Corporate Aspects of Trading and Investing France

1. INTRODUCTION

Below please find a brief article on different ways to enter the French market, as well as the setting up of a French subsidiary or holding company in France. This article outlines the most commonly used profit-driven entities and the basic consequences thereof under French corporate and tax law. This memo does not intend to deal with all existing French entities and their legal consequences. Particular emphasis will be put on the French main limited liability companies (SA, SARL and SAS), as they are most frequently used when setting up a French subsidiary or holding company. For a more detailed overview of all possibilities and consequences under French law, please feel free to contact the persons mentioned in the header of this chapter.

2. METHODS OF MARKET ENTRY IN FRANCE

2.1 SOLE PROPRIETORSHIP

Sole traders do business on their own account. They must be registered with the "*Registre du Commerce et des Sociétés*" (i.e. Company's Registry) of the competent Commercial Court and must, if they are non EEC nationals, have a resident permit if they live in France. They are responsible for their own business and are personally liable for their business debts on their entire legal estate However, their private domicile is automatically protected from creditors. Sole traders also have the possibility to protect any other real property from creditors by a statement of exemption from seizure in front of a French public notary.
Sole traders whose turnover do not exceed € 33 100 (services) or € 82 800 (sale of goods) may benefit from specific rules regarding taxes, social security contributions as well as dispense of incorporation with the Company Registry.

2.2 REPRESENTATIVE OFFICE

The representative office has neither legal identity nor administrative and financial independence. Its sole purpose is to collect business information and to inquire about business opportunities on behalf of a foreign company. Since no commercial activity may be carried out, it is excluded from income taxation and VAT. If the foreign company employs local staff, it must be registered with the French social security administrations.

2.3 BRANCH

A branch is a permanent secondary establishment of a foreign company whose purpose is to carry out business operations. As it has no legal identity, its assets and liabilities are not separate from those of the foreign company. In order to set up a branch in France, the foreign company must:

- register with the Company's Registry and file a French translation of its articles of incorporation;
- appoint a person as responsible for the branch, holding a foreign business card when required;
- file its annual accounts with the competent Clerk to the Commercial Court; and
- pay corporate tax on its profits made in France.

2.4 FRENCH LIMITED LIABILITY COMPANIES

Foreign subjects, either individuals or companies, may incorporate and own shares in a French limited liability company. There are three main types of limited liability companies: the stock company ("*Société Anonyme*" or "SA"), the limited liability company ("*Société à Responsabilité Limitée*" or "SARL") and the simplified stock company ("*Société par Actions Simplifiée*" or "SAS"). Liability of the partners/shareholder(s) is limited to their contribution in share capital.

2.5 OTHER TYPES OF COMPANIES IN FRANCE

Limited partnership (i.e. "*Société en Commandite Simple*") / Partnership limited by shares (i.e. *Société en Commandite par Actions*"):
with two types of partners/shareholders, the first category being jointly and severally liable with the company's debts.

Business partnership (i.e. "*Société en Nom Collectif*"):
joint and several liability of the partners – generally used for its tax transparency.

Civil partnership (i.e. *"Société Civile"*):
especially used for real estate activities - unlimited liability of the partners.

Mutual economic interest group (i.e. "*Groupement d'Intérêt Économique*"):
whose purpose is to support its members' activity– joint and several liabiliy of the members - tax transparency.

Non-profit-making associations (i.e. "*Association sans but lucrative*"):
for cultural, educational, sporting, political, religious, trade union, welfare or civic purposes.

There are also various types of agricultural partnerships.

3. FORMATION OF A LIMITED LIABILITY COMPANY

3.1 INCORPORATION OF A LIMITED LIABILITY COMPANY

The main steps for incorporation of a limited liability company are the following:

- check the availability of the corporate name with the French Office of Industrial Property (« INPI ») and the National Trade Register;
- prepare and sign the following documents:
  - articles of incorporation, whereby the first executives and statutory auditors when required (1) are appointed,
  - declaration of non-criminal record and parentage for all executives,
  - power of attorney for completion of legal formalities;
- open a bank account and transfer the amount of the share capital to be paid-up immediately;
- have a resident permit for executives who are non-EEC nationals, if they live in France; and
- complete the legal formalities:
  - publication of the company's incorporation in a legal gazette,
  - registration of the Articles of incorporation with the French Tax authorities,
  - filing of the documents with the *Centre de Formalités des Entreprises*, which will send them to the Clerk to the Commercial Court for registration with the Company's Registry and all the various French Administrations (i.e. tax/labour administrations).

Funds are available as from the registration of the company with the Company's Registry.

Please note that formalities can be carried out in one day and in one place for around € 500 (as disbursements).

3.2 MEMBERS AND SHARE CAPITAL OF A LIMITED LIABILITY COMPANY

Société Anonyme - SA (i.e. "Stock Company")

At least 2 or 7 members when funds are raised from the general public.
The minimal amount of share capital is € 37,000. The share capital can be contributed half upon incorporation and the balance within the 5 following years.

