

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 April 2022.

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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- **Audio-visual**

### France — Publication of Decree No. 2022-469 of 1<sup>st</sup> April 2022 regarding the organization and functioning of the Audiovisual and Digital Communication Regulatory Authority

On 2 April 2022 was published on the Official Journal the [Decree No. 2022-469](#) of 1<sup>st</sup> April 2022 regarding the organization and functioning of the Audiovisual and Digital Communication Regulatory Authority (ARCOM).

The Decree sets out the organization and operation of the Audiovisual and Digital Communication Regulatory Authority, as well as its budgetary and accounting regime, following the promulgation of [Law No. 2021-1382](#) of 25 October 2021 regarding the regulation and protection of access to cultural works in the digital era, which brought together the Higher Audiovisual Council (CSA) and the High Authority of Diffusion on the Art Works and Protection of Rights on the Internet (Hadopi) within Arcom, as of 1 January 2022 (see [Legal and regulatory update – October 2021](#)).

The Decree came into force 3 April 2022.

*Authored by Mathilde Grammont and Tommy Verdier*

- **Commercial**

**France – Adoption of the Decree n° 2022-474 of April 4, 2022 regarding the application of Article 114 of the law n° 2021-1104 of August 22, 2021 on fight against climate change and reinforcing resilience to its effects**

Article L. 224-11-1 of the French Environmental Code was introduced by Article 114 of Law 2021-1104 of August 22, 2021, known as "Climate and Resilience" law. This provision requires goods delivery platforms to ensure that a minimum proportion, increasing over time, of the two- or three-wheeled vehicles used in the context of such intermediation service are bicycles or very low-emission vehicles.

Decree No. 2022-474, published on April 5, 2022, defines the threshold of workers above which platforms are subject to this obligation and the rates of cycles, including pedal-assisted cycles, and motorized two- and three-wheelers with very low emissions to be met.

Minimum targets, increasing over time, will come into effect as of July 1, 2023. Thus, from this date, delivery platforms with more than 50 workers are required to meet a minimum share of very low-emission two- or three-wheeled vehicles, bicycles and electrically assisted bicycles for the delivery. This share will be 20% until the end of 2024, then 50% from the end of 2025, 80% from the end of 2027 and 100% from the end of 2030.

The Decree also specifies the data to be communicated to the authorities required to establish this monitoring and the procedure for their publication.

**France – Adoption of Decree No. 2022-539 of April 13, 2022 on carbon offsetting and carbon neutrality claims in advertising**

Article L. 229-68-I of the French Environmental Code, introduced by Article 12 of Law No. 2021-1104 of August 22, 2021, known as the "Climate and Resilience" law, prohibits the use of the claim "carbon neutral" in an advertisement without this claim being substantiated and justified.

The Decree 2022-539 published on the Official Journal of April 14, 2022, defines the elements that advertisers will have to publish in order to justify the carbon neutral claims with the aim of ensuring a certain transparency and preventing the risk of greenwashing. It also sets out the procedures for communicating this information.

Indeed, any advertiser who claims that a product or service is "carbon neutral", or uses any equivalent formulation, will have to publish on its website or, failing that, on its application, a summary report describing the carbon footprint of the product or service.

The Decree specifies the content of this report and sets out the conditions to be met in order to make an environmental claim relating to the "carbon neutrality" of a product or service.

The Decree also provides that the internet link or quick response code allowing access to this report is indicated on the advertising or packaging bearing the carbon neutrality claim.

The Decree applies to all advertisements to be broadcasted from January 1, 2023.

## **France - Adoption of the Decree n°2022-616 of April 22, 2022 taken for the application of article 7 of the law n° 2021-1104 of August 22, 2021 fighting against climate change and strengthening resilience to its effects**

On April 25, 2022, a new decree was published on the Official Journal implementing Law No. 2021-1104 of August 22, 2021, known as "Climate and Resilience" law. This Decree specifies the conditions for fulfilling the declaration obligation on the digital platform [www.publicite-responsable.ecologie.gouv.fr](http://www.publicite-responsable.ecologie.gouv.fr).

To encourage advertisers to adhere to a code of conduct in favor of responsible advertising, known as "climate contract", Article 7 of this law requires certain undertakings to declare themselves on a digital platform : these are importers and distributors of or other persons placing on the market goods and services subject to mandatory environmental display, mandatory energy label, or vehicles subject to a mandatory label under Article L.318-1 of the Highway Code, and whose advertising investments are greater than or equal to 100,000 euros per year.

