



# Taxation of cross-border mergers and acquisitions

**France**

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## Introduction

To summarize the French rules applicable to cross-border mergers and acquisitions (M&A), this report addresses three fundamental decisions facing a prospective purchaser.

- What should be acquired: the target's shares or its assets?
- What will be the acquisition vehicle?
- How should the acquisition vehicle be financed?

Tax is, of course, only one piece of transaction structuring. Company law governs the legal form of a transaction, and accounting issues are also highly relevant when selecting the optimal structure. These areas are outside of the scope of the report, but some of the key points that arise when planning the steps in a transaction plan are summarized later in the report.

## Recent developments

The latest major reforms in the area of cross-border transactions are as follows:

- *Anti-abuse mechanism for indebtedness involving related parties:* Interest on loans granted by related parties is only deductible where the lender is subject to income tax on the amount of interest received at a rate of at least 25 percent of the standard income tax rate (if the lender is a foreign tax resident, the comparison is made with the theoretical income tax that would have been due in France had the lender been a French tax resident). This mechanism applies to interest paid to related parties for fiscal years (FY) ending on or after 25 September 2013.
- *Implementation of 'horizontal' tax-consolidated groups:* The existing tax consolidation regime is extended to sister or cousin companies held by a parent company established in another European Union (EU) or European Economic Area (EEA) member state. This mechanism applies to FYs ending on or after 31 December 2014.
- *Elimination of neutralization mechanism:* The neutralization mechanism of the portion of costs and expenses on dividends received by a company member of a tax-consolidated group from another group member company has been removed. The taxable share is reduced to 1 percent (from 5 percent) for dividends that are received by a company (that is a member of a French tax group) from another company of the tax group or from a company established in an EU or EEA member state if this company, had it been French, would have met the conditions of being a member of the tax-consolidated group. These modifications apply to dividends paid during FYs starting on or after 1 January 2016. The 1 percent taxable fraction (subject to standard corporate income tax) is not neutralized and applies for each distribution, so groups with multi-tier participations will be comparatively penalized.
- *Participation exemption:* The participation exemption regime on dividends is no longer applicable to dividends received from foreign subsidiaries that can claim a tax deduction for said dividends. This measure applies to FYs starting on or after 1 January 2015.
- *Participation exemption on dividends amendments to comply with EU law:*
  - A new anti-abuse clause was implemented for FYs starting on or after 1 January 2016. The participation exemption regime on dividends does not apply when the distribution is made in the context of an arrangement or a series of arrangements, one of the main purposes of which is to obtain a tax advantage in contradiction with the object or purpose of the regime and that is not 'authentic', having regard to all the relevant facts and circumstances (i.e., it is not set up for valid commercial purposes reflecting the economic reality).
  - A 'safeguard clause' is introduced for dividends from a non-cooperative state or territory. Previously, dividends paid from a subsidiary established in a non-cooperative state or territory could not benefit from the participation exemption regime on dividends.



For FYs ending on or after 31 December 2015, such distributions are allowed to benefit from this regime, provided the French company can demonstrate that the distributing entity carries on real activities and that the operations or transactions conducted by the subsidiary have neither the purpose nor the effect to allow, with the intent of committing tax fraud, the localization of profits in these states or territories.

- Certain distributions made by companies carrying out certain activities exempted from corporate tax are outside the scope of the participation exemption regime. This measure is applicable to FYs ending on or after 31 December 2015, and more specifically concerns dividends from shares in certain real estate companies or venture capital companies, such as SICOMI (*société immobilière pour le commerce et l'industrie*), SCR (*société de capital risque*), SIIC (*société d'investissement immobilier cotée*) and their foreign equivalents, or SPICAV (*société à prépondérance immobilière à capital variable*).
- *Adjustments to the withholding tax (WHT) exemption for dividends paid to European parent companies:*
  - The EU WHT exemption regime also applies to dividends paid by a French company to a company, the effective place of management of which is located in the EEA. In practice, companies established in Iceland, Norway and Liechtenstein can now benefit from this regime for FYs ending on or after 31 December 2015.
  - Parent companies established in another EU member state or EEA country can legally benefit from the EU WHT exemption if they hold 5 to 10 percent of the capital of the distributing company and have no opportunity to offset French withholding tax against the tax due in their country. This measure applies to FYs ending on or after 31 December 2015.
  - The anti-abuse clause is amended to ensure the participation exemption regime on dividends complies with EU directives. As a consequence, the WHT exemption does not apply when the distribution is made in the context of an arrangement or a series of arrangements, one of the main purposes of which is to obtain a tax advantage in contradiction with the object or purpose of the regime and that is not 'authentic' having regard to all relevant facts and circumstances (i.e., it is not set up for valid commercial purposes reflecting the economic reality). This provision is effective for FYs starting on or after 1 January 2016.
- *Withholding tax (WHT) exemption:* A WHT exemption is provided for dividends that are distributed to foreign

companies in liquidation and in a loss-making position. The provision applies to distributions received on or after 1 January 2016.

