
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/August/September 2018.

Please note that French legal concepts are translated into English for information only and not as legal advice. The concepts expressed in English may not exactly reflect or correspond to similar concepts existing under the laws of the jurisdictions of the readers.

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- **Capital Markets**

France - The AMF amends its General Regulation and publishes an instruction in connection with the entry into force of the new Prospectus Regulation

The Autorité des marchés financiers (AMF) announced in a press release dated 20 July 2018 the modification of Book II of its General Regulations ("RGAMF") and the publication of a new instruction DOC-2018-07.

These new provisions are in line with the entry into force of the new European Prospectus Regulation of 14 June 2017. They take into account the guidelines adopted following an initial public consultation conducted between 24 January and 21 February 2018, and comments from a second consultation from 6 to 29 June 2018.

The national threshold above which an offer of securities to the public must be the subject of a prospectus reviewed by the AMF prior to its publication has been raised to 8 million euros. This measure has been in force since 21 July 2018.

Below this threshold of €8 million, offers relating to unlisted financial securities and offers not presented on an equity financing website must publish and make available to any interested person, prior to any subscription or acquisition, a summary information document containing:

- a description of their activity and project;
- information on the level of participation to which the issuer's managers have committed themselves in the proposed offer;

- exhaustive information on all rights attached to the securities offered in the proposed offer;
- exhaustive information on all rights attached to the securities and categories of securities not offered in the proposed offer as well as the categories of beneficiaries of these securities;
- a description of the provisions contained in the articles of association or an agreement and organizing the liquidity of the securities or an explicit mention of the absence of such provisions;
- the conditions under which copies of entries in the individual accounts of investors in the books of the issuer, evidencing the ownership of their investment, will be issued;
- a description of the risks specific to the issuer's business and project;
- a copy of the reports of the corporate bodies to the general meetings of the last and current financial year and,
- where applicable, a copy of the report(s) of the statutory auditor(s) made during the last and current financial year.

Finally, initial public offerings on an organized multilateral trading system (in this case Euronext Growth or Euronext Access) open to the public for less than €8 million are exempt from prospectus requirements but must comply with the rules of the relevant markets.

France - The AMF publishes a guide on the application of the regulation on money market funds

The Autorité des marchés financiers (AMF) published an instructional guide on money market funds as part of the application on 21 July 2018 of European Regulation 2017/1131 on money market funds (MMF).

Money market funds are UCITS or AIFs investing in liquid short-term assets with the objective of offering returns comparable to those of the money market and/or preserving the value of the investment.

The Regulation on money market funds establishes uniform rules for the authorisation and operation of money market funds at European level in order to make money market funds more resilient, limit financial stability risks and ensure fair treatment of investors.

The guide published by the AMF is intended to assist management companies in applying this regulation, and is therefore intended for those who have or wish to have one or more of their funds approved as money market funds. As such, it gathers information useful for the approval and management of money market funds, dealing in particular with approval procedures, investment policy, credit quality assessment policy, risk management and information to be provided to investors and the competent authorities.

This information guide is intended to be pedagogical and does not constitute a doctrinal document. It complements the current and future regulatory corpus and will be updated regularly according to clarifications made to the regulatory corpus applicable

to money market funds.

European Union - European Commission publishes a communiqué on the capital markets union to protect cross-border investment in the EU

Although European Union law does not solve all the problems that European Union investors may experience in the course of their activities, on 19 July 2018 the European Commission published guidelines to help them enforce their rights in the national administrations and courts while allowing Member States to protect the general interest in accordance with European Union law.

This press release was issued in the context of a recent Achmea decision in which the ECJ confirmed the illegality of investor-state arbitration clauses in bilateral intra-EU investment treaties.

The press release clarifies the situation of investors by specifying the following elements:

It reaffirms the rights of investors enshrined in particular in the Treaties of the European Union, the Charter of Fundamental Rights of the European Union, and the general principles of European Union law, such as the principles of the free movement of capital, services, goods and workers in the Union's single market, as well as the general principles of non-discrimination, proportionality, legal certainty and the protection of legitimate expectations.

It reiterates the incompatibility with European Union law of investor-state arbitration between a Member State and an investor from another Member State, including in the context of bilateral intra-EU investment treaties.

At the same time, it allows the European Union and Member States to take appropriate measures to protect legitimate general interests such as public security, public health, social rights, consumer protection or environmental protection, potentially with negative consequences for investors. However, such measures may only be taken in certain circumstances and under certain conditions, as well as in accordance with European Union law.

Publication in the Official Journal of a decree specifying the conditions under which a security, debt, instrument or right is considered as unstructured within the meaning of 4° I of Article L. 613-30-3 of the Monetary and Financial Code.

Decree no. 2018-710 of 3 August 2018, published in the Official Journal (Journal officiel) of 5 August 2018, specifies the conditions under which a security, debt, instrument or right is considered unstructured within the meaning of 4° of I of Article L.613-30-3 of the French Monetary and Financial Code. It also ensures the transposition of the regulatory provisions of Directive 2017/2399 of 12 December 2017 with regard to ranking of unsecured debt instruments in the insolvency hierarchy.