The Decree specifies which expenses are concerned by this last criterion relating to the amount of advertising investments. It concerns all net advertising expenditure recorded during the last accounting period for the purposes of advertising operations carried out on the French territory.

In case of failure to declare, companies in question will be notified by the Ministry of the Environment and will have until June 30 to regularize their situation.

The Decree also provides that the list of players who have adhered to a "climate contract" will be published on July 15 of each year and their content will be made public. In addition, the platform will disclose the list of companies that are required to make a declaration but have not done so, as well as the list of companies that have declared themselves but have not adhered to a "climate contract".

*Authored by Daghan Ozturk and Elise Foussereau*

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- **Data Protection**

### **France – Reform of the CNIL's sanction procedures: towards simplified repressive actions**

[Decree no. 2022-517 of April 8, 2022](#) (the "**Decree**") amended [Decree no. 2019-536 of May 29, 2019](#) taken for the application of [Law no. 78-17 of January 6, 1978](#) relating to information technology, files and freedoms, as amended by [Article 33 of Law no. 2022-52 of January 24, 2022](#) relating to criminal liability and internal security (we had discussed - in more detail - the changes brought by this law in the January 2022 newsletter that you can find [here](#) ).

The rules of several procedures before the CNIL have been adapted or clarified by the Decree: formal notices and sanctions; the ordinary sanction procedure before the restricted panel (the number of contradictory exchanges is no longer limited and the deadlines for filing have been extended). The Decree also details the terms of the simplified sanction procedure for less complex cases and the injunction procedure to be filed in the event of failure to respond to a formal notice.

In addition, the CNIL is now authorized to request the assistance of external persons who are responsible for assisting the rapporteur in the ordinary procedure, or who may be appointed as rapporteurs in the simplified procedure.

## **France – The proof of the formation of a contract can be established through the recording of telephone conversations**

On 25 April 2022, the CNIL published an article on [the recording of telephone conversations to establish proof of the formation of a contract](#). It details the conditions under which it is possible to record a conversation and the guarantees that must be provided.

This recording is possible when the recording is necessary to prove the formation of the contract, such as contracts that may be concluded orally. The data controller must therefore either demonstrate that it has no other means of proving that a contract has been concluded with the person or demonstrate that there is a legal obligation to record telephone conversations for evidentiary purposes (e.g. Article L. 533-10-5 of the French Monetary and Financial Code requires investment service providers to keep a record of the transactions they carry out)

Where recording is possible, the principle of data minimization must be respected in any case and recordings may not be permanent or systematic. Thus, only conversations relating to the conclusion of the contract may be recorded. The relevant part of the conversation may only be stored if there are no other means of proof of the formation or performance of the contract, such as written confirmation.

When individuals agree to enter into a contract by telephone, recordings of telephone conversations can be processed under the legal basis of the contract (Article 6.1.b of the GDPR). Information about the possibility, where available, of concluding the contract by other means (in a branch, online, by post, etc.) is therefore essential for the recording to be considered necessary for the contract.

*Authored by Anais Ligot, Anastasia Braud von Brevern, Hamza Bouhassoune and Mihnea Dumitrascu*

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### **• Employment**

#### **France – Order No. 2022-492 of 6 April 2022 reinforcing the autonomy of self-employed workers on mobility platforms, organising social dialogue in the sector and completing the missions of the Employment Platforms Social Relations Authority**

[This order](#) sets out numerous rules, in particular relating to the rules on the representativeness of professional organisations of mobility platforms.

These organisations will have to meet various criteria, such as independence, financial transparency, a minimum of one year's existence and an audience of at least 8%.

These organisations will then be able to appoint representatives to negotiate sectoral agreements on working conditions, remuneration, occupational training and the establishment and termination of commercial relations.

It also strengthens the protection of platform workers by obliging platforms to inform them of the destination, the distance covered and the minimum guaranteed price before the start of the service. The principles of non-exclusivity of the commercial relationship, as well as free choice of equipment and free determination of the itinerary are also affirmed.

#### **France - Decree No. 2022-680 of 26 April 2022 on measures to ensure a balanced distribution of each gender among senior executives and members of management bodies**

[This decree](#) completes the system instituted by the so-called Rixain law of 24 December 2021.

In particular, it specifies the data to be taken into account in order to calculate the representation gap between women and men among senior executives and members of governing bodies. The percentage of women among senior managers, the percentage of men in the same category, and the same data in the category of governing bodies must be taken into account.

The proportion is then to be assessed each year over a period of twelve consecutive months, corresponding to the accounting year.

Exceptionally for the year 2022, these differences must be published on the company's website by 1 September 2022 at the latest.

