
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 September 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**

European Union – European Commission to propose rules to protect media pluralism and independence in the European Union

Adopted on 16 September 2022, the Proposal for a [Regulation establishing a common framework for media services in the internal market \(European Media Freedom Act\) and amending Directive 2010/13/EU](#) provides safeguards against political interference in editorial decisions and against surveillance practices against media, journalists and their families. The Commission also proposes to create a new independent European media authority.

The European Parliament and the Member States will have to examine the proposal with a view to adopting a regulation under the regular legislative procedure.

Authored by Adrien Bonnet, Emilia Grenier, Jessica Seray, Eléonore Salles

- **Corporate**

France – Foreign Direct Investment Screening in France : Guidelines

The French Directorate-General of the Treasury published on September 9th 2022 its [guidelines on the control of foreign investments in France](#).

These guidelines are a direct follow-up to a [public consultation](#) organised in March 2022.

This 50-page document aim to provide "*a pedagogical and concrete presentation on the scope of application of the rules relating to the control of FIEs, on the conduct of the control procedure and on the follow-up of authorisations issued by the Minister in charge of the economy*".

In brief:

- Useful guidance is given regarding the interpretation of concepts such as chain of control within investment funds (p. 9), joint control (p. 14) and acquisition of all or part of a branch of activity (p. 18).
- With regard to exemptions, details are provided in the case of an intra-group transaction or a threshold crossing (before or after a takeover) (p. 23).
- On the monitoring of commitments, the document briefly discuss the "operational contact point within the target entity of the investment" and the modalities of their revision (p. 47).

In its press release, the French Directorate-General of the Treasury stated that it was "*committed to applying these guidelines whenever it investigates an issue related to the control of FDI*".

This publication complements the initiatives already published on the French Treasury's website since the beginning of the year ([FAQ](#), [standard forms](#), [annual report](#)) in order to clarify the administrative doctrine and the procedure applicable to the screening of foreign direct investments in France.

Authored by Louis-Nicolas Ricard

- **Cybersecurity**

European Union – Proposed Cyber Resilience Act: New obligations for manufacturers

On September 15th, the European Commission presented a new Draft Regulation on cyber resilience, the "Cyber Resilience Act". The objective of this text is to strengthen the rules on cyber security to ensure greater security of hardware and software products. The Commission noted that these products suffered from a low level of safety, coupled with a lack of user understanding and information. To address these gaps, the proposal imposes cybersecurity requirements and obligations on connected objects manufacturers, broadly defined, coercing them to provide ongoing support, software patches, and sufficient information to consumers about their products security. All products with "digital elements" will be affected.

France - The Ministry of the Interior's Orientation and Programming Bill 2022-2027: the Ministry is committed to the fight against cybercrime

The Department of the Interior Policy and Programming bill passed its first reading in the Senate on October 18, 2022.. It predicts for nearly half of the resources to be dedicated to digital transformation. The draft law includes three main provisions related to the fight against cybercrime: expanding the capabilities of investigators; facilitating asset seizures; and regulating insurance for cyberattack risks. This will be done through various actions and dematerialized procedures: awareness and training campaign, creation of a "17" cyber call number, etc. The bill must now be examined by the National Assembly.

Authored by Anais Ligot, Théophile Tsimaratos et Léanne Fortuna

- **Employment**

France -Decree No. 2022-1266 of September 29, 2022 raising the ceiling for the use of meal vouchers

[This decree](#) raises the daily limit for the use of meal vouchers to €25, as of 1 October 2022.

France - Decree No. 2022-1245 of 21 September 2022 on the use of expertise and mediation in the mobility platform sector as well as the Employment Platforms Social Relations Authority and Decree No. 2022-1246 of 21 September 2022 on the organisation of sectoral social dialogue for self-employed workers on mobility platforms

[The first decree](#) specifies the conditions under which the director general of the Authority for Social Relations of Employment Platforms rules on the expertise mission and ensures its follow-up. [The second decree](#) organizes the social dialogue in the sector (modalities for filing agreements and communication). Two published decrees precise the list of representative professional organisations. A previous decree of 25 July specified the conditions of compensation for their representatives.

France - Order No 2022-1203 of 31 August 2022 extending the application of the provisions adapting the conditions for payment of the supplementary daily allowance to the context of the covid-19 epidemic

[This order](#) extends the derogatory system of payment of employer's supplementary allowances until 31 December 2022. As the health insurance compensation system by IJSS has also been extended to 31 December, this order aligns the duration of application of the employer's compensation scheme with the social security compensation scheme.