Thus, the text specifies the criteria that securities, claims, instruments and rights must meet in order not to be considered structured, and to be issued within the chirographic rank, known as "senior non-preferred". These include interest rates, compensation components, repayment options and maturities.

- **Commercial**

France - Law for a State serving a trusted society and written rulings/rescripts: impacts on contracts

New forms of written ruling/rescript have been established by the Law n° 2018-727 of 10 August 2018 for a State serving a trusted society. Two of these written rulings/rescripts concern contract law (article 21 of the Law n° 2018-727), and more precisely the payment terms and the commercial guarantee contract.

1° Any professional operating in an economic sector mentioned in point III of the aforementioned article can ask the General Directorate for Fair Trading, Consumer Affairs and Fraud Control (DGCCRF) to "adopt a formal position on compliance with the 9th paragraph of point I of article L.441-6 of the procedures for payment terms that he intends to implement".

2° The aforementioned professional can ask the DGCCRF to "adopt a formal position on the compliance with article L.217-15 of the commercial guarantee contract that he intends to implement".

- **Corporate**

France - Additional mandatory information required in the corporate governance report and the non-financial performance declaration

[Act No. 2018-771 of September 5, 2018 regarding "la liberté de choisir son avenir professionnel"](#) (the freedom to choose one's professional future) introduces an obligation to include additional mandatory information in the corporate governance report and the declaration of non-financial performance of large companies.

On the one hand, regarding the non-financial performance declaration, [Act No. 2018-771 of September 5, 2018](#) added additional mandatory information, concerning the measures taken by the company in favor of disabled persons. This new requirement was codified in [Article L. 225-102-1, III, paragraph 2 of the French commercial Code](#).

On the other hand, regarding the corporate governance report, [Act No. 2018-777 of September 5, 2018](#) added two additional mandatory particulars concerning (i) the search for equitable representation between men and women in corporate committees and (ii) the respect for gender diversity in the 10% of positions with greatest responsibility. These new requirements were codified in [Article L225-37-4 6° of the French commercial Code](#).

These provisions apply to declarations and reports issued as from September 7, 2018.

European Union - Identification of listed companies' shareholders

[The Implementing Regulation \(EU\) 2018/1212 of the European Commission of 3 September 2018](#), published in the Official Journal of the European Union on September 4, 2018 on the application of [Directive 2007/36/EC of 11 July 2007](#) regarding (i)

shareholders' rights in listed companies, and (ii) communication and information transmission between companies and their shareholders.

These rights include:

- the right to participate and vote at general meetings and financial rights (dividends);
- the right of listed companies to identify their shareholders;
- the obligation of financial intermediaries to cooperate in the identification process; and
- improving companies' communication with their shareholders.

[The Implementing Regulation \(EU\) 2018/1212 of the European Commission \(EU\) of 3 September 2018](#) sets out the minimum requirements for the implementation of the [Directive of 11 July 2007](#), such as:

- the request for disclosure of shareholder information, the answer to be provided, the information format;
- the minimum information to be included (confirmation of receipt of votes/ confirmation of registration); and
- the deadlines to be respected when providing information concerning company events or about decisions taken by shareholders.

[The Implementing Regulation \(EU\) 2018/1212](#) of the European Commission is applicable in the Member States as from 3 September 2020.

These new provisions are included in [Article 66 of the draft law "Pacte"](#), which amends [Article L228-2 of the French commercial Code](#). This article in its new version would provide that listed companies have the right to request, at any time and against payment (at their own expense), certain information concerning their shareholders from the central depository that manages the issuance account of such companies' securities. Any statutory clause to the contrary would be deemed unwritten.

- **Data Protection**

France - The CNIL publishes a guide for the responsible use of Blockchain and personal data

The CNIL regulates the use of personal data within Blockchain in its new [guide](#), published on September 24th. In this respect, any participant with writing rights on the chain that decides to submit data for validation by miners may be considered as a data controller. Moreover, developers of "*smart contracts*" and miners validating the recording of personal data in the blockchain are likely to be qualified as subcontractors. The CNIL insists that blockchain technology and the protection of fundamental rights are not antagonistic or mutually exclusive.

France - The CNIL focuses on biometrics

The CNIL launched a [public consultation](#) on 3 September, open until 1 October, on future regulation on the use of biometric data in the workplace. The CNIL recently imposed a [penalty of 10,000 euros](#) on a company for illegally implementing a biometric clocking system in order to control employees' schedules. The CNIL recalled that biometric data is subject to a particularly protective legal framework and that, barring exceptional circumstances, such data cannot be used by employers to monitor employees' working hours.

France - Cour de Cassation decision: Comments made by 14 people in a Facebook group are private

In a [decision](#) dated 12 September 2018, the French Cour de Cassation clarified the nature of comments in a private Facebook group. The Court confirms that comments in a private group of 14 people cannot be considered public and, consequently, may not give rise to the qualification of gross misconduct which would justify termination of employment.

