
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 November 2018.

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- **Commercial**

France - Act n°2018-938 of 30 October 2018 "for the balance of trade relations in the agricultural and food sector and healthy, sustainable and accessible nutrition for all", known as the EGalim Act, and its impact on the publication of judicial decisions for misleading or aggressive commercial practices

The EGalim Act was enacted on 1 November 2018 (cf. [French legal and regulatory update Octobre November 2018](#)). Its purpose is to rebalance trade relations between agricultural producers and major distributors and thus draws up specific rules for the agricultural sector in terms of distribution law and consumer law.

Important measures of the EGalim Act include a provision on the publication of judicial decisions for misleading or aggressive commercial practices. Before the entry into force of this law, this publication was not intended for aggressive commercial practices and was only a possibility concerning misleading commercial practices.

Henceforth, in the event of pronouncing a judicial decision for misleading or aggressive commercial practice, the Court is obliged to order the display or distribution of all or part of the decision or a public notice (articles L132-4 and L132-11 of the Consumer Code).

- **Corporate**

France - Extension of the sectors subject to the foreign investment authorization procedure

Foreign investments made in France are in principle made freely. However, given the so-called "sensitive" or "strategic" nature

of the sector of activity in which they are contemplated, certain foreign investments are subject to prior authorization from the French Minister of the Economy. Business sectors subject to prior authorization are listed by Articles [L. 151-3](#) and [R. 153-2](#) of the French Monetary and Financial Code.

[Decree No. 2018-1057 of 29 November 2018](#), published in the Official Journal on 1 December 2018, relating to foreign investments subject to prior authorization, has extended the sectors subject to foreign investment authorization procedure.

The decree provides for two new features :

- authorizations are aimed at new economic sectors, essential to guarantee the country's interests related to matter of public order, public security, national defense, in particular cyber security, artificial intelligence, robotics, additive manufacturing and semiconductors; and
- Target companies have the possibility to submit a rescript request to the administration to find out whether the transaction is subject to authorisation.

[Article 10 of the Decree](#) specifies that the provisions are applicable from 1 January 2019.

France - Exemption from drafting management report for "small" joint stock companies (*société anonyme*) and limited partnership with shares (*société en commandite par actions*)

[The Law n°2018-727 for a State in the service of a trusted society \(Etat au service d'une société de confiance, ESSOC\)](#) as of August 10, 2018 has extended the scope of the exemption from the requirement to prepare a management report for all small companies, accountingly speaking, that is, companies not exceeding two thresholds of the following three thresholds according to [Article L. 232-1 of the French Commercial Code](#):

- EUR 4 million for the balance sheet total;
- EUR 8 million of turnover; and
- 50 employees of workforce.

However, this exemption does not apply to companies in the banking and provident sector, listed entities and persons and entities relying on the generosity of the public.

Joint stock companies (*société anonyme*) and limited partnership with shares (*société en commandite par actions*) exempted from reporting as small businesses, however, must establish a corporate governance report. Indeed, [paragraph 6 of Article L.225-37](#) not having been amended by law [ESSOC law](#).

These provisions apply to fiscal years ending on or after August 11, 2018.

France - A "permanent representative" may not be declared as the default beneficial owner

[Article L561-46 of the Monetary and Financial Code](#) requires all unlisted companies and entities registered in the Trade and Companies Register to declare their beneficial owner. Apart from the criterion of holding a sufficient percentage of shares or voting rights (more than 25%), the presumption of control may be established by other means. [Article R561-1 of the Monetary and Financial Code](#) specifies that the reference to the company's chief executive officer when a beneficial owner has not been identified is the natural person who legally represents it.

ANSA (Association Nationale des Sociétés par Actions), in its communication from the Legal Committee No. 18-042, states that where a company has as its legal representative a legal person whose manager as a natural person has delegated his power of representation to a representative, the only beneficial owner who can be declared by default is the CEO of the company.

Consequently, the register of beneficial owners must be mentioned only in the case of a natural person with legal representative powers (corporate officer).

The "permanent representative" does not hold by law a power of representation of the legal person and cannot therefore be qualified as a beneficial owner.

