

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 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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For additional information, please speak to your usual contact.

Contact

Bruno Knadjian

Avocat à la Cour, Partner

Hogan Lovells (Paris) LLP
17, Avenue Matignon
CS 60021
75008 Paris
Tél. : +33 1 53 67 47 47
Fax : +33 1 53 67 47 48

Hoganlovells.com

1. Capital Markets

Europe -Binary options, CFDs: ESMA prohibits or restricts marketing, distribution or sale to retail investors

On 23 March 2018, the European Securities and Markets Authority (ESMA) agreed on a prohibition of the marketing, distribution or sale of binary options to retail investors.

ESMA also agreed to restrict the marketing, distribution or sale of certain contracts for difference (CFDs) to retail investors. These restrictions concern in particular the prohibition of inducements by a CFD provider or a risk warning attached to authorised products.

These measures are part on one hand of the authority's desire to protect individual investors and on the other hand of the implementation of intervention measures permitted by the new regulatory framework for markets in financial instruments (MiFID 2).

These measures will apply one month after the publication of the European Official Journal in the case of binary options and two months in the case of CFDs. Moreover, in accordance with MiFIR regulation, these intervention measures are only put in place on a quarterly basis and can be extended.

Europe - The AMF Publishes position 2018-03 on non-guaranteed investment, investment advice and advice to companies on capital structure, industrial strategy, mergers and companies takeovers

On 14 March 2018, the AMF published in its doctrine, position 2018-03 concerning the conditions for defining activities designated with the generic term corporate finance advice ("*conseil en haut de bilan* ") under the umbrella of a related service as defined in

Article L. 321-2(3) of the French Monetary and Financial Code which may be exercised without authorisation.

This position, developed in collaboration with the ACPR, specifies to what extent and under what conditions the persons who assist, advise and accompany natural persons or legal persons and their managers and/or their shareholders or associates in the context of a proposed transfer/acquisition of a company, of external growth, capital opening or fund raising operations, and, where applicable, in the search for financing for these same operations, deliver a service that is likely to fall not within the scope of investment advisory or non-guaranteed investment services subject to authorisation but within the related service free to exercise referred to in Article L. 321-2(3) of the French Monetary and Financial Code.

The doctrine paper addresses in particular the criteria for differentiating between corporate finance advice and investment advice, but also between corporate finance advice and non-guaranteed investment advice. These criteria must be assessed *in concreto*.

2. Commercial

France – Default to comply with the rules on terms of payment

The French Ministry of Economy and Finances announces a biannual publication of decisions sanctioning companies on this ground.

On March 23rd, the president of the French Observatory on terms of payment and the State secretary to the Ministry of Economic and Financial Affairs presented the evolutions of terms of payment over the year 2017 on the occasion of the handing of the annual report of the Observatory to the Ministry of Economic and Financial Affairs.

Although drawing up an encouraging report, the Observatory is also pointing out that some companies, notably the largest ones, still default to comply with the applicable regulations either by lack of awareness or by negligence.

The State secretary took this opportunity to publicly announce that from now on and "to provide such publications [decisions sanctioning companies] with a greater visibility, the Ministry will disclose to the public the decisions sanctioning companies [because of their default to comply with the rules on terms of payment] twice a year."

3. Corporate

France - Details regarding adoption of decisions and shareholder participation within companies

Ordinance No 2017-747 of May 4, 2017 adopting various measures aiming at facilitating the adoption of decisions and shareholders' participation in companies, adopted pursuant to the provisions of Article 141 of law No 2016-1691 of December 9, 2016 regarding transparency, fight against corruption and modernization of the economic life, also called "Sapin II Law", providing various measures aiming at improving the functioning of commercial companies, came into force on May 6, 2017 (cf. legal updates of May 2017).

Decree No. 2018-146 of February 29, 2018 specifies the conditions of application of the Ordinance.

