

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 December 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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- **Corporate**

### **France – Extension to 2023 of the temporary lowering of the threshold that triggers foreign investments review in French companies listed on a regulated market**

[Decree 2022-1622 of December 23, 2022 relating to the temporary lowering of the threshold for control of foreign investments in French companies whose shares are admitted to trading on a regulated market](#) extends, until December 31, 2023 and without modification of its terms, the lowering of this threshold from 25% to 10% of voting rights.

Citing the "*need to further protect listed French companies engaged in sensitive activities [...] from opportunistic non-European shareholdings that could pose a threat to national security*", the [French government justified the extension of this measure](#), which has been in force since July 2020, because of the "*economic context linked to the energy crisis*", which "*does not make it possible to eliminate the risks for these companies*".

### **France – Exclusion clauses in French SAS in line with the Constitution**

In a dispute relating to the exclusion procedure provided for in the articles of association of a French SAS, the French Supreme Court deemed serious and accepted the referral to the French *Conseil constitutionnel* of 4 applications for a priority preliminary ruling on the issue of constitutionality (*QPC*) relating to articles L. 227-16 and L. 227-19 of the French Commercial Code with articles 2 and 17 of the Declaration of the Rights of Man and of the Citizen, relating to the right of Property (*Cass. Com, Oct. 2, 2022, n° 22-40.013*). In its ruling, the French Cour de cassation took the opportunity to state that the provisions abolishing the requirement of unanimity for the adoption or modification of a statutory exclusion clause in simplified joint stock companies were applicable to simplified joint stock companies created prior to the entry into force of Law Soilihi n°. 2019-744 of July 19, 2019.

The French *Conseil constitutionnel* finally ruled that the exclusion procedure provided for in the articles of association of French SAS pursuant to articles L. 227-16 and L. 227-19 of the French Commercial Code complied with articles 2 and 17 of the Constitution, which respectively provide that infringements to the right to Property must be justified by the public interest and be proportionate to the objective pursued, and that "the right to Property is inviolable" (*QPC decision no. 2022-1029 of December 9, 2022*).

*Authored by Louis-Nicolas Ricard*

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- **Data Protection**

**European Union – The European Commission has published its draft decision on the transfer of data between the EU and the US**

On December 13, 2022, the European Commission published a draft adequacy decision for the data protection framework for transfers between the EU and the US. This project follows the Schrems II decision of July 16, 2020 (C-311/18) of the European Court of Justice, which invalidates the Privacy Shield, and the signature on October 7, 2022 by the American President of the executive order constituting an agreement in principle which has enabled discussions to move forward on the implementation of this new framework for transfers from the European Union to the United States. The draft provides for certain measures to ensure that EU citizens have the means to assert their rights with regard to their personal data, notably in terms of recourse for individuals whose personal data is affected and limitations on US authorities being able to access personal data transferred from an EU Member State. The draft still needs to be submitted to the EDPB for an opinion, to be approved by the Member States and to be subject to the scrutiny of the European Parliament before being adopted.

*Authored by Julie Schwartz and Léanne Fortuna*

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- **Employment**

**France - Decree no. 2022-1714 of December 29, 2022 related to a one-time aid to employers of apprentices and exceptional aid to employers of apprentices and employees on professionalization contracts.**

[This decree](#) sets the amount of financial aid for hiring work-study students for 2023. The amount is unified at 6,000€ from January 1<sup>er</sup> until December 31, 2023, i.e. an increase of 1,000€ for a minor alternating student, but a decrease of 2,000€ for a major alternating student.

**France - Law no. 2022-1616 of December 23, 2022 on the financing of social security for 2023.**

In the area of payroll, [this law](#) codifies the new flat-rate deduction of employer's contributions on overtime in companies with 20 to less than 250 employees, to be deducted from the total remuneration. In addition, the duration of URSSAF audits in companies with less than 20 employees is limited to 3 months. Finally, during an audit within a company belonging to a group, URSSAF may use the information obtained during the audit of any other company in the same group.

Regarding anti-fraud, this law will allow control officers to access bank information and communicate with the clerks of the commercial courts.

Finally, sick leave prescribed during a teleconsultation will no longer give entitlement to daily allowances, unless it has been prescribed by the attending physician or by a physician who has already been consulted in person less than a year previously.