From 1 March 2023, these differences must also be published on the website of the Ministry of Labour.

**France - Decree No. 2022-678 of 26 April 2022 on the environmental indicators to be included in the economic, social and environmental database (BDESE) and on economic, social, environmental and trade union training**

[This decree](#) enables the application of the provisions of the so-called Climate Law of 22 August 2021. It specifies the numerous indicators that must be contained in the economic, social and environmental database. These indicators depend on the size of the company (between less than 300 employees and more than 300 employees), and whether or not the company is subject to the extra-financial performance declaration.

*Authored by Marion Guertault, Alexandra Tuil and Baptiste Camus*

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- **Finance**

**France – Loans guaranteed by the French State**

The [order of 7 April 2022](#) introduced a *PGE Résilience* intended solely for companies severely impacted by the direct or indirect economic consequences of the conflict in Ukraine and whose repayment capacity is compatible with additional financing to a first loan guaranteed by the French State. This *PGE Résilience* has been available since 6 April 2022 and follows the same structure as the loans guaranteed by the French State introduced at the beginning of the health crisis: same maximum duration (up to 6 years), same minimum repayment grace period (12 months), same scope and price of the State guarantee.

The maximum amount of this *PGE Résilience*, which is added to the maximum amount of loans guaranteed by the French State for which the company has been eligible since March 2020, is equal to 15% of the average annual turnover (CA) achieved over the last three closed accounting years.

*Authored by Charlotte Bosch*

- **Insurance**

**France - Law 2021-402 of 8 April 2021 on the reform of insurance brokerage and banking and payment services brokerage came into force on 1<sup>st</sup> April 2022**

Law 2021-402 of 8 April 2021 came into force on 1<sup>st</sup> April 2022. It introduces the obligation for insurance brokers, banking and payment services brokers and their respective agents to adhere to professional associations approved by the ACPR.

The law on the reform of the brokerage industry also provides for (i) new provisions governing cold calling to prospective customers who are not bound by a current relationship with the insurance distributor, (ii) a more restrictive distribution procedure and (iii) an obligation to keep a record of cold calls made.

**France - ACPR and AMF note – Digital journey for subscription to financial savings products**

On April 21, 2022, the ACPR/AMF Joint Unit published a [teaching note](#) on the digital processes for subscribing to financial savings products. This note follows a phase of consultation and work as well as consumer tests carried out by the two authorities. The teaching note highlights certain practices and shortcomings noted, particularly in terms of the content of communications of a promotional nature presented upon landing on the site, the clarity and readability of pre-contractual information, the collection of information on the customer, supporting the customer as part of the digital journey. The note encourages professionals to put in place the systems described in the note in connection with each of these themes in order to foster the client's informed consent.

*Authored by Ghina Farah and Mohamed Boukesra*

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- **Intellectual Property**

**France – Public survey among users regarding the harmonization of Patent Law**

Since 25 April 2022, the French Industrial Property Office (INPI) has invited users of the national patent system to give their opinion in a [Questionnaire](#), which will be open until 18 May 2022, relating to the harmonization of patent law at the international scale.

In this context, the Questionnaire consults professional users concerning three issues: the grace period, prior use rights and interfering applications.

**France – Publication of the 2021 Annual Report of the French Industrial Property Office**

On 11 April 2022, the French Industrial Property Office (INPI) released its [Annual Report](#) for the year 2021. It presents numerous figures regarding the past year, including the number of applications filed between 2017 and 2020 (patents, trademarks, designs and models) as well as figures for a first full year of implementation of the [Law No. 2019-486](#) of 22 May 2019, also known as the PACTE law.

On the one hand, the Report shows that new types of trademarks keep developing with, in particular, the registration of 31 sound marks, 75 collective marks and 15 certification marks.

On the other hand, utility certificates turned into patent and oppositions against granted patents have also developed with 188 utility certificates transformed into patents, i.e. 27.9% of the former, and 19 patent oppositions filed.

### **European Union – Proposal for a Regulation on geographical indications for craft and industrial products**

On 13 April 2022, the European Commission presented a [Proposal for a Regulation](#) on the establishment of a system for the protection of geographical indication for craft and industrial products.

The Proposal for a Regulation follows the [Intellectual Property Action Plan](#) adopted in November 2020, in which the Commission announced that it would examine the feasibility of such a system at the European Union scale.

Based on the system of geographical indications for agricultural products, wines and spirits, the Proposal for a Regulation aims at protecting the rights of producers for craft and industrial products made according to a certain know-how and within a certain geographical area in order to enable them to better resist competition and counterfeiting and maintaining their unique know-how.

