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 July and August 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.

If you would like to consult this newsletter from past months, please click here.

Please send an e-mail to communicationparis@hoganlovells.com if you wish to subscribe to this publication.

For additional information, please speak to your usual contact.

Contact

Sophie Giono
Knowledge | Research Services
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

Hoganlovells.com

- **Audio-visual**

France – Clarification on the "must carry" obligation and framing in the case of the neighbouring rights of an audiovisual communication company by the Cour de Cassation

On 4 July 2019, in the case opposing the company Playmédia to the company France Télévisions, the Cour de Cassation specified the conditions for the application of Article 34-2 of Law No. 86-1067 of 30 September 1986 relating to the "must carry" obligation i.e. the obligation that audiovisual communication services distributors have to broadcast public channels transmitted by terrestrial frequencies.

On the one hand, the Cour de Cassation approves the Appeal Court for having ruled that Playmédia could not benefit from the abovementioned obligation as there was neither a contractual relationship between the distributor and the editor of audiovisual communication services nor a subscription system to access Playmédia's services, a diffusion, first unrestricted then conditioned to an anonymous registration not being sufficient.

In parallel, on 24 July 2019, the Conseil d'Etat cancelled a decision of the Audiovisual Council ordering France Télévisions not to oppose the diffusion of its content by Playmédia, on the ground that the latter's services are offered without subscription.

On the other hand, the Cour de Cassation states that framing (i.e. dividing a page from a website into multiple windows and display in one of them an element from another website while hiding the environment to which it belongs) used by Playmédia to present its content constitutes a communication to the public which France Télévisions has the exclusive right to prohibit on the basis of its neighbouring rights as an audiovisual communication company.

- **Data Protection**

France – CNIL Publishes a Reference Framework for "Health Risk Monitoring"

The French Data Protection Authority ("CNIL") adopted a Reference Framework for Health Risk Monitoring *(vigilances sanitaires)* on 9 May 2019. It was subsequently published in the Official Journal on 18 July 2019. Aimed at manufacturers, companies, operators and other entities involved in the placing on the market of pharmaceutical products and medical devices, the text establishes a standard framework for processing personal data when conducting health risk monitoring activities.

If the processing of personal data complies with all the requirements laid down in the Reference Framework, the entities in question only need to make a declaration of conformity online before carrying out the data processing. On the other hand, if these entities wish to deviate from the requirements laid out in the Reference Framework, they will have to submit an application for authorisation before the CNIL.

France – CNIL's New Guidelines on Cookies and Other Tracking Devices

On 19 July 2019, the French Data Protection Authority ("CNIL") published new Guidelines on Cookies and Other Tracking Devices. These guidelines replace the recommendations relating to cookies and other tracking devices adopted by the CNIL in 2013.

The main novelties are twofold. Firstly, scrolling down or swiping through a website can no longer be viewed as a valid expression of consent for the storage of cookies. Secondly, operators using cookies and other tracking devices must be able to prove that they have obtained consent.

Without waiting for the future ePrivacy Regulation, which is currently under discussion at the European level, the CNIL has decided to update is framework for cookies in the interest of internet users. These guidelines will be supplemented in the beginning of 2020 by a new recommendation that will inform operators about practical techniques for obtaining valid consent. The CNIL has indicated a grace period, which will end six months after the publication of the upcoming recommendation.

European Union – European Parliament Publishes a Study on Blockchain and GDPR

On 24 July 2019, the European Parliament published a study on blockchain and the GDPR. The study underlines a number of points of tension that have emerged between blockchain technology and the GDPR in the past few years.

In particular, the study takes note of the difficulty involved in applying GDPR principles (e.g. data minimisation principle) to blockchain technology. A further complicating factor, according to the study, is the difficulty involved in defining which entities qualify as (joint-) controllers, especially in the light of recent developments in case law.

However, the study finds that despite these obstacles, blockchain technology can still be used as a tool to achieve GDPR's underlying objectives, such as by providing data subjects with more control over their personal data.