**France - Law No. 2022-1598 of December 21, 2022 on emergency measures relating to the functioning of the labor market with a view to full employment.**

[This law](#) authorizes the Government to extend by decree the current unemployment insurance rules until December 31, 2023, and the "bonus-malus" on the unemployment insurance contribution until August 31, 2024. The new articles L. 1242-11-1, L. 1251-33-1 and L. 5411-6-1 introduce a varying system of unemployment insurance (a more favorable mechanism when the unemployment rate is high, and vice versa), obligations for the employer to inform 'Pôle emploi' of the refusal of an employee who is offered an open-ended contract similar to his or her fixed-term contract after its expiry, and the elimination of unemployment benefits for holders of fixed-term contracts in the event of refusal on two occasions during the last 12 months of an open-ended contract (with the same or similar job, remuneration that is at least equivalent for an equivalent duration of work, the same classification and the same place of work; these rules do not apply if the employee has been employed under a permanent contract within the last 12 months).

This law also assimilates abandonment of post (with formal notice and after the expiry of a time limit) to resignation. In the event of a dispute, the case will be brought directly before the judgment office, which will decide on the nature of the termination of employment within one month of the case being referred to it. Finally, in response to the Constitutional Council's censure of previous provisions of the Labor Code defining the electoral body, two new articles L. 2314-18 and L. 2314-19 provide that "the following are the members of the electoral body 2314-19 provide that *"all employees aged sixteen or over, who have been working for at least three months in the company and who have not been subject to any prohibition, disqualification or incapacity relating to their civic rights"* are eligible to vote, and that *"employees who have a specific written delegation of authority allowing them to be assimilated to the head of the company or who effectively represent him before the social and economic committee"* are not eligible.

**France - Law No. 2022-1587 of December 19, 2022 to combat fraud in the personal training account and to prohibit the canvassing of its holders.**

[This law](#) sanctions any commercial prospecting of holders of a personal training account (CPF). In addition to the prohibition of commercial canvassing and a better referencing of training organizations, the reimbursement of undue sums in case of fraud is facilitated.

**France - Decree no. 2022-1506 of December 1, 2022 relating to the flat-rate deduction of employer contributions on overtime for companies with at least twenty and less than two hundred and fifty employees.**

[This decree](#) has provided details on the fixed deduction for overtime. The amount of the fixed deduction is set at 0.5€ per hour of overtime. The assessment of the company's headcount is done in accordance with the calculation methods of article L. 130-1 of the CSS. In the event of an audit, the documents required are the same as those required for companies with less than 20 employees (specified in the BOSS).

*Authored by Oussama El Hassani & Baptiste Camus*

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- Finance

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

Article 147 of [law n° 2022-1726 of 30 December 2022](#) and the [order of 30 December 2022](#) provide that the French state guarantee may benefit to *PGE Résilience* which are made available by credit institutions until 31 December 2023 instead of 31 December 2022 (*PGE Résilience* were previously described in the edition of the [French Legal and Regulatory Update of April 2022](#)).

*Authored by Charlotte Bonsch*

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- Insurance

#### **France – ACPR: recommendation 2022-R-02 of December 14, 2022 on the promotion of extra-financial characteristics in life insurance advertising communications**

The Autorité de Contrôle Prudentiel et de Résolution ("ACPR") has published a recommendation on the risk of customer exposure to certain life insurance practices promoting extra-financial characteristics.

The ACPR is particularly concerned with "greenwashing" and invites the professionals under its supervision not to use advertising arguments that could mislead the public by promoting extra-financial characteristics. In this respect, and with the aim of providing clear, accurate and non-misleading advertising information when promoting extra-financial characteristics, the ACPR reminds professional entities that they must base their advertising on objective and precise elements in order not to mislead the public.

This recommendation will come into effect no later than 1 April 2023 for any advertising communication issued after that date.

**Source :** [https://acpr.banque-france.fr/sites/default/files/media/2022/12/28/20221228\\_recommandation\\_2022-r-02.pdf](https://acpr.banque-france.fr/sites/default/files/media/2022/12/28/20221228_recommandation_2022-r-02.pdf)

#### **France – ACPR: notice on the appointment of executive directors and key functions holders in the "Solvency II" regime**

On 14 December 2022, the ACPR updated the former notice issued on 2 November 2016 on the appointment of effective managers and key functions holders under the Solvency II regime.