France - Decree no. 2022-1195 of 30 August 2022 on the determination of the rates and methods of calculation of the indemnity and partial activity allowance for employees recognised as vulnerable and presenting a proven risk of developing a serious form of infection with the covid-19 virus

[This decree](#) sets new rates applicable to partial activity of vulnerable persons, as of September 1, 2022. The partial activity allowance rate is lowered, now set at 60% of the gross remuneration.

Authored by Baptiste Camus and Oussama El Hassani

- **Finance**

France – Loans guaranteed by the French State

As indicated in the last edition of the [French Legal and Regulatory Update](#), article 23 of [law n° 2022-1157 of 16 August 2022](#) provides that the French state guarantee may benefit to loans which are made available by credit institutions until 31 December 2022 instead of 30 June 2022. The [order of 19 September 2022](#) specifies that this extension to 31 December 2022 only concerns *PGE Résilience* and provides for a minor additional amendment to these *PGE Résilience* (*PGE Résilience* were previously described in the edition of the [French Legal and Regulatory Update of April 2022](#)).

Authored by Charlotte Bonsch

- **Insurance**

France – ACPR: statement on the coverage of cyber risks in insurance policies

The ACPR published a press release dated 23 September 2022 in which the authority considers that insurance organisations must identify, in an exhaustive manner, their exposure to cyber risk in insurance contracts, even implicit ones.

The aim is to make the wording of the terms and conditions of insurance policies concerning the coverage and exclusion of cyber risks more explicit and clear.

Welcoming EIOPA's publication of 22 September 2022, the ACPR reminds insurers to implement a cyber risk assessment to be included in the ORSA report if necessary and to anticipate the impact that cyber risks could have on their solvency requirements.

Source: [Implicit guarantees in contracts covering cyber risk: ACPR welcomes the publication of EIOPA's position](#)

France - Direction Générale du Trésor : Report on the development of insurance against cyber risk

On 7 September 2022, the French Directorate General of Treasury published a report on the development of insurance against cyber risk. An action plan based on four axes has been proposed to fight against cyber risks:

- clarify the legal framework for cyber risk insurance by establishing good drafting practices and reinforcing the information provided to insured on the scope of their guarantees to improve the consideration of this risk;
- foster better measurement of cyber risk by creating a specific cyber class in the medium term;
- improve risk sharing between insured, insurers and reinsurers; and
- raise companies' awareness on cyber risk.

Source: [Directorate General of the Treasury: report on the development of cyber risk](#)

European Union – EIOPA: Publication on implicit cyber risk hedging

EIOPA has published on 22 September 2022 a statement on cyber risk exposure in which it recommends that national supervisors pay more attention to the supervision of cyber underwriting risk, in particular for (re)insurance undertakings which are potentially more exposed to these kind of risks.

Against the background of a sharp increase in cyber risk, EIOPA recommends assessing the needs, objectives and characteristics of the target market with regard to the exclusion of systemic risks resulting from cyber risk.

Source: [EIOPA statement on the management of cyber exposures](#)

European Union - ESAs: report on transparency of investments in fossil gas and nuclear economic activities

The three European Supervisory Authorities (EBA, EIOPA and ESMA - "ESAs") have submitted to the European Commission their final report on 30 September 2022 on the disclosure of financial products' exposure to investments in fossil gas and nuclear energy related economic activities in the framework of the regulation on disclosure of financial products' exposure to fossil gas and nuclear energy related economic activities (the "Regulation").

The ESAs propose through this report to add specific disclosures to ensure transparency of investments in fossil gas and nuclear economic activities and to make minor technical revisions to the Regulation to correct inconsistencies observed after its publication.

Source: [ESAs' proposals for the regulation of fossil gas and nuclear investments](#)

Authored by Ghina Farah, Mohamed Boukesra and Maxime Kaya

- **Intellectual Property**

France – Entry into force of the French patent office's fifth PPH (Patent Prosecution Highway) agreement with the Korean Intellectual Property Office

The PPH agreement concluded on 14 July 2022 between the French patent office (INPI) and its Korean counterpart, the Korean Intellectual Property Office, entered into force on September 1st, 2022.

This agreement allows applicants for a French patent to request the acceleration of the procedure for the grant of a corresponding second patent application filed with the Korean office. Reciprocally, this PPH agreement applies to applicants for a Korean patent, who will be able to speed up the processing of their applications filed with the French PTO, whether they claim the priority of a national patent application in Korea or of an international application (PCT) of which the preliminary examination is performed by the Korean office.