France - The new data protection act and its implementation decree entered into force

[Decree n°2018-687](#) of 1 August 2018, which entered into force on 4 August 2018, contains several measures for the implementation of the Data Protection Act, as amended by the [Act n°2018-493 of June 20th, 2018](#), on the protection of personal data, entered into force one month earlier. The Decree also amends the [Decree n°2005-1309](#) of October 20th, 2005 in order to comply with the [General Data Protection Regulation](#) (GDPR) and contributes to the transposition of the [Directive \(EU\) 2016/680](#) on the protection of the processing of personal data for the purposes of the prevention, investigation, detection and prosecution of criminal offences or the execution of criminal penalties.

France - The CNIL fines DAILYMOTION € 50 000 for a data leak

On 2 August 2018, the French Data Protection Authority ("CNIL") imposed a [50,000 Euro fine](#) on DAILYMOTION for breach of its legal duty to secure the personal data of its registered users on its video hosting platform.

By December 2016, a cyber-attack targeting the platform had compromised 82.5 million email addresses and 18.3 million encrypted passwords. The CNIL considered that this massive data leak could not have been successful had certain basic safety measures been implemented by DAILYMOTION.

France - Questions to the ECJ: Generalized and indiscriminate retention of content-related data by providers of electronic communication services

The Conseil d'Etat, in response to an action for annulment regarding four decrees ([n° 2015-1185](#), [n° 2015-1211](#), [n° 2015-1639](#) and [n° 2016-67](#)) referred three questions to the ECJ for a preliminary ruling in a [decision dated July 26th, 2018, Quadrature du net and others](#).

In this case, Quadrature du Net denounced the excessively broad spectrum of surveillance allowing "*the administrative authority to collect technical collection data in real time or by automatic detection*", as well as the obligation of "*retention of generalized and indiscriminate content-related data*" imposed on providers of electronic communication services, which would

violate the right to privacy.

The Conseil d'Etat, after having pointed out that the decrees complied with the French Constitution, decided to stay the proceedings and referred the following three questions to the ECJ concerning the interpretation of the [Directive of July 12th, 2002](#):

1. does the Directive's requirement for all subscribers' and users' traffic and location data to be stored indiscriminately and in a generalized way by service providers, given its usefulness for national security purposes, constitute an invasion of privacy justified by the right to security guaranteed by Article 6 of the EU Charter?
2. does the Directive allow service providers to be required to collect, in real time, data related to traffic and the location of identified individuals given its proven usefulness in the fight against terrorism?
3. does the Directive require, in all cases that data subjects be informed of access to their traffic and location data or can this information be considered unnecessary once the effectiveness of a right to remedy is ensured?

France - The CNIL implements new health research simplification measures

On 16 July 2018, the CNIL implemented five new methodologies of reference for health data ([MR-001](#), [MR-003](#), [MR-004](#), [MR-005](#) et [MR-006](#)) in order to simplify data processing formalities for health research, studies or evaluations. Thus, the data controller who carries out research according to a methodology of reference shall no longer need to request a specific authorisation from the CNIL: only a certificate of compliance with the concerned methodology of reference will be required.

These new methodologies aim to create a protective framework for data subjects' personal data while promoting research, innovation and competitiveness.

- **Insurance**

France - Withdrawal of licence of an insurance undertaking - Coverage of losses

The [Decree no. 2018-612](#) dated 16 July 2018 and the [Ministerial Order](#) dated 30 June 2018 (the "**Decree**" and the "**Order**"), both adopted in application of Ordinance n° 2017-1609 dated 27 November 2017 and which entered into force on 18 July 2018, further detail the rules applicable in relation to the coverage of losses in case of withdrawal of the licence of an insurance undertaking.

The Decree specifies the modalities of intervention of the Fund for the Guarantee of Mandatory P&C Insurances (*Fonds de Garanties des Assurances Obligatoires de dommages* – "**FGAO**") in case of withdrawal of the licence of an insurance undertaking covering motor vehicle liability risks and damages to work risks. The Decree also specifies the modalities of intervention of the Fund for the guaranty losses which are consequential to Preventive Acts for Diagnosis or Care (*Fonds de garantie des dommages consécutifs à des Actes de Prévention de Diagnostic ou de Soins*) in case of withdrawal of the licence of an insurance undertaking covering medical liability risks. The Order specifies accounting and financial aspects in relation to

intervention of the FGAO.

France - Lack of mandatory motor vehicle liability insurance - Insured vehicles file

The [Decree no. 2018-644](#) dated 20 July 2018 on the measures to fight against the lack of mandatory motor vehicle liability insurance ("**Decree**") specifies the rules applicable to the file listing the vehicles that are likely not to comply with the motor vehicle liability insurance obligation, and notably the time period insurance undertakings and insurance intermediaries benefit from for filling-in the said insured vehicles file.