European Union – EDPB Publishes Guidelines on Video Surveillance

The European Data Protection Board (EDPB) published its Guidelines on Processing of Personal Data through Video Devices on 12 July

2019. These guidelines aim to provide guidance on how the GDPR should be applied to all types of video use cases.

The guidelines state that any processing of personal data through a video device triggers the application of the GDPR, as soon as a person can be identified either directly or indirectly, unless a household exemption applies.

The guidelines cover a number of subjects including the lawful bases that can be used for the processing. In particular, the EDPB considers that the legitimate interest needs to be of real existence and a present issue (e.g. serious incidents in the past). The legitimate interest basis can be invoked only if the purpose of the processing cannot be fulfilled by other less intrusive means. The controller must also carry out a balancing test between its legitimate interests and the data subject's rights and freedoms for each processing.

Now that the public consultation period is over, the final version of the guidelines is expected to be published by the end of the year.

European Union – EPDB-EDPS Joint Response to the LIBE Committee on the Impact of the US Cloud Act

On 10 July 2019, the European Data Protection Board (EDPB) and the European Data Protection Supervisor (EDPS) adopted a Joint Response to the Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament on the impact of the US Cloud Act (Clarifying Lawful Overseas Use of Data Act) on the European legal framework for personal data protection.

The EDPB and the EDPS consider that unless a US Cloud Act warrant is recognized or made enforceable on the basis of an international agreement, the lawfulness of transferring personal data to US authorities cannot be ascertained as per Article 6(1) of the GDPR.

The two European institutions stress the need for a new Mutual Legal Assistance Treaty between the EU and the United States, containing strong data protection safeguards, e.g. the principles of proportionality and data minimisation. The European Commission has recently engaged in negotiations with the US for a new agreement.

European Union – EDPB's Opinion on the Competence of a Supervisory Authority in Case of a Change in Circumstances Relating to the Main or Single Establishment

On 9 July 2019, the European Data Protection Board (EDPB) adopted an Opinion on the Competence of a Supervisory Authority in Case of a Change in Circumstances Relating to the Main or Single Establishment, at the request of the French and Swedish Data Protection Authorities. The text provides for three situations in which the competence of one Supervisory Authority can be transferred to another:

- Relocation of the main or single establishment within the EEA
- Creation of the main or single establishment or relocation from a third country to the EEA
- Disappearance of the main or single establishment

- **Employment**

France – Publication of a new decree on 30 August 2019 (2019-912) for the implementation of the 2018-2022 Programming and Justice Reform Act.

In accordance with the commitments made by the current Government to make justice simpler, but also more readable and effective, this new decree amends the Code of the Judicial Organisation (COJ) by laying down the rules relating to the jurisdiction of the judicial court.

Pursuant to this decree, the judicial court will replace the *Tribunal d'Instance* and *Tribunal de Grande Instance* as from 1 January 2020. Consequently, the judicial court will become the competent court in employment law matters to hear disputes concerning professional elections and the appointment of trade union delegates and representatives, as well as disputes relating to the organisation methods, the list of employees to be consulted and the regularity of consultation procedures on company agreements.

France - Publication of an ordinance on 21 August 2019 (2019-861, Official Journal 22) supplementing the reform of the employment obligation for disabled workers provided for by the "Professional Future" law.

The ordinance of 21 August 2019 completes the reform of the obligation to employ disabled workers provided for in the "*Professional Future*" law of 5 September 2018, having already organised the transfer of the annual contribution currently managed by AGEFIPH to Urssaf, as from 1 January 2020.

The allocation of new powers to the URSSAF continues and the latter are now in charge of examining applications for "*rescript AGEFIPH*" as well as litigation and sanctions relating to the obligation to employ disabled workers. Thus the "AGEFIPH rescript" will be repealed on 1 January 2020.

France - Publication of an ordinance on 21 August 2019 (2019-861, Official Journal 22) specifying the fate of the rights acquired under the former system of individual right to training as well as the period during which the personal training account is credited.