- *Country-by-country reporting:* A country-by-country reporting requirement is introduced for FYs starting on or after 1 January 2016 (see details below).
- *Introduction of 'exceptional depreciation':* This measure, introduced by the Macron Act (published in the French official journal on 7 August 2015), allows companies subject to corporate tax to deduct from their taxable base an amount equal to 40 percent of the original value of certain equipment assets that the companies acquire or manufacture between 15 April 2015 and 14 April 2016. This deduction has been extended to companies that rent a property eligible under a leasing contract or a lease-purchase agreement during the same time period. It has also been extended to optic fiber equipment, heavy trucks and robots acquired or manufactured between 1 January 2016 and 31 December 2016.

## Asset purchase or share purchase

Although an asset purchase may be considered as a more flexible funding option, a share purchase can be more attractive, notably regarding the amount of registration tax and the right to transfer tax losses of the target company. Some tax considerations relevant to each method are discussed later in this report.

### Purchase of assets

Where several assets are purchased at market prices, there are no statutory rules governing the allocation of the purchase price among the various assets purchased. For depreciation purposes, the contract may allocate a value to each asset transferred, which will be the basis of depreciation.

Transfers between associated parties must normally be made at market value, although market value, being an economic rather than a tax concept, is not defined in the law. The market price generally is the price that an ordinary buyer would agree to pay.

Where the assets are transferred at a price that is lower or higher than their market value, the difference can be qualified as a deemed distribution, subject to the 3 percent contribution on dividend distributions and to WHT where one of the parties is a non-resident.

Within a tax-consolidated group, if assets are transferred between members at a price that is lower or higher than the assets' market value, the difference constitutes an indirect subsidy, which is neutralized at the level of the tax-consolidated results. However, such indirect subsidies have to be de-neutralized in the group-taxable results of the FY during which either the company that grants or the company that benefits from the indirect subsidy leaves the tax group or the tax-consolidation group ceases to exist.

## Goodwill

Under French tax rules, goodwill, which is considered an intangible asset, generally cannot be amortized except by the creation of a provision, subject to strict conditions.

The value of the goodwill is included in the net worth of the company. If goodwill is transferred, it must be included in the recipient company's accounts.

## Depreciation

Most tangible assets may be depreciated for tax purposes, the major exception being land. Rates of depreciation vary depending on the asset. Higher rates are allowed for plant and machinery used in two- or three-shift manufacturing and for assets subject to substantial corrosion or abrasion.

As of 1 January 2005, new accounting rules apply to depreciation. Based on International Financial Reporting Standards (IFRS), component accounting is used for the separate components of an asset, and depreciation is booked component-by-component.

Typical rates are as follows:

- motor vehicles: 20 percent, straight-line method
- plant and machinery: 10 to 20 percent, straight-line method
- buildings: 2 to 5 percent, straight-line method.

Intangible assets, such as goodwill and securities, may not generally be amortized, but, under certain circumstances, they may be depreciated by way of provisions. However, the acquisition costs of technical processes, patents, patterns and knowhow are usually depreciated over the length of their legal or contractual life.

Under French tax rules, patents may be depreciated over a period that is shorter than their period of legal protection but not less than 5 years.

In order to encourage investment in the industrial production, companies can deduct from their taxable income a sum equal to 40 percent of the original cost of eligible assets (except financial charges) used for their activity when such assets are manufactured or purchased between 15 April 2015 and 14 April 2016. This measure also benefits companies renting qualifying assets under a leasing contract, or a rental contract with a purchase option, concluded during that period of time. Thus, instead of deducting 100 percent, companies may deduct 140 percent of the value of the purchased, manufactured or rented assets. This measure entitles companies subject to corporate income tax at the standard rate (i.e., 33.33 percent) to benefit from an effective tax reduction of 13 percent of the invested value of eligible equipment. The measure has been extended to optic fiber equipment, heavy trucks and robots acquired or manufactured between 1 January 2016 and 31 December 2016.

## Tax attributes

Under French tax law, it is not possible to transfer liabilities. Only assets can be sold. Liabilities may be transferred in a disposal of shares or in contributions (spin-off), subject to the legal regime of demergers.

## Value added tax

In the absence of special rules, the standard valued added tax (VAT) rate is 20 percent (19.6 percent until 31 December 2013).

However, a VAT exemption is applicable where the sale qualifies as a transfer of assets or part thereof within the meaning of French and European Union (EU) law, such as a transfer of a business.

On the transfer of a business, the exemption applies to the disposal, subject to payment, of all the assets constituting the business (i.e. intangible and tangible assets excluding real estate).

The effective transfer of the clientele is necessary to qualify for such VAT exemption. The disposal of an isolated element would then be subject to VAT, unless the element in question is the clientele or real estate, in which case the disposal is usually subject to the transfer tax.

The VAT exemption does not apply to inventories sold alone.

## Transfer taxes

In principle, the purchaser pays French registration tax. However, article 1705 of the French Tax Code provides for the joint and several liability of both the purchaser and the seller for the payment of this tax.

