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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 2019.

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

If you would like to consult this newsletter from past months, please click [here](#).

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For additional information, please speak to your usual contact.

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- **Capital Markets**

### France – Preparing for Hard Brexit: what are the measures provided for in the Ordinance of 6 February 2019

Pursuant to the [Law of 19 January 2019](#) allowing the French Government to take by way of ordinance the necessary measures to prepare the withdrawal of the United Kingdom from the European Union, [an ordinance](#) on financial services which are applicable only in the event of Hard Brexit has been issued by the French Government on 6 February 2019.

This ordinance provides for several key measures, including:

- the exclusion of the anatocism rule which prohibits the capitalisation of interests due over a period of less than one year for French law master agreements published by the International Swaps Derivatives Association (ISDA) in respect of derivatives;
- the introduction of a new mechanism for the replacement of derivative framework contracts with framework contracts governed by French law, subject to certain cumulative conditions as set by the Ordinance;
- facilitating access by French entities to British interbank and securities settlement systems, which will continue to benefit from the protective measures of the [Finality Directive of 19 May 1998](#) and ensure that settlements within these systems are final; and
- the continuity of the Supervisory Authority's powers of sanction and supervision for acts committed by persons under its authority but also for successive performance contracts concluded on the basis of a European passport.

**For more details please click on the following link** (Only a French version is available):

<https://www.hoganlovells.com/fr/publications/produits-derives-et-brexit-que-retenir-de-lordonnance-du-6-fevrier-2019>

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- **Data Protection**

#### **France – First ruling upon request of the CNIL's qualified person**

When the administration considers that content published on the Internet constitutes a direct provocation or promotes acts of terrorism, it can order Internet service providers and search engines to block access to or stop indexing such content.

These measures are implemented under the control of a qualified person designated by the French Data Protection Authority (the "CNIL"). This person can submit a cancellation request to the administrative courts.

In this context, on February 4<sup>th</sup>, 2019, [the administrative court of Cergy-Pontoise quashed several content withdrawal decisions](#) made by the Anti Information Technology-Related Crime Central Office (*Office central de lutte contre la criminalité liée aux technologies de l'information*). This is the first ruling issued upon request of the CNIL's qualified person.

#### **European Union – EDPB Guidelines on certification pursuant to Articles 42 and 43 of the GDPR**

In February 2019, the European Data Protection Board (EDPB) released its [guidelines on certification and identifying certification criteria in accordance with Articles 42 and 43 of the General Data Protection Regulation](#) (GDPR), adopted on January 23<sup>rd</sup>, 2019.

In this context, certification refers to a third party attestation related to processing operations by controllers and processors.

The guidelines explain the key concepts, scope and purpose of certification. They aim at facilitating the uniform application within the European Union of the provisions of Articles 42 and 43 by the supervisory authorities and the different certification bodies, the role of which they clarify in this regard. In particular, the guidelines provide considerations to take into account in the definition and approval of certification criteria.

#### **European Union – EDPB information note on data transfers in the event of a no-deal Brexit**

On March 30<sup>th</sup>, 2019, unless Brexit is delayed, the UK will become a third country to the European Union. In the event of a no-deal Brexit, and without derogations provided by the GDPR or an adequacy decision by the European Commission acknowledging that the UK ensures an adequate level of protection, any personal data transfer to the UK will have to comply with the GDPR provisions applicable to transfers to third countries.

In an [information note of February 12<sup>th</sup>, 2019](#), the EDPB mentions the mechanisms that may be used to transfer personal data to the UK under such circumstances, such as executing Standard Data Protection Clauses approved by the European Commission or using Binding Corporate Rules.

The EDPB recommends companies to adopt a multi-step plan. Companies should first identify personal data transfers to the UK, then the appropriate transfer mechanisms. Such mechanisms should be implemented by March 30<sup>th</sup>, 2019. After that, companies should mention transfers to the UK in their internal documentation and update their privacy notices accordingly to inform data subjects.