Since 1 January 2015, the rights acquired by employees under the individual training rights to (**i.e** droit individuel à la formation, hereafter "*DIF*") have been credited to employees' personal training accounts (**i.e** compte personnel de formation, hereafter "*CPF*"). However, these rights acquired under the DIF had to be used before 1 January 2021. Otherwise, the latter were definitively lost.

The text of 21 August 2019 puts an end to the temporary nature of the conservation of acquired and unused DIF hours. These rights can now be used without time limit, provided that they have been declared by the employee on his CPF before 31 December 2020 via the website www.moncompteactivite.gouv.fr.

France - Publication of a new decree on 20 August 2019 (2019-856) pursuant to the Social Security Financing Act for 2019 to facilitate and improve the use of part-time therapy.

The Social Security Financing Act for 2019 contained provisions to facilitate the use of therapeutic part-time notably by putting an end to the obligation to stop working full-time before the introduction of part-time therapy.

Under the same impetus, the decree of 20 August 2019 aligns the methods of calculating the daily allowance paid in the event of part-time work for therapeutic reasons with those of the daily allowance paid in the event of illness. In other words, the daily allowance paid in the event of part-time therapeutic work is now equal to 50% of the basic daily earnings calculated on the basis of the remuneration paid during the period preceding the work stoppage. In addition, the amount of the daily allowance may not exceed the loss of daily earnings linked to the reduction in activity.

- **Insurance**

France – Supplementary health insurance contract – Right of termination without charge or penalty

The law n°2019-733 of 14 July 2019 relating to the right to terminate supplementary health insurance contracts without costs (the "**Law**"), was published in the Official Journal of the French Republic on 16 July 2019.

The Law grants a right of termination without charge or penalty of "supplementary health" insurance contracts after the expiry of a period of one (1) year from the first subscription of the policy. A decree to be issued by the *Conseil d'Etat* will define the classes or categories of contracts covering (i) natural persons outside their professional activities or (ii) subscribed by an employer or a legal person for the benefit of its employees or members concerned by this new right of termination, so called "infra-annual" termination right.

The termination of the contract will take effect one (1) month after the notification made by the insured or the policyholder to the supplementary health insurance undertaking (insurance company, mutual insurance company or provident institution). The insurer shall be required to refund the difference of the premium or contribution on a *pro rata temporis* basis, within thirty (30) days of the effective date of the denunciation or termination.

In addition, the Law modifies the means of notifying the insurer of the termination of an insurance contract. The insured may notify the termination of a contract either (i) by letter or any other durable medium, (ii) by a declaration made at the registered office or at the insurer's representative, (iii) by an extrajudicial act, (iv) or, where the insurer proposes to conclude a contract by a means of distance communication, by the same means of communication, or (v) by any other means provided for in the contract. The addressee of the notification must confirm receipt in writing.

This right of termination will be effective on a date fixed by decree by the *Conseil d'Etat* and at the latest on 1 December 2020, it being specified that it will also apply to adhesions or contracts existing on that date.

European Union – EIOPA - Publications of opinions on IORP risk management

On 10 July 2019, the European Insurance and Occupational Pensions Authority ("**EIOPA**") published four opinions intended for national competent authorities in order to assist them in the implementation of Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (known as "**IORP 2**") implemented into French law by Ordinance n° 2019-575 of 12 June 2019 (See Legislative and Regulatory Newsletter – June 2019) :

- an opinion on the use of governance and risk assessment documents in the supervision of institutions for occupational retirement provisions ("**IORPs**"), which sets out EIOPA's expectations for the minimum content of information on the management of own risk assessment and the presentation of results;

- an opinion on the practical implementation of the common framework for risk assessment and transparency for IORPs in which EIOPA encourages the national competent authorities to (i) raise awareness among IORPs of the availability of the common framework as a risk assessment tool and (ii) prepare to assist pension funds in the implementation of this tool;
- an opinion on the supervision of the management of operational risks faced by IORPs, in which EIOPA emphasises the importance of prospective monitoring; and
- an opinion on the supervision of the management of environmental, social and governance risks faced by IORPs providing an illustration of how environmental, social and governance risks can arise in the context of traditional prudential risks.