The Decree will enter into force on 31 December 2018, with the exception of provisions relating to the updating of the insured vehicles file which already entered into force on 25 July 2018.

France - Supplementary occupational pension

The French Regulatory Authority (*Autorité de contrôle prudentielle et de résolution* – "**ACPR**") published new Instructions applicable to supplementary occupational pension undertakings in relation to:

4. the national prudential documents to be filed by supplementary occupational pension undertakings on an annual basis ([Instruction no. 2018-I-11](#) dated 11 July 2018);
5. the European prudential documents to be filed by supplementary occupational pension undertakings on an annual and quarterly basis ([Instruction no. 2018-I-12](#) dated 11 July 2018); and
6. the ACPR approval procedure on the eligibility of unrealised capital gains for the calculation of the solvency margin of supplementary occupational pension undertakings ([Instruction no. 2018-I-13](#) dated 11 July 2018).

The ACPR has also published an [Instruction no. 2018-I-14](#) dated 11 July 2018 amending its former Instruction n°2017-I-07 relating to the content of the licence application to be filed either for obtaining a supplementary occupational pension fund licence or for the transformation of an administrative licence for supplementary occupational pension funds, supplementary occupational pension institutions and occupational pension mutual companies or unions, so as to include in the [appendix](#) attached to Instruction n° 2017-I-07 references to the aforementioned Instruction n° 2018-I-11.

The ACPR also published a [notice](#) dated 13 September 2018 relating to the system of governance, an internal risk evaluation and solvency assessment (ORSA) and the report to supervisory authorities and to the public (RSR/ SFCR) applicable to supplementary occupational pension undertakings.

France - Update of the ACPR instructions

The ACPR has amended a number of its Instructions and related appendices to update information required in the context of:

1. the acquisition or extension of shareholding in an insurance or reinsurance undertaking or in an insurance group company ([Instruction no. 2018-I-08](#) dated 11 July 2018);

2. the appointment or the renewal of persons who effectively run the company or of key functions holders of insurance undertakings and supplementary occupational pension undertakings ([Instruction no. 2018-I-09](#) dated 11 July 2018);
3. the content of the file for the prior declaration of the affiliation, the withdrawal or the exclusion of a mutual insurance group company, a mutual grouping union or a company of a social protection insurance group ([Instruction no. 2018-I-15](#) dated 11 July 2018);
4. the filing of prudential documents by insurance or reinsurance undertakings which are not subject to the "Solvency II" regime ([Instructions no. 2018-I-16](#) and [2018-I-17](#) dated 11 July 2018); and
5. the content of the file for the conclusion or amending a substitution agreement ([Instruction no. 2018-I-10](#) dated 11 July 2018).

France - Insurance distribution - Professional capacity of insurance intermediaries

The [Order](#) dated 26 September 2018 relating to eligible skills for continuing professional training and development actions referred to under Article R. 512-13-1 of the French Insurance Code ("**Order**"), provides a list of skills for continuing professional training and development which vary depending on the nature of the products being distributed, the methods of distribution and the functions being performed. The Order also set forth the content and the characteristics of such training. The Order will enter into force on 23 February 2019.

The ACPR also published an [information document](#) on the professional competence of insurance intermediaries dated 12 September 2018, in which the ACPR specifies its expectations in terms of verification of the professional capacity of employees, as well as regarding the identification of employees who exercise an insurance distribution related function and the subsequent mapping of the level of professional competency requirements.

France - Insurance distribution - Duty to advise

The ACPR published an [information document](#) named "Principles governing the insurance advice" dated 10 July 2018 which takes stock of on the implementation of the Directive 2016/97 of 20 January 2016 on Insurance Distribution ("**IDD**").

In this document, the ACPR covers several subject matters in relation to the duty to advise as stemming from the IDD. The ACPR notably specifies among these subject matters the substance of the duty to advise and makes a distinction between three different levels of advice which, depending on the case, are either compulsory or facultative. The identification of customers' requirements and needs within the different levels of advice is also reviewed by the ACPR, such as the timing and the manner for the announcement of the level of advice.

France - Anti-money laundering and financing of terrorism

The ACPR specified the inputs of the Decree of 18 April 2018 reinforcing the French anti-money laundering and financing of terrorism mechanism supplementing the implementation of the fourth anti-money laundering directive in an [information note](#) dated 13 September 2018.

The ACPR also specified its expectations as regard the management of politically exposed persons in an [information note](#) dated 3 September 2018.

European Union - Insurance distribution - Q&A

The EIOPA published two sets of questions and answers ("**Q&A**") in relation to insurance distribution, dated 11 July 2018:

1. a [Q&A](#) relating to the Commission Delegated Regulation (EU) n° 2017/2358 dated 21 September 2017 supplementing IDD with regard to product oversight and governance requirements for insurance undertakings and insurance distributors; and
2. a [Q&A](#) relating to the Commission Delegated Regulation (EU) n° 2017/2358 dated 21 September 2017 supplementing IDD with regard to information and conduct of business rules applicable to insurance-based investment products.