The decree specified, inter alia:

- in the framework of the new Articles R.223-20-2 and R.223-20-3 of the French Commercial Code, the formal conditions and time periods within which the shareholders of a limited liability company (société à responsabilité limitée) holding 5% of the share capital may have items or draft resolutions added on the agenda of a shareholders' meeting (Article L.223-27 of the French Commercial Code). This measure, specific to limited liability companies, applies to general meetings convened on or after April 1st, 2018.
- in the framework of the new Articles R.225-61-1 to R.225-61-3 of the French Commercial Code, the conditions under which both non-listed joint stock companies (sociétés anonymes) and partnerships limited companies by unlisted shares (sociétés en commandite par actions) may provide, in their articles of association, that shareholders' meetings are held exclusively by videoconference or similar means (Article L.225-103-1 of the French Commercial Code). The Decree also defines the procedures for shareholders to oppose the exclusive use of videoconferencing.

These provisions came into force on March 3rd, 2018.

France - Implementation of the register of the beneficial owners

A declaration of the beneficial owner(s) of each company and legal entity registered with the French Companies' Registry is now a legal obligation for the legal representatives of companies and legal entities by Ordinance n°2016-1635 of December 1, 2016 reinforcing the French anti-money laundering and anti-terrorist financing system and its implementing Decree n°2017-1094 of June 12, 2017 transposing the provisions of Directive 2015/849/EU of the European Parliament and of the Council of May 20, 2015 on the prevention of the use of the financial system for the purpose of money laundering or terrorism financing.

The Decree came into force on August 1st, 2017 (cf. legal updates of June 2017).

Companies already registered on that date had until April 1, 2018 to declare their beneficial owner(s).

Failure to file the required declaration or declaring inaccurate information may lead, for natural persons (legal representatives of the company) to six months' imprisonment and a fine of EUR 7,500 and, for legal persons, to a fine of EUR 37,500.

4. Data Protection

France - The bill adapting the French national law to the general regulation on data protection has been adopted by the Senate

Further to the adoption by the National Assembly, in first reading, on February 13, 2018 of the French bill implementing the General Data Protection Regulation, the senators in turn reviewed, amended and adopted the bill in first reading on March 21, 2018.

Among the main changes:

- the age at which a minor may consent to the processing of his/her personal data has been set to 16 years old by the senators (instead of 15 years old);

- the possibility to engage, in the context of a class action, the liability of a person having caused a damage in matter of personal data has been postponed to May 25, 2020;
- to ensure that a user has the choice between different services when using a terminal, the senators also prohibited the abuse of a dominant position on the market of online public communication services, the object or effect of which is to subordinate, on the terminal equipment's market, the sale of such equipment to the simultaneous purchase of such service.

However, deputies and senators, meeting in a Joint Committee on 6 April, did not agree on a common version of the text, which should therefore be reviewed in April.

5. Finance

FRANCE - Decree n°2018-205 relating to the mediator of credit to political parties and candidates

Decree n°2018-205 dated 27 March 2018 (JORF n°0073 dated 28 March 2018), made for the application of Article 28 of the law n°2017-1339 dated 15 September 2017 for confidence in political life, prescribes the conditions under which the mediator of credit to political parties and candidates will exercise its powers to promote the legal and transparent financing of political life by facilitating dialogue between candidates and political parties and banks and financing companies.

In addition to clarifying the means necessary for its activities and the obligations to which the mediator is subject, the decree provides the conditions for its referral and the procedure under which the mediation is conducted in case of loan refusal or account refusal to candidates or political parties.

The decree also provides that a report on the exercise of the mediator's mission will be drawn up no later than 30 September 2019.

This decree came into effect on 1st April 2018.

France - Usury rate

The notice (*avis*) dated 28 March 2018 relating to the implementation of articles L. 313-3 of the French consumer code and L.313-5-1 of the French monetary and financial code regarding usury rate (JORF n°0073 dated 28 March 2018) specifies the threshold of usury rate applicable as from 1st April 2018. The thresholds are determined according to type of loans.

