
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 March 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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- **Arbitration**

International - African Continental Free Trade Area Agreement

On 2 April, 2019, the Gambian Parliament became the 22nd state to ratify the African Continental Free Trade Agreement (AfCFTA), paving the way for the world's largest free trade area. What are the next steps, the stakes of this new major treaty? This article details the key developments brought by this treaty and their expected contribution to investment and trade on the African continent.

["The African single market takes a step forward as the African Continental Free Trade Area Agreement becomes a reality"](#)

- **Data Protection/IT**

France – Publication of the standard regulation on biometrics at work by the CNIL

The CNIL published its ["Biometrics in the workplace" model regulation](#) on 28 March 2019. In accordance with Article 9.4 of the GDPR, EU Member States have the possibility to introduce additional conditions for the processing of special categories of data, such as biometrics.

Current Article 8.II.9 of the French Data Protection Act No. 78-17 of 6 January 1978 provides that employers may process the biometric data that is strictly necessary in order to control access to workplaces and to devices and applications, if such processing complies with the model regulations adopted by the CNIL.

This model regulation imposes obligations on employers that process biometric data as controllers. In particular, data controllers must justify, with supporting documents, their use of biometrics and their choice of storage means for the biometric measurements used when the data subjects do not have full control over them. They must also carry out an impact assessment for such processing. The model regulation also imposes obligations concerning the categories of personal data that may be collected, their retention period and the security measures to be implemented.

European Union – Adoption of the European Cybersecurity Act

On 12 March 2019, the European Parliament adopted the [draft regulation on ENISA \(European Union Agency for Cyber Security\) and on information and communications technology cybersecurity certification](#).

The draft regulation must now be approved by the Council of the European Union. It will enter into force 20 days after its publication in the Official Journal, with the exception of some of its provisions.

The draft regulation creates a European cyber security certification scheme for information and communications technology products, services and processes. It increases the competence and tasks of ENISA, which becomes the European reference point for cyber security and has the task of developing European cyber security certification schemes. European certificates will be divided into three assurance levels: basic - substantial - high. Those certificates will be issued in each EU Member State by an authority specifically designated for this purpose.

European Union – Adoption of the EDPB opinion on the interplay between the e-Privacy Directive and the GDPR

The European Data Protection Board (EDPB) adopted [an opinion on the interplay between the e-Privacy Directive and the GDPR](#) on 12 March 2019.

These two pieces of legislation have similar but different material scopes. The e-Privacy Directive mainly applies to the processing of personal data in the context of electronic communications, whereas the GDPR applies generally to processing of personal data.

The purpose of this opinion is to clarify the interplay between both sets of rules, in particular with regard to the competence, tasks and powers of the supervisory authorities within the meaning of the GDPR.

According to the EDPB opinion, the principle is that the e-Privacy Directive applies when it lays down specific obligations. In all other instances, the GDPR applies and both sets of rules coexist. Finally, the EDPB clarifies that a supervisory authority within the meaning of the GDPR cannot be deprived of its competence when the e-Privacy Directive would be applicable in addition to the GDPR; a Member State may also grant such authority competence to enforce part of the national implementation of the e-Privacy Directive.

- **Employment**

France –The 2019-2022 Programming and Reform for Justice Law and The 2019-221 Strengthening the organization of courts Law will impact social litigation.

Thus, as from 1 January 2020, the merger of the Court of First Instance with the Civil Courts will have the effect of making representation mandatory for professional election disputes. Prior conciliation will also be mandatory or else the case may be declared inadmissible if the matter is deferred to the court. It will be up to the regulatory authority to define the notion of legitimate grounds so that the parties may avoid this obligation. The registry of the Labor Court will be merged with the one of the judicial Court provided that the Labor Court is located in the same municipality as the judicial Court.

Nb: for a presentation of the amendments in the field of civil procedure, please [click here](#).

- **Insurance**

France – Brexit – Information related to the insured and policyholders

The [Order dated 22 March 2019](#) (“**Order**”), adopted in application of Article 2 of the Ordinance no. 2019-75 of 6 February 2019 relating to the preparatory measures for the withdrawal of the United Kingdom from the European Union (“**EU**”) with respect to the financial services, further details the information to be provided to insureds and policyholders by foreign companies which have written a contract from their registered office in a Member State of the EU or branches established in a Member State of European Communities, and no longer comply with [Article L. 310-2 of the French insurance code](#) and are therefore no longer authorised to provide direct insurance in the territory of the French Republic.

