

A legal guide to investing in France

for foreign investors



2015

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Introduction

We are pleased to present the McDermott Will & Emery '*Legal guide to investing in France*'. This guide provides an overview of France's legal and tax environment in the key areas that matter most to foreign investors.

France is a prime destination for foreign direct investments. It hosts over 20,000 foreign companies on its soil, representing almost two million jobs and a third of our exports. In ten years, France has attracted more than 6,000 foreign investments.

At the heart of a single market of 500 million people, foreign companies come to France to benefit from quality infrastructure, a tremendous lifestyle, significant connections with the rest of Europe and the world, one of the most competitive energy markets in Europe, a skilled and productive workforce, and an environment conducive to research and innovation.

France is undergoing a period of transformation. Recent changes have already made the business and regulatory environment simpler and more attractive to investors. Significant reforms have been, and are still being implemented in areas such as contract law, employment law, commercial law, and tax law.

We trust you will find the McDermott Will & Emery '*Legal guide to investing in France*' a useful overview of key legal issues concerning your planned or existing investments in France. As always, we welcome any feedback from readers. We would also remind you that quality legal advice in relation to each specific investment remains essential.

McDermott Will & Emery, Paris



1. THE FIRM

McDermott Will & Emery is a leading international firm with a diversified business practice. Currently numbering more than 1,100 lawyers, we have 19 offices worldwide and a strategic alliance with MWE China Law Offices in Shanghai.

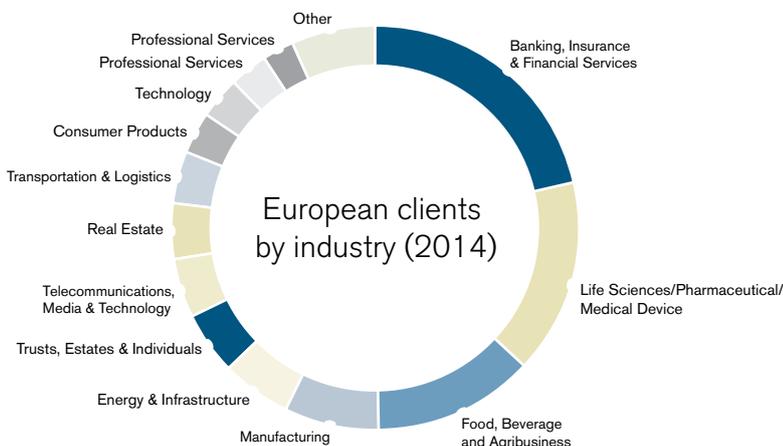
Our Firm has over 80 years of experience serving a broad range of client interests. We understand the issues faced by corporate decision makers because many of our lawyers have held key government and in-house positions. We understand how economic, social and political issues affect operations because our lawyers have navigated the complex business and regulatory environment themselves.

Outstanding client service is a cornerstone of our practice that has withstood the test of geography, economy and time. We are proud of the recognition we have received from our clients for our commitment to service, and we value their satisfaction as the best measure of our success.

2. FIRM CLIENTS

Our diversified business practice enables us to represent a wide range of commercial, industrial and financial enterprises, both publicly and privately held. Our clientele include some of the world's largest corporations, small and medium-sized businesses, and individuals.

As a Firm, we represent more than 77 percent of the Fortune 100, and 49 percent of the Forbes 100 Largest Private Companies. Clients outside the United States account for 27 percent of the Firm's revenue.



AWARDS & RECOGNITION

- McDermott's Paris office is consistently recognized by third party ranking publications as a leader in the field
- *Chambers Europe* 2014 has recommended our French lawyers as leaders in the fields of Life sciences, International Projects and Africa / energy
- *The Legal 500 EMEA* 2014 edition recommended our French lawyers as leaders in the field of Public Law, Tax, International Arbitration, Litigation, Employment, EU Competition, Life Sciences, Corporate / M&A
- *Décideurs Juridiques*, *Option Droit & Affaires* and *Magazine des Affaires* 2014 have ranked our EU Competition, Life sciences, Tax and International Arbitration, Corporate / M&A practices as leaders within the French market



McDermott Will & Emery Paris

From France our team provides multidisciplinary legal services to domestic and international clients, with a focus on cross-border transactions in the areas of Africa / energy, competition, corporate, dispute resolution, employment, finance, international arbitration, public law, and tax.

Our France-based team brings a wealth of practical and impressive legal and business backgrounds to all matters on which they advise.

In addition to guidance on specific issues and multidisciplinary advice, McDermott Will & Emery's clients in France, or based internationally, benefit from an interactive approach with a host of client support services to truly add value to their business.

1. OUR CAPABILITIES

Our team of highly qualified professionals have come together in Paris with the common goal of servicing the many multinational corporations based there and internationally as well. France is a vital hub within Europe, and our team of skilled lawyers have the capabilities, knowledge and experience to service the needs of their clients on domestic and cross-border bases.

A number of our lawyers are multilingual, languages spoken include Arabic, English, French, German, Italian, Japanese, Portuguese, Spanish, and Swedish. These language abilities enable our team to reach beyond the standard service many other firms provide to their clients — a capability that differentiates our French practice from a number of our competitors allowing us to better service their multi-jurisdictional needs.

2. OUR PRACTICE

Each of our France-based practices is part of an international network of collaborative lawyers who share ideas on trends and key developments in law as well as on the numerous industries in which we operate. As a result we are able to provide seamless, multidisciplinary service to our clients.

Key areas of practice include:

Africa / Energy	Employment
Competition	Life Sciences
Corporate / M&A / Private Equity	Public Law / Regulatory
Dispute Resolution & International Arbitration	Taxation



Our Offices



McDermott Will & Emery's headquarters are based in Chicago and we have international offices located in Paris, Boston, Brussels, Chicago, Dallas, Düsseldorf, Frankfurt, Houston, London, Los Angeles, Miami, Milan, Munich, New York, Orange County, Rome, Seoul, Silicon Valley, and Washington, D.C.. Our international capability is further enhanced by our strategic alliance with MWE China Law Offices in Shanghai which enables us to work together to provide clients with a comprehensive and fully coordinated service.

It is the breadth of the firm's practice that distinguishes McDermott Will & Emery from our competitors. We aim to add value to clients' businesses, seeking commercial solutions rather than focusing on the narrow legal issues that may arise.

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Foreign investment in France Regulatory



As a general rule, foreign investment in France is unrestricted.

However, a prior declaration is required for administrative or statistical purposes and some investments in strategic sectors are subject to a prior authorization.

1. REQUIREMENT: DECLARATION FOR ADMINISTRATIVE OR STATISTICAL PURPOSES

The only requirement is that a prior statistical or administrative declaration is filed as follows:

- The acquisition of 10 % or more of the equity or voting rights in a resident company – or when equity or voting rights in the company rise above the 10% threshold, if the amount of these transactions exceeds €15 million, is subject to a declaration filed with the Banque of France,
- The following transactions are subject to a prior administrative declaration to the Ministry of the Economy and Finance (Treasury directorate): (i) the creation of a new company, if the investment exceeds €1.5 million, (ii) the acquisition of all or part of a business line, and (iii) the acquisition of a direct or indirect equity interest in (or any other transaction with) a French company amounting to more than 33.33 % of its share or voting rights (unless the investor already has a majority interest in the French company).

2. EXCEPTION: PRIOR AUTHORIZATION IN SENSITIVE SECTORS

2.1 Sensitive sectors in which investments shall be preceded by an authorization

In order to ensure the protection of French national interests, investments in certain sectors considered being strategic and “sensitive” require prior authorization when the following transactions are contemplated:

- For any investor (*i.e.* from European Union (“EU”) as well as non-EU countries): the acquisition of a controlling interest (*i.e.* majority of voting rights) in a French company and the acquisition of all or part of a business line by a foreign investor,
- For investors from countries outside of the EU: the acquisition of interests exceeding 33.33 % of equity or voting rights in a French company.

With this respect, investments that require prior authorization are the following:

(i) **Investments from EU Member States:** private security services, interests concerning the prevention of illicit use of biological or toxic agents or other agents prohibited in the construction of chemical weapons, equipment designed to intercept communications, the evaluation and certification of systems used in information technology, the production of goods or provisions of services relating to the security of information systems, goods and technology with dual applications.

A Decree dated 14 May 2014 extended this list by including foreign investments made in activities related to the integrity, the safety and the continuity of (i) the supply of water, electricity, gas, hydrocarbons and any other source of energy and (ii) the operation of transport services and telecommunications, as well as foreign investments made in activities related to “the protection of public health”.

(ii) **Investments from non-EU countries:** the interests indicated above, including the sectors targeted by the Decree dated 14 May 2014, plus: gambling (excluding casinos), encryption and decryption systems for digital applications, businesses certified for national defense, trade in weapons, munitions and explosives for military applications or equipment used in warfare, and businesses under contract to supply research or equipment to the French Ministry of Defense or its subcontractors.



Foreign investment in France Regulatory

2.2 Formalities and sanctions related to the request of the authorization

2.2.1. Formalities

Upon the realization of any contemplated transaction, the investor has to send a request to notify the foreign investment to the Treasury Directorate. This request must outline the proposed transaction and provide basic corporate information about the investor.

Upon receipt, the Treasury Directorate will conduct a review of the reported transaction and will respond within a 2-month-term, failing which the authorization is deemed granted.

The authorization of the Treasury Directorate may be contingent upon specific undertakings aiming at ensuring that the contemplated investment does not jeopardize French national interests, such as:

- Undertakings to preserve the business operations the industrial, R&D and related know how capacities,
- Undertakings to preserve safety of the supply chain,
- Guaranties as to the performance by companies that have their registered office in France under procurement contracts, whether as contractor or subcontractor, or contracts concerning public safety, national defense or research, or the production or trading of weapons, ammunitions, or explosive powder or substances, or
- Should the strategic business sector for which authorization is required be an ancillary business of the target company, sale of such ancillary business to a company independent from the investor.

The Treasury Directorate must refuse to authorize the reported transaction should the implementation of the conditions imposed not be sufficient enough to ensure the defense of French national interests.

2.2.2. Sanctions

Failure to comply with the prior authorization regime leads to a wide range of sanctions.

Investment carried out without the Treasury Directorate approval or in contravention of the conditions imposed by the Treasury Directorate may be sanctioned by a civil fine up to twice the amount of the non-complying investment and the parties may be commanded to return to the status quo ante at their own expense.

In addition, any agreement, understanding or contractual provision purporting to effectuate a foreign investment in one of the strategic business sectors, whether directly or indirectly, without due authorization from the Treasury Directorate is null and void and will therefore be unenforceable.

Under French law, any third party may invoke such voidness before the relevant jurisdiction as a ground to ask for the investment operation to be annulled.

Finally, criminal sanctions may be imposed on the investor, including imprisonment for up to five years, seizure of the investment, and a fine of up to twice the amount of the investment. This fine can be multiplied by five in the case of legal entities held liable for the offense.

Foreign investment in France

Corporate



1. TYPES OF CORPORATE ENTITIES – LIMITED LIABILITY COMPANIES

There are three main types of limited liability companies in France: (i) the “*Société Anonyme*” (“**SA**”), (ii) the “*Société à Responsabilité Limitée*” (“**SARL**”), and (iii) the “*Société par Actions Simplifiée*” (“**SAS**”).

The incorporation process is quick and easy. One should note however that the opening of a bank account can take time due to the anti-money laundering obligations that French banks have to comply with.

- The SA is a limited liability company whose shares can be listed on a stock market. It requires a minimum capital of €37,000 for a private SA and €225,000 for a public SA. It must have a minimum number of seven shareholders. This type of entity is perfectly suited for large businesses contemplating the possibility to go public.

There are two forms of management structure for an SA, which are by and large regulated and leave little room for flexibility:

»The one-tier structure: a board of directors (“*Conseil d’administration*”) determines the business strategy and oversees the actions of a general director (and his deputies), who is in charge of daily management. The general director, who is appointed – and removed – by the board of directors, can also act as Chairman of the board of directors,

»The two-tier structure: an executive board (“*Directoire*”) manages the company while a supervisory board (“*Conseil de surveillance*”) oversees the actions of the executive board and determines the business strategy. The members of the executive board are appointed – and removed – by the supervisory board.