France - Impossibility to declare to the Trade and Companies Register an alternate manager of limited liability company (SARL) is not allowed

The Coordinating Committee for the Trade and Companies Register (*Comité de coordination du registre du commerce et des sociétés*) in its [opinion CCRCS No. 2018-002](#) reiterates its position ([CCRCS, opinion No. 95-94, 14 November 1995](#)) and recalls that the law does not provide the possibility for the term "substitute" to be added to the SARL manager because the manager, with regard to third parties, has the broadest powers ([com. art. L. 223-18, para. 3](#)), the contractual restrictions on the powers of a manager being unenforceable against third parties ([C. com., art. L. 223-18, para. 4](#)).

- **Data Protection**

France - The CNIL publishes its list of processing operations requiring an impact assessment

Following the opinion of the European Data Protection Board (EDPB/formerly Art. 29 WP), the CNIL published on November 6th, 2018, a [list](#) of data processing for which a data protection impact assessment (DPIA) is required, and corresponding [guidelines](#).

[Article 35 \(4\) of the General Data Protection Regulation \(GDPR\)](#) provides that data protection authorities must draw up a list of processing operations requiring a DPIA, which must then be reviewed by the EDPB in order to ensure a uniform application of the GDPR in the European Union.

The CNIL's list includes fourteen types of different processing operations for which a DPIA is mandatory. However, this list is not exhaustive. The nine criteria of the [EDPB guidelines](#) remain applicable in order to determine whether a DPIA is required for a particular processing operation.

France - The CNIL adopts two guidelines on changes to processing operations in the health sector

On November 5th, 2018, the CNIL published a [summary document](#) and an [article](#) presenting the most frequent cases of changes to data processing operations for the purpose of research, study or evaluation in the health sector and their consequences in terms of formalities. Indeed, these processing operations, which sometimes last several years, are subject to developments and changes.

The CNIL thus specifies the steps to take in the event of "*substantial changes*" of such processing operations.

France - The CNIL updates its information on four national databases

On November 15th, 2018, the CNIL updated [four practical sheets](#) presenting four large personal data databases in France.

These four updated databases are the following:

- The national DNA fingerprinting database ("[fichier national des empreintes génétiques \(FNAEG\)](#)"): facilitating the identification and search of offenders using their DNA profile, and of missing persons using the DNA profile of their descendants or ascendants;
 - The automated fingerprint identification database ("[fichier automatisé des empreintes digitales \(FAED\)](#)"): allowing the search and identification of perpetrators of crimes and offences as well as the identification of individuals sentenced to a custodial sentence. It also facilitates the search for missing persons or the identification of deceased or seriously injured persons;
 - The criminal records' database ("[traitement d'Antécédents Judiciaires \(TAJ\)](#)"): allowing France's police and national "*gendarmerie*" to share their respective data;
 - The wanted persons' database ("[fichier des personnes recherchées \(FPR\)](#)"): to identify all persons who are the subject of a search or verification of their legal status.
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- **Insurance**

France - AML-FT – Guidelines from the FATF on life insurance risk

The Financial Action Task Force ("**FATF**") has updated on 25 October 2018 its [guidances](#) for a risk-based approach for the life insurance sector ("**Guidelines**"). These Guidelines contain recommendations on the modalities for implementing anti-money

laundering and terrorist financing measures for life insurance undertakings, insurance intermediaries, and regulatory authorities of the insurance industry.

European Union - Governance – Key functions holders

The European Insurance Occupational Pensions Authority ("EIOPA") has published on 15 November 2018 a [report](#) setting out the findings of the EIOPA's peer review on how national competent authorities apply rules relating to key functions.

This report notably relates to the situations of combinations of different key functions with same person, or the question of the subordination of key function holders.

European Union - Solvency II – Reporting and communication to the French regulatory authority (*Autorité de Contrôle Prudentiel et de Résolution* – "ACPR")

Two Implementing Regulations that have been adopted by the European Commission for the purpose of the implementation of Directive 2009/138 of 25 November 2009 ("**Solvency II**") have been published in the official journal of the European Union:

- The [Commission Implementing Regulations 2018/1843](#) of 23 November 2018, amending Implementing Regulation (EU) 2015/2452 as regards the scope of application of the template for disclosing premiums, claims and expenses by country; and
- The [Commission Implementing Regulations 2018/1844](#) of 23 November 2018, amending and correcting Implementing Regulation (EU) 2015/2450 laying down implementing technical standards with regard to the templates for the submission of information to the supervisory authorities in accordance with Directive 2009/138/EC of the European Parliament and of the Council.