The transfer of immovable property is subject to a 5.09 percent registration duty, calculated on the sale price (or the fair market value of the related assets if higher). For transfers occurring between 1 March 2014 and 29 February 2016, this rate can be increased up to 5.80665 percent, depending on the French department in which the immovable property is located. This measure has been extended for transfers occurring as from 1 March 2016.

In the transfer of a business, the word 'business' refers to the French notion of fonds de commerce. From a legal standpoint, a fonds de commerce is an aggregate of business assets, both tangible and intangible, used in a particular business. It consists mainly of a clientele attached to a particular group of business assets. It may also consist of a right to a lease or a specific collection of equipment, tools and merchandise.

Article 719 of the French Tax Code stipulates that the transfer of a business would trigger the payment of a transfer tax amounting to:

- 3 percent for the portion of the sale price (or the fair market value, if higher) that does not exceed 200,000 euros (EUR) after application of a EUR23,000 allowance

- 5 percent for the portion of the sale price (or the fair market value, if higher) that exceeds EUR200,000.

The tax is assessed on:

- the intangible assets transferred, such as clientele, goodwill, leasehold rights to the business premises, patents, inventions, trademarks, current contracts (e.g. distribution agreements), licenses and administrative authorizations
- tangible fixed assets, such as furniture and equipment
- tools and supplies.

New merchandise (inventories) is usually not subject to French registration tax or VAT if certain conditions are met (French Tax Code, articles 723 and 257). When these conditions are not fulfilled, the new merchandise is subject to VAT.

## Purchase of shares

### Tax indemnities and warranties

In the case of negotiated acquisitions, it is usual for the buyer to request, and the seller to provide, indemnities and warranties as to any undisclosed tax liabilities of the company to be acquired. The extent of the indemnities and warranties is a matter for negotiation. Where an acquisition is made by way of a market raid or hostile takeover, it is not possible by virtue of the nature of the acquisition to seek warranties or indemnities.

### Tax losses

French tax legislation does not include any rule restricting the validity of tax losses in the case of a change of ownership. However, specific restrictions have to be considered in the case of tax losses crystallized in a tax group.

Tax losses generated by the target company cannot be offset against the profits of other companies that are members of the tax group, but tax losses may be offset against the company's own future profits.

Where a French target company with trading losses is acquired, these losses may be used against its own future trading profits unless the company undergoes a 'real change of activity' or changes its tax regime. The concept of a 'real change of activity' has recently been clarified by French tax law. It now includes the addition, discontinuance or transfer of an activity that entails, respectively, an increase or a decrease of over 50 percent (relative to the previous FY) in either revenue or the average headcount and gross amount of fixed assets.

For FYs ending after 20 September 2011, the following limitation applies to the utilization of losses:

- carry back of prior-year losses is limited to EUR1 million; a credit is granted that can be used to pay corporate income tax (CIT) in the following 5 years and is refundable in the sixth year

- carry forward of losses to offset against profits of future year is limited to EUR1 million plus 50 percent of the taxable result in excess of the EUR1 million threshold (60 percent for FYs ending between 21 September 2011 and 30 December 2012).

### Crystallization of tax charges

If the target belongs to a tax-consolidated group, de-consolidation costs could arise if the acquisition leads to breaking the tax group or at least to the exit of the target from the tax group. Such costs would crystallize at the level of the head of the tax group.

### Pre-sale dividend

A dividend distribution and a capital gain realized on a sale of shares may benefit from a full tax exemption when some conditions are met. Pre-sale dividend issues arise in France since, in the case of dividends distribution, the lump sum that remains taxable corresponds to 5 percent of the distributed dividends while it corresponds to 12 percent of the realized capital gain (provided the parent company held the shares for at least 2 years). As a result, it could be advantageous for a company to make a dividend distribution prior to a sale of shares. However, dividend distributions trigger the levy of a 3 percent contribution (except for distributions made within a tax-consolidated group).

Additionally, within a tax-consolidated group, dividend distributions are no longer fully exempt as of FYs starting on or after 1 January 2016 and a lump sum of 1 percent remains taxable. Under certain conditions, this regime also applies to dividends received from EU/EEA companies.

Otherwise, a sale of shares or a dividend distribution is subject to the standard corporate tax rate of 34.43 percent (38 percent for FYs ending on or before 30 December 2016).

### Transfer taxes

The transfer of shares in a joint stock company, i.e. an SA (corporation), SAS (simplified joint stock company) or SCA (*société en commandite par actions*) is subject to transfer tax at the rate of 0.1 percent.

The transfer of shares in all other corporate companies, such as SARLs (limited liability companies) or partnerships (e.g. SNC — general partnership or SCS — limited partnership) is subject to tax at the rate of 3 percent for that part of the price exceeding EUR23,000. The tax base is reduced by EUR23,000 multiplied by the percentage that the shares to be disposed of represent of the capital of the company.

However, no transfer tax is due where the seller and buyer belong to the same economic or tax-consolidated group.