- **Employment**

**France – Secondment of employees: transposition of European Directive n°2018/957 dated 28 June 2018**

[Order n° 2019-116 dated 20 February 2016](#) implements into French law the provisions of [European Directive n°2018/957 dated 28 June 2018](#). These new provisions reinforce the control of secondment by introducing new information obligations for user companies and temporary employment agencies. Seconded employees will now have to receive the same compensation as that received by a local employee on an equivalent work position. A maximum duration of secondment is now fixed. Thus, the specific regime for secondment provided for in the French Labour Code is only applicable to secondments of a maximum duration of 12 months, unless a derogation is granted in the conditions that will be specified by a later decree.

These new rules will come into force on July 30, 2020.

**France – Challenging the conventionality of the Macron scale**

Under the terms of the Ministerial Circular n° C3/201910006558 of 26 February 2019, the Ministry of Justice asks the Attorneys General of the Courts of Appeal to inform it of the judgments handed down by the employment tribunals within their jurisdiction which have upheld or, on the contrary, have ruled out the conventionality of the scale of compensation for dismissal without real and serious cause provided for in article L. 1235-3 of the French Labour Code. The Ministry of Justice also requests the communication of the judgments that have been appealed so that Public Prosecutors can "*intervene as an added party to make known the opinion of the Public Prosecutor's Office on this question of application of the law under Article 426 of the Code of Civil Procedure*".

**France – AGIRC-ARCCO merger**

The letter from the Social Security Department addressed to the Central Agency for Social Security Funds (ACOSS) dated 25 February 2019 confirms the temporary maintaining of the former objective categories allowing the employer to benefit from a favourable social regime despite the merger of AGIRC-ARCCO.

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- **Insurance**

**France – Insurance distribution – Continuing professional training**

The French Regulatory Authority (*Autorité de contrôle prudentiel et de résolution* – "ACPR") has published a [note](#) dated 23 February 2019 relating to the application of the continuing professional training obligation stemming from the Directive 2016/97 of 20 January 2016 on insurance distribution ("IDD"). The ACPR mentions that during the inspections that its services will perform in 2019, strict attention will be paid to the steps undertaken by professionals to comply with the continuing professional training obligation, and that its services also expect professionals to be in a position to already provide the list of persons or categories of persons that must follow a training. The ACPR also indicates that its services will give specific attention to the consistency between the trainings and the nature of products being distributed, the modalities of distribution and the role of the persons being trained.

## **France – Brexit – Preparatory measures for the financial industry in view of the withdrawal of the United Kingdom from the European Union**

The [Ordinance n°2019-75](#) of 6 February 2016 on preparatory measures for the financial industry in view of the withdrawal of the United Kingdom ("UK") from the European Union ("EU") ("**Brexit**") ("**Ordinance**") has been published on 7 February 2019.

Pursuant to the Ordinance, following Brexit, insurance undertakings registered in the UK will no longer be authorised to renew the insurance contracts they have written in France pursuant to European passporting rights, or to carry-out direct insurance operations implying call for insurance premiums. Insurance contracts that would be renewed or subject to direct insurance operations implying call for insurance premiums by insurance undertakings mentioned above will be deemed to be void. However such voidness will not be enforceable towards insureds, policyholders and beneficiaries of insurance contracts. Also, insurance undertakings that will no longer be authorised to carry out their activities in France will have to inform their insureds and policyholders of this pursuant to modalities that are yet to be specified by regulatory means.

The Ordinance will enter into force on the day following the date of Brexit, in the absence of agreement being reached between the UK and the EU.

## **France – French Guarantee Funds for Mandatory Non-Life Insurances – Modification of the contribution rate applicable to insurers covering automobile risks**

The [Order](#) dated 28 February 2019 relating to contributions to the French Guarantee Funds for Mandatory Non-Life Insurances (*Fonds de garantie des assurances obligatoires de dommages* – "FGAO") ("**Order**") raised the contribution rate due by insurance undertakings in relation to the "automobile" section of the FGAO from 12% to 14% of all the charges of this section. This new contribution rate is applicable to accounting periods that started on 1<sup>st</sup> January 2019.

## **European Union – Brexit – Recommendations for the insurance sector in light of Brexit**

The European Insurance and Occupational Pensions Authority ("**EIOPA**") has published nine (9) [recommendations](#) dated 19 February 2019 ("**Recommendations**") for the insurance sector in light of Brexit.