Whatever the structure, the company’s shareholders are granted by law and under the articles of association, certain rights, including the right to approve any decision that triggers an amendment to the articles of association (e.g. capital increase, change of registered office, change of corporate purpose, etc.).

- The SARL is a limited liability company that requires only one shareholder. It is commonly used for small businesses. Unlike the SA, the SARL’s share capital can be of only €1. The management structure consists in one or more managers, who can be shareholders but cannot be legal entities. These managers have broad powers to act on behalf of the company, subject to the powers granted by law to the shareholders. Share transfers are restricted by law and possibly by the articles of association.
- The SAS is a limited liability company that is commonly used by foreign investors due to its flexibility. It is also the preferred vehicle for joint ventures. The SAS requires only one shareholder and its minimum capital requirement is €1. The only requirement applicable in terms of management is the appointment of a president by the shareholder(s). Apart from this requirement, the shareholder(s) can freely provide for the governance structure in the articles of association, e.g. several managers with equal power or an executive committee to approve certain management decisions. As a result of the large degree of flexibility of the SAS, the articles of association need to be drafted carefully. Transfers of shares in an SAS are unrestricted, unless the articles of association provide otherwise, and are carried out by way of signature of a transfer form and recorded in the company’s books.

Another type of entity is available since 2001. The SE (the “*Société Européenne*”, or European Company) is a limited liability company partially regulated by EU law and partially by the law of the Member State in which the company’s headquarters are located. SEs have a minimum capital requirement of €120,000. The main advantages of a SE are (i) the possibility to transfer the registered office from one Member State to another, and (ii) the European “label” that may help in doing business across Europe.



Foreign investment in France Corporate

1.1 Acquiring a French Private Company

The most common structure for the acquisition of a private company is by way of an acquisition of the company's shares. However, the purchaser may also decide to purchase all or part of the target company's assets.

Where the assets acquired by the buyer constitute a business ("*fonds de commerce*"), French law provides for specific rules, which apply to the sale of the business and trigger specific legal and tax consequences. A business typically consists of (i) intangible assets (the clientele, the commercial name, the intellectual property rights owned by the company, the right of the company under a lease agreement, *etc.*), and (ii) tangible assets (equipment and stock).

1.1.1 Should the business of the target or its shares be acquired?

• Transfer of liabilities

When acquiring the target company's shares, the buyer inherits all the assets and all the liabilities of the target. It is therefore customary for buyers to carry out extensive legal due diligence of the target.

On the contrary, when acquiring some or all the assets of the target, the buyer will not be transferred any of the target's liabilities, unless provided otherwise in the asset purchase agreement.

• Transfer of contracts

In a share deal, all the contracts entered into by the target will remain in place, subject to change of control provisions.

In an asset deal, the contracts entered into by the target will only be transferred to the buyer subject to the prior approval of the counterparties. There are, however, some exceptions to this principle. Where the sold assets constitute a business, employment agreements, insurance contracts, and commercial leases will transfer to the buyer by operation of law. In addition, employment contracts are also transferred to the buyer by operation of law in the event of a transfer of an economic entity which retains its identity (so called "*TUPE*" regulation), including in situations where the economic entity does not constitute a business within the meaning of French law.

• Transfer of real estate

In a share deal, real estate is "transferred" to the buyer without any need for specific formalities.

In an asset deal, real estate is transferred through a separate agreement executed before a notary.

• Registration duties

The sale of shares of a non-listed SA or an SAS is subject to registration duties at the rate of 0.1% (uncapped), assessed on the sale price, or, if higher, the market price (*cfr.* Section 2.1 of "Tax"). The sale of shares in an SARL is subject to registration duties at the rate of 3% (uncapped), assessed on the sale price, or, if higher, the market price.

Finally, the sale of shares of a non-listed real estate company is subject to registration duties at the rate of 5%. Unless provided otherwise in the share purchase agreement, French registration duties are due by the buyer.

The sale of a business is subject to registration duties in France at the rate of (i) 3% on the taxable basis comprised between €23,000 and €200,000, and (ii) 5% above €200,000. Registration duties are assessed on the sale price of the assets, reduced by the estimated value of the stocks and receivables transferred, and increased by any expense charged by the seller to the buyer (or, if higher, the market price). Unless provided otherwise in the asset purchase agreement, French registration duties are due by the buyer.

Foreign investment in France

Corporate



1.1.2 Acquisition process and documentation

The acquisition process of a share deal is substantially similar to that followed in most other jurisdictions.

• Preliminary contracts

It is customary for the parties to enter into a letter of intent setting out the essential terms of the contemplated transaction, such as the structure, the price, and the timetable. These terms, which are usually non-binding, constitute the basis for the negotiation of the definitive agreement(s). One should note that French law provides for an obligation to negotiate contracts in good faith, which means that the parties must give consideration to the non-binding terms of the letter of intent. The letter of intent sometimes contains a binding exclusivity provision, whereby the seller undertakes not to discuss a similar transaction with any other party.

In parallel with, but separately from the letter of intent, the parties usually enter into a binding confidentiality agreement.

• Due diligence

It is customary for buyers to carry out a thorough legal diligence and for targets to organize the disclosure of the requested information / documents into an electronic data room.

A vendor due diligence report is also sometimes provided by sellers in the context of auction bids. Although this speeds up the process, it does not keep the buyer from carrying out its own due diligence, in particular where the seller refuses to give a reliance letter.

• Negotiation of the definitive agreement(s)

By and large, the share purchase agreement forms used in France are substantially similar to those used in the U.S. or in other main European countries.

The price provision is one of the most important provisions, with the possibility to set up a post-closing price adjustment and / or an earn-out payment. The customary representations and warranties cover a large range of issues. They are usually capped (25% of the purchase price is generally understood to be an average on the French market) and limited in time (12 to 36 months being the average timeframe, except for tax, labor, and environmental representations, which are longer). Indemnification payment to the buyer can be secured through the deposit of part of the purchase price into an escrow account, a bank, or parent guarantee, or warranties insurance. Disclosures to the representations and warranties are usually structured as an appendix to the share purchase agreement.

There is likely to be ancillary documents, such as a transitional services agreement, an incentive package to managers, or board minutes covering various transitional issues.

• Consultation of the works council

French companies with more than 50 employees are required to set up a works council (see page 30 for details about the works council). Where the target has a works council, the latter must be informed and consulted before the buyer and the seller execute the share purchase agreement. In general, once the parties have agreed on the substantial terms of the share purchase agreement, they will “freeze” the agreement and begin the information / consultation process, in which each will have a key role to play. It is only once the works council has issued an opinion on the contemplated transaction – whether the opinion is positive or negative is irrelevant – that the parties will be in a position to execute the share purchase agreement.



Foreign investment in France Corporate

• Information of the target's employees

A shareholder contemplating the transfer of 50% or more of the share capital of an eligible company must inform such company of its intention to transfer. In turn, the company must inform all its employees individually, such that they are in a position to make an offer to acquire the shares. Similarly, an eligible company contemplating the transfer of a business (*fonds de commerce*) must inform its employees of such project.

This obligation only applies to target companies which (i) have less than 50 employees or (ii) have 50 or more employees provided they qualify as SMEs (small and medium enterprises, under the meaning of EU law).

This obligation, which was introduced on 1 November 2014 rises multiple issues:

- The only obligation is to inform the employees; in principle, the shareholder has no obligation to engage into negotiations with the employees.
- The law does not specify which transfers are concerned; for instance, there is uncertainty as to whether a contribution of shares / assets would fall within the scope of the regulation.
- If the target does not have a works council, the information of all employees must be made at least 2 months before the closing of the transaction; it may be possible to structure the information obligation as a condition precedent.
- If the target has a works council, the instruction must be made at the latest at the same information / consultation of the works council.
- According to the law, the only information to be given to the employees is the intention to transfer the shares / business; however, should some employees request further information to make an offer, it is recommendable that the shareholder provides at least some very basic information about the target (information-memo type).
- Failure to inform the employees may trigger the nullity of the transfer.

As of the date of this guide, the French government has indicated that it may consider amending the law in view of the hostile reaction of the French business and legal communities. Such amendments, if any, are expected at the of the first quarter of 2015.

• Completion

Unless there are conditions precedent (e.g. competition approval, bank financing, restructuring of the target), it is customary to have a simultaneous signing and closing.

1.2 Acquiring a French Public Company

Control of a French public company is most frequently obtained through a voluntary or mandatory public tender offer. When a company initiates a public tender offer, either alone or in concert, it publicly informs the shareholders of another company that it is willing to purchase their shares for a specified price, paid either in cash (cash tender offer - "*offre publique d'achat*"), by way of the tender of shares (exchange offer - "*offre publique d'échange*"), or by way of a combination of both cash and shares.

1.2.1 Role of the Financial Market Authority

Public takeovers are mainly regulated and supervised by the Financial Markets Authority ("*Autorité des Marchés Financiers*" - "**AMF**") and the main rules and principles governing public takeovers are set forth in the AMF's General Regulation. The AMF is in charge of controlling the conformity of public tender offers with applicable legal and regulatory provisions and delivers an approval of the draft prospectus filed in relation to that offer.

Foreign investment in France

Corporate



The key principles governing public offers are:

- A level playing field between bidders,
- Market transparency and integrity, and
- Equal access to information by holders of securities affected by the offer.

1.2.2 Voluntary public tender offer

The tender offer process is as follows:

1. The bidder prepares a prospectus setting out the terms and conditions of the tender offer, which is filed with the AMF by one or several presenting banks guaranteeing that the offer is unconditional.
2. The publication of the offer by the AMF triggers the opening of the offer period.
3. The AMF has, in principle, ten trading days as of the date of publication of the offer to issue a clearance decision confirming that the terms of the offer comply with applicable legal and regulatory provisions (*visa*).
4. The target company must file with the AMF a document in response to the prospectus at the latest five trading days after the date of the AMF *visa*, except in the event of a joint offer between the bidder and the target company. The AMF has five trading days to issue a clearance decision with respect to the response document.
5. In the standard procedure ("*procédure normale*"), *i.e.* where the bidder, acting alone or in concert, holds less than 50% of the share capital or voting rights of the target company at the time of the offer, the offer period will last 25 trading days, except if extended by the AMF (up to 35 trading days).
6. Competing offers may be filed up to five trading days prior to the closing date of the initial offer, in which case the initial bidder may either withdraw its offer or file an improved offer.
7. The results of the offer are published at the latest nine trading days after the closing date of the offer period.
8. The offer is successful provided the bidder obtains a number of shares representing more than 50% of the share capital or voting rights of the target.

A simplified procedure ("*procédure simplifiée*") may be used when the bidder holds, directly or indirectly, alone or in concert, 50% or more of the target's share capital and voting rights, or when it intends to acquire up to 10% of the target's share capital and voting rights only. In this scenario, a shorter timetable will apply (the offer period is 10 trading days for a cash tender offer or 15 trading days for other types of offers).

1.2.3 Mandatory tender offers

Any person, acting alone or in concert, that comes to hold, directly or indirectly, more than 30% of the share capital or voting rights of a French public company shall immediately inform the AMF and file a public tender offer with a view to acquiring all of the company's share capital.

Such procedure will also be applicable in the event a person, acting alone or in concert, (i) comes to hold more than 30% of the share capital or voting rights of a French public company further to a merger or contribution, or (ii) holds directly or indirectly between 30% and 50% of the share capital or voting rights of a French public company and increases such holding by at least 1% within 12 months.



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1. OWNING A FRENCH COMPANY / BRANCH

1.1 Corporate Income Tax

1.1.1 Corporate Income Tax Base

French corporate income tax is levied on a territoriality basis. French and non-French companies are subject to French corporate income tax mainly on net income and gains derived from (i) businesses operated in France, and (ii) real estate assets located in France, subject to the provisions of double tax treaties signed with France.

A non-French company would be considered as operating a business in France where: (i) the business is operated through an autonomous establishment located in France, (ii) the business is operated through an agent who is dependent from the non-French company, or (iii) the non-French company is engaged in operations in France which can be viewed as a full commercial cycle.