European Union – Adoption of the final version of the Rules of procedure of the Unified Patent Court (UPC)

By decision of 8 July 2022, the Administrative Committee of the Unified Patent Court adopted the final version of the [Rules of procedure](#) of the UPC. Prior to this adoption, the rules of procedure were approved by the European Commission, which verified in particular their compliance with EU law.

This new version notably introduces a mechanism of suppression of an unauthorised declaration of derogation ("*Opt-Out*"), and clarifies the conditions of publication of the judgments rendered by the UPC.

The Rules of procedure entered into force on 1st September 2022. In a [roadmap](#) published on 6 October 2022, the Administrative Committee announced that it was currently planning for the Court to begin its operation by 1st April 2023.

International - Entry into force of the fourteenth edition of the Locarno classification

The World Intellectual Property Organization (WIPO) announced on 23 September 2022 the entry into force of the new edition of the International Classification used for the purposes of registering industrial designs.

This new edition will apply to all international applications filed on or after January 1st 2023.

Authored by Adrien Bonnet, Emilia Grenier, Jessica Seray, Eléonore Salles

- **Litigation**

France – The decree implementing the French law of 21 March 2022 aiming at improving the protection of whistleblowers entered into force

The decree implementing the French law no. [2022-401](#) of 21 March 2022 aiming at improving the protection of whistleblowers entered into force on **5 October 2022** (decree no. [2022-1284](#) of 3 October 2022). This decree repeals decree no. [2017-564](#) of 19 April 2017 adopted in application of the [Sapin Law II](#) which previously instituted a related procedure.

The provisions of this decree apply in particular to private entities employing **at least 50 employees** and certain public entities also employing at least 50 employees. These entities must **establish a procedure for collecting and processing internal alerts**.

The decree includes various provisions notably relating to:

- the calculation of the threshold of 50 employees,
- the legal instrument to establish the procedure for collecting and processing internal reports, after consulting the relevant employment bodies,
- the determination of the channels to receive alerts (phone, videoconference, face-to-face meeting, etc.),
- the publicity and dissemination measures of the alert procedure to the employees,
- the designation of the persons and services authorized to collect and process alerts,
- measures to process internal alerts (analysis of the admissibility, request for additional information, etc.), and
- measures to ensure the confidentiality and integrity of the information collected.

The decree also lists the external competent authorities to deal with the procedure for the collection and processing of alerts.

France – The French Administrative Supreme Court annuls certain provisions of the decree of 2019 reforming civil procedure

By decision of 22 September 2022 (available [here](#)), the French Administrative Supreme Court (*Conseil d'Etat*) confirmed the legality of the main provisions of the decree no. [2019-1333](#) of 11 December 2019 reforming civil procedure.

However, certain provisions were notably annulled to guarantee legal certainty and the right to an effective remedy:

- **Article 750-1 of the French Civil Procedure Code.** This article imposes certain modes of amicable dispute resolution prior to launching certain “small” claims before the judicial tribunal, such as claims not exceeding 5,000 Euros. This provision was entirely annulled because it did not sufficiently specify the manner in which the unavailability of judicial conciliators was to be considered as established. The French Administrative Supreme Court specifies that the annulment of Article 750-1 of the Civil Procedure Code is not retroactive to avoid excessive consequences on the functioning of justice.

- **Article 901 and 933 of the French Civil Procedure Code** insofar as they refer to all the information provided for in **Article 57 of the same Code without excluding the indication of the exhibits on which the claim is based**. These articles specify the formalism of the statement of appeal. These provisions required, due to an incorrect reference to Article 57 of Civil Procedure Code, the inclusion in the statement of appeal of the exhibits on which the claim is based, even though the claimant has 3 months to file his brief at the court secretariat with the possibility of attaching new exhibits. This annulment is retroactive.
- **Article 55 II of the Decree no. 2019-1333 of 11 December 2019**, insofar as this provision does not mention **Articles 760 and 768 of French Civil Procedure Code among the provision subject to application to proceedings instituted as of 1st January 2020**. This article provided for the application, by way of derogation from the above-mentioned Article 55 I, of certain provisions to proceedings introduced as of 1st January 2020. These provisions specify the procedure for appointing a lawyer and for filing submissions before the judicial tribunal. However, the law dated 23 March 2019 on justice reform, on the basis of which the decree of 11 December 2019 was taken, had provided that the provisions relating to mandatory representation by a lawyer before the judicial tribunal would apply to proceedings introduced as of 1st January 2020. The annulment therefore brings the decree into line with the law. This annulment is retroactive.