The Recommendations relate to different items such as run-off, the authorisation of third-country branches, the lapse of authorisation, portfolio transfers, changes in the habitual residence or establishment of the policyholder, communications to policyholders and beneficiaries, or distribution activities.

The Recommendations will apply starting from the date following that on which the EU treaties will cease to apply to and in the UK.

## **European Union – IDD – Q&A**

The EIOPA has published a set of [questions and answers](#) ("**Q&A**") relating to insurance distribution dated 15 February 2019, in which EIOPA rules on the application of the Connected Contracts Exemption in the context of the IDD.

## **European Union – Key information document for packaged retail and insurance-based investment products**

The European Supervisory Authorities (that is together the EIOPA, the European Securities and Markets Authority and the European

Banking Authority) ("ESAs") published on 8 February 2019 their [final recommendations](#) relating to the amendment of Delegated Regulation no. 2017/653 of 8 March 2017 on key information document for packaged retail and insurance-based investment products ("PRIIPS Delegated Regulation"). Although the ESAs conclude that it is not appropriate to propose substantive amendments to the PRIIPS Delegated Regulation at this time, they will pursue their work in 2019 in the perspective of a review of said Delegated Regulation.

#### **European Union – Solvency II – Request for technical advice on the review of the Solvency II Directive**

The European Commission addressed a [request](#) to the EIOPA on 11 February 2019 for technical advice on the review of the Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance, notably with regard to the supervision of insurance and reinsurance undertakings including when these are member of a group.

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- **Intellectual Property**

#### **France – Government Bill relating to companies' growth and transformation (PACTE Bill)**

On 12 February 2019, the *Sénat* adopted upon first reading most of the intellectual property provisions of the [PACTE Bill](#). Only a few modifications and removals were performed.

In particular, Article 42 bis which grants to the French National Institute of Industrial Property the capacity to assess the inventive step while reviewing a patent application was deleted (for further information, see the [Legislative and Regulatory Newsletter – January 2019](#)).

On 20 February 2019, the Government Bill was submitted to the Parliament Joint Committee which did not manage to reach a compromise on the draft text.

The Government Bill will be examined again by the *Assemblée Nationale* as from 13 March 2019.

#### **European Union – Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market**

On 13 February 2019, the European Parliament, the European Union Council and the Commission reached an agreement on a [Proposal for a Directive on Copyright in the Digital Single Market](#). This Proposal was then approved by the Permanent Representatives Committee, on 20 February 2019.

Although it is not binding law yet, the Proposal draws up a stable provisional version of the new Directive, including the measures of Articles 11 which grants new neighboring rights to press publishers and Article 13 which sets up a new liability regime for content sharing service providers.

The Proposal will be examined by the European Parliament in March 2019.

#### **European Union – Proposal for amending Regulation no. 469/2009 on the Supplementary Protection Certificate for medicinal products**

The [Proposal](#) was adopted by the Council of the European Union on 20 February 2019.

The Proposal aims at enhancing the competitiveness of producers of generic and biosimilar medicinal products and allows an exception to

the protection of original medicinal products granted by a Supplementary Protection Certificate (SPC).

This exception gives European manufacturers the right to produce a generic or biosimilar version of the medicinal product protected under a SPC for the exclusive purposes of exporting outside the Union or storing ("stockpiling") in the Union no earlier than six (6) months upon expiry of the SPC's protection.

This exception is limited as it does not cover import in the Union act for reconditioning or re-exportation. Additionally, the Proposal imposes an obligation of information to authorities and SPC right holders to generics and biosimilar producers.

The Proposal amending the Regulation no. 469/2009 must now be reviewed by the European Parliament in March 2019.

- **Audiovisual**

**France – Law no. 2019-127 of 25 February 2019 authorizing ratification of the World Intellectual Property Office Treaty on Audiovisual Performances**

The [Law](#) authorizing the ratification of the WIPO's Treaty on Audiovisual Performances was published in the Official Journal on 26 February 2019.