These two Implementing Regulations entered into force on 15 December 2018.

- **Intellectual Property**

France - Approval of the resale right at the expense of the buyer from the Cour de cassation

Pursuant to [Article L. 122-8 paragraph 3](#) of the Intellectual Property Code ("IPC"), which transposes in identical terms the article 1(4) of the [Directive 2001/84/CE](#), the resale right is at the expense of the seller.

The terms and conditions of an auction company provided that this resale right would be borne by the buyer. The National Union of the Antiquarians assigned on the basis of unfair competition and invalidity of the provision at stake.

Seized by the Court of Cassation, the CJEU considered, in a Decision dated 26 February 2015 ([C-41/14](#)), that Article 1(4) of the Directive 2001/84/CE does not prohibit that the person liable for payment of the resale right, appointed by the national

legislation, being it is the seller or a professional of the art market involved in the transaction, can contract with any other person, including the buyer, that the latter bears eventually, totally or partially, the cost of the resale right, provided that it does not affect the obligations and liability of the person liable for payment towards the author.

In a Decision of 24 March 2017, the Versailles Court of Appeal quashed the litigious provision, on the grounds that the provisions of Article L.122-8, paragraph 3 of the IPC are imperative, excluding thus any contractual derogation.

In its [Decision dated 9 November 2018 \(Appeal No. 17-16.335\)](#), the Plenary Assembly of the Court of Cassation, ruled that this provision is not imperative and should be interpreted in the same way as the one issued from Article 1(4) of the Directive 2001/84/CE.

Digitization of the procedures relating to patents, utility certificate and supplementary protection certificate before the INPI

[Decision No. 2018-156](#) of the General Director of the French Industrial Property Office of the 8th of November 2018, taken in accordance with the [Patent Law Treaty](#) of 1 June 2000 which aims at harmonizing and streamlining formal procedures with respect to national and regional patent applications and registrations.

The Decision notably provides that, the filing of a French patent application, a utility certificate, a European patent converted into a French patent application, a division, an application for a supplementary protection certificate, a limitation, complementary exhibits as well as the procedures and subsequent discussions will be made online on the INPI's website.

By contrast, patent applications regarding inventions likely to interest National Defense or sensitive inventions or presumed to be sensitive are subject to a derogatory regime.

The Decision entered in force on 19 November 2018.

International - Amendments to the Common Regulations under the Madrid Agreement and Protocol in force as from 1 February 2019

[WIPO Information Notice No. 21/2018](#) specifies that the following amendments to the [Common Regulations under the Madrid Agreement Concerning the International Registration of Marks and the Protocol relating to that Agreement](#) will enter into force on 1 February 2019.

- New Rules *27bis*, *27ter* and 40.6 (division and merger of international registrations),
- The amendments to Rules 22 (revocation of an international registration stemming from a division due to the ceasing effect of the basic registration) and 32 (publication in the WIPO Gazette of International Marks),
- The cancellation of Rule 27.3 (inscription of the merger of international registrations), and
- The new point 7.7 of the schedule of the fees and taxes.

The adoption of New Rule 27*bis* enables the holders to request the division of an international registration for a contracting party; in the case of a partial temporary refusal, this division would enable them to pursue the granting procedure for the goods and services that have not been subject to the refusal.

Audiovisual

France - Adoption and referral to the Constitutional Council of the Law proposal regarding the fighting against manipulation of information

On 20 November 2018, the [Proposals of Organic Law](#) and [Ordinary Law](#) were finally adopted by the National Assembly.

Articles 1, 11, 13 and 14 of the Proposal of ordinary law oblige the online platforms operators which activity exceeds a determine threshold of connections in France to transparency when it promotes contents of information regarding a debate of general interest in exchange of a remuneration, during three months before general elections and should take measure to fight against the broadcast of fake news capable of disturbing public order and alter the sincerity of specific elections, such as the transparency of its algorithms.