European Union - Insurance distribution - Professional indemnity insurance and financial capacity of intermediaries

The EIOPA published a set of [draft regulatory technical standards](#) adapting the base figures in euros for professional indemnity insurance and for financial capacity of intermediaries ("**RTS**") together with its final report including answers to its consultation on said RTS draft, both dated 26 June 2018 (this consultation has been mentioned in our [February 2017](#) newsletter).

The Draft RTS anticipates an increase (i) of the base euro amounts of the professional indemnity insurance of insurance intermediaries, and (ii) of the base euro amount of the financial capacity of insurance intermediaries, compared to amounts set forth under the IDD.

European Union - Insurance distribution - Key Information Document (KID) for packaged retail and insurance-based investment products

The European Supervisory Authorities (that is together the EIOPA, the European Securities and Markets Authority (ESMA) and the European Banking Authority (EBA)) have updated their joint committee guidance relating to the key information document ("**KID**") for packaged retail and insurance-based investment products on 20 July 2018. For this purpose, the European Supervisory Authorities updated (i) the set of [questions and answers](#) on the KID, as well as (ii) the [flow diagrams](#) for the risk and reward calculations in the KID.

European Union - Solvency II - Update of EIOPA's Q&As and technical information

The EIOPA updated a number of its sets of questions and answers relating to the Directive n° 2009/138 of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance ("**Solvency II**") ("**Q&As**"), among which:

1. the [Q&A](#) on Solvency II;
2. the [Q&A](#) on Delegated Regulation no. 2015/35 dated 10 October 2014 supplementing the Solvency II;

3. the [Q&A](#) on procedures, formats and templates of the solvency and financial condition report;
4. the [Q&A](#) on templates for the submission of information to the supervisory authorities;
5. the [Q&A](#) on the use of internal models;
6. the [Q&A](#) on guidelines on valuation of technical provisions;
7. the [Q&A](#) on the loss-absorbing capacity of technical provisions and deferred taxes; and
8. the [Q&As](#) on risk-free interest rate.

The EIOPA also updated certain sets of its technical information relating to the Solvency II Directive, among which:

9. the [technical information](#) on Solvency II relevant risk free interest rate term structures; and
10. the [technical information](#) of the symmetric adjustment of the equity capital charge.

European Union - Brexit - Disclosure of information to consumers on the impact of the withdrawal of the UK from the EU

The EIOPA published an [Opinion](#) with a set of [questions and answers](#) on the disclosure of information to consumers by insurance undertakings and intermediaries on the impact of the withdrawal of the UK from the EU, dated 28 June 2018.

European Union - Determination of insurance classes under which an insurance contract falls

The Mediation panel of the EIOPA published an [Opinion](#) ("**Opinion**") dated 25 June 2018, intended notably for the ACPR, under which the panel rules on the analysis of the insurance classes under which an insurance contract falls. In this case, the ACPR and the Irish regulator could not agree on the nature of an insurance contract, and more precisely on whether this contract was falling under the person's insurance category (both life and non-life) or under the miscellaneous pecuniary losses class.

- **Intellectual Property**

France - Publication of the Law No. 2018-670 of 30 July 2018 on the protection of trade secrets

The [Law No.2018-670](#) implementing the [Directive \(UE\) 2016/943 of 8 June 2016 on the protection of trade secrets](#) has been published on the 31 July 2018 in the Official Gazette, after its validation by the Constitutional Court in its [Decision No. 2018-768 DC of 26 July 2018](#). ([French Legal and Regulatory Newsletter - June 2018](#)).

The Law defines the cumulative criteria of the trade secrets and the conditions of its violation, and further provides, in

accordance with the Directive, that a Court may, in addition to granting monetary damages, order every proportionate measure to prevent or to stop the damage (prohibition, destruction, recall of the products...)

New procedural options are further available to the civil or commercial courts: court hearing behind closed doors, the possibility to adapt the published decision, restricted access to the exhibits to specifically identified persons...

Some exceptions to the protection of trade secrets are provided; the secret is in particular not enforceable against a release made to exercise freedom of speech and communication rights, or to reveal an illegal activity, with good-faith, in order to protect the public interest.

France - Audiovisual

Published in the Official Gazette of 21 July 2018, the [Decision No. 17 of 3 July 2018](#) of the Commission in charge of determining the types of medium, the rates of remuneration and the conditions of payment of remuneration for private copying in accordance with Article L.311 -5 of the Intellectual Property Code, sets the amount of the remuneration due by the television editors or their distributors, within the meaning of the law n ° 86-10687 of September 30, 1986, which provide a natural person by remote access the reproduction for private use of works from a program broadcast in a linear manner by that publisher or its distributor, provided that such reproduction has been requested by that natural person before or for the remaining part of the broadcast of the program.

The remuneration rate applicable to this type of service had already been set by the Commission Decision No. 16 of 19 June 2016, but is being re-evaluated following a study of uses confirming the importance of the copying of audiovisual programs made using this type of services.