Companies whose assets are more than 50 percent real estate (*société à prépondérance immobilière*) are subject to tax at the rate of 5 percent (with no allowance and no

cap), regardless of the legal status of the company (or the membership to the same group of companies).

Transfer tax is assessed on the sale price increased of liabilities taken over by the buyer or the fair market value if higher.

#### **Tax clearances**

It is not possible to obtain a clearance from the French tax authorities giving assurance that a potential target company has no tax arrears or is not involved in a tax dispute.

### **Choice of acquisition vehicle**

The following vehicles may all be used to acquire the shares or assets of the target company:

- subsidiary
- branch of a foreign company
- treaty country intermediary company
- local holding company
- joint venture
- other special purpose vehicle (such as a partnership).

The choice of the structure can be critical for tax purposes, especially if it is intended to set up a tax-consolidated group.

Moreover, some specific constraints must be taken into account, such as thin capitalization rules (see later in the report) as well as the Charasse and Carrez amendment rules.

According to Charasse amendment rule, if a tax-consolidated group member purchases a company outside the tax-consolidated group from shareholders that directly or indirectly control the target company (the notion of control being defined by the French Commercial Code) and the target company becomes a group member, a portion of the group's financial expenses is not deductible for tax purposes for 9 years, even if no loan is used to purchase the target company.

According to the Carrez amendment rule, the deduction of interest expenses relating to the acquisition of qualifying participations (*titres de participation*) requires substantiating that those participations are effectively managed by the company holding them or by a company established in France and belonging to the same economic group (subject to conditions). In addition, when the subsidiary can be considered to be 'controlled' by another company within the meaning of the French Commercial Code, such control must be effectively exercised from France. Otherwise, a portion of all the taxpayer's interest expenses is considered as non-tax-deductible and must be added back to its tax result. This add-back is made over a period of 8 years, starting in the year following that of the acquisition of the qualifying participation.

#### **Local holding company**

If profits are to be reinvested in the business or invested in other undertakings carried on by the buyer in France, the buyer should consider incorporating a local holding company to act as a dividend trap. The local holding company would receive the dividends free of tax (i.e. exempt up to 95 percent, decreased to 99 percent in the case of tax consolidation as from 1 January 2016, subject to conditions) from the ventures carried on in France or abroad by the group. However, a 3 percent contribution on dividend distributions is payable by the French distributing company unless the latter and the holding company that receives the dividends belong to the same tax-consolidated group. In addition, using a French holding company partly funded by debt and forming a tax group with the target could allow the interest paid by the parent company to be offset against the operating profits of the target (subject to anti-hybrid rules, thin capitalization restrictions, the Charasse and Carrez amendment rules and the general limitation on interest deductibility). The holding company could reinvest those dividends in other subsidiaries.

#### **Foreign parent company**

The use of a foreign parent company to acquire the shares or assets of the target company has important tax consequences for dividend distributions and interest.

The French Tax Code stipulates that dividends distributed by French companies to non-residents shall, in principle, give rise to the application of a WHT to be levied and paid to the public treasury by the distributing company. The statutory rate of this WHT is, in principle, 30 percent where the dividends are distributed to legal entities (75 percent where the latter is located in a so-called 'non-cooperative' country or territory). The WHT rate may be reduced under the terms of international tax treaties that have been concluded by France, provided certain requirements are met.

According to article 119 *ter* of the French Tax Code, which incorporates the EU Parent Subsidiary Directive, dividends paid by a French company its EU member state parent company are exempt from WHT when the following conditions are met:

- The parent company and the distributing subsidiary take the form of one of the companies listed in the appendix to the 2011/96 EU Directive.
- Both companies are subject to corporate income tax at the standard rate in the EU member state or EEA State in which they are located.



- The parent company's place of effective management is in an EU member state or EEA State.
  - The parent company has held at least 10 percent of the subsidiary's share capital for at least 2 years (or has committed to hold the participation for at least 2 years).
  - For FYs ending on or after 31 December 2015, parent companies established in another EU member state or EEA country can legally benefit from the EU WHT exemption if they hold 5 to 10 percent of the capital of the distributing company and have no opportunity to offset French withholding tax against the tax due in their country.

The WHT exemption regime is applicable to companies established in the EEA (i.e., Iceland, Norway and Liechtenstein) for FYs ending on or after 31 December 2015.

Moreover, the anti-abuse clause was amended so as to comply with EU directives, for FYs starting on or after 1 January 2016. As a consequence, the WHT exemption does not apply when the distribution is made in the context of an arrangement or a series of arrangements, one of the main purposes of which is to obtain a tax advantage in contradiction with the object or purpose of the regime and that is not 'authentic', having regard to all relevant facts and circumstances (i.e., it is not set up for valid commercial purposes reflecting the economic reality).

According to the French Tax Code (article 235 *ter* ZCA), dividends paid by a French company are subject to a 3 percent contribution payable by the distributing company.

Finally, the French Tax Code provides that interest paid by French individuals or companies to non-resident entities is, in principle, exempt from a French WHT unless if paid to a so-called 'non-cooperative' country or territory (WHT applies at the rate of 75 percent in this case).