European Union - Publication of the report on the general good provisions of the Member States

EIOPA published, on the basis of Article 11 §5 of the Insurance Distribution Directive of 20 January 2016 ("**IDD**") which instructed EIOPA to examine the general good provisions published by Member States in the context of the proper functioning of the IDD and the internal market, a report analysing national general good rules (the "**Report**").

In this Report, EIOPA:

- assesses the accessibility, in the different Member States, of general good rules (in particular in terms of publication on the website of the competent national authorities) and indicates what are its expectations in terms of appropriate publication by the Member States of these rules;
- carries out a thematic analysis, selecting examples from the different Member States, of the general good provisions which apply to the insurance distribution activities.

Finally, EIOPA indicates that, given the large number and diversity of general good rules, it will launch a consultation following the publication of this Report in order to gather comments from stakeholders on general good provisions that would be considered disproportionate with regard to consumer protection and that would have an adverse impact on cross-border activities.

- **Intellectual Property**

France – Clarifications on the royalty fee for the commercial exploitation of the image, name and voice of professional athletes and coaches

On 2 July 2019, the Ministries of Solidarity and Health, Public Action and Accounts, and Sports published Circular No. DSS/5B/2019/152 specifying the application of Decree No.2018-691 of 1 August 2018 relating to the commercial exploitation of the image, name and voice of professional athletes and coaches.

This Circular notably details the categories of revenue that can be subject to the payment of royalties which is allocated for this type of exploitation and provided for in Article L. 222-2-10-1 of the Sports Code.

The definition, calculation and modalities of payment are also detailed.

This Circular further recalls the necessity of the existence of a subordinate relationship between the athlete or the coach and the association or sports company at the time the contract of commercial exploitation of the image, name or voice is concluded, and specifies that the end of the work contract leads to the end of the commercial exploitation contract.

Clarifications on the scope of the duty to make public online communication services accessible to disabled persons

Decree No. 2019-768 of 24 July 2019 relating to the accessibility for disabled people of online public communication services has been adopted for the application of Article 47 of the Law No. 205-102 of 11 February 2005 for equal opportunities, participation and the citizenship of disabled persons.

The Decree specifies the scope of the requirement to make content accessible (debtors of the obligation, concerned contents, etc.) as well as the technical modalities of implementation of this accessibility requirement and the sanctions.

The provisions of the Decree apply to legal persons of public law and legal persons of private law referred to in Article 47 under I as from (i) 23 September 2019 for web, intranet and extranet pages created since 23 September 2018, (ii) 23 September 2020 for contents created before 23 September 2018 and (iii) 23 June 2021 for mobile apps, software packages and electronic urban furniture.

As for companies with a turnover of at least 250 million euros, the Decree apply as from (i) 1 October 2019 for all content created as of this date, (ii) 1 October 2020 for contents created before 1 October 2019 and (iii) 1 July 2021 for mobile applications, software packages and digital street furniture.

Creation of a neighbouring right for press agencies and press editors

Law No. 2019-775 of 24 July 2019 creates neighbouring rights for press agencies and press editors.

This Law, definitively adopted at second reading by the National Assembly, reiterates the Parliamentary Bill that had been adopted at second reading by the Senate on 3 July 2019 (See Legislative and Regulatory Newsletter – June 2019).

New Article L. 218-2 of the Intellectual Property Code (IPC) notably specifies that the authorization of press agencies and editors is required even before a partial public communication of their press publications. Furthermore, new Article L. 218-4 of the IPC includes a non-exhaustive list of elements to be taken into account in calculating the remuneration of press agencies and editors. Finally, new Article

L. 218-5 of the IPC specifies the modalities for the remuneration of non-journalist authors.

This Law will enter into force on 24 October 2019. It does not apply to press publications published for the first time before the entry into force of the Directive 2019/790 of the European Parliament and the Council on copyright and related rights in the Digital Single Market on 6 July 2019.