The updated notice reminds(i) the general principles of governance as defined in the Solvency II Directive and implemented under French law; (ii) the conditions under which the ACPR processes the notifications relating to the appointment or renewal of effective managers and key functions holders; and (iii) the main points of attention on the governance system and the application of the proportionality principle setting out, *inter alia*, guidance on recommended structures and setups and commenting on potential exceptions to the mainstream setups.

**Source:** [https://acpr.banque-france.fr/sites/default/files/media/2022/12/22/20221222\\_notice\\_de\\_rfc.pdf](https://acpr.banque-france.fr/sites/default/files/media/2022/12/22/20221222_notice_de_rfc.pdf)

### **France – ACPR: instruction on annual reporting requirements related to sustainability in financial services**

The ACPR has published Instruction No. 2022-I-24 on the annual documents to be submitted by insurance bodies and supplementary occupational pension funds subject to the provisions of Article 29 of Law No. 2019-1147 on energy and climate and the provisions of Article 4 of Regulation (EU) 2019/2088 of the European Parliament and of the Council of November 27, 2019 on the publication of sustainability information in the financial services sector. The instruction is addressed to insurance and reinsurance organisations engaged in life insurance or capitalization operations and to occupational pension funds and requires the submission to the ACPR, within six months of the end of the annual financial year, of the annual report required by the V of Article D. 533-16-1 of the French Monetary and Financial Code containing information relating to the environmental, social and governance criteria, known as sustainability factors that must be adopted by the reporting organisations. The instruction specifies the structure that the report must follow according to the total balance sheet of the entity and the information that must be provided in the report. In addition to this report, entities with a balance sheet total exceeding EUR 500 million are required to submit additional information on the proportion of outstanding amounts relating to activities in accordance with the technical review criteria defined in the delegated acts relating to Articles 10 to 15 of Regulation (EU) 2020/852 of 18 June 2020 on the establishment of a framework to promote sustainable investment. There are also additional disclosure requirements for entities insuring or reinsuring insurance-based investment products ("**Taxonomy Regulation**").

**Source :** [https://acpr.banque-france.fr/sites/default/files/media/2022/12/22/20221222\\_302\\_instruction\\_2022-i-24.pdf](https://acpr.banque-france.fr/sites/default/files/media/2022/12/22/20221222_302_instruction_2022-i-24.pdf)

### **France - Termination of an ancillary insurance policy: amendment of the information document for exercising the termination right**

The order dated 5, December 2022 published in the Official Journal of December 13, 2022 amends the Annex to Article A. 112-1 of the French Insurance Code relating to the information that must be included in the information document to be provided to customers in order to facilitate the exercise of their termination right when concluding an ancillary insurance policy. The document specifies the new time limit for policyholders to exercise their termination right which has been extended to 30 (calendar) days following the conclusion of the contract, and the conditions that must be met in order to exercise this right.

The order came into force on 1<sup>st</sup> January 2023.

**Source :** <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000046727411>

*Authored by Ghina Farah, Mohamed Boukesra and Ryan-Landry Yohou*

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- **Intellectual Property**

### **France – Partial cancellation of the implementation of the "DSM" Directive in that it does not provide for appropriate remuneration of authors.**

By a [decision of November 15, 2022](#), the Conseil d'Etat partially cancelled the [Ordinance of May 12, 2021 implementing Directive \(EU\) 2019/790 of April 17, 2019 on copyright and related rights in the digital single market](#) ("DSM" Directive) insofar as it does not provide for "appropriate" remuneration of authors in the event of licensing or assignment of exploitation rights.

Article 18 of the Directive provides that authors and performers must receive "appropriate and proportionate" remuneration for the assignment or licensing of their exploitation rights.

Article 20 of the same Directive provides for the possibility for authors and performers to claim appropriate additional remuneration if the remuneration initially agreed upon proves to be disproportionately low compared to the income derived from the exploitation of the work or performance.

The transposition Ordinance of May 12, 2021 amends article L. 131-5 of the Intellectual Property Code by providing for the revision of the contract of assignment of exploitation rights if the author has been remunerated at an exceedingly low flat rate, or an additional remuneration if the author has received a proportional remuneration that is exceedingly low in relation to the income derived from the exploitation.