[1] Appointment of statutory auditors is compulsory for SA. In SAS and SARL, it is compulsory when two of the three following thresholds are met: (i) total balance sheet exceeding € 1 000 000 for SAS and 1 550 000 for SARL, (ii) turnover – excluding VAT - exceeding € 2 000 000 for SAS and 3 100 000 for SARL and (iii) number of employees exceeding 20 for SAS and 50 for SARL. In a SAS it is also compulsory if the company is controlled by one or several companies or controlled another company.

Société à Responsabilité Limitée - SARL (i.e. "Private limited company")

From 1 to 100 partners.
The amount of the share capital is freely fixed by the articles of incorporation. The share capital can be contributed to one fifth and the balance within the 5 following years.
The partners can also choose a variable share capital and carry out withdrawals with a minimum of one tenth of the share capital fixed by the articles of incorporation. It cannot be listed on the Stock Market.

Société par actions simplifiée – SAS (i.e. "Simplified Stock Company")

May be created by one or several shareholders.
The amount of the share capital is freely fixed by the articles of incorporation. The share capital can be contributed to one half and the balance within the 5 following years.
It cannot be listed on the Stock Market.

4. MANAGEMENT OF A LIMITED LIABILITY COMPANY

4.1 SOCIÉTÉ ANONYME - SA (I.E. "STOCK COMPANY")

Two types of management structure are possible:

1. General Manager ("*Directeur Général*"), with a Board of Directors ("*Conseil d'administration*") which may have 3 to 18 directors (who may have to be shareholders if provided for by the articles of incorporation). The General Manager may also be the President of the Board but this is not compulsory and he may be assisted by Delegates.
2. Executive Committee ("*Directoire*") which may have 1 to 5 members (7 for a listed company), shareholders or not, with a Supervisory Board ("*Conseil de surveillance*"), which may have 3 to 18 directors (who may have to be shareholders if provided for by the articles of incorporation).

The General Manager runs and represents the company vis-à-vis third parties (representation power granted to the Executive Committee President in the second type of management).

The Board of Directors (or the Executive Committee) convenes the Shareholders General Meeting (SGM), fixes the agenda, draws up the annual accounts and the management report, appoints and dismisses the legal representative. Moreover, some operations are subject to the Board of Directors' (or the Supervisory Board's) prior approval, such as (i) any regulated agreements (2) and (ii) the granting of any security to warrant third party's debts.

The SGM approves the annual accounts, allocates profits, appoints and removes Directors (or Supervisory Board members), appoints the statutory auditors and approves or rejects regulated agreements.

[2] The scope of regulated agreements depends on the type of company; In the SA, it mainly concerns agreements signed with an executive or a shareholder holding – directly or indirectly - 10% of the share capital at least.

Any extraordinary decision (entailing the amendment of the articles of incorporation) is of the sole competence of the extraordinary SGM (i.e. share capital increase or decrease, transfer of registered office, change in corporate name or closing of financial year, transformation, winding-up, etc…).

4.2 SOCIÉTÉ À RESPONSABILITÉ LIMITÉE - SARL (I.E. "PRIVATE LIMITED COMPANY")

SARL are mainly used for small sized and family businesses.
One or more individual managers are given authority to run and represent the company vis-à-vis third parties. They are not necessarily partners of the company. Managers convene the SGM, draw up the annual accounts and the management report.

The SGM approves the annual accounts, appoints and removes the Managers and takes major decisions involving the amendment of the articles of incorporation, as well as giving its prior approval to regulated agreements.

Except when forbidden by law (i.e. for the annual accounts' approval), partners' decisions may be taken by a private deed signed by all the partners.

4.3 SOCIÉTÉ PAR ACTIONS SIMPLIFIÉE – SAS (I.E. "SIMPLIFIED STOCK COMPANY")

SAS has a flexible organisation that is suitable for medium sized businesses, as well as for fully owned subsidiaries. It is run and represented by a President (either individual or legal entity) who may not be a shareholder. He may be assisted by one or more General Managers or any other management or controlling body, as freely set down by the articles of incorporation.

The articles of incorporation freely set the rules of internal organisation (i.e. type of management, distribution of powers, means of collective decision making, shareholders' information) with limited legal requirements and where there is at least 2 shareholders, it can set share transfer clauses (i.e. prior approval or non-transferability up to 10 years) or shareholders' exclusion clauses.