### Non-resident intermediate holding company

Most tax treaties signed by France contain provisions designed to prevent treaty shopping. The EU directive also contains an anti-abuse clause that may apply to non-EU investors who set up an EU investor company for tax purposes.

### Local branch

When profits will be regularly repatriated, it is sometimes desirable to form a branch or use an existing one to acquire the assets of the target company. The remittance of branch profits is subject to a 30 percent special branch profits tax. Tax treaties may provide for a lower rate or exemption from this tax. Moreover, no branch tax is levied within the EU.

French corporate tax is the same for a branch as for a subsidiary and, except for the branch tax, no WHT is levied in

France on foreign branch profits. The overall French corporate tax rate is 34.43 percent (38 percent for FYs ending on or before 30 December 2016).

A French branch of a foreign entity may be the head of a French tax group.

A number of legal and tax issues need to be considered when choosing between a branch and a subsidiary. The main tax issues concern corporate tax. Examples are as follows:

- Head office expenses reasonably attributable to the operations of a branch are, in principle, tax-deductible. The expenses of an exchange of services between a subsidiary and a parent company are only deductible if carried out on an arm's length basis.
- Branch profits, whether or not remitted to head office, are subject to a 30 percent WHT or branch tax, depending on the relevant tax treaty, although an exemption may be obtained if there is no remittance. Branch profits remitted to the head office are also subject to the 3 percent contribution on dividend distributions except where the head office is located in an EU member state or a non-discrimination clause of a tax treaty can be applied.
- The profits of a subsidiary are subject to WHT only if they are distributed. Dividend distributions made abroad are subject to a 30 percent WHT, which is normally reduced by tax treaties.
- Moreover, there is a WHT exemption on the basis of the EU directive (discussed in this report's section on foreign parent companies), except where the head office is located in an EU member state. This exemption has been extended to EEA companies.
- Branches generally are not covered by France's tax treaties and thus cannot usually benefit from them. Subsidiaries are French entities and thus qualify for reductions or exemptions from taxes.
- Branches are not presently entitled to claim a credit for foreign taxes paid, whereas subsidiaries, as residents, may claim a credit for foreign taxes (in particular, WHT).

### Joint venture

Where an acquisition is to be made in conjunction with another party, the question arises as to the most appropriate vehicle for such a joint venture. Although a partnership can be used, in most cases, the parties prefer to conduct the joint venture via a limited liability company. A limited liability company offers the advantages of incorporation (legal existence separate from that of its members) and limited liability for its members. In a partnership, the partners have unlimited joint and several liability for the debts of the partnership.



## Choice of acquisition funding

A purchaser using a French acquisition vehicle to carry out an acquisition for cash needs to decide whether to fund the vehicle with debt or equity. The tax implications of the two approaches are discussed later in the report.

### Debt

The principal advantage of debt is the potential tax-deductibility of interest paid to a related party or to a bank in the framework of a bank loan.

### Deductibility of interest

Generally, interest paid by a company is tax-deductible. However, the French tax rules include an exception concerning the deductibility of interest paid on shareholders' accounts. Such interest is tax-deductible only if the borrowing company's capital is fully paid-up (article 39.1.3 of the French Tax Code), and only up to the rate of the yearly average of average effective rates accorded to companies by credit institutions for variable rate loans having an initial duration of over 2 years (article 39.1.3 of the French Tax Code). For the FY ending 31 December 2015, the maximum deductible interest rate was 2.15 percent).

French thin capitalization rules apply to any loan or advance between affiliated companies and between sister companies.

Interest paid to a related party should not exceed the interest rate provided for by article 39.1.3 of the French Tax Code. Any excess interest is permanently non-tax-deductible and may be subject to WHT if paid abroad. However, a higher rate is accepted for tax purposes if it corresponds to a rate the French paying company could have obtained from a third-party bank. In this case, the paying company must prove that the interest rate used is arm's length (e.g. by providing bank offers).

Then it must be determined whether the theoretically deductible interest effectively can be deducted in the FY of accrual. This would be the case if the paying company is not considered thinly capitalized; that is, where the borrower meets one of the following three ratios:

- the borrower's intragroup debt-to-net-equity ratio does not exceed 1.5:1 (debt-to-equity ratio)
- the amount of interest does not exceed 25 percent of the current pre-tax result plus intragroup interest and deductible depreciation (interest coverage limit)
- the amount of interest does not exceed the total interest amount received by the French borrower from affiliated entities (received intragroup interest limit).

Whenever the amount of acceptable interest simultaneously exceeds these three thresholds, the excess amount is not immediately deductible, but it can be carried forward over future FYs. The deferred interest is deductible in the following FY (FY + 1) if the interest accrued during FY + 1 does not exceed the interest coverage limit of FY + 1. If it does, the deferred interest is deductible only up to the difference between the interest coverage limit of FY + 1 and the amount of FY + 1 interest. The part of the deferred interest not available for deduction in FY + 1 is rolled over, but the amount of the deferred interest is decreased by 5 percent per year as from the second year of carry forward.