Authored by Bertille Ibled and Alexis de Kouchkovsky

- **Public Law**

France – Public procurement – Clarification of price modifications and conditions of application of the theory of unforeseeability

Asked by the Minister of the Economy to issue an opinion on the possibility of modifying prices and tariffs in public procurement contracts and on the conditions of application of the theory of unforeseeability, the Council of State issued an [opinion](#) on 15 September 2022, which was widely commented on.

This opinion was requested in order to allow public purchasers and private operators to better grasp the difficulties in the execution of public procurement contracts resulting from the strong increase in prices and difficulties in the supply of raw materials.

Among the interesting contributions of this opinion, the Council of State confirmed that the parties may agree on a modification of prices or tariffs only, without modifying the services subject to the contract themselves (so-called "dry" modification of the price or tariff), and that they also may implement a modification of the sole duration of the public contract or concession. These modifications must comply with the framework - already known - of the articles of the public procurement code relating to modifications to contracts and concessions, i.e., in particular, they must be made necessary by unforeseeable circumstances, not constitute substantial modifications or be of small amount.

The Council of State also provided clarification on the relationship between these modifications and the principles arising from the theory of unforeseeability. In this respect, it recalls that when the conditions of unforeseeability are met, the payment of an indemnity for unforeseeability by the public entity, if necessary following the intervention of the administrative judge, is a right for the contract holder, whereas the revision of the financial clauses of the contract is not. Moreover, the theory of unforeseeability is subject to a legal regime independent of the rules of the public procurement code on the modification of contracts, and is therefore not subject to the limits contained therein, in particular the ceiling of 50% of the amount of the initial contract per modification.

This opinion of the Council of State was the subject of a [technical sheet](#) published by the Legal Affairs Department of Bercy on 21 September last, and was then supplemented by a [circular](#), published on 4 October 2022, relating to the performance of public procurement contracts in the current context of rising prices for certain raw materials and repealing circular No. 6338/SG of 30 March 2022.

Authored by Bruno Cantier and Astrid Layrisse

- **Real Estate**

France – Publication of the ILAT, ILC and ICC indices

The INSEE has published the 2nd quarter 2022 indexes for commercial and professional lease reviews:

- Commercial Rent Index (ILC): 123.65, i.e. an increase of 4.43% over one year ;
- Tertiary rents index (ILAT): 122.65, i.e. an increase of 5.32% over one year;
- Construction cost index (ICC): 1966, i.e. an increase of 7.96% over one year.

It should be noted, however, that the so-called Purchasing Power Law of August 16, 2022 limited the annual variation in the commercial rent index to 3.5% for the quarters between the second quarter of 2022 and the first quarter of 2023 for small and medium-sized businesses, i.e., those employing fewer than 250 people and with annual revenues not exceeding 50 million euros or total assets not exceeding 43 million euros.

France - Tolerance until December 31, 2022 for declarations on the OPERAT platform

The Eco Energie Tertiaire regulation requires that all commercial buildings with a surface area greater than or equal to 1,000 sqm specify their energy consumption on the OPERAT platform before September 30 of each year. This year, for the first time, this obligation is implemented for the energy consumption of 2020 and 2021. The Ministry of Ecological Transition and Territorial Cohesion and the Ministry of Energy Transition have therefore decided to grant a period of tolerance until December 31, 2022, during which time those subject to the obligation will be able to continue to declare their consumption but also to modify as many times as necessary the declarations already made.

Authored by Margot Derumaux

- **Technology**

France - Legal guarantee of conformity: new obligations for digital goods, content and services

Last June, the decree n° 2022-946 revised and completed the current regulatory provisions relating to the legal guarantee of conformity for goods, digital content and digital services. This text came into force on October 1, 2022, obliging the professionals concerned to integrate new provisions into their general terms and conditions of sale, and into their commercial guarantee contracts. The professional must include a box in the general conditions of sale in which he must recall the existence and the terms of implementation of legal guarantees. The decree also specifies the terms and conditions for informing the consumer about updates and compliance of these digital goods.

European Union - The European Commission wants to recast the Product Liability Directive and put in place an AI-specific liability directive

With its two proposals adopted on September 28, the European Commission wishes to adapt the liability regime of product manufacturers and consumer protection to the digital age. In this context, it first proposes to modernize the existing rules on the strict liability of manufacturers for defective products, from smart technologies to pharmaceutical products. The aim is to provide greater legal certainty and to guarantee compensation to victims.

It also proposes to create a new directive that would harmonize national liability rules applicable to AI, in order to, among other things, make it easier for victims of AI-related damage to obtain compensation.

Authored by Anais Ligot, Théophile Tsimaratos et Léanne Fortuna

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