

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 February 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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1. Capital Markets**France - The *Autorité des marchés financiers* (AMF) published a summary of the responses to the public consultation on initial coin offerings (ICO)**

On February 22, 2018, the AMF published the summary of responses to the public consultation on ICO. The AMF received 82 responses from a large scope of stakeholders such as digital economy players, individuals, market infrastructures, finance professionals, law firms and academics.

In order to respond to the development of fundraising based on the use of crypto assets, blockchain technology, and to the risks associated, the AMF has proposed three options to provide a legal framework for these transactions.

Option 1 was to promote best practice guide without changing existing legislation. Option 2 was to extend the scope of existing texts to treat ICOs as public offerings of securities. Finally, option 3 proposed a new legislation adapted to ICOs.

A large majority of participants opted for option 3. Respondents particularly stressed the need for token buyers to have an information document concerning notably the issuer, the ICO project or the accounting treatment. The AMF Board has decided to continue work on the definition of a specific legal framework for ICOs in coordination with the other public authorities concerned.

France - The AMF considers that the offer of cryptocurrency derivatives requires approval and that it is prohibited to advertise such offer via electronic means

On February 22, 2018, the AMF published its analysis on the legal classification of crypto-currency derivatives. Over the past few months, many trading websites have begun to offer contracts which allow investors to bet on the rise or fall of a cryptocurrency without holding the underlying asset.

In its analysis, the AMF first defined what is covered by the term "derivative" as a legal term and then assessed whether cryptocurrency can be considered as an eligible underlying for the purposes of the texts. The regulator concluded that a cash-settled crypto-currency contract can be regarded as a financial contract, without the need to legally qualify the crypto-currencies.

As a result, platforms that offer cash-settled crypto-currency derivatives must comply with the regulations applicable to financial instruments, in particular the rules on approval, good conduct and reporting of transactions to a central repository under EMIR. Above all, these products are covered by the advertising ban introduced in France on certain financial contracts by the Sapin 2 law.

France - On 1 February 2018, ISDA, ICMA and other associations jointly published a benchmark transition roadmap :

The Roadmap describes the interests of a transition from IBORs to RFRs and suggests a plan for the transition.

IBORs (Interbank Offered Rate) such as LIBOR, EURIBOR et TIBOR are determined upon information exchanges between banks on their interest rate. If banks exchange false information, these benchmarks can therefore easily be manipulated, which can cause huge losses on the market and systemic risks. It may also happen that information is missing to determine an IBOR if, for instance, the interbank market is frozen.

RFRs (risk-free rates) are determined upon the interest rates of an issuer of high quality (i.e. very unlikely to default). In France, the RFR is based upon the interest rate of *obligations assimilables du Trésor* (OATs), which are the bonds issued by the French government (*Agence France Trésor*). RFRs are much more reliable than IBORs.

The transition to RFRs needs adapting (update of contracts, modification of certain Events of Default which could otherwise be triggered by the use of a RFR, regulatory changes, etc) even more than certain alternative RFR do not yet exist.

In the European Union, a working group was created in September 2017. It works together with the ECB, ESMA, the European Commission and FSMA. The purpose of the group is to identify alternative RFRs, minimize the impact of the transition on the market and guarantee the continuity of contracts. Other working groups outside the EU are also working on identifying the better RFR for each currency

2. Competition

Europe - The Council adopted a regulation to ban unjustified geo-blocking

On 27 February 2018, the Council adopted a new Regulation (EU) 2018/302 of the European parliament and of the Council on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC. Geo-blocking prevents online access to products or services on a website based in another Member State.

The new regulation will prevent discrimination for consumers and companies when buying online products and services in another European country. However, it will still be possible to provide different general terms and conditions and online interfaces specific to certain Member States. The new rules will prevail regarding passive sales but the right of suppliers to impose active sales restrictions will not be affected.

Some services such as retail financial services, audiovisual services and copyright protected services will be excluded from the scope of the regulation.

3. Employment

France - Act allowing to give unused resting days to employees giving care to one of their relatives suffering from an important autonomy

loss or a disability

Act n° 2018-84 dated 13 February 2018 (Journal officiel dated 14 February 2018) has created a device allowing anonymous gift of resting days amongst employees of the same company, when one of them gives care to one of his/her relative suffering from an important autonomy loss or a disability. This device is based on the one already in place to the benefit of parents caring for their gravely sick child.

France - Decree abolishing the stamp duty applicable to transnational secondment

Decree n° 2018-82 dated 9 February 2018 (Journal officiel dated 9 February 2018) abolishes the French Employment Code regulatory provisions related to the contribution meant to compensate the implementation cost of the dematerialised system of declaration and of control of secondment of workers. This contribution, worth € 40 per secondment, was supposed to be collected as from January 1st 2018, but in fact never was.

France - Ministerial order related to prevention of occupational risks

Ministerial order dated 27 December 2017 (Journal officiel dated 15 February 2018) amends the list of pathogenic biological agents and of technical prevention measures to implement in labs where workers may be exposed to some of these pathogens.

France - Ministerial order setting the admissibility template form to be joined to validation of acquired experience (VAE) applications

Ministerial order dated 29 November 2017 (Journal officiel dated 1 February 2018) sets a template form titled "request of admissibility to validation of acquired experience". This template has to be joined to the application to the certification organisation. It is available through this organisation or online.

4. Insurance

France - Substitution agreements between mutual insurance companies or unions

The Decree n° 2018-56 dated 31 January 2018 on the modalities of application of substitution agreements entered into between mutual insurance companies or between unions governed by the second book of the French Mutual Insurance Code ("**Decree**"), which has been adopted in application of Article 5 of Ordinance n° 2017-734 of 4 May 2017 modifying the rules relating to mutuality undertakings, has been published in the French Official Journal on 2 February 2018. The Decree notably specifies the mandatory provisions to be included in such substitution agreements, pursuant to which for the record mutual insurance companies or unions can transfer their insurance undertakings to other mutual insurance companies or unions, and the modalities of information of such substitution of participating members or beneficiaries. The Decree entered into force on 3 February 2018.