The Commission also intends, with the Proposal for a Regulation, to create a simple and inexpensive two-step registration procedure consisting of an initial assessment by the domestic intellectual property office and then by the EU Intellectual Property Office. This assessment will ensure the product at stake is identifiable as originating from a geographical area. Moreover, the qualities, characteristics or notoriety of the product must be essentially due to the area of origin.

Finally, the Proposal for a Regulation wishes to ensure compatibility with the international protection of geographical indications so that manufacturers can protect their products in all countries that are signatories to the [Geneva Act](#) of the Lisbon Agreement on Appellations of Origin and Geographical Indications, to which the European Union acceded in November 2019, and which protects craft and industrial indications.

### **European Union - Renewal of the Cooperation Agreement between the EPO and the CPVO**

On 31 March 2022 was renewed for a duration of five years the [Cooperation Agreement](#) between the Community Plant Variety Office (CPVO) and the European Patent Office (EPO) signed in 2016.

This Agreement has increased transparency and knowledge exchange between both organizations. The renewal of the Agreement aims at exchanging relevant data and making it available to enable examiners to search for plant varieties protected by certificates, thus increasing the validity of European patents.

### **European Union - Extension of Pilot Project for oral proceedings in opposition held by videoconference until 31 December 2022**

Following two years of implementation, the President of the EPO has decided to further extend the [Pilot Project](#) for oral proceedings in opposition by videoconference (VICO) until 31 December 2022.

This extension is to ensure the health and safety of officers and visitors to its sites in the context of the on-going pandemic. It is also an opportunity to provide additional tools and procedures for videoconference. These improvements are in response to feedback from users following extensive survey, and in particular to improve respect for deadlines.

## European Union – EPO launches new Ombuds Office service

As of 29 April 2022, a new mediation service called [Ombuds Service](#) is available to assist parties who experience difficulties in their dealings with the EPO and which have exhausted the regular channels for resolution. The Ombuds Office acts as a facilitator of these exceptional cases contributing to the resolution of disputes on track in an informal, confidential and neutral environment.

The launch of this new mediation service is intended to complement existing services such as the complaints service. It naturally does not address matters that are part of the jurisdiction of the Boards of Appeal.

*Authored by Mathilde Grammont and Tommy Verdier*

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- **Public Law**

### France – Modifications of the public procurement code and sustainable purchases

Decree n°2022-767 regarding various modifications to the public procurement code, published in the OJFR of 3 May 2022 and taken in application of the "Climate and Resilience" law of 22 August 2021, sets out several provisions for a more sustainable public procurement. It removes the possibility of defining a single award criterion based on price in public procurement: from 2026, the only possible single criterion will be the cost, determined according to a global approach that may be based on life cycle costs and that takes into account the environmental characteristics of the offer. In addition, if the purchaser relies on a plurality of criteria, at least one of them must take into account the environmental characteristics of the offer. Regarding the concessions, the decree adds the obligation for contract holders to describe, in their annual report, the measures implemented to guarantee environmental protection and integration through economic activity, also from 2026. Furthermore, by a provision that came into force on 4 May 2022, it creates an optional ban to bid for public procurement contracts and concessions for companies that have not met their obligation to draw up a vigilance plan pursuant to the commercial code. Finally, the decree lowers from €100 million to €50 million the annual amount of purchases above which certain purchasers must draw up a scheme to promote socially and environmentally responsible purchases. This provision will come into force on 1<sup>st</sup> January 2023.

### France – Floating wind farms in Mediterranean

The decision of 17 March 2022 following the public debate on the project for floating wind farms in the Mediterranean and their connection, published in the OJFR of 20 March 2022, confirmed the launch in 2022 of a competitive bidding procedure to award two floating offshore wind farms, each with a capacity of approximately 250 MW, in the Mediterranean. A second competitive bidding procedure is to be launched at a later date for two other farms of 500 MW each, which will constitute extensions of the first farms and will thus form farms with a total capacity of 750 MW. The decision identifies in Annex 1 the areas where these wind farms will be located, which are all in the French exclusive economic zone, and the potential areas for connection to the sea and to the land. It also specifies that the terms and conditions of the tendering procedures will have to take into account the recommendations of the public and to include an obligation for the winning bidder to propose measures to avoid, reduce and compensate the impacts on fishing activities.

For more information on the regulatory framework applicable to offshore wind farms in France and around the world, we invite you to have a look at our brochure « [Offshore Wind Worldwide](#) ».

*Authored by Bruno Cantier and Astrid Layrisse*

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