 and 29 April 2019, (ii) between 30 April 2019 and 30 May 2019, and (iii) between 31 May 2019 and 29 June 2019 ([BOI-BIC-CHG-50-50-30-20190123, n°40](#)).

France - Exemption of non-residents real estate capital gains: the FTA update its doctrine regarding capital gains realized on the sale of real estate located in France

As a reminder, [Article 43 of the French Finance for 2019, n° 2018-1317 dated 28 December 2018](#) provided for two amendments to the exemption regimes applicable to real estate capital gains realized upon the sale by French non-resident of real estate located in France.

On the one hand, [Article 244 bis A of the FTA](#) now provides for the application, under certain conditions, of a full exemption from capital gains tax upon the sale by individuals who have become non-residents of their former main residence located in France . On the other hand, the conditions for applying the specific partial exemption, provided for in [Article 150 U of the CGI](#), in the event of the sale of a property in France, have been amended to increase from 5 to 10 years, as from the sale by the non-resident of his tax domicile outside France, the period before the expiry of which the sale must take place, when the seller does not have the free disposal of the property at least since 1 January of the year preceding that of the sale.

As these provisions apply to capital gains realized upon disposals made since 1 January 2019, the French tax authorities have updated their doctrine accordingly to reflect such changes.

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