Unless otherwise provided by the French tax code, the taxable income is equal to the net income booked in the company's financial statements. The most notable tax exemptions concern dividends and certain long-term capital gains (see Section 1.2). Expenses incurred in the interest of the company are generally deductible from a tax standpoint. The most notable deduction limitations concern interest expenses (see Section 2.3).

1.1.2 Use of Tax Losses

Tax losses generated by companies subject to French corporate income tax can be either carried forward or carried back.

• Carry forward

Tax losses can be carried forward without any time limitation.

The amount of tax losses that can be offset on the taxable income of a subsequent financial year is however limited to €1 million plus 50% of such portion of the taxable income exceeding €1 million.

The right to carry forward tax losses is further subject to the condition that (i) the business from which the tax losses derived is continued by the company, and (ii) there is no substantial change in that business¹. Finally, the transfer of tax losses in the context of reorganizations (merger, spin-off, etc.) must be allowed by a ruling issued by the French tax authorities.

• Carry back

Tax losses generated by a company during a fiscal year can, up to €1 million, be carried-back on the taxable income realized in respect of the previous fiscal year².

¹ A substantial change is characterized where (i) the company conducts an additional business resulting in the increase of 50% of its turnover or of both the number of its employees and gross asset value, or (ii) the company ceases to perform, or transfers, a business resulting in the decrease of 50% of its turnover or both the number of its employees and gross asset value. In case of temporary interruption or substantial change of business, the company can, in certain circumstances, obtain from the French tax authorities a ruling confirming the availability of the tax losses.

² The taxable income realized in respect of the previous fiscal year is decreased by (i) the distributions which were paid out of this income, (ii) such portion of the income that gave rise to the utilization of a tax credit, where the corporate income tax was partially paid with a tax credit, (iii) any long-term capital gains, and (iv) any income benefiting from specific incentive exemptions provided for in the French tax code.

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The election for the carry-back is made in the corporate income tax return filed in respect of the fiscal year during which the tax loss was generated. As a result of the carry-back of its tax losses, the company gets a non-taxable receivable against the French Treasury, computed by applying the corporate income tax rate (see below) to the amount of taxable income offset by the tax loss. This receivable may be (i) used for the payment of the corporate income tax due in respect of the five following fiscal years, (ii) reimbursed at the end of this five-year period, or (iii) transferred within that five-year period to a financial institution.

1.1.3 Corporate Income Tax Rate

The standard corporate income tax rate is 33.33%¹.

This tax rate may however be increased to (i) 34.43%, taking into account a 3.3% social surtax assessed on the corporate income tax liability, to the extent exceeding €763,000, or (ii) 38%, also taking into account a 10.7% temporary surtax, assessed on the corporate income tax liability, that is applicable to large companies whose annual turnover exceeds €250 million. This temporary surtax is due in respect of fiscal years ending between 31 December 2011 and 30 December 2015.

Furthermore, profits distributed by French companies, or profits up-streamed by French permanent establishments, are generally subject to a specific 3% tax, subject to certain exceptions². This 3% corporate tax is due by the distributing company.

In our view, where the French distributing company is at least 95% held by a non-French parent company, this 3% corporate tax should however be regarded as (i) an unjustified restriction on the freedom of establishment prohibited under EU regulations if the parent is established in the EU, and (ii) a violation of the non-discrimination provision included in most of the double tax treaties signed by France if the parent is established in a double tax treaty-protected State. As a result, non-French parent companies established in the EU or in a relevant treaty-protected State that own at least 95% of a French subsidiary and have received distributions in the past two years that have been subject to the 3% corporate tax should consider submitting a claim to obtain the refund of that 3% corporate tax.

1.1.4 Tax Credits

French companies may, subject to certain conditions, benefit from corporate income tax credits. The most notable ones are (i) the R&D tax credit, and (ii) the tax credit for competitiveness and employment.

• R&D tax credit

All companies incurring R&D expenses are eligible to the tax credit, regardless of their size or business sector. The Tax credit is equal to 30% of R&D expenses below €100 million³, and 5% above €100 million.

¹ Small and medium enterprises (“**SMEs**”) may benefit from a reduced income tax rate of 15% up to €38,120 of profits to the extent that (i) they are subject to corporate income tax, (ii) their annual turnover does not exceed €7.63 million, and (iii) at least 75% of their share capital is held by individuals or other qualifying SMEs.

² Specific exemptions are available in respect of (i) distributions made between companies which are part of the same tax consolidated group, (ii) distributions by SMEs within the meaning of the EU Regulation No. 800/2008, (iii) distributions made by French Real Estate investment vehicles (“**REITs**”) and by their tax exempt subsidiaries, (iv) distributions paid with the company’s own shares, and (v) repatriation of profits derived by French permanent establishments of companies established in the EU.

³ SMEs are eligible to an additional tax credit, equal to 20% of innovation expenses (capped at €400,000 per year).



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Expenses eligible to the tax credit are the followings: (i) compensations paid to qualified employees (engineers or assimilated), to the extent their functions are directly related to R&D activities, (ii) amortization charges related to assets dedicated to R&D activities, and (iii) operating expenses, equal to 50% of the compensations paid to qualified employees and 75% of amortization charges. The tax credit generated in respect of a considered year (N) can be offset against the corporate income tax due in respect of fiscal years N to N+3, or assigned to credit institutions for security purposes. Any portion of the tax credit that has not been offset in N+3 can be repaid to the company. By exceptions, young innovative companies and SMEs can benefit from an immediate repayment.

• Tax Credit for Competitiveness and Employment (“TCCE”)

The TCCE has been introduced by the amended Finance Law for 2012 and applies as from January 1, 2013. It benefits to companies and partnerships which taxable income is subject to corporate income tax in France, either at their level or at the level of their partners. The TCCE is equal to 6% of the gross amount of compensations not exceeding 2.5 times the French annual minimum wage (“SMIC”). The TCCE generated in respect of a considered year (N) can be offset against the corporate income tax due in respect of fiscal years N to N+3, or assigned to credit institutions for cash or for security purposes. Any portion of the tax credit that has not been offset in N+3 is repaid to the company. By exception, the tax credit generated by young innovative companies or SMEs can be repaid immediately.

1.2 Dividends and Capital Gains

1.2.1 Dividends

Dividends distributed to a French parent company are exempt from corporate income tax. A lump-sum equal to 5% of the gross dividends must however be added back to the taxable income of the parent company and is subject to the corporate income tax.

This participation-exemption regime only applies if:

- The subsidiary is not located in a non-cooperative State or territory (see Section 4.2),
- The parent company holds a minimum 5% participation in the distributing company for at least two years; if the two-year holding period is not met at the time of the distribution, the participation-exemption still applies but it will be denied retroactively if the stake held by the parent company in the distributing company decreases to less than 5% within the two-year holding period.

If voting rights held by the parent company in the subsidiary are below 5%, the participation-exemption regime would apply but only up to such portion of shares with a voting right.

In addition, the participation-exemption regime does not apply to dividends paid out of profits that are deductible from the taxable income of the distributing company, in particular if these dividends are treated as interest on a hybrid instrument in its jurisdiction.

1.2.2 Long-Term Capital Gains

The following capital gains benefit from a favorable tax regime:

- Capital gains realized on the disposal of qualifying participations (including essentially those participations that are eligible to the participation-exemption) that are held for at least two years at the time of the transfer are subject to corporate income tax on a basis equal to 12% of their gross amount,

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- Capital gains realized on the disposal of patents that are held for at least two years at the time of the transfer are subject to corporate income tax at the reduced rate of 15% (plus surtaxes, as the case may be); subject to certain conditions, the 15% tax rate is also available to income derived from patents.

Capital gains on the disposal of real estate companies are subject to a specific regime, which is not described in the present guide.

1.3 Withholding Taxes

The principles described below apply to the extent the payments are made in a State other than a non-cooperative State or territory. Payments made in those States or territories are subject to a specific regime described in Section 4.2.

1.3.1 Withholding Tax on Dividends

Pursuant to French domestic tax rules, dividends distributed by a French company to a non-French corporate shareholder are generally subject to a withholding tax at the rate of 30%, unless the shareholder can rely on the provisions of the EU Parent-Subsidiary Directive¹, case law of the European Court of Justice (“ECJ”) or the relevant double tax treaty in order to benefit from a withholding tax exemption or reduction.

Under the EU Parent-Subsidiary Directive, as currently transposed into French tax law, a withholding tax exemption applies to dividends received by an EU company that holds directly at least 10% of the financial and voting rights of the French company distributing the dividends for a period of not less than two years (or, alternatively, that commits to hold the relevant shares for a two-year period). To benefit from this exemption, the EU parent company must, inter alia, (i) have its effective place of management in the jurisdiction of its incorporation, (ii) be the beneficial owner of the distribution, and (iii) not be ultimately controlled by a non-EU shareholder. If the last requirement is not met, the withholding tax exemption would still be available if it can be demonstrated that the main purpose for the interposition of an EU parent company between the French company and the non-EU controlling shareholder is not to avoid the French withholding tax.

Under ECJ case law (*Denkavit*, 14 December 2006, No. 170/05), the French withholding tax exemption is also available to an EU parent company that (i) holds directly at least 5% of the financial rights of the relevant French company for a period of not less than two years, and (ii) cannot offset the French withholding tax against the corporate income tax due in its jurisdiction (which is generally the case if the EU parent company benefits from a participation-exemption regime in respect of the dividends it receives). Among the requirements to be satisfied to benefit from such exemption, the EU parent company must (i) have its effective place of management in the jurisdiction of its incorporation, and (ii) not have been artificially interposed so as to avoid the French withholding tax.

1.3.2 Withholding Tax on Interest

Interest paid by a French debtor to a non-French creditor is generally exempt from withholding tax in France pursuant to domestic rules.

1.3.3 Withholding Tax on Royalties and Services Fees

Subject to the provisions of the relevant double tax treaties, a 33.33% French withholding tax applies to (i) income derived in France from intellectual property rights, and (ii) income derived as a consideration for services rendered or used in France, if paid by a person operating a business in France to an entity that is subject to income tax and that does not have in France a permanent professional facility.

¹ Council Directive No. 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, as amended by the Council Directive of November 25, 2013.



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Pursuant to the EU Interest and Royalties Directive¹, as currently transposed into French tax law, the French company paying a royalty may however benefit from a withholding tax exemption, if, inter alia, (i) the EU resident recipient and the French company paying the royalties are related entities², (ii) the EU resident recipient is the beneficial owner of the royalties, and (iii) the EU resident recipient is not ultimately controlled by non-EU shareholders (unless it can be demonstrated that the main purpose for the interposition of one or several EU companies in the shareholding chain was not to avoid the French withholding tax). In addition, the withholding tax exemption would only apply to the extent that the royalty payment does not exceed the amount payable at arm's length conditions.

1.3.4 Branch Tax

Subject to the provisions of the relevant double tax treaties, a 30% rated branch tax applies to distributable profits booked in the accounts of French permanent establishments of non-French companies.

Non-French companies may however obtain branch tax reliefs if they are in a position to demonstrate that all or part of the French permanent establishment's after tax profits were not distributed to its shareholders, or were distributed to French resident shareholders. Furthermore, the branch tax does not apply to after tax profits realized by French permanent establishment of EU companies that are subject to corporate income tax in their jurisdiction, without benefiting from a general or a specific exemption.

1.4. Business Tax

French and non-French companies operating a business in France are generally liable for business tax in France. The business tax regime was completely renewed in 2010. Renamed "*contribution économique territoriale*" ("**CET**"), the new business tax includes two different taxes: (i) the "*cotisation foncière des entreprises*" ("**CFE**"), and (ii) the "*cotisation sur la valeur ajoutée des entreprises*" ("**CVAE**").

The CFE is assessed on the gross cadastral³ rental value of the real estate properties available to the relevant companies, and used by it in the course of its business. The CFE rates are determined by local authorities, and may therefore vary significantly from one location to the other.