European Union - Solvency II – Calculation of technical provisions and basic own funds

The Commission Implementing Regulation (EU) 2018/165 dated 31 January 2018 ("**Implementing Regulation**") laid down technical information for the calculation of technical provisions and basic own funds for reporting with reference dates from 31 December 2017 to 31 March 2018, in accordance with the Solvency II Directive. The Implementing Regulation entered into force on 4 February 2018 and applies retroactively since 31 December 2017.

European Union - Solvency II – Solvency capital requirement

On 28 February 2018, the European Insurance and Occupational Pensions Authority ("**EIOPA**") provided the European Commission with its second set of advice in relation to specific aspects of the Delegated Regulation (EU) 2015/35 of 10 October 2014 completing the Solvency II Directive. This new set of advice covers various aspects relating to the methods, assumptions and standard parameters used when calculating the solvency capital

requirement ("SCR") with the standard formula, which were not covered by the EIOPA in its first set of advice published in October 2017. The EIOPA also published a set of [questions and answers](#) on the review of the SCR standard formula.

European Union - Insurance Intermediaries – Professional indemnity insurance and financial capacity

On 1 February 2018, the EIOPA initiated a [public consultation](#) on its proposal for draft regulatory technical standards ("RTS") increasing the base euro amounts of minimum guarantees provided for under professional indemnity insurance contracts to be written by insurance intermediaries, and the minimum amount of the financial capacity of insurance intermediaries, provided for under Article 10 of the Insurance Distribution Directive.

Any comments in relation to this consultation can be submitted to the EIOPA until 27 April 2018; the EIOPA will then submit finalised draft RTS to the European Commission by 30 June 2018 at the latest.

European Union - Brexit – European Commission's notice to stakeholders on the consequences of Brexit on the insurance and reinsurance industries

On 8 February 2018, the European Commission published a [Notice](#) on the European Union applicable rules in the field of insurance and reinsurance in relation to Brexit ("**Notice**"). The Notice provides that, subject to any specific transitional arrangement that may be contained in a possible withdrawal agreement, the United Kingdom will be considered as a third country to the European Union as of 30 March 2019, and specifies the consequences of Brexit with regards to EU laws and regulations currently applicable to undertakings operating from or towards the United Kingdom in terms of authorisations, continuance of insurance contracts, information disclosure and group supervision.

5. Life Sciences

France – Publication of the Decree on Hosting of Personal Health Data

The [Decree n° 2018-137 dated 26 February 2018](#) on the hosting of personal health data was published in the OJ on 28 February 2018.

The Decree provides and defines the modalities for the transition from an accreditation procedure to a certification procedure by accredited bodies for the hosting of personal health data in digital format. The approval procedure is maintained during a transitional period.

The Decree is issued pursuant to the Ordinance n° 2017-27 dated 12 January 2017 on the hosting of personal health data which amended the Article [L.1111-8](#) of the French Public Health Code, the new version of which will enter into force on 1 April 2018.

A detailed presentation of this Decree can be found in a [Newsflash](#) dated 2 March 2018.

6. Tax

France - 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 31 December 2017 to 30 March 2018 used to calculate the limit of deductible interest in accordance with the provisions of [Article 39, 1-3° of the French Tax Code](#) (the "FTC").

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

The maximum deductible rates for this period are respectively 1.67%, 1.65% and 1.63% for fiscal years ended (i) between 31 December 2017 and 30 January 2018, (ii) between 31 January 2018 and 27 February 2018, and (iii) between 28 February 2018 and 30 March 2018 ([BOI-BIC-CHG-50-50-30-20180207](#), n°40).

France - Withholding of individual income tax: first comments from the FTA

The FTA partially published their official guidelines relating to the withholding of French individual income tax to be implemented as from 1 January 2019 ([BOI-IR-PAS-20180131](#)).

As a reminder, Article 60 of the Finance Act [n°2016-1917](#) for 2017 dated 29 December 2016 (*as modified by Government Regulation n°2017-1390 dated 22 September 2017*) provided for a withholding tax mechanism applicable for French individual income tax purposes. This withholding tax mechanism replaces the current payment system of French individual income tax.

In these first guidelines, the FTA specify the implementing rules of the withholding of French individual income tax (*i.e. scope, applicable rates, tax reporting obligations, etc.*).

Fight against tax fraud: new hearing procedure

The FTA published their official guidelines relating to the new hearing procedure provided by [Article L. 10-0 AB](#) of the French Tax Procedure Code ([BOI-CF-COM-20-50-20180207](#)).

As a reminder, this procedure, applicable since 1 January 2017, enables the FTA to proceed with the hearing of any person (*other than the involved taxpayer*) who may have useful information relating to tax fraud.

The FTA notably specify (i) the implementing rules of this new procedure, and (ii) the conditions under which audition transcripts may be used.

Annual tax on office premises: publication of applicable tariff for fiscal year 2018

The FTA published the tariff of the annual tax on offices, business premises, storage facilities and parking areas in the Ile-de-France region (the "**Tax on Office Premises**") with respect to fiscal year 2018 ([BOI-IF-AUT-50-20-20180207](#), n°200).

As a reminder, the tariff of the Tax on Office Premises is updated annually depending on the construction cost ("*Indice du coût de la construction*") published by the *Institut National de la Statistique et des Etudes Economiques*.

This new tariff applicable for fiscal year 2018 represents an increase of 1.64% compared to the tariff applicable in 2017.

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