5. OFFICERS' LIABILITY OF A LIMITED LIABILITY COMPANY

5.1 CIVIL LIABILITY

The executives may have civil liability3, personally or jointly, for (i) noncompliance of the legal and regulatory provisions, (ii) infringement of the articles of incorporation, or (iii) misdemeanours committed in the management of the company. Towards third parties, their liability can only be involved in case of fault distinct from their duties and for which they are personally liable. In case of a receivership (i.e. "*redressement judiciaire*" or "*sauvegarde*") or compulsory liquidation (i.e. "*liquidation judiciaire*"), with a mismanagement giving rise to insufficient assets, they can be bound to contribute to the payment of all or part of the loss, or they can be sentenced for

[3] Directors and General Manager/Executive Committee in a SA, Manager in a SARL and President/General Manager and any other contractual management body in a SAS

personal bankruptcy (i.e. which would mean a ban on doing business or managing legal entities with a business activity).

5.2 CRIMINAL LIABILITY

The executives may be criminally liable for infringement of corporate rules (i.e. distribution of fictitious dividends, misuse of corporate assets, abuse of powers or voting rights and producing of corporate accounts which do not give a true and fair view of the company's situation).
Furthermore, the criminal liability of the company's legal representative may be involved in his capacity as the company's business manager ("*chef d'entreprise*"), in particular, in the event of a breach of employment law or freedom of competition, unless a regular delegation of powers has been granted to a third party, generally a senior employee executive, duly empowered with the necessary authority, competence and means.

Companies may be criminally liable for all offences, with a fine up to five times the one applicable to individuals, except in the field of press/media.

6. TAXATION OF PROFITS

6.1 CORPORATE TAXATION

Corporate tax

All business companies are, in principle, subject to corporate tax. Branches of foreign companies are also taxable. Most partnerships do not pay this tax: their profit is divided between the partners with each partner being taxed on his share.
Excluding temporary additional taxes, the following tax rates are applied:

- Standard rate of 33.33%4.
- Small businesses pay 15% on the first €38,120 and the standard rate on remaining profits.
- Reduced rate of 15% on total proceeds of industrial property (royalties and capital gains on asset sales), affecting patents, inventions that can be patented and manufacturing processes.
- Capital gains realised on the sale of a qualifying shareholding held for at least two years are 88% tax exempt. As a result such gains are subject to a maximum effective tax rate of 4% .

Companies can freely choose the date of their financial year end and can change it during the company's existence, subject to the maintaining of a twelve-month financial year period.
Corporate tax is payable in quarterly instalments.

Taxable profit

Taxation is based on the net income, after deducting allowed expenditure (i.e. all expenses properly incurred for the benefit of the company's business, depreciation and provisions).
Some expenses are not tax deductible: the tax itself, the special tax on company's cars, some accounting provisions, excessive salaries and fringe benefits, non-business expenses, luxuries, fines and penalties. There are special rules applying to the tax deduction of interest paid on shareholders/partners' loan.
Capital expenditure can only be deducted through depreciation on the expected life of the asset. Company cars' depreciations are only deductible on the basis of a maximum price of € 30,000 per car for the less polluting car, €18,300 in the most common case (€ 9,900 per car for the most polluting cars).

Losses can be carried forward indefinitely under the limit of €1 million plus 50% of the benefit of the year exceeding this threshold, since 2011.. The amount of the losses which exceed this limit can be carried forward indefinitely under the same limit.

It is also possible to deduct the current year's losses from taxable profit realised the previous year ("carryback") to have consequently a credit tax which can be refunded by Treasury (under conditions). The amount which can be deducted is capped to the less higher amount between the profit declared and €1,000,000.

Newly established businesses located in specific areas, recently acquired struggling businesses, and emerging technologies businesses can take advantage of specific tax exemption elections.

[4] This rate will be reduced for all companies to 28% by the end of the year 2019, in different steps depending on the taxable profit and the turnover

Taxation of dividends

When a France-based subsidiary distributes dividends to its European-based parent company, such a dividend payout will not be subject to any withholding tax in France, as long as certain conditions are met:
- both undertakings must be subject to corporate tax
- the parent company must have a direct minimum holding of 10% of the subsidiary's capital for a least two years, or shall make such a commitment.

When a 5% French subsidiary distributes a dividend to its French parent company (shareholding held for more than 2 years), the latter is exempted from corporate tax on the corresponding profit, if both companies are subject to corporate tax, subject to taxation of a share for fees and expenses of 5%.
Furthermore, French companies which distribute a dividend are subjected to an additional tax equal to 3 % of the dividends payed. However, SMEs within the meaning of the Community definition are not subjected to this tax. Several exceptions are admitted, for example distributions between companies with a direct or indirect detention rate of 95 % do not have to pay this tax. The compatibility of the contribution with the European law is not certain (5).

Tax consolidation

When a French parent company holds at least 95% of the share capital of other companies, the group can be taxed as a single company for periods of 5 years, provided that all companies have the same financial year end. No more than 95% of the parent company can be held by another corporate body liable to corporate tax.
The parent company is solely liable for the payment of the corporate tax.

[5] A preliminary ruling procedure is pending at the ECJ

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