Pursuant to this Order, such information shall be provided within fifteen days of the date of the change of circumstances and should notably state (i) the reasons why the company no longer complies with authorisation requirements; (ii) whether a transfer of portfolio to an entity duly established in the EU is ongoing; (iii) the fact that the company will not renew its contracts, nor the cover period, and indicate that the company will continue to meet its commitment notwithstanding its new status.

These companies shall also, two months before the end of the coverage period, inform the policyholders, of the term of the contract as well as advise them to find another guarantee with an insurer that is duly authorised to provide direct insurance in France.

The Order will enter into in force on the date of the withdrawal of the United Kingdom from the EU with no deal.

France – Update of the ACPR instructions

On 15 March 2019, the French Regulatory Authority (*Autorité de contrôle prudentiel et de résolution – ACPR*) published:

- an [instruction no 2019-I-02](#) that repeals its Instruction no 2012-I-07 of 13 December 2012 relating to the questionnaire on the application of the rules for clients’ protection which became obsolete and which has been replaced by its Instruction no 2017-I-21 of 1st December 2017.
- an [instruction no 2019-I-03](#) modifying its Instructions no 2016-I-01 and no 2016-I-02 of 14 January 2016, to update the thresholds for the application of the quarterly information to be provided by certain companies that are subject to the “Solvency II” regime as defined in its Instruction no°2016-I-01 as well as the modalities for the exemption of the companies mentioned in Article 3 of the Instruction no 2016-I-01.
- an [instruction no 2019-I-04](#) modifying its Instruction no 2019-I-16 of 27 June 2016, which updates the information required in the annual prudential documents that companies which are subject to the “Solvency II” regime and the supervision of the ACPR shall provide.
- an [instruction no 2019-I-05](#) modifying its Instruction no 2018-I-12 of 11 July 2018 which updates the information required in the annual and quarterly documents that supplementary occupational pension undertakings shall provide to the ACPR.

France - Outsourcing of activities – Prior notification of the ACPR

On 15 March 2019, the ACPR published an [instruction no 2019-I-06](#) to which is attached a form specifying the content of the information to be provided by insurance companies and reinsurance undertakings that are subject to the “Solvency II” regime as well as supplementary occupational pension undertakings, prior to the outsourcing of their activities or any important or critical functions or prior to any significant changes in their situation.

European Union

No insurance update this month.

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- **Intellectual Property**

France – More flexibility for the exemption authorizing exploitation of cinematographic works as videograms

The condition related to the operating results of cinematographic works which allows the exploitation of cinematographic works on a video medium earlier than the usual 4 months period following the date of release in movie theatres is more flexible since [Decree N°2019-216 of 21 March 2019](#).

Indeed, this Decree provides that this exemption is from now on automatically granted if, after a cinematographic work has been shown for four weeks in movie theatres, the amount of visits is inferior or equivalent to 100 000.

The Decree came into force on 23 March 2019.

European Union – Adoption by the European Parliament of the Directive on Copyright in the Digital Single Market

[Proposal for a Directive on Copyright in the Digital Single Market](#) was adopted by the European Parliament on 26 March 2019.

The adopted bill is substantially identical to the one on which the three organs of the European legislative procedure agreed on 13 February 2019 (see Legal and Regulatory News – [September 2018](#) and [February 2019](#)). It notably creates a "neighboring right" for publishers of press publications, reinforces the liability regime for online content sharing platforms and provides for several exceptions to copyright and neighboring rights (data mining for the purposes of scientific research, copy by cultural heritage institutions of any copyright protected item held permanently in their collection for conservatory purposes, etc.).

This Proposal for a Directive will now need the approval of the European Union Council.

Member States will then have two years from the entry into force of the Directive to implement it into their domestic legal framework.

In this regard, on 1 April 2019, the Conseil supérieur de la propriété littéraire et artistique, the Haute autorité pour la diffusion des œuvres et la protection des droits sur Internet and the Centre national du cinéma et de l'image animée launched a [joint mission](#) aiming at assessing the efficiency and the relevance of the automated recognition tools for protected contents available on online sharing content platforms and providing recommendations regarding the use of these technological tools with regards to the new Directive.

European Union – Clarifications to Regulation (EU) N°1308/2013 and Regulation (EU) N°1306/2013 as regards designations of origin, geographical indications and traditional terms

[Delegated Regulation \(EU\) 2019/33](#) and [Implementing Regulation \(EU\) 2019/34](#) of 17 October 2018 were published in the Official Journal of the European Union on 11 January 2019.