The Conseil d'Etat, upon request from the *Comité pluridisciplinaire des artistes-auteurs et artistes-autrices* (CAAP) and the *Ligue des auteurs professionnels*, ruled that the implementation was inadequate, in that the text does not provide that the remuneration must be appropriate.

*Authored by Adrien Bonnet et Audrey Naturel*

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- **Privacy**

#### **France – The bill for the Paris 2024 Olympic and Paralympic Games**

On December 22, 2022, the French government presented its bill for the 2024 Olympic and Paralympic Games to the Council of Ministers, following the opinion of the French Conseil d'Etat. The purpose of this bill is to provide a legal framework for the various aspects impacted by the Olympic and Paralympic Games. This bill is taken in addition to the measures already provided by the law of March 26, 2018 on the organization of the 2024 Olympic and Paralympic Games.

Among the areas covered, the bill addresses the following issues: athlete healthcare, anti-doping (through genetic data analysis), advertising rules preceding the Olympic and Paralympic Games and security. Regarding the security, the text provides in particular the possibility of implementing, on an experimental basis, surveillance systems with so-called 'augmented' cameras.

In an opinion on December 8, 2022, the French Data Protection Authority ('the CNIL') particularly discussed issues related to the use of 'augmented' cameras and the processing of athletes' personal data in the context of anti-doping controls.

The bill should be discussed in the French Senate as early as January 24, 2023.

*Authored by Josephine Beaufour and Clément Taieb*

- **Public Law**

**France – Public procurement contracts - Amendments to the public procurement code as of 1st January 2023**

[Decree](#) n°2022-1683 of 28 December 2022 containing various amendments to the public procurement code, published in the OJFR of 29 December 2022, introduces a number of changes to public procurement contracts aiming notably at simplifying procedures and improving the cash flow of companies. Firstly, it extends until 31 December 2024 the exemption from the prior advertising and competitive tendering procedure for works public procurement contracts entered into to meet a need with an estimated value of less than 100 000 euros excluding tax, and for lots involving works of less than this amount, if the cumulative amount of these lots does not exceed 20% of the total estimated value of all lots.

Secondly, the minimum rate of advance payment is increased from 20% to 30% for public procurement contracts awarded to a small or medium-sized enterprise or to a craftsman.

In addition, it specifies the threshold condition for reserving public procurement contracts and concessions to companies located in prisons and employing detainees by setting the minimum proportion of detainees to be employed in this context at 50%.

Finally, the decree continues the dematerialisation of public procurement by authorising candidates and bidders to send the purchaser a backup copy of their documents transmitted electronically (and not only on a physical medium), which copy must be received by the purchaser within the time limit prescribed for the submission of candidatures or bids in order to be taken into consideration.

The decree applies to public procurement contracts and concession contracts for which a consultation is launched or a notice of call for competition is sent to the publication as from 1st January 2023.

*Authored by Bruno Cantier and Astrid Layrisse*

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- **Telecom**

**France - Arcep's new numbering plan came into force on January 1, 2023**

In its new decision establishing the 2022 numbering plan and its management rules, Arcep modifies the numbering plan to take into account new uses. The majority of these changes came into effect on January 1, 2023. These include the prohibition of using 10-digit mobile numbers starting with 06 and 07 for cold calling, the end of geographic numbers, the creation of a minimum duration of use of numbers, as well as a set of measures to modify procedures before Arcep, and the implementation of new measures to improve protection against abuse and fraud, such as the implementation of the authentication system as of 25 July 2023 allowing to authenticate the caller id.

## France - Online platform operators must retain illegal content for six months

On 13 December 2022, a decree was adopted by the government in order to set the time limit and the methods for storing illegal content reported and removed or made inaccessible by the operators of online platforms . This decree thus specifies the terms of application of 1. c) of Article 6-4 of the French law for confidence in the digital economy. The retention of this content is set at 6 months from the date on which they were removed or made inaccessible, a period allowing the judicial authorities to obtain the necessary information for the research, establishment and prosecution of criminal offences. Moreover, the retention must be made in such a way as to facilitate rapid access to the data for the judicial authorities, while preventing cross-referencing with other databases that would allow the identification of the persons who put the content online.

*Authored by Gabriel Lecordier et Léanne Fortuna*

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