European Union - Adoption of the European Directive on copyright in the Digital Single Market by the European Parliament

[Directive n° 2016/02 on copyright in the Digital Single Market](#) was adopted by the European Parliament on 12 September 2018. This version amends the one proposed by the European Commission in 2016 (see Legislative and Regulatory Newsletter – July, August and September 2016) and approved by the Council of the European Union on 25 May 2018.

This amended version of the Directive notably stipulates that the related right for press publishers neither extends to mere hyperlinks leading to press publications which are accompanied by individual words, nor to private and non-commercial uses by individual users.

The trialogue between the European Parliament, the European Commission and the Council of the European Union continues in order to adopt a final and compromised version of the Directive.

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- **Life Sciences**

France - Publication of the Order dated 1 August 2018 approving amendment n°6 to the National Agreement

organizing the deployment of telemedicine in France

The National Agreement, signed on 25 August 2016, organizes the relationship between private doctors and the public health insurance. Amendment n°6 to the National Agreement was signed on 14 June 2018 between the *Union nationale des caisses d'assurance maladie* (Uncam) and the representative unions of private doctors. It was published in the OJ dated 10 August 2018.

This amendment provides the modalities for the deployment, on French territory, of certain telemedical acts. In particular, and in accordance with the Social Security Financing Act for 2018, the amendment includes teleconsultation and tele expertise acts in the general financing regime.

Teleconsultation acts will be covered by public health insurance, under certain conditions, as of 15 September 2018. The tele expertise deployment schedule will be implemented before the end of 2020.

Telemedicine: Decree n° 2018-788 dated 13 September 2018 on the modalities for the implementation of telemedicine activities repealing certain contractualization obligations

Following recent legislative and regulatory developments including certain acts of telemedicine in the general financing regime (including teleconsultation, eligible for reimbursement by the French public health insurance since 15 September 2018), this Decree repeals, in particular, the obligations of organizations and healthcare professionals engaged in telemedicine activities to contract:

- with regional health agencies (*ARS*); and
- between them.

This Decree reduces the formalities prior to the implementation of telemedicine projects in France and, by doing so, should foster their development.

It entered into force on 15 September 2018.

- **Litigation**

Entry into force of the Protocol No. 16 to the Convention on the Protection of Human Rights

On 1 August 2018, the [Protocol No. 16 to the Convention on the Protection of Human Rights](#) entered into force for the contracting parties, including France.

According to the Protocol, the highest courts and tribunals of a contracting party may request a legal opinion from the Court on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the

Protocols. The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it.

The guidance delivered by the Grand Chamber shall be legitimate but not binding.

Entry into force of the Law for a State at the service of a trusted society

On 12 August 2018, the [Law n° 2018-727 for a State at the service of a trusted society](#) entered into force.

This Law creates a right to make mistakes in declarations to the administration: natural persons or legal entities infringing upon a rule applicable to their situation for the first time, and in good faith, will not be punished by the administration if they rectify their situation, either of their own accord, or after being invited to do so.

This Law also creates the right to review: a company can now request an administration to conduct a review to ensure its compliance. The administration will have to make such review within a reasonable time-frame.

Publication of the Law No.2018-670 related to the protection of trade secrets

On 31 July 2018, the [Law No. 2018-670](#) transposing [Directive \(EU\) 2016/943 of 8 June 2016 on the protection of trade secrets](#) was published in the Official Journal, after having been validated by the Constitutional Council in its [Decision No. 2018-768 DC of 26 July 2018](#).

The Law defines the concept of trade secrets by using three interdependent criteria: information known to a limited number of persons; it has commercial value because it is secret and it is subjected to special protection measures.

The Law specifies the conditions under which the acquisition, use and disclosure of information covered by trade secrets is unlawful and would constitute grounds for civil liability. The Law provides that the court may, in addition to damages, prescribe any proportionate measure likely to prevent or stop any such infringement (prohibition, destruction, product recall, etc.).

The Law provides exceptions to the protection of trade secrets: e.g. the protection of trade secrets shall not affect the right to freedom of expression and communication.

- **Public Law**

France - Time periods for consulting the Regulatory Authority for rails and roads

Decree No. 2018-828 dated 28 September 2018, published in the OJRF dated 30 September 2018, provides for a time period of two months for the Regulatory Authority for rail and road activities (ARAFER) to deliver an opinion on draft regulatory texts relating to access to the rail network and the design, construction and use of rail infrastructures and equipment. The Decree also authorizes that, in exceptional cases, this time period for consultation may be reduced to two weeks, upon request of the Prime Minister.

- **Real Estate**

France - The schedule of easements "risks" and soils information replaced by a new form from the 3 August 2018

The Ministerial Order dated 13 July, published on 2 August 2018 in the Official Journal provides for an updated schedule of easements for "risks" and soils information ("*état des servitudes "risques" et d'information sur les sols*").