Delegated Regulation 2019/33 inter alia:

- lays down the rules streamlining administration and application requirements for quality schemes and marketing standards in the EU wine sector, based on the geographical location of production and the name of a wine product, where a specific quality, reputation or other characteristic is attributable to its geographical origin; and
- sets out the specific labelling arrangements applicable to wines marketed in the EU.

Implementing Regulation 2019/34 inter alia:

- sets out administrative provisions concerning application and handling requirements for a scheme of quality marketing standards in the wine sector based on the geographical location of production and production standards of the wine; and
- lays down the implementation of rules for the quality schemes, the required rules on checks, the labelling, and the presentation of certain wine sector products.

Both Regulations entered into force on 14 January 2019.

- **Litigation**

France – The Law n°2019-222 of 23 March 2019 on 2018-2022 Programming and Reform for Justice

[The 2018-2022 Programming and Reform for Justice Law](#), which aims to simplify and modernize the judicial system, has several consequences for civil procedure, the main ones being discussed below.

As from 1 January 2020, the Courts of First Instance and the Civil Courts will be united under a common name: the judicial Courts. They become competent for all civil and commercial matters which are not assigned to another jurisdiction because of their nature.

The Law aims to develop and promote the use of alternative dispute resolution. Mediation or conciliation is now possible at any stage of the proceeding, including in summary proceedings. Article 4 of the Law provides for the creation of online mediation platforms. The latter must comply with requirements of ethics, transparency, confidentiality and must guarantee the protection of their users' personal data.

The Law offers the parties the possibility to choose an exclusively written proceeding without a hearing before the Civil Court. The agreement of all parties is required. This proceeding will be authorized for disputes below 5,000 euros.

The proceeding regarding the order for payment is now entrusted to a Civil Court specially designated by decree. The proceeding is also becoming completely online: requests will be sent electronically, except for natural persons not represented by a lawyer.

France – The Decree n°2019-213 of 20 March 2019 amending some provisions relating to the organization of the French Supreme Court

The [Decree n°.2019-213 of 20 March 2019](#), which entered into force on 23 March 2019, amends some provisions relating to the organization of the French Supreme Court.

In particular, the Decree modifies the designation's process of the section' deans of the chambers of the French Supreme Court, which will now be appointed by order of the first president of the French Supreme Court on a suggestion from the president of the chamber concerned. The Decree also abolishes the function of section's president.

- **Public Law**

France – New framework for the fixation of the railway fees

In the frame of the implementation of the railway reform, the [Ordinance n°2019-183 dated 11 March 2019](#) relating to the framework for setting fees due for the use of the railway infrastructure and relating to the design and update of the contract entered into between the French State and SNCF Réseau (i.e. the infrastructure operator), published in the OJRF dated 12 March 2019, states that the infrastructure fees due for the use of the national railway network will be set out for a three year-period, in order to improve the visibility for the railway undertakings. The Ordinance also details the conditions under which the "sustainability" criterion applicable to such fee structure is construed in the particular instance of railway transport services for which a public service contract is concluded. Finally, it reinforces the binding effect of the opinion given by the French regulatory authority for rail and road activities (the "ARAFER") on the proposed infrastructure fees and on the draft contract to be entered into between the French State and SNCF Réseau, and to subsequent amendments to this contract.

France – Complementary provisions added to the new global public procurement code

[Order dated 22 March 2019](#) establishing the preliminary annex to the French global public procurement code, published in the OJRF dated 31 March 2019, creates a preliminary annex to the French global public procurement code referencing twenty-one orders and opinions, which each constitutes an annex to this code. Thus, it continues the movement of gathering, in a single code, all provisions applying to public procurement contracts. Besides that, [Decree n°2019-259 dated 29 March 2019](#) modifying some provisions codified in the regulatory part of the French global public procurement code, also published in the OJRF dated 31 March 2019, corrects some material errors of this code. This updated version of the Code entered into force on 1st April 2019 for contracts for which a consultation was initiated, or a contract notice was sent for publication as of or after this date.