Furthermore, Title II and Article 12 of the Proposal of organic law expand the competences of the CSA, which will be allowed to prevent or suspend the radio or television services that are controlled or under the influence of a foreign State that broadcast, willfully, fake news that are likely to affect ballot's sincerity.

On 21 November 2018, the Prime minister and more than sixty senators have seized the French Constitutional court on the basis of freedom of speech and communication.

European Union - Recast of the Audiovisual Media Services Directive

On 6 November 2018, the European Union Council voted [Directive \(UE\) 2018/1808 of 14 November 2018](#) amending the [Audiovisual Media Services Directive](#)

Article 6 of the Directive strengthens the protection by audiovisual medias services against incitement of violence or hatred and the public provocation to commit a terrorist offence. Article 28ter of the Directive obliges the video sharing platforms providers to this protection obligation.

Pursuant to Article 13 of the Directive, the on-demand media services are forced to offer at least 30% of European works within their catalogue. In addition, when member States require that media services providers contribute financially to the production of European works, they can also require that these media services providers that target an audience on their territory are also obliged to those financial contributions, even if they are settled in others member States.

Finally, Article 28bis of the Directive confirms and eases the principle of country of origin whereby audiovisual providers do not necessarily have to comply with the rules of the 28 member States but only to the ones of the country in which they are settled.

The Directive will enter into force on 18 December 2018 and the member States will have to comply with it at the latest on 19

- **Litigation**

France – Entry into force of a decree to implement new rules for the publication of instructions and circulars

The [Decree No. 2018-1047 of 28 November 2018](#) was adopted pursuant the law of 10 August 2018 "for a State in the service of a trusted society" and establishes new rules for the publication of instructions and circulars.

It reinforces the obligation to publish instructions and circulars containing an interpretation of substantive law or a description of administrative procedures, by providing that they will now be deemed to be repealed if they are not published.

It creates a right to the enforceability, for the benefit of citizens, of circulars issued by State administrations and published on ministerial websites. Any person may rely on the interpretation, even if inaccurate, of a rule made by these documents, as long as this interpretation has not been modified.

- **Public Law**

France - Publication of a new, global public procurement code

[Ordinance n°2018-1074 dated 26 November 2018](#) and [Decree n°2018-1075 dated 3 December 2018](#) creating respectively legal and regulatory parts of the code of the public purchasing, published in the OJRF dated 5 December 2018, gather in a same legal corpus all provisions applying to all government contracts involving the supply of works, equipment or services, whatever their form. In particular, they codify rules relating to classic public procurement contracts, concession contracts, subcontracting and public project management. The new public procurement code will apply to contracts for which a consultation was initiated, or a contract notice was sent for publication from 1st April 2019, except for provisions related to modification of concession contracts, which also apply to concession contracts concluded or for which a tendering procedure was initiated, or a concession notice was sent for publication before the 1st April 2016.

France - Precisions on the capacity obligation mechanism

[Decree n°2018-997 dated 15 November 2018](#) relating to capacity obligation mechanism in the electricity sector, published in the OJRF dated 17 November 2018, brings provisions of the Energy Code into line with the [decision](#) of the European Commission declaring the French mechanism compatible with European rules on State aids. Among other things, it (i) explicitly takes into account cross-border contributions to security of supply in France and (ii) implements a multiannual contract scheme for new capacities. This decree will be applicable from the date at which the ministerial order approving rules of capacity mechanism, mentioned in the article R.335-1 of the Energy Code, will entry into force.

- **Real Estate**

France - Promulgation of the ELAN law

Law n°2018-1021 dated 23 November 2018 said law for the Evolution of Housing, Development and Digital ("ELAN law") was enacted on 24 November 2018.

This law focuses on the modification of a number of dispositions which impact various areas of real estate law, and notably :

- Modification of planning regulations (town planning documentation, constructability, etc.);
- Fighting against abusive legal actions relating to planning;
- Enforceability of the energy performance diagnosis;
- Strengthening of the penalties in case of breach of the obligations relating to the renting of the primary home (notably on platforms such as Airbnb);
- Modification of the coownership voting regulations to avoid deadlock cases.

Though some measures entered into force immediately, a number of the measures provided for by the ELAN law have a differed date of entry into force, notably to allow for additional regulatory texts to be published (e.g.: the energy performance diagnosis will be enforceable from 1 January 2021).

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