These French thin capitalization rules apply to all loans that, while borrowed from a third-party company, are guaranteed by an affiliated company, subject to certain exceptions (e.g. bonds issued under a public offer or pledge on borrowers' shares).

Affected guarantees include personal safety guarantees (e.g. personal securities, first demand guarantees and even letters of comfort in certain circumstances) and security interests (e.g. pledges of the debtor's securities, mortgages).

The interest limitation does not apply:

- when the borrower proves that the debt/net equity ratio of the group equals or exceeds its own debt-to-net-equity ratio
- to certain financial operations or structures (i.e. group cash pools, credit institutions and goods leased through finance leases) under certain conditions
- when the portion of interest that is not immediately deductible is less than EUR150,000.

In addition, specific rules apply to tax-consolidated groups: generally, a deferred interest is limited to the excess of the interest paid to related (but not tax-consolidated) entities over the 25 percent coverage limit computed at the level of the tax group.

The Carrez amendment rule disallows deductions of interest expenses relating to the acquisition of qualifying participations (*titres de participation*) that are not managed by the company holding them or by a company established in France and belonging to the same economic group.

Additionally, a general restriction to the deductibility of interest has been introduced for FYs starting on or after 1 January 2014. Only 75 percent (85 percent for earlier FYs) of the net interest expenses are tax-deductible (unless such net interest expenses are lower than EUR3 million).

Finally, the Finance Act for 2014 introduces a new anti-abuse mechanism for indebtedness involving related parties. Now, interest related to loans granted by related parties is only deductible where the lender's interest received is subject to income tax of at least 25 percent of the standard income tax. (If the lender is a foreign tax-resident, the comparison would be made with the theoretical income tax that would have been due in France if the lender had been a French tax resident.)

## **Withholding tax on interest and methods to reduce or eliminate withholding tax**

As of 1 March 2010, the general principle is that French-source interest is exempt from French WHT.

The sole exception to this exemption concerns the interest arising on financial advances granted by entities located in non-cooperative jurisdictions. According to French tax law, non-cooperative jurisdictions are countries and territories that:

- are not EU member states
- have not concluded treaties with at least 12 different member states or territories containing a mutual assistance clause allowing for the exchange of information
- have not entered into any such treaty with France.

The French tax authorities publish a list of non-cooperative jurisdictions annually. For 2016, the non-cooperative countries or territories are Botswana, Brunei, Guatemala, Marshall Islands, Nauru Island and Niue Island.

The interest derived from financial advances granted by entities located in such jurisdictions is subject to a 75 percent French WHT.

## **Checklist for debt funding**

The use of bank debt may avoid thin capitalization, the recently enacted anti-abuse mechanism and transfer pricing problems.

Interest paid by a company in the framework of a bank loan is tax-deductible when some conditions are met.

Where a company affiliated with the borrower guarantees a bank loan, the interest paid to the bank is also subject to the thin capitalization rules.

According to the Carrez amendment rule, a portion of interest paid to purchase substantial shareholdings is added back to the tax result when the company cannot prove that the decisions regarding those shares are made by it (or by a French company belonging to the same group) and that the company actually has an influence over the target company.

In addition, for FYs starting on or after 1 January 2014, only 75 percent (85 percent for earlier FYs) of the net interest expenses are tax-deductible (unless such net interest expenses are lower than EUR3 million)

## **Equity**

If there is a risk of non-deductibility of interest, it may be better to use equity to fund the acquisition.

Under French corporate law, the capital of a company may be increased to finance the acquisition. This capital increase may result from a cash contribution or from issuing new shares to the seller in satisfaction of the consideration.

From a French registration tax standpoint, increasing share capital by way of a contribution under the *apport à titre pur et simple regime* (i.e. the sole consideration received in exchange should be new shares issued by the French company) only triggers the payment of a small fixed registration duty of EUR375 (if the contributed company's share capital is less than EUR225,000) or EUR500 (if the contributed company's share capital is equal to or higher than EUR225,000).

## **Favorable tax treatment for reorganization operations**

### **Mergers**

The following comments relating to the restructuring of companies concentrate on mergers. Specific issues arising from dissolutions, split-ups and spin-offs are dealt with separately.

### **Direct taxes**

A merger involves the dissolution of the absorbed company followed by an increase in the capital of the absorbing company.

The absorbed company is taxed at the current rate of corporate tax on the profit and provisions of the FY (currently 33.33 percent). A 3.3 percent surtax for companies that have a taxable income basis higher than EUR763,000 increases the corporate and short-term capital gains tax rates to 34.43 percent. A 10.7 percent surtax applies to companies with a turnover of more than EUR250 million for FYs ending on or before 30 December 2016. As a result, the maximum corporate tax rate amounts to 38 percent for those companies (for FYs closed on or before 30 December 2016). For FY closed on or after 31 December 2016, the maximum corporate rate is 34.43 percent.