European Union – Clarifications of the CJEU on the use of a protected work in a news report and the citation of protected work via hypertext link

In Decision C-516/17 of 29 July 2019, the CJEU interpreted Article 5, paragraph 3 of Directive 2001/29/CE of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

An author had sent its manuscript to newspaper editors without giving them permission to publish it. Spiegel Online made the whole manuscript available to its readers via a hyperlink.

The Court ruled that the use of protected works in order to report news events cannot be subject to the prior consent of the author. However, national jurisdictions have to check whether the diffusion of the protected work is truly necessary to achieve the informatory purpose pursued.

Regarding the exception for quotation, the Court notably states that it is not necessary for the quoted work to be inextricably integrated, by way of insertions or reproductions in footnotes for example, into the subject matter citing it, so that a quotation may thus be made by including a hyperlink to the quoted work.

However, the Court recalls that the exception for quotation only applies when the quoted work, in the way it is effectively presented, has already been lawfully made available to the public. In this case, the author had published its manuscript on his website making clear that he dissociated himself from the modified version published without his consent by an editor. The Court notably ruled that this manuscript had been lawfully made available to the public only insofar as it included mentions of the dissociation of the author. According the CJEU, it is incumbent on the national court to check whether the publication of the original version of the manuscript and article of the editor without the mentions of the dissociation of the author with regards to their content conforms to fair practice and is justified by the purpose pursued by the quotation at stake.

- **Life Sciences**

France – New Health Law Enacted

Law No. 2019-774 on the Organisation and the Transformation of the Health System, also known as the Health Law, was enacted on 24 July 2019. It was subsequently published in the Official Journal on 26 July 2019.

Ratification of the Anti-Benefit Ordinance of 19 January 2017: Article 77 of the Health Law ratifies Ordinance No. 2017-49 of 19 January 2017, which aimed to revise the existing anti-benefit mechanism. The implementing texts are yet to be issued. The new Health Law also makes a number of changes to the measures laid out in the Anti-Benefit Ordinance, in particular with regards to the prohibition for actors targeted by the anti-benefit regulation to pay hospitality fees to students and students associations. This amendment came into force on 27 July 2019.

Development of Digital Healthcare: The Law makes it possible to implement much of the measures set out in the French Government's My Health 2022 *(Ma santé 2022)* Strategy, and to this end, it promotes the development of digital health services such as telemedicine.

The Law will create a new Health Data Hub which will replace the existing Health Data Institute *(Institut des données de santé).* Access to health-related data will be widened, and the Government plans to expand the possibilities of utilising such data, for the development of artificial intelligence in particular. Moreover, by 1 January 2022, all patients in France will have access to their own digital health space *(espace numérique de santé),* which will allow them to access their medical records.

Lastly, the Law introduces a new type of remote medical practice, called telecare *(télésoin),* for pharmacists and other healthcare professionals. Telecare services will be more precisely defined at a later stage by a ministerial order, following consultation from the French National Authority for Health *(Haute Autorité de santé).* In addition, geographical restrictions relating to the practice of telemedicine will be removed by law.

- **Litigation**

France – The ordinance no.2019-738 of 17 July 2019, issued pursuant Article 28 of the 2018-2022 Programming and Reform for Justice Law

The purpose of the ordinance, published in the Official Journal on 18 July 2019, is to clarify the procedure "in the form of summary proceedings" by renaming it so as to highlight the fact that it is a decision on the merits and issued quickly.

Thus, the term "summary proceedings", which is a source of errors, has been deleted and it will now be necessary to refer to the "accelerated procedure on the merits". However, the "in the form of summary proceedings" is not deleted. It will be reserved for urgent cases where litigants need to obtain a judgment on the merits within a short period of time. As in fixed-day proceedings, the claimant will be given a hearing date at short notice, without having to justify a particular urgency.