- **Tax**

France - Reporting obligations on platform operators: publication by the French tax authorities (the "FTA") of its guidelines specifying article 242 bis of the French tax code (the "FTC") and its implementing decree dated 27 December 2018

As a reminder, [Article 242 bis of the FTC](#) requires platform operators to:

- inform users every time a transaction is made via the platform about the fiscal regimes and social regulations applicable to their activities (in particular through hypertext links) and to send them annually a summary document indicating the annual amount of revenue they have generated on the site; and
- send the FTA a document summarising all the information communicated annually to the user.

On 15 March 2019 ([BOI-BIC-DECLA-30-70-40-20190315](#)), the FTA published its opposable guidelines specifying the aforementioned article as well as its implementing [decree dated 27 December 2018](#), the essential additions of which are summarised below.

- Procedure to increase the reliability of the user identification

In accordance with [article 23 L octies of annex IV to the FTC](#), when the total gross value of the transactions performed by the user on a single platform during the year in question is higher than or equal to €1,000, the platform operator is required to make the identification data of the user concerned reliable.

As a measure of tolerance, the FTA consider that this threshold is raised to €3,000, combined with an annual number of transactions at least equal to 20, for sales of furniture between individuals, other than precious metals, which sale's price is less than or equal to €5,000.

- User status

In accordance with c of 2° of article 242 bis of the FTC, platform operators should indicate the status of individual or professional communicated by the user.

This information is determined under the sole responsibility of the user.

Merger tax regime: maintenance of the benefit of the merger tax regime in the event of non-compliance with the three-year retention commitment undertaken in connection with partial asset contribution transactions carried out before 1 January 2018

The FTA issued a decision published in its opposable guidelines on the consequences of non-compliance with the three-year retention commitment on the shares received by the transferring company for a partial asset contribution ([BOI-RES-000028-20190328](#)).

As a reminder, Article 23 of Act N°2017-1775 of 28 December 2017 amending the Finance Act for 2017 abolished the commitment to retain for three years the shares received in exchange for the contribution, provided for in Article 210 B(a)(1) of the FTC, for a partial asset contribution carried out as from 1 January 2018 and not subject to a prior approval of the FTA.

Thus, the FTA have specified that the benefit of the merger tax regime granted for an initial partial asset contribution transaction carried out in 2017 may not be challenged retroactively on the sole ground of the breach of the three-year commitment undertaken by the transferring company in 2017. The same would apply in the event of a contribution of shares subject to a retention commitment in connection with a merger of the transferring company, a division or a partial contribution of assets placed under the merger tax regime.

Income from subsidiaries subject to a tax equivalent to the French corporation tax ("IS") in the United Kingdom: mitigation of the consequences on the tax consolidation regime in the event of withdrawal of the United Kingdom from the European Union and from the European Economic Area (the "EEA")

As a reminder, dividends received by a company that is a member of a tax consolidation group from French companies that are members of the same group or from companies established in a Member State of the European Union or of the EEA that are subject to a tax equivalent to the "IS" and that meet the conditions set out for companies established in France to be members of a tax consolidation group, are exempt from corporate income tax except a portion of fees and expenses at the rate of 1% of the received dividends subject to the "IS".

The FTA issued a decision published in its opposable guidelines on the tax consolidation consequences of a possible withdrawal of the United Kingdom from the European Union or from the EEA. In such event, the FTA indicate that it will be accepted that the income received from companies established in the United Kingdom until the end of the financial year of the beneficiary company during which the United Kingdom withdraws from the European Union will be deemed to come from companies established in the European Union ([BOI-RES-000035-20190306](#)).

European Union - European Union list of non-cooperative jurisdictions for tax purposes: addition by the Council of the European Union of ten (10) jurisdictions to the list of non-cooperative jurisdictions of the European Union

The European Council adopted [on 12 March 2019](#) a revised European Union list of non-cooperative jurisdictions for tax purposes so called "blacklist".

The list now includes fifteen (15) jurisdictions, comprising five (5) jurisdictions that figure on this list since its creation: American Samoa, Guam, Samoa, Trinidad and Tobago, and the American Virgin Islands. The following ten (10) additional jurisdictions have been added to the European Union's blacklist: Aruba, Barbados, Belize, Bermuda, Dominica, Fiji, Marshall Islands, Oman, the United Arab Emirates and Vanuatu.

As a reminder, since the adoption of the Anti-Fraud Act on 24 October 2018, the French list of non-cooperative jurisdictions has been extended to the European Union's list of non-cooperative jurisdictions. Among the consequences that could be particularly restrictive, we can mention a withholding tax rate of 75% applied on interest and dividend payments realised to these non-cooperative jurisdictions.

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