The CVAE is due by companies whose annual turnover exceeds €500,000. It is assessed on the added value generated by the companies, capped at 80% or 85% of their annual turnover (depending on whether the turnover exceeds €7.6 million or not). The CVAE rate is 1.5%. Companies whose turnover does not exceed €50 million however benefit from progressive CVAE reliefs, resulting in an effective CVAE rate between 0 and 1.5%.

The CET (*i.e.* CFE plus the CVAE) due by a company in respect of a fiscal year must not exceed 3% of the company's added value, as determined for the computation of the CVAE. Companies are therefore entitled to claim a CET relief equal to the portion of the business tax liability exceeding this cap. This relief is offset against CFE.

¹ Council Directive No. 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States.

² For the purposes of the EU Interest and Royalties Directive, entities are related if (i) the EU resident recipient is the parent of the French company, *i.e.* has held a minimum participation of 25% in the French company for at least two years, or has committed to hold such a participation for at least two years, or (ii) the French company is either the parent company or the sister company of the EU resident recipient to the same extent.

³ Property value recorded in the registers of the relevant municipality (generally far below market value).

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1.5 Value Added Tax (“VAT”)

French VAT is levied on any supply of goods or services realized for a valuable consideration by any person carrying out an economic activity, or deemed realized, in France, pursuant to VAT territoriality rules.

There are four different VAT rates applicable in France. A standard VAT rate of 20%, an intermediate rate of 10%, and two reduced rates of 5.5% and 2.1%, which apply to specific supplies of goods and services.

The French tax code also provides for VAT exemptions, which apply in particular to exports and EU supplies of goods and services, and to most of financial services.

VAT incurred by a taxpayer on the acquisition of goods or services (“**Input VAT**”) is generally deductible from the VAT invoiced by the taxpayer in the course of his business (“**Output VAT**”), to the extent that the acquired goods or services are used to carry out an activity subject to VAT without benefiting from an exemption. Any excess of the Input VAT over the Output VAT can be (i) offset on a further VAT liability, or (ii) reimbursed, subject to certain conditions.

2. ACQUIRING SHARES IN A FRENCH COMPANY

2.1 Transfer Tax

The purchase of a French business (or regarded as such for French tax purposes) is subject to transfer tax at the rate of (i) 0% until €23,000, (ii) 3% between €23,000 and €200,000, and (iii) 5% above €200,000 (*cf.* Section 1.1.1 of “Corporate”).

The purchase of shares issued by a French company (other than a real estate company) gives rise to a transfer tax that is generally due by the buyer, as follows:

- The purchase of shares of a French company listed on a stock exchange market is generally exempt from transfer tax in France, unless (i) the transfer is materialized in a written agreement, in which case a 0.1% transfer tax is due, or (ii) the securities transferred are issued by a French company whose market capitalization exceeds 1€ billion, in which case the transfer tax is not due, but is replaced by a 0.2% tax on financial transaction (the financial transaction tax is generally due by the investment service provider involved in the transaction),
- The purchase of shares of a French corporation (SA or SAS), that is not a listed corporation, is subject to a 0.1% transfer tax assessed on the purchase price¹ or, if higher, on the fair market value of the shares that are disposed of,
- The purchase of shares of a French partnership or a French company other than a SARL is subject to a 3% transfer tax assessed on the purchase price² or, if higher, on the fair market value of the shares that are disposed of.

The disposal of shares of companies incorporated outside of France is not subject to transfer tax in France, unless the transfer is materialized in a written agreement executed in France.

¹ Property value recorded in the registers of the relevant municipality (generally far below market value).

² An allowance equal to €23,000, multiplied by the percentage of shares purchased, is available.



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2.2 Tax Consolidation

The tax consolidation regime allows French companies to form a tax group with their French subsidiaries, whereby (i) the profits and losses realized by the companies included in the tax consolidated group are consolidated for corporate income tax purposes, (ii) intra-group distributions, transactions, waivers of debt or subsidies are neutralized for the computation of the tax consolidated basis, and (iii) the parent of the tax consolidated group is solely liable for the corporate income tax due by the group.

The material conditions to form, or join, a tax consolidated group, can be summarized as follows:

- The parent of the group must be subject to corporate income tax in France and its share capital must not be owned, at 95% or more, by another company subject to corporate income tax in France,
- The subsidiaries must be subject to corporate income tax in France and their share capital must be owned, at 95% at least, directly or indirectly, by the parent company of the group, and
- The fiscal years of the parent company of the group and its subsidiaries must coincide and last, in principle, 12 months.

From a formal standpoint, the parent company of the tax group must file an election letter with the competent tax authorities, and the subsidiaries must formalize their agreement in a written document that is attached to the election letter and filed by the subsidiaries with the competent tax authorities.

If the conditions to benefit from the tax consolidation regime are no longer met, the regime ceases to apply. The termination of a tax consolidated group, or the exit of a member from the group, generally takes place as of the opening date of the fiscal year during which the event triggering the exit occurs, unless the exit is due to the acquisition or the merger of the parent company of the tax consolidated group, in which case the acquiring or the merging company can elect to form a new group with the members of the existing group. The termination of the group or the exit of a member however give rise to the taxation of transactions and subsidies previously neutralized for the computation of the tax consolidated basis.

In addition, as from fiscal years closed on or after December 31, 2014, the French tax consolidation regime also allows French sister companies whose direct or indirect parent company is established in an EU Member State, in Norway, in Iceland or in Liechtenstein, to form a horizontal tax consolidated group between them and their direct and indirect French subsidiaries.

2.3 Deductibility of Interest Expenses

2.3.1 Thin Capitalization Rules

The tax deductibility of interest expenses is subject to French thin capitalization rules which provide for (i) an interest rate limitation (“**Interest Rate Limitation**”), and (ii) a thin capitalization limitation (“**Thin Capitalization Limitation**”).

The Interest Rate Limitation applies to interest incurred on loans granted by direct shareholders and related parties¹. Such interest is only deductible within the limit of a maximum interest rate, which is based on the average effective floating rate on bank loans with a minimum maturity of two years².

¹ Two companies are viewed as related parties where (i) one of them holds directly or indirectly at least 50% of the share capital of the other, or exercises control over the other, or (ii) they are 50% held directly or indirectly, or controlled, by a third company.

² In respect of fiscal years ending on December 31, 2014, the maximum interest rate was 2.79%.

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If the loan is granted by a related party, the borrower can however demonstrate that the market rate is higher, in which case the interest can be deducted based on such higher rate. Interest paid to a related company exceeding this Interest Rate Limitation is not deductible and is characterized as a deemed distribution and subject, as the case may be, to the French withholding tax on dividends.

The Thin Capitalization Limitation is applicable to the portion of interest incurred on loans from related parties that is deductible under the Interest Rate Limitation. Such interest exceeding simultaneously the following three thin capitalization caps cannot be deducted with respect to a given fiscal year:

- The amount of interest deductible in application of the Interest Rate Limitation multiplied by the ratio between (i) 1.5 times the borrower's net equity (as at the opening or the closing of a fiscal year), and (ii) the average amount of loans from related entities,
- 25% of the borrower's before tax operating profits, increased by the amount of interest deductible pursuant to the Interest Rate Limitation, depreciation and some portion of finance lease payments, and
- The amount of interest received by the borrower from related entities.

By exception, the Thin Capitalization Limitation does not apply, *inter alia*, where (i) the amount of non-deductible interest in application of the Thin Capitalization Limitation does not exceed €150,000, or (ii) the global indebtedness of the borrowing company is lower than the global indebtedness of the group of companies to which it belongs.

The scope of the Thin Capitalization Limitation is extended to third-party financings secured by guarantees granted by a related party. Third-party financings guaranteed by another third-party are also within the scope of the Thin Capitalization Limitation if that third-party's guarantee is itself guaranteed by an entity related to the borrower, subject to certain exceptions. Such loans are now treated as if they were granted by a related party for thin capitalization purposes.

2.3.2 Other Limitations

The French tax system also provides for certain anti-abuse rules the purpose of which is to limit the deductibility of interest expenses incurred by French companies in certain circumstances.

• The "Amendement Carrez" rule

This rule aims at preventing non-French acquirers from interposing a French acquisition vehicle to acquire a target and raising debt in France to finance the acquisition in order to deduct interest expenses in France where the target is not effectively managed from France.

Pursuant to these provisions, the tax deductibility of financial expenses incurred by a French company upon the acquisition of a shareholding qualifying for the participation-exemption regime is subject to the condition that the French company is able to demonstrate that, in respect of the fiscal years covered by the 12-month period following the relevant acquisition date, (i) the decisions relating to the shareholding are effectively made in France, and (ii) the control or influence over the target company is effectively exercised in France.



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If the French company fails to bring this evidence, a portion of the financial expenses incurred on the acquisition of the shareholding would be added back to its taxable income during an eight-year period, starting from the fiscal year beginning after the acquisition. The portion of non-deductible financial expenses is determined by applying to the expenses the ratio between the acquisition price of the shares and the average annual amount of the acquiring company's debt.

This tax deduction limitation would however not apply where (i) the aggregate value of the acquired shareholding is lower than €1 million, (ii) the acquisition is not financed with debt incurred by the acquiring company or by a related French company, or (iii) the global indebtedness of the acquiring company is lower than the global indebtedness of the group of companies to which it belongs.

- *The “Amendement Charasse” rule*

This rule aims at preventing the deduction of financial expenses incurred in connection with self-acquisitions.

These provisions limit the tax deductibility of interest incurred within a tax consolidated group where (i) a French company, member of a group, acquires the shares of a French target, either from persons controlling, directly or indirectly, the acquirer, or from companies that are controlled, directly or indirectly, by such persons, and (ii) the target joins the tax consolidated group within a nine-year period following its acquisition by the acquirer. Where applicable, a portion of the financial expenses incurred by the group must be added back to the taxable income of the group, during each fiscal year until the end of the eighth fiscal year following that of the acquisition of the target. The portion of non-deductible financial expenses is determined by applying to the financial expenses the ratio between the acquisition price of the shares and the average annual amount of the acquiring company's debt.

- *The “anti-abuse” provision introduced by the Finance Act for 2014*

This rule aims at preventing international corporate groups or investment funds from using hybrid instruments or hybrid entities.

As from fiscal years closed on or after 25 September 2013, the tax deductibility of interest incurred by French companies on loans granted by French or non-French related party creditors requires the taxpayer to demonstrate, upon request of the French tax authorities, that the related party creditor is subject in its jurisdiction, in respect of that interest, to an income tax that is at least equal to 25% of the income tax that would be computed pursuant to French standard income tax rules (“**Minimum Income Tax Requirement**”).

Where the creditor is a non-French entity, the corporate income tax computed pursuant to French standard rules is the income tax it would have been liable for in respect of the interest had it been established in France. If the creditor is a tax transparent partnership or an investment fund, the Minimum Income Tax Requirement is assessed, subject to certain conditions, at the level of the shareholders which are related to the partnership or to the investment fund, if any.

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2.3.3 General Cap

Financial expenses incurred by companies whose net financial expenses, as booked in their account, exceed €3 million in respect of a relevant financial year are subject to a general cap equal to 75% of the company's net financial expenses (*i.e.* 25% of the net financial expenses will be added back to the taxable income)¹. Dividends, commercial discount notes, capital gains, foreign exchange gains, and penalties for late payment are not taken into account for the computation of the net financial expenses.

3. DISPOSING SHARES IN A FRENCH COMPANY

Capital gains realized by a French company on the disposal of shares of a French company (other than a real estate company) are taxed as described in Section 1.

Capital gains realized by a non-French resident on the disposal of shares of a French company (other than a real estate company) are generally not subject to withholding tax in France, unless the seller is domiciled or formed in a non-cooperative State or territory (see Section 4.2). By exception, and subject to the application of double tax treaty provisions, gains made by a non-French resident on the disposal of shares in a French company are subject to a 45% withholding tax if the seller holds (or has held at any moment during the five-year preceding the sale) more than 25% of the financial rights of that company.

4. FRENCH SPECIFIC ANTI-EVASION RULES

4.1 Controlled Foreign Corporation Rules (“CFC Rules”)

As an exception to the territoriality principles mentioned in Section 1.1, in certain circumstances, the scope of French corporate income tax can be extended to certain net income or gains generated through entities (or permanent establishments) located in low tax jurisdictions.