In cases where the use of this particular procedure "in the form of summary proceedings" is not justified, the order provides for the substitution of a proceeding under ordinary law, in summary proceedings or upon request, where the handed down decision may be provisional and the case requires a certain speed.

For example, in the event of illegal occupation by individuals of a private land assigned to an economic activity, and where such occupation is likely to hinder such activity, the owner or holder of an actual right of use on the land may refer the matter to the Presiding Judge of the Civil Court who will rule in summary proceedings (and no longer in the form of summary proceedings).

This ordinance will be supplemented by a decree of the French Council of State for the regulatory part of the reform.

- **Public Law**

France – Publication of a decree implementing the railway reform

In the framework of the implementation of the railway reform, Decree n°2019-851 dated 20 August 2019 relating to information on passenger railway public services and on necessary elements to operate the transferred rolling stocks, and to protection of data covered by business secrecy, published in the OJRF dated 22 August 2019, lists the categories of information relating to these services that have to be made available to the organizing transport authorities, and details the conditions of their transfer. It also states categories of information that these authorities shall provide to candidates to a passenger railway transport public service contract, whilst SNCF Mobilités will have to make information available to the organizing transport authorities requesting the transfer of the rolling stocks. The decree sets out the conditions for protection by these authorities of the information covered by business secrecy.

- **Real Estate**

France – Publication of a new decree aimed at improving energy performance in existing buildings used for tertiary sector activities

Since 2010, French law has required that actions be undertaken to improve the energy efficiency of buildings dedicated to tertiary sector activities in order to optimize their energy performance.

Following the publication of an initial decree in May 2017 (in application of the Law dated 13 December 2000 and the Law dated 17 August 2015) and subsequently annulled in June 2018 by the French High Court (*Conseil d'Etat*), the French government finally issued a new decree on 23 July 2019. This long-awaited decree (which was issued pursuant to Law dated 23 November 2018 known as the "ELAN Act") will come into force on 1st October 2019.

The purpose of this decree is to determine the conditions for the application of the law, which requires the implementation of actions to reduce the final energy consumption in buildings dedicated to use by the tertiary sector (*bâtiments à usage tertiaire*) constructed prior to 24 November 2018 by at least 40% by 2030, 50% by 2040 and 60% by 2050, compared with a reference energy consumption which cannot predate 2010 (whereas the May 2017 decree provided for a 25% reduction in consumption by 2020 and 40% by 2030).

The buildings concerned by this obligation are any existing buildings or parts of existing buildings where tertiary sector activities (i.e. health,

education, services, retail activities, etc.) are undertaken on a floor area of 1,000 square meters (sqm) or more (instead of 2.000 sqm buildings in the May 2017 decree), with the exception of certain buildings set out in an exhaustive list in the decree (buildings used for religious, national defense, public safety or security purposes or those with a temporary building permit).

In order to comply with the obligation to take action to reduce final energy consumption in the above-mentioned buildings, the decree specifies in particular:

- the conditions for determining the objectives for reducing final energy consumption;

- the type of actions that can be undertaken to achieve these objectives (installation of high-performance equipment in particular), and

- the possibility of modulating these objectives under certain conditions (in particular, in the event that the costs of the necessary actions are clearly disproportionate to the expected benefits).

The calculation methods for determining the baseline energy performance of a building and its level of final energy consumption will be specified in a future ministerial order, as well as the specific conditions for modulating final energy consumption reduction objectives.

In addition, the decree provides that a dedicated website will be set up so that from 2021 onwards owners and/or tenants can communicate their data/information regarding progress towards the achievement of these objectives annually, allowing the platform manager (*gestionnaire*) to verify that the objectives have been achieved.

The data/information provided on said dedicated website will then be reviewed by the manager one year after each stage of the program (i.e. in 2031, 2041 and 2051).