The new form now called "schedule of risks and pollutions) ("*état des risques et pollutions*") will replace the current form which entered into force on 1 January 2018. It now includes the risk "radon".

The new form is available in prefectures, sub-prefectures, and town halls, and downloadable from the website of the Ministry in charge of the prevention of major risks

(http://www.georisques.gouv.fr/sites/default/files/IAL_modele_201807_Pdf.pdf).

The Ministerial Order dated 13 July 2018 entered into force on 3 August 2018, however, the form was only uploaded online on the 6 August 2018.

- **Tax**

France - Publication of the Draft French Finance Act for 2019

On 24 September 2017, the French Government published the [Draft Finance Act for 2019](#) ("Projet de Loi de Finances pour 2019" – "**PLF 2019**"). In this respect, you will find below an overview of the key measures relating to corporate and individual taxation.

1. Corporate taxation

Amendment of the French tax consolidation regime

Article 12 of the PLF 2019 provides for several modifications to the French tax consolidation regime, in particular regarding the tax treatment applicable to (i) certain intra-group dividends distributions, (ii) subsidies and debts write-offs granted between companies within the same tax consolidated group and (iii) the taxable portion of the capital gains realized upon the sale of securities within the tax consolidated group.

As a reminder, pursuant to the provisions of [Articles 223 B](#) and [223 F of the French Tax Code](#), these three types of intra-group transactions are currently neutralized for the purposes of calculating the consolidated tax group's overall income.

Among the amendments introduced in the PLF 2019, are (i) the end of the mechanism neutralizing the aforementioned intra-group transactions and (ii) a consecutive reduction from 12% to 5% of the taxable portion of the capital gains realized upon the

sale of securities within the tax consolidated group.

Overall reform of the French tax regime restraining the deductibility of financial expenses

Article 13 of the PLF 2019 provides for an overall reform of the rules currently restraining the deductibility of financial expenses, leading to the suppression of (i) the rule providing for a general limitation of the deduction of net financial expenses, (ii) the thin capitalization rules and (iii) the so-called " Carrez Amendement ", and their replacement by a new regime derived from [the EU directive n° 2016/1164 and dated 12 July 2016](#) (hereafter the "**ATAD Directive**")

As a reminder, [Article 212 bis of the French tax code](#), provides for an overall cap for the deductibility of interests while the thin capitalization rules provided under [Article 212 of the French tax code](#) limit the deductibility of interest paid to related entities only when certain ratios are cumulatively exceeded. The "Carrez Amendement" limits the deductibility of financial expenses incurred with respect to the acquisition of participation securities when the French acquiring company does not hold the decision making over the purchased securities.

Pursuant to Article 13 of the PLF 2019, the aforementioned rules will be replaced by a unique mechanism consisting in a new overall cap applied to the deductibility of financial expenses and based on the company's EBITDA and applicable as of 1st January 2019.

Introduction of a new general anti-abuse rule with respect to corporate income tax ("CIT")

Article 48 of the PLF 2019 provides for the transposal of the general anti-abuse rule provided for in [Article 6 of the ATAD Directive](#) with respect to French CIT.

Pursuant to this new general anti-abuse rule, an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine with regard to all relevant facts and circumstances will have to be ignored for CIT purposes.

The wording of the new general CIT anti-abuse rule is similar to the current anti-abuse clause provided within [Article 119 ter of the French tax code](#) with respect to investment income. The existing anti-abuse rule provided for under [Article 145, 6-k of the French tax code](#) with respect to the French participation-exemption regime would be removed as a result of the implementation of the new general CIT anti-abuse rule.

2. Taxation of individuals

Modification of the French «exit tax»

Article 51 of the PLF 2019 amends the French "exit tax" so as to restrict its application solely to situations where an individual abusively transfers its fiscal residence out of France before rapidly selling securities held by him or her.

As a reminder, the French "exit tax", provided for in [Article 167 bis of the French tax code](#), triggers the taxation of individuals mainly with respect to unrealized capital gains existing on the securities they hold, in the event of a transfer of their fiscal

residence outside of France occurring after 3 March 2011.

Among the changes provided in the PLF 2019, are (i) the reduction to two years (against fifteen years today) of the automatic tax relief period, (ii) a reorganization of the calculation methods and access conditions to the suspension of payment regime, and (iii) a simplification in the reporting obligations.

Simplification of the favorable tax regime for the free transfer of shares, so-called "Dutreil Transmission Agreement"

Article 16 of the PLF 2019 plans to modernize the tax system in favor of the free transfer of shares, also known as the "Dutreil Transmission Agreement".

As a reminder, the "Dutreil Transmission Agreement" mechanism, provided for in [Article 787 B of the French tax code](#), takes the form of a partial exemption from inheritance or gift tax, and applies to transfers of shares of companies carrying on an industrial, commercial, agricultural or liberal activity, provided that such shares which have been subject to collective and individual holding undertakings.