Pursuant to French CFC Rules, if an entity established in a low tax jurisdiction is controlled by a parent company subject to corporate income tax in France, the net income made by such controlled foreign entity (“**CFC Entity**”) must be included in the French parent company's tax base, either as business profit or as a distribution without benefiting from the participation-exemption regime.

French CFC Rules apply if the following conditions are met:

- The CFC Entity is liable to an amount of taxes in its jurisdiction that is inferior to 50% of the amount of taxes that it would have paid had it been established in France, and
- The French parent company holds, directly or indirectly, more than 50% of the entity's share capital (or only 5% if more than 50% of the CFC Entity is held (i) by companies established in France or, (ii) by companies controlling or controlled by companies established in France.

¹ The net financial expenses to which the 75% cap applies are equal to the positive difference between (i) financial expenses incurred in connection with loans made available to the company, that are deductible pursuant to the other limitations mentioned above, increased by a portion of rentals paid by the company under leasing contracts (or assimilated), and (ii) financial income received in connection with loans granted by the company, increased by a portion of rentals received under leasing contracts (or assimilated).



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Safe harbor provisions allow parent companies of CFC Entities located in the EU to remain out of the scope of the French CFC Rules, to the extent the structure does not constitute an artificial arrangement to avoid or reduce French taxes. Where the CFC Entity is located outside the EU, the French parent company must demonstrate that the industrial or commercial business of the CFC Entity is real and mainly carried on with non-affiliated companies, in its jurisdiction.

Similar provisions exist for French resident individuals investing in entities located in low tax jurisdictions.

4.2 Specific Rules Applicable to Non Cooperative States and Territories (“NCSTs”)

A NCST is a jurisdiction that is not an EU Member State and has not concluded with France, or with at least 12 other States as of January 1, 2010, a treaty that includes an administrative assistance provision regarding tax matters. Furthermore, a jurisdiction with which France has signed such a treaty may become an NCST if the treaty is not ratified, or if the administrative assistance provision is not effectively applied by the other contracting jurisdiction. The French government publishes the list of NCSTs on an annual basis. The 2015 list includes Botswana, Brunei, Guatemala, Marshall Islands, Montserrat, Nauru, Niue and the British Virgin Islands.

The French tax rules regarding NCSTs are designed to discourage taxpayers from doing transactions with those jurisdictions, by, inter alia, drastically increasing taxation on payments made directly in an NCST (*i.e.* to a bank account opened in an NCST or, if the payment is not made through a wire transfer, to a person or entity whose domicile or main office is located in an NCST) and on investments made, directly or indirectly, in an NCST.

The main adverse tax consequences deriving from the qualification as NCST are described below.

4.2.1 Payments to NCSTs or to NCST Residents

The withholding tax rates applicable to interest, dividends, royalties derived, and capital gains realized, by a non-French-resident taxpayer are increased to 75% (as opposed to the standard domestic rates mentioned in Sections 1.3 and 3) where the payment is made directly to an NCST, or, with respect to capital gains, where the seller is a person or entity that is domiciled or formed in an NCST. As regards interest payments and service fees, the 75% withholding tax rate does not apply in specific circumstances (*e.g.* to listed debt instruments), or if the French-resident debtor is in a position to demonstrate that the main purpose and effect of the transaction is not to locate income in the relevant NCST, which in practice may prove difficult.

In addition to the above, interest payments and service fees paid, or due, by a French-resident person or entity to a person or entity domiciled or formed in an NCST are not deductible for French tax purposes, unless the French-resident debtor demonstrates that the main purpose and effect of the transaction is not to locate income in the relevant NCST.

4.2.2 Investments in an NCST

The French participation-exemption regime applicable to dividends and the favorable taxation regime applicable to long-term capital gains derived by a French resident company in respect of a qualifying participation (exemption up to 95% as regards dividends, and up to 88% as regards capital gains – please refer to Section 1.2) does not apply where the relevant participation is held in a company that is domiciled or formed in an NCST.

Foreign investment in France Tax



5. FRENCH SPECIFIC TRANSFER PRICING RULES

Since 2010, French companies that have an annual turnover or gross asset value exceeding €400 million, are related to a French or foreign entity exceeding one of these thresholds or are part of a French tax consolidated group that includes a company exceeding one of these thresholds, are required to prepare a full transfer pricing documentation package to be made available to the French tax authorities during a tax audit.

Pursuant to the Anti-Tax Evasion Act and the Finance Act 2014, these companies are required to file simplified transfer pricing documentation annually, within the six-month period following the deadline for filing corporate income tax returns.

Failure to provide a complete transfer pricing documentation is subject to a minimal penalty of €10,000. This penalty may however reach, depending on the seriousness of the failure, the higher of:

- 0.5% of the amount of the transactions that are not sufficiently documented, or
- 5% of the net income transferred abroad and related to transactions that are not sufficiently documented.

Those companies are also required to make available to the French tax authorities, during a tax audit, their cost accounting statements¹ and consolidated accounting statements (as appropriate), as well as the tax rulings granted to their non-French affiliates (as appropriate).

In addition, all French companies whose accounts are maintained in computerized format are required to provide to the French tax authorities soft copies of electronic financial statements complying with specific format requirements set by the French tax authorities.

¹ This requirement also applies to (i) companies with an annual turnover higher than €76.2 million, or €152.4 million if their main activity is the sale of goods, other items, supplies of food to be taken out or consumed on the premises, or the rental of residential premises; (ii) companies that hold, or are held by a company satisfying any of the above criteria; and (iii) companies that are part of a French tax consolidated group that includes at least one company satisfying one of the above criteria.



Foreign investment in France Labor & Employment

French Labor & Employment Law only applies to ‘salaried employees’ (“*salariés*”) and not to ‘independent contractors’ (“*travailleurs indépendants*”) such as freelance consultants.

The distinguishing element between a salaried employee and an independent contractor is the existence of ‘a link of subordination’ or ‘a bond of obedience’ between the contracting parties. If such a link exists, then the parties are deemed ‘employer’ and ‘employee’.

1. HIRING IN FRANCE - TYPES OF EMPLOYMENT CONTRACTS

Under French Labor & Employment Law, an employer can hire an employee either under an indefinite-term employment contract (“*contrat à durée indéterminée*” or “*CDI*”) or under a fixed-term employment contract (“*contrat à durée déterminée*” or “*CDD*”).

Provided they comply with the French Labor Code and any applicable industry-wide collective bargaining agreement (“*CBA*”) and / or company-wide labor agreements, the parties are free to negotiate the terms and conditions of their relationship (job description, salary, bonus, work location, mobility, working hours, non-compete, non-solicitation, confidentiality, etc). An employer cannot, without the employee’s prior written consent, modify the essential elements of the employment contract (such as the salary or the working time duration).

An employee cannot be hired under a *CDD* for a limited number of reasons such as the need to replace a temporarily absent employee, increase staff during exceptionally busy seasons, keep up with an increase in business, carry out the duties of an employee who is about to join the company, etc. A *CDD* cannot be entered into in order to replace an employee on strike or to perform dangerous activities.

The maximum duration for a *CDD* is typically 18 months, renewals included. However, some specific cases permit only a month duration *CDD*, and some others allow its extension up to 24 months.

Employers who do not comply with these rules may be subject to civil, financial and criminal sanctions (including the recharacterization of the *CDD* into a *CDI*, the payment of damages, and a fine).

2. COLLECTIVE BARGAINING AGREEMENT (“CBA”)

CBA is an agreement signed between employers’ organizations and employees’ trade unions for a certain industry. Such a CBA contains rules that are often more favorable to employees than the law (for instance, higher severance pay, additional illness allowances, “holiday bonus”, etc.).

The CBA applicable to a company is determined in function of its main activity. Once the main activity of a company is covered by the scope of application of a CBA, the latter automatically, compulsorily and immediately applies to the company.

Foreign investment in France

Labor & Employment



3. WORKING TIME

The general principle is that any hour worked in excess of the amount of 35 hours per week per employee is considered overtime. However, it is only hours worked at the request of the superior of an employee, or with his explicit or tacit consent, that will be regarded as overtime. This figure of 35 hours per week is not an absolute maximum, but only a threshold beyond which certain conditions will apply. The first condition is that any hour worked on top of the 35 per week limit (extra hour) should be either compensated with compensatory rest or paid with an increase at the following rates:

- 36 to 43 hours: 25%,
- 44 hours: 50%.

Besides the 35 hours per week limit, the daily working hours may not exceed 10 hours (breaks excluded), and despite being 44 hours the limit amount an employee may work during one week, the weekly number of working hours, calculated by taking an average of 12 consecutive weeks, must not exceed 44 hours. Employers who breach the working time provisions may be subject to criminal sanctions. Last but not least, regarding the annual limit of extra hours, the general principle established in the French Labor Code is that each worker cannot work more than 220 extra hours per year. Any extra hours on top of that 220 hours limit, apart from being paid with the corresponding increase, should be compensated with compensatory rest. This rest is due on top of the payment already mentioned above.

Certain managers who are largely autonomous in the organization of their working time are exempt from overtime restrictions. The employee is paid a lump-sum remuneration for a fixed number of working days per year. In the context of such a working time arrangement, the autonomous executive works during the year a fixed number of days, regardless the completed number of hours, in the limit of compliance with daily and weekly rest. The maximum limit is set at 235 days but the usual number of working days under French law is 218.

4. REMUNERATION

There are minimum salary requirements under French law. The Statutory Minimum Wage law (“SMIC”), updated in January 2015, sets the minimum hourly rate at €9.61 gross, and the monthly rate at €1,457.52 gross for a 35-hour work week. Other benefits or agreements may be included, including adjustments for increases in profit, or other economic or financial considerations.

5. SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS

Both the employer and employee make automatic contributions to the French social security and pension schemes. The employer typically remits 40-50% of the gross remuneration, while the employee contributes 20-22%. The employee's portion is deducted directly from the paycheck at the end of each month or fortnight. Employees must declare and pay their own income tax.



Foreign investment in France Labor & Employment

Expatriates working in France are typically subject to the same rights and obligations as French employees regarding social security and tax payments. However, in cases where France has signed a “social security” agreement with another country, it is possible that the expatriate may be exempted from paying into the French system and could instead remain under her / his own country’s system. Under certain conditions, if the expatriate employee is to work in France for only a short timeframe and remains under contract with her / his home country, that employee can maintain her / his existing social security and pension plans with her / his home country.

Lastly, it is important to note that there is no need to set up a business in France to hire an employee. The foreign employer need only register with French labor authorities for social security contribution purposes.

6. EMPLOYMENT REPRESENTATION

For companies with over 11 employees, employee / personnel delegates must be elected to provide representation for the employees at the decision-making level. Their mission is to present to the company’s management all individual or collective claims related to the employees and their social protection. In companies with less than 200 employees, they may constitute the employee / personnel delegation at the company’s committee.

For companies with 50 or more employees, a works council must be elected to represent the employees’ interests. Works council are in particular informed prior to any business deals; in other words, anytime a merger or acquisition is proposed, the works council must be consulted. Most investments in France typically arise out of the acquisition of a French company or of part of another French company. It is, therefore, essential for investors to be mindful of French statutes regarding work councils, employee benefits including social security and healthcare. Lastly, works council needs also to be consulted in case a collective dismissal is intended, or in case on company’s closure.

Finally, law also permits to designate one union representative in companies with at least 50 employees. They represent the union by which they were designated to negotiate company or plant agreement.

7. DISMISSING AN EMPLOYEE, OR EMPLOYEES

Dismissal is for the employer the common way of terminating a *CDI*. However, as France is not an at-will employment country, layoffs must have genuine, serious reasons, or, at least, business and economic reasons. Permitted reasons for dismissal include the needs for a company to (i) adjust because of financial problems, (ii) adapt to technological change, (iii) restructure to maintain competitiveness, and (iv) close the business or part of the business to adapt to a changing business environment. An employee may be dismissed for breach of contract or for misconduct, though such a dismissal must include a process providing the employee an opportunity to present her / his defense during an official meeting held prior to any termination decision can be made by the employer. The employer must also comply with the relevant notice period for termination. Depending on the seriousness of the conduct, employees may or may not be entitled to severance pay.