Long-term capital gains arising from the transfer of substantial shareholdings (held for at least 2 years) are 88 percent exempt. They are thus taxable at the reduced rate of: (i) 4 percent (33.33 percent × 12 percent); (ii) 4.1316 percent (34.43 percent × 12 percent); or (iii) 4.56 percent (38 percent × 12 percent for FYs on or before 30 December 2016).

Short-term capital gains are taxed at the same rates as business profits (currently 33.33, 34.43 or 38 percent, depending on the company's taxable income basis and turnover). The 38 percent rate is repealed as described above for FYs closed on or after 31 December 2016.

The absorbing company acquires the assets transferred free of tax.

Preferential treatment is available in the case of mergers (article 210 A of the French Tax Code). The principal advantages of this treatment are as follows:

- The absorbed company is not subject to corporate tax on net capital gains on fixed assets transferred in a merger. With respect to intragroup mergers, in principle, assets are contributed on a net book value basis, whether it is an upstream or a downstream merger.
- Where the merger is between unrelated parties, assets are contributed on a fair market value basis, unless it is a reverse merger.
- The absorbing company must include in its own balance sheet the provisions and depreciations made by the absorbed company.
- Capital gains on non-depreciable assets can be exempt from French corporate income tax and are not taxed even if the merger value of these assets is higher than their value in the absorbed company's accounts.
- If the absorbing company re-sells a non-depreciable asset, it must calculate the capital gain or loss on the basis of the tax value of the asset in the absorbed company's accounts (rollover).

If the absorbing company sells the transferred assets, the relevant date for long- and short-term capital gains is the date of acquisition by the absorbed company.

In principle, the absorbed company's losses cannot be offset against the absorbing company's profits, except when a special ruling from the tax authorities is granted. This ruling can only be obtained when the merger is carried out under the preferential regime and where certain conditions regarding the transferred activities are met.

### Registration tax

Under article 816 of the French Tax Code, the merger of two companies gives rise to a liability to registration tax, paid by the absorbing company at a fixed amount. This amount is EUR375 if the absorbed company's share capital is lower than EUR225,000, and EUR500 in other cases.

### Retroactive effect

Mergers may be given retroactive effect from both an accounting and tax standpoint. However, the merger's effective date cannot be earlier than the more recent of:

- the first day of the absorbing company's FY
- the first day of the absorbed company's FY.

This provision enables the results realized by the absorbed company during the months preceding the effective date of the merger to be offset against the profits and losses incurred by the absorbing company in the same period.

## Dissolution without liquidation

### Direct tax

According to article 1844-5 of the French Civil Code, the dissolution without liquidation (*transmission universelle de patrimoine*) of a company owned by a sole shareholder is not followed by liquidation. Instead, it entails the transfer of all the company's assets and liabilities to the sole shareholder. In accordance with the Finance Act of 2002, the dissolution without liquidation qualifies for the favorable tax regime under article 210 of the French Tax Code as described above for mergers.

Thus, the tax treatment of a dissolution is the same as that for mergers.

### Registration tax

The dissolution of the merged company remains subject to a registration tax of EUR375 or EUR500 (article 811 of the French Tax Code). However, the transfer of real estate resulting from such an operation can be subject to a registration tax of 0.715 percent (article 678 of the French Tax Code).

### Retroactive effect

Dissolutions may have a retroactive effect only from a fiscal standpoint. Unlike mergers, retroactive effect is not allowed for dissolutions from an accounting standpoint.

### Spin-off

A spin-off (or partial business transfer) is an operation whereby a company transfers part of its assets and liabilities to another company in exchange for shares. The portion of assets transferred must constitute a complete and autonomous branch of activity.

The concept of a complete and autonomous branch of business requires that the collection of assets and liabilities to be transferred are those of a division of a company that constitutes, from a technical standpoint, an independent

activity capable of being carried on using the division's own resources under normal conditions in the economic sector concerned. In short, a complete and autonomous branch of activity is a collection of assets and liabilities of a company's division able to carry out an activity autonomously.

Regarding direct taxes, under article 210 B of the French Tax Code, a partial transfer is eligible for the favorable tax treatment applicable to mergers if all the following conditions are met:

- The transfer is of a complete and autonomous branch of activity.
- The transferring company retains the shares it receives in exchange for the assets for at least 3 years.
- The transferring company commits itself to calculate capital gains on the sale of shares with reference to the value that the assets had in its own accounts from a tax standpoint.

If one of these conditions is not met, it remains possible to obtain a ruling from the French tax authorities. This ruling may be granted by right where:

- The contribution is based on economic reasons and is not motivated by tax avoidance reasons.
- All guarantees are provided to the French tax authorities that they will subsequently be able to tax the capital gains on which the taxation has been deferred.

Regarding registration tax, the transfer is subject to the favorable treatment provided for in article 817 of the French Tax Code, which limits the registration tax to a fixed amount of EUR375 or EUR500, depending on whether the level of share capital is lower than or equal to EUR225,000.