Among the simplifications provided for in the PLF 2019, are (i) increased possibility of contributing or selling the shares covered by the agreement and (ii) a limitation of the annual reporting requirements.

Financial expenses: the French tax authorities updated the maximum rate of deductible interest from a tax standpoint

The French tax authorities (the "FTA") updated their guidelines by modifying the reference rate for the twelve-month periods ending from 30 September 2018 to 30 December 2018 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 French tax code 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 1.53%, 1.52% and 1.51% for fiscal years ended (i) between 30 September 2018 and 30 October 2018, (ii) between 31 October 2018 and 29 November 2018, and (iii) between 30 November 2018 and 30 December 2018 ([BOI-BIC-CHG-50-50-30-20180502](#)).

France - Tax audit: publication in the French Official Gazette of Act n°2018-727 which modifies the procedures applicable to tax audits

[Act n°2018-727 dated 10 August 2018](#), (hereafter, the "ESSOC Act ") published in the French Official Gazette ("JORF") on 11 August 2018, strengthens the taxpayer's right to make mistake and grants him new guarantees in the context of tax audit operations.

As a reminder, the French Tax Proceedings Code already provides for a core of protections and guarantees for taxpayers against the French Tax Administration (the "FTA") in the course of a tax audit.

Among the measures introduced in the ESSOC Act, are mainly featured (i) a recognition of the taxpayer's right to make

mistakes which results, in particular, in the reduction of penalties for late interest and (ii) the extension of the enforceability of the FTA's conclusions drawn in its reassessment notice following the conclusion of a tax audit.

France - Corporate income tax rate: the FTA comments on the conditions of the progressive rate decrease

The FTA updated their guidelines regarding the implementation of the French corporate income tax rate decrease ([BOI-IS-LIQ-10](#) ; [BOI-IS-LIQ-20-10](#) ; [BOI-IS-LIQ-20-20](#) ; [BOI-IS-RICI-30-10-20-10](#) ; [BOI-IS-DECLA-20-10](#) ; [BOI-IS-DECLA-20-30](#) ; [BOI-IS-AUT-10-10](#)).

As a reminder, [Article 84 of the French Finance Act for 2018](#) (*loi de finances pour 2018 n°2017-1837*) provided that the standard rate of corporate income tax, provided for in [Article 219-I of the French Tax Code](#), would be gradually reduced to 25% in 2022, compared to 33.33% today.

In its new comments, the FTA clarifies the impact of the corporate income tax rate decrease on the calculation of advance corporate income tax payments and tax credits, as well as the methods for assessing the turnover thresholds applicable to reduced corporate income tax rates; the FTA finally comments on the coordination measures necessary for the application of various tax measures referring to the corporate income tax rate.

France - VAT: the FTA updated their official guidelines regarding the notion of "services connected with immovable property"

The FTA updated their official guidelines regarding the French VAT territoriality rules applicable to the provision of services relating to immovable property in the light of the Council Implementing Regulation (EU) N° 1042/2013 dated 7 October 2013 ([BOI-TVA-CHAMP-20-50-30](#)).

As a reminder, [Article 259, A, 2° of the French Tax Code](#) provides that, by way of derogation from the general French VAT territoriality rules applicable to service provisions, the provision of services relating to immovable property is subject to VAT in France when the property is located in France.

In its new comments, the FTA clearly states that only services which have a "sufficiently direct" link with immovable property fall within the scope of [Article 259, A, 2° of the French Tax Code](#) while also specifying the two alternative identification criteria that are applicable.

International - OECD Multilateral Instrument: publication of the Act authorizing the ratification of the OECD multilateral instrument

[Act n°2018-604 dated 12 July 2018](#) authorizing the ratification of the OECD multilateral instrument "to implement tax treaty related measures to prevent base erosion and profit shifting" was published in the JORF on 13 July 2018.

As a reminder, the OECD multilateral instrument, which entered into force on 1 July 2018, has been designed to amend some of the provisions of double tax treaties entered into by its signatory States without resorting to bilateral negotiations between States.

The first applications of the OECD multilateral instrument are expected to start in France as soon as 1 November 2018 and it should amend the provisions of double tax treaties and improve the rules setting out the framework for dispute resolution in the event of double taxation.

International - Transfer pricing: publication of a decree specifying the terms of presentation and content of the transfer pricing documentation

By a [decree n°2018-554](#), published in the JORF on 30 June 2018, the French Government has clarified the application of [Article L 13 AA of the French Tax Proceeding Code](#) which sets out the applicable transfer pricing documentation obligations.

As a reminder, following the OECD's report on Action 13 of the BEPS Project dedicated to transfer pricing documentation, a new transfer pricing documentation model was defined. This model was transposed in France by the French Finance Act for 2018.

[Article R 13 AA - 1 of the French Tax Procedures Code](#), created by the abovementioned decree, defines the scope of the documentation obligations imposed on companies subject to transfer pricing obligations by specifying the content of the tax returns, the means of providing the documentation as well as the calculation formulas ascertainable by the FTA.

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