Mass layoffs involving the dismissal of 10 or more employees during a 30-day period, in companies of more than 50 employees, require to consult with the works council prior to any termination decision is made by the employer. A job preservation plan (“*plan de sauvegarde de l’emploi*”) must be presented in order to minimize job losses and maximize the redeployment opportunities for the soon-to-be laid-off employees.

Foreign investment in France

Labor & Employment



The job preservation plan must also discuss the severance pay's financial terms. The statute of limitations for appealing collective dismissals is two years from the date of the notice of dismissal.

A new employment law was recently adopted and now provides more clarity on the timing of the information and consultation procedure of the works council. The new legislation provides for maximum time limits of anywhere from two to four months depending on the number of employees concerned by the dismissals.

The employers may now either negotiate directly with the trade unions or unilaterally implement a social plan, which will still need to be submitted to the works council for consultation. Under both methods, the plan will still need to be submitted to the labor authorities as a final step in the process - the approval process in cases where the agreement was negotiated with the trade unions takes up to 15 days, and the process for cases where the agreement was implemented unilaterally takes up to 21 days.

This new legislation also requires the company contemplating closing a French business to first attempt to find a purchaser.

8. AMICABLE TERMINATION

French law has also recognized a termination by mutual consent ("*rupture conventionnelle*"). The mutual consent procedure allows for an amicable termination, giving the employee the right to collect unemployment benefits as if she / he were dismissed and allowing the employee to receive severance pay. However, French law limits the employee's, or former employee's ability to later file suit against her / his former employer. The statute of limitations for a wrongful termination suit after a mutual consent separation is 12 months, and, even so, the only argument available to an appellant is "lack of consent" to the mutual consent agreement, an argument which can be difficult to prove.



Foreign investment in France Competition

France has a longstanding business-friendly heritage. At the same time, consumer welfare is integral to France's economic policy. Accordingly, both these aspects are reflected in French competition law, which has played an important role in the development of the internal market in the EU.

French competition law applies equally to all companies operating in France. In particular, the detailed rules and guidance it provides are helpful to companies wishing to enter the French market.

Companies, and in some circumstances private individuals, who infringe competition law can face sanctions. The rules are enforced by the French Competition Authority ("**FCA**") and, in limited cases, by commercial courts, whose decisions may be appealed to French judicial or administrative courts.

Effective competition in the French market is maintained through merger control rules. The FCA and the French courts, through their application of antitrust regulations, sanction anti-competitive agreements or unfair conduct by companies toward other companies or consumers, particularly by companies holding a dominant position.

1. MERGER CONTROL

Mergers may be subject to either EU or French merger control rules. In the former scenario, if EU notification thresholds provided below are met, then companies have the "one-stop-shop" benefit of notifying only the European Commission ("**Commission**"), and not any competent EU Member State. In the latter scenario, if French notification thresholds provided below are met, then companies must comply with French notification requirements. If the merger meets notification thresholds of other EU Member States, then companies must also comply with those other Member States' notification requirements. Whichever scenario applies, the same merger may also require notification to one or several competition authorities outside the EU.

Notification under French and EU merger control rules is mandatory and must be completed before the closing and implementation of any transaction that is reportable as provided below.

1.1 Notification Criteria

Transactions that must be reported to either the FCA or the Commission are the following:

- Considered to be a concentration within the meaning of competition law, *i.e.* a transaction involving a change in the nature of control of the target company, and
- Which meet relevant turnover thresholds.

"Concentration" is a broad concept within the meaning of EU and French law. Besides ordinary mergers and joint ventures, acquisitions of direct or indirect control over a company are also considered a "concentration". Control is defined as the possibility to exercise decisive influence over a company, taking into account both legal (including shares and voting rights) and factual elements.

A careful assessment of whether a concentration requires notification is essential before it is implemented. Serious sanctions can be imposed for implementing a reportable concentration without prior notification or before clearance has been given by the competent competition authority (*i.e.* up to 5% of the pre-tax turnover achieved in France at the French level and up to 10% of the aggregate pre-tax turnover worldwide at the EU level). For purposes of assessing a notification requirement, turnover figures are crucial. They are calculated according to very precise rules:

Foreign investment in France Competition



French and EU thresholds for merger control

France	EU (“EU dimension”)
<ul style="list-style-type: none"> - The combined pre-tax turnover worldwide of all companies or groups of individuals or of legal persons who are parties to the concentration is more than €150 million, - The total pre-tax turnover generated in France by at least two of the companies or groups of individuals or of legal persons who are parties to the concentration is more than €50 million, and - No “EU dimension”. <p>Note: There are specific and lower thresholds for concentrations in the retail sector and French overseas territories.</p>	<ul style="list-style-type: none"> - The combined aggregate worldwide pre-tax turnover of all the parties to the concentration is more than €5 billion, - The aggregate EU-wide turnover of each of at least two of the parties to the concentration is more than €250 million, and - Each of the parties to the concentration does not achieve more than two-thirds of its aggregate pre-tax EU-wide turnover within one and the same EU Member State. <p>OR</p> <ul style="list-style-type: none"> - The combined aggregate worldwide turnover of all the parties to the concentration is more than €2.5 billion, - In each of at least three EU Member States, the combined aggregate pre-tax turnover of all the parties to the concentration is more than €100 million, - In each of at least three EU Member States included for the purposes of above, the aggregate pre-tax turnover of each of at least two of the parties to the concentration is more than €25 million, and - The aggregate pre-tax EU-wide turnover of each of at least two of the parties to the concentration concerned is more than €100 million, unless each of the parties achieves more than two-thirds of its aggregate pre-tax EU-wide turnover within one and the same EU Member State.

Note: There are several referral mechanisms according to which a concentration which is reportable to the FCA or the Commission can be, in fine, reviewed by the other authority.

Note: Most EU Member States have their own set thresholds. These are generally based on turnover and / or market share. McDermott Will & Emery various offices in Europe can assist in assessing whether a concentration requires notification in one or several EU Member States.



Foreign investment in France Competition

1.2 Procedure of control

In the absence of an extension (e.g. to negotiate commitments or “stop the clock”), the FCA or the Commission must issue a decision within 25 business days of receipt of a complete notification either to:

- Authorize the concentration, with or without commitments (Phase I), or
- Open an in-depth investigation (Phase II).

From the opening of Phase II, and in the absence of an extension (e.g. to negotiate commitments or “stop the clock”), the FCA or the Commission must issue a decision within 65 business days in France and 90 business days in the EU.

Experience shows that transactions which do not raise any competition concerns, including those involving investment funds, can be cleared before the end of the 25 business day deadline. Furthermore, both the FCA and the Commission generally favor the granting of conditional authorizations at the end of Phase I rather than pursuing in-depth investigations (Phase II).

When carrying out an in-depth investigation, the test applied by the FCA and the Commission to assess the effects of the concentration under review on competition is similar and basically aims at examining whether such concentration may significantly impede competition, notably through the creation or strengthening of a dominant position.

The analysis of the effects carried out by the FCA and the Commission takes into account a number of factors that may offset the anticompetitive effects which have been identified, such as any substantiated efficiency gains brought by the concentration.

If serious anti-competitive effects are identified and cannot be sufficiently offset by its positive effects, the contemplated concentration will be either prohibited or authorized subject to commitments to restore competition.

2. ANTITRUST LAW

Both French and EU law prohibit cartels and other anticompetitive agreements/concerted practices, as well as abuses of a dominant position. French law also specifically prohibits abuses of a state of economic dependency and certain other types of unilateral restrictive practices, even if implemented by a company that is not in a dominant position (*i.e.* where it does not have significant market power).

Companies that infringe the competition rules are subject to fines of up to 10% of aggregate worldwide pre-tax turnover by the FCA or by the Commission. Moreover, under French law, in limited circumstances, individuals may also be criminally prosecuted (although not apply in practice).

2.1 Cartels

Recently, the FCA ruled on two major cartel cases. The first one involved concerted practices between major manufacturers of home and personal care products (including Colgate-Palmolive, Henkel, Reckitt Benckiser, Unilever, Procter & Gamble, Johnson & Johnson, and L'Oréal) which were fined in December 2014, a total amount of €345 million (cartel in home care products) and €605 million (cartel in personal care products) for coordinating their commercial policy towards supermarkets, and in particular their price increases. SC Johnson (for the cartel in home care products), and Colgate-Palmolive (for the cartel in personal care products) were immune from the fines as they were the first to reveal the existence of the two distinct cartels to the FCA. Similarly to other cartelists, they also benefitted from reductions of fine as part of the French settlement procedure.

Foreign investment in France

Competition



In the second case, in December 2012, the FCA fined two leading French cellular phone companies, Orange, together with its parent company France Télécom, and SFR, with respective fines of €117.4 million and €65.7 million for hindering market competition by limiting the choice of mobile service providers, especially to the detriment of the newest entrant into the market, Bouygues Télécom, who lodged the initial complaint.

At the EU level, two EU companies (SKF and Schaeffler) and four Japanese companies (JTEKT, NSK, NFC, and NTN together with its French subsidiary NTN-SNR) were fined by the Commission in March 2014 for price fixing, collusion in requests for quotation and for annual price reductions from customers and for exchange of commercially sensitive information, including €315 million for SKF, €370 million for Schaeffler and €201 million for NTN (total fine imposed on all cartel participants amounted to €953 million).

In another case, in December 2013, the Commission heavily fined eight international financial institutions, including Deutsche Bank (€725.8 million), Société Générale (€445.9 million), Royal Bank of Scotland (€391.1 million), JP Morgan (€80 million), and Citigroup (€70 million), for having participated in illegal cartels relating to interest rate derivatives, *i.e.* Libor and Euribor. The total amount of the fines was higher than €1.7 billion.

2.2 Abuses of dominant position

As to cases relating to abuses of dominant position, the fines imposed by the FCA on SNCF (a French railway company) for an abuse of its dominant position in rail freight transport amounted to €60.9 million in 2012. In June 2014, the FCA fined SRR, jointly and severally with its parent company, SFR (French cellular phone companies) for a total amount of €46 million for an abuse of dominant position in the mobile telephony sector.

At the EU level, in 2009, Intel was fined over €1 billion by the Commission for having abused its dominant position by tying in conditional rebates and payments with its products to prevent sales of specific rival products. Many cases relating to abusive conduct in the past years were settled by commitments on the part of the dominant undertaking.

Where a company has taken part in an anticompetitive practice (which may come to light in the course of due diligence before the acquisition of such company), it may apply for leniency by reporting the infringement to the FCA or to the Commission in order to obtain full or partial immunity from fines. Among other conditions, leniency requires that the company put an immediate end to its involvement in the anticompetitive practice(s) concerned, and to genuinely and fully cooperate with the FCA or the Commission. Full immunity can only be obtained by the first company that applies for leniency. If the company is not the first to apply for leniency, a reduction in fine will primarily depend on its place in the queue of companies that apply for leniency and the added value of the information provided by the applicant. A reduction can reach up to 50% of the fine that would otherwise have been imposed.

For example, in the home and personal care products cartels mentioned above, SC Johnson and Colgate-Palmolive were the first companies to disclose the existence of the cartels (SC Johnson for the cartel in home care products and Colgate-Palmolive for the cartel in personal care products) and apply for leniency with the FCA, thereby benefiting from a complete exemption of a fine that would otherwise have reached up to €51 million and €84 million. As for the cartels in the interest rate derivatives industry mentioned above, Barclays and UBS benefited from full immunity, thereby avoiding a fine of around €690 million and €2.5 billion respectively for their participation in the infringements established by the Commission.



Foreign investment in France Competition

Where an investigation has already been initiated by the FCA or the Commission against a company, leniency may still be possible. Several other options are also available to such a company:

- Defend itself and challenge any objections raised by the FCA or the Commission,
- Enter into the settlement procedure (*i.e.* not challenge the objections) and obtain a fine reduction ranging from 10% to 25% (if commitments are offered) in France and 10% in the EU, or
- Propose commitments to the FCA or the Commission to put an end to the anticompetitive practice(s) concerned. This is only possible, in practice, for unilateral or vertical practices. This solution has the advantage of greatly speeding up the resolution of cases because otherwise the average timeframe to obtain a final decision can take up to three to six years.