If the objectives are not met by the owners and/or tenants or if they do not communicate the required information each year on the dedicated website, the prefects (*préfets*) will be entitled to send them a formal notice to comply with their obligations, or even require them to draw up an action program to enable them to meet the objectives aimed at reducing the final energy consumption of the building(s) concerned. An administrative penalty system (fines) is also set up to sanction non-compliance with certain provisions of the Decree.

The system thus put in place is very ambitious in nature.

Particular attention should be paid to the content of the forthcoming ministerial order supplementing the above-mentioned provisions. The provisions of this ministerial order - the date of issue of which is not known at this time - are indeed necessary to enable the operational implementation of the mechanism provided for by the decree.

- **Tax**

France - "GAFA Tax": implementation, as from 1 January 2019, of a new turnover tax applicable to companies providing digital services in France

Pending the conclusion of the ongoing negotiations within the OECD, France has adopted at national level a digital service tax (so-called "**GAFA Tax**" – Act no. 2019-759 dated 24 July 2019) which is based on the European Union's works and codified in Articles 299 *et seq*. of the French Tax Code (the "**FTC**").

The GAFA Tax is due by French or foreign digital companies for which turnover realized from certain taxable digital services exceeds specific turnover thresholds for a calendar year, both in France and worldwide (for companies that are members of a consolidated group, the thresholds are assessed at the group level). The GAFA Tax is levied at a rate of 3%, on the amount of turnover generated by the provision of taxable digital services to users located in France. The scope of the taxable digital services includes "intermediation" services as well as the sale of services to advertisers and their representatives.

The new tax applies with retroactive effect from 1 January 2019, with specific provisions regarding its application in 2019 which provide for the payment of a single instalment in November, computed on the 2018 taxable amounts. The question of the survival of this tax is still uncertain following the recent discussions with the Trump administration. It may be thoroughly modified once the OECD's ongoing negotiations are successfully concluded.

France - Deductibility of financial expenses: the French Tax Authorities published their official guidelines with respect to the new rule restraining the deductibility of net financial expenses

In an update dated 31 July 2019, the French Tax Authorities (the "**FTA**") published their official guidelines on the new regime capping the deductibility of net financial expenses for tax purposes, which is provided for in Articles 212 bis and 223 bis of the FTC as amended by Article 34 of the French Finance Act for 2019 (no.2018-1317) dated 28 December 2018 transposing the Article 4 of the EU/2016/1164 Directive (so called "ATAD" Directive). These guidelines are enforceable until their possible revision, and have been put out to public consultation until 30 September 2019.

Applicable to fiscal years beginning on or after 1 January 2019; the new cap rule limits the deductibility of net financial expenses to the greater of the two following amounts : 30% of the entity's taxable profits before interest, tax, depreciation and amortization (tax EBITDA) or EUR 3 million. However, in case of thin-capitalization, such limits are respectively reduced to 10% and EUR 1 million. At the same time, the guidelines relating to three mechanisms which limited the deductibility of financial expenses have been removed: the rule providing for a general cap to the deduction of net financial expenses (so called "*rabot fiscal*"), the thin-capitalization rules and the so-called "Carrez Amendment".

More specifically, the FTA's new guidelines include clarifications on: the definition of the net financial expenses, the rules for computing the tax result on which is based the tax EBITDA, the conditions giving rise to an additional deduction capacity (on that matter, the FTA

details the notions of equity and consolidated financial statements), the applicable rules in case of thin-capitalization (especially the entity's debt-to-equity ratio used for this purpose), the possibility to carry forward indefinitely the non-deductible portion of the net financial expenses, the definition of net financial expenses for public infrastructure agreements and the specific rules applicable to consolidated tax groups.

France - Anti-abuse rule: the French Tax Authorities published their official guidelines on the new general anti-abuse rule with respect to corporate income tax

The FTA published their official guidelines on the new general anti-abuse rule applicable to corporate income tax ("**CIT**"), inserted in Article 205 A of the FTC, as introduced by Article 108 of the French Finance Act for 2019 (no. 2018-1317) dated 28 December 2018.