6. Insurance

France - Resolution in the insurance sector

The Decree n° 2018-179 dated 13 March 2018 on the resolution regime applicable in the insurance sector ("**Decree**"), which has been adopted in application of Ordinance n° 2017-1608 of 27 November 2017 creating the said resolution regime and mentioned in our November 2017 newsletter, entered into force on 16 March 2018. The Decree notably inserted in the French Insurance Code a

new chapter on crisis prevention and management measures, which specifies the rules relating to the preparation, the assessment and the implementation of preventive recovery plans, the analysis of the company's potential of resolution, the resolution procedure and the cooperation and exchange of information in the context of resolution. The Decree further specifies that the entities subject to the obligation to prepare a preventive recovery plan (*i.e.*, notably insurance and reinsurance undertakings with a total assets value exceeding certain thresholds specified in an order) should provide that plan on 1st July 2019 at the latest.

France - Dematerialisation of contractual relationships

The Ordinance n° 2017-1433 of 4 October 2017 on dematerialisation of contractual relationships in the financial sector, which was mentioned in our September 2017 newsletter, has been supplemented by the [Decree n° 2018-229](#) of 30 March 2018 and by the [Order](#) dated 27 March 2018 modifying the French Insurance Code. Those texts, which entered into force on 1st April 2018, modify and complete the "Regulatory" and "Order" sections of the French Insurance Code with the aim of facilitating the dematerialisation of contractual relationships in the insurance sector.

France - Statutory auditors – Information to be provided to the ACPR

The Autorité de Contrôle Prudentiel et de Résolution ("**ACPR**") published an [Instruction n° 2018-I-03](#) dated 5 March 2018 modifying the Instruction n° 2016-I-07 relating to the information to be provided to the ACPR with regard to statutory auditors ("**Instruction**"). In accordance with the Instruction, which entered into force on 12 March 2018, information with regard to the appointment or renewal of appointment of one or more statutory auditors must as of now be notified to the ACPR by completing a specific registration form available on the French Central Bank's website "[OneGate](#)" portal.

European Union - Insurance Distribution Directive – Postponement of the date of application of transposition measures

The [Directive n° 2018/411](#) dated 14 March 2018 modifying the Insurance Distribution Directive ("**IDD**") as regards the date of application of the implementing measures of the Member States of the European Union ("**EU**") has postponed the initial date of 23 February 2018 on which Member States were required to adopt and publish the laws, regulations and administrative provisions necessary to implement the IDD to 1 July 2018. The Directive also delayed the date of repeal of the Directive on insurance mediation dated 9 December 2002 to 1st October 2018, which corresponds to the date of entry into force of the IDD.

7. Tax

France - Abrogation of the 3% Contribution

The French tax authorities amended their official guidelines so as to draw the consequences of the abrogation of the French 3% contribution on dividend distributions (the "3% Contribution") as set forth in [Article 37 of the French Finance Act 2018](#).

As a reminder, certain companies were subject to a specific contribution at a rate of 3% assessed on the amounts distributed by such companies (*as provided by former Article 235 ter ZCA of the French tax code*). However, in a ruling dated 6 October 2017 ([n°2017-660 QPC](#)), the French Constitutional Court declared such 3% Contribution unconstitutional.

In this context, the French Finance Act for 2018 drew the consequences of the above-mentioned decision and abrogated such 3%

Contribution for dividends paid as from 1st January 2018. The official guidelines published by the French tax authorities relating to the 3% Contribution are therefore withdrawn ([BOI-IS-AUT-30-20180307](#)).

International - Update of the list of applicable tax treaties as of 1st January 2018

The French tax authorities have updated the list of tax treaties entered into by France and which are applicable as of 1st January 2018 ([BOI-ANNX-000306-20180307](#)).

The only major update in this respect relates to the last amendment to the tax treaty entered into between France and Portugal, which was signed on 25 August 2016, and entered into force on 1st December 2017.

As a reminder, such amendment to the tax treaty entered into between France and Portugal provides for an update on (i) the list of taxes to which the tax treaty applies (*which now includes the French social contributions – CSG/CRDS*), and (ii) the rules regarding the taxation of remunerations paid to public agents.

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