Foreign investment in France

Intellectual Property



French law provides protection for industrial property rights (*i.e.* patents, trademarks, and industrial designs) as well as literary and artistic property rights (*i.e.* copyrights and related rights). Databases and software also benefit from copyright protection.

French law provides particularly strong protection for employees who are creators or inventors of protected works. Inventions by employees in the course of a job (including inventive tasks) or studies or research expressly requested by their employer belong to the employer but entitle the employees to additional remuneration. All other business-related inventions (*i.e.* outside the scope of normal duties but performed during the performance of their functions, within the field of activity of the company, or as a result of knowledge or use of technologies or specific means of the company) belong to the employees. However, the employer can obtain the assignment of the ownership or a license of all or part of the invention in its favor by paying the employee “fair compensation”. Inventions which do not fall in to either of the previous two categories belong to the employees, who are free to assign or grant a license of the invention to the company (or to a third party) on a freely negotiated basis.

In France, legal advisers who specialize in Intellectual Property (“IP”) (“*conseils en propriété intellectuelle*”) are recognized as a separate legal profession. Like lawyers admitted to the bar, such counsel are entitled to advise clients with respect to IP matters (including the filing of applications for registration, the negotiation of contracts, the provision of legal opinions and the defense of IP rights before the French or international IP authorities), with the important exception, however, of the representation of clients before French or international courts which is reserved to bar-qualified lawyers.

1. PATENTS

1.1 Protected Inventions

Under the French Intellectual Property Code (“IPC”), inventions must meet the following requirements in order to be patentable:

- Novelty (not yet disclosed to the public),
- Inventive step (non-obviousness, compared to the current state-of-the-art), and
- Capable of industrial application (utility).

Under French law, patent protection is granted on a first-to-file basis, rather than a first-to-invent basis.

Certain categories of products are never patentable, regardless of whether they meet patentability requirements. These include, but not exclusively, computer programs, the human body (including the sequencing of genes), processes that cause undue animal suffering in relation to medical benefits, or inventions that are against public policy or morality.

1.2 Registration Procedure

Patent registration is made by submitting a detailed application to the French National Institute of Intellectual Property (“*Institut National de la Propriété Intellectuelle*” - “*INPI*”), including a very precise description of the invention and its possible uses.

After review and subject to approval of the application, the *INPI* registers the patent on the National Patents Registry (“*Registre National des Brevets*”) and grants the holder exclusive rights on the invention for 20 years.



Foreign investment in France Intellectual Property

Additional patents may subsequently be filed if the patent holder improves upon the invention, such as for agro-chemical and pharmaceutical products.

Patents may also be granted by the European Patent Office (“EPO”), which is located in Munich, Germany. Patent holders may initially file their applications with the EPO, which then forwards the applications to the 38 national offices of countries who are signatories to the European Patent Convention. Provided that national requirements are met, a national patent is granted in each jurisdiction where protection has been requested by the applicant for a non-renewable period of 20 years. Although patent applications can be processed through the EPO, there is not as yet any Community or pan-European patent. The EU adopted a Unitary Patent Package in 2012 which will substantially alter the application system and create a pan-European patent (the “Unitary EU Patent”), as well as a “Unified Patent Court”. The new patent court’s Central Division will have its main seat in Paris with subdivisions located in London for cases in the fields of life sciences, chemistry and human necessities, and in Munich for advanced engineering and resources efficiency. However, the entry into force of the Package is currently on hold for an indefinite period pending the resolution of legal challenges. If finally implemented, the Package would enable the resolution of disputes across Europe through a single court system and make it easier and significantly less expensive to obtain patent protection with unitary effect in most countries of the EU.

In the event of assignment or granting of a license of a French patent, a copy of the relevant agreement must be filed with the *INPI* in order for the modification of the rights to become enforceable against third parties.

Compulsory licenses on patented inventions may be granted to third parties in the event of absence of use by the patent holder, or in some instances for public policy reasons.

In parallel, inventions may benefit from the lighter protection offered under the system of the *Soleau envelope*. *Soleau envelopes* are sealed and dated envelopes containing a description of an invention, an identical copy of which remains in the hands of the inventor. They are used to establish that the inventors had knowledge of an invention or idea prior to a patent application; however, they do not grant the inventors any exclusive rights on the invention but only a right of use. Therefore, when seeking for exclusive protection of their invention, it is recommended that inventors file patent applications.

2. TRADEMARKS

2.1 Protected Marks

The IPC provides that marks that can be represented graphically – words, names, letters, numbers, sentences, pictures, labels, 3D designs, sounds and musical phrases – may be registered and protected as trademarks, provided that such marks are:

- Available (*i.e.* not already covered by another protection for identical categories of goods and services or used by a third party in relation to identical or similar goods or services), and
- Distinctive (*i.e.* capable of distinguishing the goods and services of one party from those of another).

2.2 Registration Procedure

Trademark protection is granted solely through registration, on a first-to-file basis. Actual use of an unregistered trademark does not, in principle, establish any rights for its owner, with the exception of well-known trademarks (“*marques notoires*”) and only for similar products or services.

Foreign investment in France

Intellectual Property



The *INPI* is responsible for the registration of all trademarks upon review of the distinctiveness of the trademark covered by the application. The *INPI* will not check the availability of the mark, leaving such verification to the sole responsibility of the trademark applicants. Previously registered trademarks and other useful information are accessible free of charge from the *INPI*'s website (www.inpi.fr).

If the registration of a trademark is not opposed by a third party within two months of the publication of the application in the Official Bulletin of Industrial Property, then applicants are granted exclusive rights on their registered trademarks for ten years. The trademarks may be renewed for unlimited renewal periods of ten years.

Filing of Community trademarks can be made with either the *INPI* or directly with the Office for Harmonization in the Internal Market (“**OHIM**”), located in Alicante, Spain. An applicant may also request the extension of French national trademark protection to be EU wide within six months of the initial application. Community trademarks are offered the same protection in each and every Member State of the EU for periods of ten years, which are also renewable for unlimited periods of ten years.

In the event of assignment or granting of a license of a French trademark, a copy of the relevant agreement must be filed with the *INPI* in order for the modification of the rights to become enforceable against third parties (a similar system applies to assignments and licenses on Community trademarks). However, non-registered licensees have been permitted to join infringement proceedings brought by trademark holders.

3. INDUSTRIAL DESIGNS

Designs (*i.e.* the original appearance, in whole or in part, of a product or its packaging resulting from, among others, contours, lines, shape, texture, colors or materials) are protected both pursuant to the following set of rules and under the protection applicable to copyrights as set out in Section 4.

3.1 Protected Designs

Industrial designs may be protected if the following requirements are satisfied:

- Novelty (*i.e.* no prior disclosure to the public), and
- Individuality (*i.e.* a different appearance, in whole or in part, from previously disclosed drawings and designs to informed observers).

3.2 Registration Procedure

Applications for registration of industrial designs are filed with the *INPI* which, upon approval, grants the holder exclusive rights on the design for renewable five year periods, up to a maximum of 25 years.

As with trademarks, designs can be protected within the EU by filing with the *INPI* or directly with the OHIM and are offered the same protection within each and every Member State of the EU, for renewable five year periods, up to a maximum of 25 years. An extension of the scope of a French design to the EU may also be requested within six months of the initial application.

As a result of the application of copyright protection to industrial designs, once the protection offered by their registration has come to an end, designs still continue to be protected by economic and moral rights inherent in copyrights as set out in Section 4.



Foreign investment in France Intellectual Property

4. COPYRIGHTS

4.1 Protected Works

Unlike patents and trademarks, copyrights do not need to be registered to be protected. The existence of the rights arises out of the creation of the work.

Protection is granted to any original work, *i.e.* a “work of the mind of its author”, for a period of 70 years following the author’s death, after which the work is no longer protected and enters the public domain.

Software, books, scientific writings, musical compositions, drawings, and pictures fall within this category and can be protected, provided that they are original and reflect a creative process.

Less extensive protection is also granted to holders of related rights (“*droits voisins*”), *i.e.* to persons other than the author of the creative work but who have participated in its implementation or distribution. The IPC grants such rights to performers, music producers, film producers, and broadcasting organizations.

4.2 Right Granted

Copyrights include both economic rights (“*droits patrimoniaux*”) and moral rights (“*droits moraux*”). Moral rights are specific to the protection granted by copyright under French law – their equivalent is not recognized under the copyright protection of common law jurisdictions.

Economic rights allow authors to prevent unauthorized reproduction, sale, distribution or performance, in whole or in part, of the protected work, except under limited circumstances (*e.g.* private performances, limited quotations of the work, press reviews, public speeches, and parodies).

Economic rights may be freely assigned by an author to third parties through a written agreement, which sets out the scope and nature of the rights granted, time period, geographic scope, and means of reproduction.

Moral rights include the right of an author to protect his / her name and the integrity of his / her creation, and the right to choose whether or not to disclose the work to the public. Such rights are exclusively attached to the author, are perpetual and may not be assigned. Their use, however, is transferred to the heirs upon the author’s death.

French law also recognizes the specificity of works which are created by several authors: the IPC distinguishes between collaborative works, collective works and composite works, in each case granting a different protection to the various authors depending on their involvement during the creation process.

Foreign investment in France

Intellectual Property



5. IP LITIGATION

The IPC recognizes the right of holders of a patent or trademark to initiate legal proceedings for infringement of their rights:

- Patent infringement - manufacturing and / or selling patented inventions, or facilitating the same by persons who are not entitled to do so.
- Trademark infringement - reproduction, imitation, use, association, removal or alteration of registered trademarks as well as causing confusion with a protected trademark in the eyes of the public.
- Copyright infringement – publication, reproduction, distribution, broadcasting, performance of any work protected by copyright without the authorization of the creator(s) or rightful owner of the copyright.

IP infringement proceedings and related unfair competition matters are within the exclusive jurisdictions of certain designated French High Courts (*"Tribunaux de Grande Instance"*, the Paris High Court for patent infringement, ten designated High Courts for trademark infringement).

Common remedies in infringement proceedings are the award of damages and fines and, in some circumstances, the withdrawal, destruction and / or prohibition to market infringing goods.

6. PERSONAL DATA PROTECTION

The processing of personal data, that is any information relating to an identifiable individual, is regulated and controlled by an independent administrative authority, the *"Commission nationale de l'informatique et des libertés"* (*"CNIL"*), through the enforcement of Law No. 78-17 of 6 January 1978, on data processing, data files and individual liberties.

Fraudulent, unfair or illegal processing of data as well as the use of personal data for other than justified purposes are punishable by five years of imprisonment and a fine of up to €300,000. Individuals whose personal data is collected must be informed extensively of their rights (such as the compulsory or optional nature of their responses, the consequences of failing to answer, the categories of individuals or organizations who could have knowledge of the data and the place where they can exercise their right of access and rectification or deletion). Failure to provide such information to the concerned individuals is punishable by a fine of up to €1,500.

Unless the processing of personal data is carried out for exclusively private activities, data controllers must either obtain the *CNIL's* prior authorization (e.g. when transferring data to certain countries), or file a prior notification with the *CNIL* (e.g. when processing human resources or customer data). However, certain limited types of data processing may be entirely exempt from any authorization or notification obligations (such as the collection and use of personal data for payroll processing or tax declarations, or the compilation and update of insider lists in listed companies for compliance with the Market Abuse European Directive¹).

¹ Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse).



Foreign investment in France Commercial Litigation / International Arbitration

1. COMMERCIAL LITIGATION

In general, litigating before French Courts is less expensive than in common law countries for the following main reasons:

- There is no pre-trial discovery since each party is only required to provide the supporting evidence it intends to rely upon to support its own claims or defenses. Parties may seek to obtain documents from the opposing party, but courts take a restrictive approach in analyzing such requests.
- As of today, class actions are not recognized under French Law, except in very limited circumstances involving consumer associations (Consumer Code, Article L. 422-1).