This new general anti-abuse rule will be applicable for fiscal years beginning on or after 1 January 2019. It allows to disregard the tax consequences of an arrangement or a series of arrangements which, having been put in place in order to obtain, as the main purpose or one of the main purposes, a tax advantage contrary to the intention of the author of the text, are not genuine with regard to all relevant facts and circumstances.

The FTA's guidelines succinctly clarify the arrangements covered by the rule, without, however, listing the situations for which this new rule may or may not be applied to. They consider the "main" purpose of an arrangement should be construed as being the "essential" purpose of such arrangement, and provide details on the criteria to be met to identify the main tax purpose. As such, the relevant commercial reasons to demonstrate that the arrangement is genuine should be economic reasons including those that are patrimonial, organizational or financial. The FTA also specifies that the notion of "purpose of the applicable tax law" refers to the goal pursued by the legislator.

Finally, the general anti-abuse rule can be equally applied to several operations taken as a whole, as well as to a single operation or act. The FTA's guidelines also precise how the different anti-abuse rules are articulated with each other.

France - The French patent box regime: publication of the official guidelines of the French Tax Authorities with respect to the new regime for the taxation of industrial property products

The French Tax Authorities (the "**FTA**") published their official guidelines (BOI-BIC-BASE-110-30-20190731) with respect to the new optional patent box regime provided for in Article 238 of the FTC as modified by Article 37 of the French Finance Act for 2019 (no. 2018-1317) dated 28 December 2018. These guidelines have been put out to public consultation until 15 September 2019.

As a reminder, the new patent box regime provides a preferential tax rate of 10% applicable to the proceeds from the licensing of patents or the sale of eligible industrial property rights, granted only if specific reporting and documentation obligations are fulfilled. It applied to fiscal years beginning on or after 1 January 2019.

Especially, the FTA's new guidelines specify the assets which products are eligible to the reduced tax rate. They also give a non-exhaustive list of the R&D expenses to be included or excluded for the determination of the net income, as well as the method to assess the so-called "nexus" ratio which used to compute the net income eligible for the reduced tax rate.

France - Intra-group loans: Opinion of French *Conseil d'Etat* regarding the possibility for taxpayers to demonstrate the arm's length character of interest rates on intra-group loans by reference to bond issues

In an opinion *SAS Wheelabrator Group* (no. 429426 dated 10 July 2019), the French Council of State allows taxpayers to refer to bond debt benchmarks to prove the arm's length character of interest rates charged on intra-group loans in accordance with the provisions of Article 212, I-a of the FTC using a transfer pricing approach aimed at identifying the arm's length price.

However, while it accepts in principle the comparison with bond loans interest rates, the French *Conseil d'Etat* specifies that the reference to bond interest rates as comparable is subject to the condition that (i) companies which have issued bond loans are in the "same economic conditions" as the taxpayer, and (ii) those issued bonds "constitute a realistic alternative to an intra group loan".

This opinion decides as a recurring dispute topic opposing the FTA and taxpayers, with the latter frequently using comparable bond debt to prove the arm's length character of interest rates charged on intra-group loans, because of the lack of other accessible comparables. Thus, the further application of this opinion by administrative courts should be closely monitored in order to assess whether or not it effectively leads to readjust the strength of the positions of the FTA and taxpayers on that matter.

- **Telecom**

France – 5G Law Enacted

Law No. 2019-810 to Safeguard Interests of Defence and National Security of France in Mobile Radio Network Operations, also known as the 5G Law, was enacted on 1 August 2019. It was subsequently published in the Official Journal on 2 August 2019. The law sets up a new prior authorisation regime for operating 5G equipment, in order to reinforce the security of future networks. From 2020, the French Government will submit a report yearly to the French Parliament regarding the implementation of the prior authorisation regime set up by the law.