This [Treaty](#) grants a minimum standard of protection to Performers on their audiovisual works. It particularly grants to this performers moral and economic rights for a minimal duration of at least fifty (50) years (for further information on this Treaty, [see the Legal and Regulatory Newsletter of June 2012](#)).

Nonetheless, the Treaty shall enter into force only after ratification by thirty member States. France is the thirteenth ratifying country.

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- **Litigation**

**France – Decree of 27 February 2019 regarding the implementation of the processing of personal data from the individual cameras of municipal police officers**

The [Decree n°2019-140](#) of 27 February 2019 is adopted for the application of the Law of 3 August 2018 which authorized the use of mobile cameras by municipal police officers.

The decree specifies the documents that must be provided by mayors to obtain approval from the prefect, the categories of recordable data (notably images, sounds, timestamp), the persons authorized to have access to the data (municipal police chief and specially appointed officers, officers and officers of the judicial police, mayor, etc.).

It also mentions the proceedings related to the public's right of information and opposition. When a municipality sets up such a system, it must inform the public on its website or by posting it in the town hall.

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- **Public Law**

**France – Railway safety in the Channel Tunnel in case of a no-deal Brexit**

[Ordinance n°2019-96 dated 13 February 2019](#) relating to the preparation of the withdrawal of the United Kingdom from the European Union regarding railway safety in the Channel Tunnel, published in the OJRF dated 14 February 2019, empowers the Railway Safety Public Establishment to perform its missions of railway safety national authority for the part of the concession of the Channel Tunnel located on the French territory, in the event of a « no-deal » withdrawal of the United Kingdom based on the article 50 of the Treaty on European Union. To this day, this role falls to an intergovernmental commission appointed jointly by France and United Kingdom as the safety bi-national authority for the whole cross-Channel fixed link.

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- **Tax**

**France – Tax assessment: simplification of the rules of proof of notification of assessment to a taxpayer domiciled abroad**

The notice of assessment is the document by which the French Tax Authorities ("FTA") claims from the taxpayer the tax it considers not to have been paid within the legal time limits. The notice of assessment must be notified to the taxpayer before the tax can be recovered. This notification is generally made by post (either by simple letter or by registered letter with acknowledgement of receipt).

Where the taxpayer is domiciled abroad, the administrative guidelines previously applicable stipulated that the notice of assessment had to be notified to the taxpayer by registered letter with acknowledgement of receipt. Only the return of the acknowledgement of receipt signed by the addressee could constitute proof of valid notification of the notice of assessment.

In practice, the FTA faced certain difficulties. Indeed, the acknowledgement of receipt was not always returned to the FTA by the foreign postal service and thus the FTA could not prove that the notice of assessment had been duly notified. The FTA has therefore amended their guidelines ([BOI-REC-PREA-10-10-10-20-20190819](#)) by specifying that for debtors whose address is located in a foreign State that has accepted notification by post, the notice of assessment will now be considered as having been duly notified as soon as the administration is able to provide either proof of receipt of the document by the debtor or proof of presentation of the document at the last address known to the tax administration.

**France – Research Tax Credit: increase in the threshold for the additional reporting obligation for companies that incur a certain amount of research expenditure**

In accordance with [Article 244 quater B, III bis of the French Tax Code](#) ("FTC"), companies that incur a certain amount of research expenditure eligible for the Research Tax Credit ("RTC") are required to produce a statement describing the nature of their ongoing research work, the progress of their research programs, the material and human resources, direct or indirect, devoted to it, the proportion of doctorate holders financed by this expenditure or recruited on their basis, the number of corresponding full-time equivalents and their average remuneration, as well as the location of these resources.

The Finance Act for 2019 dated 28 December 2018 ([Act No. 2018-1317 - Article 151](#)) amended the threshold of research expenditure above which this additional reporting obligation applies by reducing it from €100 million to €2 million. Failure to comply with this reporting obligation is sanctioned by the application of a tax fine of an amount equal to €1,500 ([Article 1729 B, I paragraph 2 of the FTC](#)).

The FTA has therefore updated their guidelines ([BOI-BIC-RICI-10-10-60-20190213](#)) to take into account this threshold reduction.

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