The Consumer Act of 17 March 2014 introduces a class action mechanism into French law. The scope of the Consumer Act is limited to group actions relating to consumers and competition law. In addition, consumers can only file their claims through consumer groups that are represented by government-approved associations. At present, only 16 associations will be entitled to represent consumers.

The Consumer Act provides for a time limit of five years for follow-on actions initiated before French civil courts, starting from a decision taken by the Commission, National Competition Authorities or national courts.

In addition to a classic opt-in procedure, the bill provides for a simplified procedure when the court is aware of the identity and the number of victims, and when victims have suffered damages of the same amount.

After having ruled on the liability of the professional(s), the court may impose on them the obligation to directly and individually compensate the victims within a specified timeframe and according to terms decided by the court. Prior to any compensation, however, victims who have been informed individually by the court must accept the compensation within the terms of the court's decision. This simplified procedure is therefore not an opt-out procedure but a specific and unique opt-in procedure.

The enforcement decree of the Consumer Act entered into force on 1 October, 2014, establishes detailed rules for the implementation of the Consumer Act. Several group actions have been initiated since 1 October 2014 but no judgment has been rendered yet.

The bill provides that, 30 months after the promulgation of the law, the French Government will draft a report on the enforcement of group actions that will consider, amongst other things, the extension of its scope to cover health and environment.

- Affidavits are not common forms of evidence and are not subject to cross-examination.

1.1 Statute of Limitations

The French law on the statute of limitations was reformed in 2008 (Civil Code, Articles 2219 et seq., revised by Law No. 2008-5561 of 17 June 17 2008) and came into effect on 19 June 2008. For general breach of contract and tort claims, the applicable statute of limitations is five years.

1.2 Jurisdiction

Commercial disputes are normally within the jurisdiction of the Commercial Courts ("*Tribunaux de commerce*"), unless such a specialized court does not exist in given administrative region, in which case they will be heard by General Trial Courts ("*Tribunaux de grande instance*").

Foreign investment in France

Commercial Litigation / International Arbitration



1.3 Commercial Court Structure

The judges of the Commercial Courts are often retired leaders of the business community who are elected by their peers for their business knowledge and experience, and typically do not have any formal legal training. The judges generally sit in panels of three, in which one of the judges is assigned as the reporting judge (“*juge rapporteur*”) for each case. Closing arguments usually take place before this *juge rapporteur* rather than the whole panel assigned to the case. However, all three judges are required to sign off on the final judgment.

1.4 Procedure

Parties may appear on their own behalf, but retain the right to be assisted or represented by counsel.

A plaintiff commences his action by obtaining a hearing date with the clerk (“*greffier*”) of the Commercial Court. This plaintiff then serves a summons and complaint (“*assignation*”) on the defendant at least 15 days prior to this hearing date. Once served, the *assignation* must be filed by the plaintiff with the Commercial Court at least eight days prior to the hearing date. Alternatively, the parties may agree to voluntarily appear before the Commercial Court, or file a joint petition with the *greffier*.

1.4.1 General Procedure

Although proceedings before the Commercial Court are oral, the parties usually exchange written pleadings in practice. If the matter is not ready to be ruled upon after the initial hearing, the Court will set subsequent hearings, usually every four to six weeks, or will entrust the *juge rapporteur* with the task of getting the matter ready for trial.

French procedural rules do not provide deadlines for the exchange of pleadings or supporting evidence, but deadlines are informally determined by the Court (or, if applicable, by the *juge rapporteur*) based on the principle that each party must be given an adequate right of reply.

The appointed *juge rapporteur* may order the parties to provide information deemed necessary for the resolution of the dispute or to produce relevant documents that would provide guidance to the Court. Should the parties fail to abide by such instructions, the *juge rapporteur* may turn the matter over to the three-judge panel to decide upon the party’s non-compliance.

The *juge rapporteur* will also enter on the record any settlement reached, even a partial one on specific issues, between the parties. He may also order, even *sua sponte*, any necessary investigative measures. If the parties do not object, the *juge rapporteur* may be the only judge on the panel to hear closing arguments. Otherwise, he will transfer the matter to the panel for final deliberation as soon as the pre-trial investigation is completed.

Proceedings on the merits before the Commercial Court generally last between 12 and 18 months.

1.4.2 Fast-Trak Procedure

For cases with an element of urgency, a fast-track procedure on the merits exists (“*procédure à bref délai*”), which can take from four to eight months. The presiding judge has discretionary authority to grant such requests if the party can demonstrate the necessity and urgency for accelerated proceedings. An order for a fast-track procedure cannot be appealed.



Foreign investment in France Commercial Litigation / International Arbitration

1.4.3 Interlocutory Motions

The presiding judge of the Commercial Court (“*juge des référés*”) may, within the limits of the jurisdiction of the Court, grant applications for urgent relief (“*référé en cas d’urgence*”) where the respondent does not contest the issues raised by the application, or the relief requested is justified by the existence of a dispute between the parties (usually to maintain the status quo). The *juge des référés* may also grant applications for protective or restorative orders (“*référé en cas de dommage imminent ou de trouble manifestement illicite*”) where such an order is necessary to prevent an imminent loss or is necessary to put an end to a manifestly illegal situation. And he may grant applications for payment of a sum of money (“*référé provision*”), or performance (“*référé injonction*”) where the respondent will be ordered to make an interim payment to the creditor / applicant or order the respondent to perform a specific obligation. Proceedings for interlocutory motions generally last between one and two months.

1.4.4 Ex Parte Motions

The presiding judge of the Commercial Court may, upon petition and within the limits of the jurisdiction of the court, grant *ex parte* motions required by the circumstances of the case without adversarial proceedings. Where such a motion is granted, the party against whom the order has been given may challenge it in an adversarial hearing before the presiding judge who rendered the *ex parte* order.

1.4.5 Confidentiality

In general, hearings before the Commercial Courts are open to the public, but the court has discretion to grant closed hearings where (i) the parties jointly request that the hearings be confidential, or (ii) publicity could breach a party’s right of privacy.

1.5 Remedies

Damages awarded by the Commercial Court are solely intended to compensate the actual loss actually suffered. Punitive damages do not exist under French Law.

Specific performance may be granted for breach of certain obligations, such as transferring a thing or paying a specific amount of money.

1.6 Appeal

1.6.1 Court of Appeal

Parties have the right to file an appeal with the Court of Appeal (“*Cour d’appel*”) against a judgment made by a Commercial Court, challenging both the Commercial Court’s findings of fact and law. Such an appeal amounts to a trial *de novo*, even permitting parties to produce new evidence. An appeal must be filed within one month of service of the judgment on the respondent. When the judgment is served outside France, the deadline is extended by two months.

Unless otherwise expressly provided for in the Court’s judgment, timely filing of an appeal will stay and / or suspend the execution of the judgment. The provisional enforcement of a decision may not be implemented without it being expressly provided for in the judgment, except those specific decisions that may be enforced provisionally as of right (e.g. interlocutory orders).

Proceedings before the *Cour d’appel* generally last between one and two years.

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1.6.2 Supreme Court

Parties may also petition for review of an appellate decision, limited to challenging only the legal merits, with the Supreme Court for juridical matters (“*Cour de cassation*”) within two months from the date of service of the decision. A petition for review will not suspend the enforcement of the decision made by the Court of Appeal, except as otherwise provided by law.

Proceedings before the *Cour de cassation* generally last between 12 and 18 months.

1.7 Enforcement of Commercial Court Judgments

Enforcement proceedings are governed by the provisions of the Code of Civil Enforcement Proceedings.

Under French Law, enforcement proceedings are (i) handled by a bailiff (“*huissier de justice*”), (ii) relatively short in duration, (iii) and not expensive.

2. INTERNATIONAL ARBITRATION¹

In order to preserve neutrality, it may be preferable to agree to refer disputes to international arbitration. Other reasons to opt for international arbitration include:

- The relative ease of enforcing in France an arbitral award (whether rendered in France or abroad) as compared with a foreign judgment,
- The quality of arbitrators (typically commercial lawyers with a good understanding of business needs) as compared with the quality of certain national judges,
- The fact that arbitration is a one-stop process, in which arbitral awards are not subject to appeal or other types of challenge in all but the most exceptional cases, and
- The relatively high level of confidentiality and privacy inherent in an arbitration, compared with national court proceedings which are in many cases open to the public.

International commercial arbitration is only available as a dispute-resolution mechanism if the parties have agreed on it, either in the contract giving rise to the dispute or in a submission agreement entered into after the dispute has arisen. Care should be taken in the drafting of the arbitration clause. In general, it is best to use the standard clause of the institution (e.g. International Chamber of Commerce or London Court of International Arbitration) chosen. These can easily be found on the internet.

Care should also be taken to specify:

- The number of arbitrators: One is obviously cheaper and may be faster than three, but having three helps to minimize the risk of bad decisions and allows each of the Parties to appoint a co-arbitrator in which it has confidence.

¹ The partner in charge of the arbitration team in the Paris office of McDermott Will & Emery is Jacob Grierson, who is the co-author of “Arbitrating Under the 2012 ICC Rules: An Introductory User’s Guide”, published by Kluwer Law International.



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- The place of arbitration: France is an attractive and safe place to arbitrate international business disputes, because French law is very favorable to arbitration. However, if (to preserve neutrality) it is preferred to arbitrate outside of France, the French courts have an excellent record of enforcing foreign arbitral awards, whether against French or other companies. Other safe places to arbitrate in Europe include London, Geneva, and Zurich, among others.
- The language of the arbitration: Depending on the place of arbitration chosen and the particular circumstances of the agreement, other changes may need to be made too. It is advisable to consult an arbitration specialist when drafting an arbitration clause where there may be more than two parties or more than one contract involved in any dispute (*i.e.* multi-party or multi-contract disputes).

3. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN FRANCE

Rules applicable to the control exercised by French Courts over a foreign judgment depend on the country in which such judgment was made.

3.1 For Judgments Given by a Court of an EU Member State

The main rules are provided for by Chapter 3 of the European Regulation No. 44/2001 of 22 December 2000 as well as Chapter 3 of the European Regulation No. 1215/2012 of 12 December 2012 on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, pursuant to which:

- A judgment rendered in another EU Member State shall be recognized in France without any special procedure being required,
- Any interested party who raises the recognition of a judgment as the principal issue in a dispute may apply for a decision that the judgment be recognized,
- Under no circumstances may a foreign judgment be reviewed as to its substance,
- A judgment shall be refused recognition only in very specific cases, such as if:
 - (i) Such recognition is manifestly contrary to the French public policy,
 - (ii) It is irreconcilable with a judgment issued in France in a dispute between the same parties, or
 - (iii) It is irreconcilable with an earlier judgment rendered in another EU Member State or in a third country involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in France.

A judgment given in another EU Member State and enforceable in that State shall be enforced in France when, on the application of any interested party, it has been declared enforceable there. The application shall be submitted to the presiding judge of the *Tribunal de grande instance*, and the procedure is relatively fast (around two weeks).

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3.2 For Judgments Given by a Court of a Country other than an EU Member State

The main rules are as follows, subject to provisions to the contrary in specific international treaties:

Under French Law, enforcement proceedings are (i) handled by a bailiff (“*huissier de justice*”), (ii) relatively short in duration, (iii) and not expensive.

- No foreign judgment can be enforced in France unless exequatur has been granted in respect of that judgment,
- Exequatur is granted following judicial proceedings during which the “international conformity” of the judgment at hand is verified,
- The exequatur proceedings take place before the *Tribunal de grande instance*.

Traditionally, exequatur was granted when four conditions were met:

- Territorial jurisdiction of the foreign court to be established by a sufficient link between the dispute and that court,
- Conformity with the French conception of international public policy,
- No fraudulent evasion of the law that would otherwise be applicable, and
- Application by the foreign court of the law designated by the French rules of conflicts of laws or of a law having a similar effect.

However, in a ruling of 20 February 2007, the *Cour de cassation* finally decided that the fourth condition no longer needed to be met.

As a result, exequatur of a foreign judgment granted by a non-EU Member State is now relatively easy to obtain in France.