## Split-up

The split-up of a company (*scission*) is a legal operation whereby all the assets and liabilities of the company are transferred to two or more new companies. The old company ceases to exist and its shareholders receive the shares issued by the new companies. The preferable treatment available for mergers/spin-offs for direct tax can also be applied to the split-up to the extent that:

- The split-up company transfers at least one autonomous branch of activity to each company benefiting from the contribution.
- The shareholders who held at least 5 percent of the split-up company commit to keep the shares of the beneficiary companies or the new company for at least 3 years.

The favorable registration duties treatment applicable to mergers also applies to a split-up without particular conditions.

However, the favorable tax treatment only applies to a split-up within the framework of a reorganization and not to a split-up resulting in equity sharing.

## Deferred settlement

Deferred payments under earn-out clauses are subject to the same tax treatment as capital gains or losses realized on the sale.

## Other considerations

### Concerns of the seller

Capital gains are taxable at the standard French corporate income tax rate subject to the restriction noted earlier. Stamp tax is payable by the buyer.

The seller will mainly be concerned with the indemnities and/or warranties requested by the buyer (usually subject to negotiation).

For companies, capital gains on the sale of substantial shareholdings held for at least 2 years are 88 percent exempt from tax. They are thus taxable at the reduced rate of: (i) 4 percent (33.33 percent × 12 percent); (ii) 4.1316 percent (that is, 34.43 percent × 12 percent); or 4.56 percent (38 percent × 12 percent only for FYs closed on or before 30 December 2016). If the shares sold do not qualify as substantial shareholdings, the capital gain is taxable at the standard corporate income tax rate of 33.33 percent, 34.43 percent or 38 percent. The 38 percent rate no longer applies to FYs ending on or after 31 December 2016.

For individuals, the capital gain is subject to personal income tax at the progressive rates (up to 45 percent) after application of an allowance of: (i) 50 percent where the shares have been held between 2 and 8 years; and (ii) 65 percent where they have been held for more than 8 years (higher allowances exist for shares of small and medium enterprises, subject to conditions). The capital gain is also subject to social contribution at a rate of 15.5 percent (with no allowance). These rules apply for capital gains realized as of 1 January 2013.

If a seller sells all or part of their assets to a buyer who carries on their own business with those assets, the tax authorities may consider that the buyer has purchased the goodwill and may subject the transaction to registration tax at the maximum rate of 5 percent.

WHT for capital gains on substantial shareholdings derived by non-residents amounts to 45 percent (75 percent where the seller is located in a non-cooperative country or territory).



## Company law and accounting

### Types of reorganization

- Merger (*fusion*) involves the absorption of one company by another company. The absorbing company may be a new company that takes over one or more existing companies, or it may be an existing company that takes over one or more existing companies.
- Split-up (*scission*) consists of the transfer of all of a company's assets to two or more existing or new companies. In principle, a split-up involves complete and independent branches of activity.
- Spin-off (*apport partiel*) occurs when a complete and independent branch of activity of one company is transferred to another company. The spin-off may be made to an existing company or a new company.
- Dissolution without liquidation (*transmission universelle de patrimoine*) occurs when all shares of a company are held by a single shareholder; it may be decided to dissolve this company, leading to a transfer of all its assets and liabilities to the single shareholder.
- Exchange of shares (*fusion à l'anglaise*) occurs when a contribution of shares is deemed to be a complete branch of activity benefiting from the favorable tax treatment for corporate tax purposes in three cases:
  - where the contribution applies to more than 50 percent of the capital of the contributing company
  - where the contribution confers on the beneficiary company a direct holding percentage of the voting rights, when no other partners hold more
  - where the beneficiary company already holds more than 30 percent and the contributions give it the majority of the voting rights.

### Investment in France

France relaxed its regulations on foreign investment in 1996. In principle, investment in France does not require prior approval from the exchange control authorities. Nevertheless, foreign investment in certain economic sectors must be pre-approved by the Ministry of Finance, based on the fulfillment of certain conditions. The approval is deemed to be granted if, within 2 months of filing a prior authorization, the Ministry of Finance has not opposed the investment.

On 15 May 2014, a new decree was enacted to update the list of activities requiring prior authorization, taking into account those currently deemed essential to guarantee France's interest in public order, public security and national defense.

Before the 2014 decree, 11 types of activity connected with public health, public security and public authority fell within the scope of the prior authorization regime.

For non-EU investors, the 2014 decree significantly extends the scope of the regime to other activities, in particular relating to materials, products or services ensuring the protection of public health or the integrity, security and continuity of: (i) the supply of electricity, gas, hydrocarbons or other energy resources; (ii) the supply of water; (iii) the operation of transport networks and services; and (iv) operation of electronic communication networks and services, etc.

The applicability of this regime also depends on conditions relating to the nature of the investment and (ii) the nationality of the foreign investors (inside or outside the EU), which have not been modified.

The following investments from a third country are subject to prior authorization:

- acquisition of control of a French company
- direct or indirect acquisition of all or part of a branch of activity of a French company
- the crossing of the 33 percent threshold of direct or indirect holding of the share capital or of the voting rights of a French company (applicable to non-EU investors only).

Prior authorization is deemed to have been obtained for:

- investments between companies that are members of the same group, which means that the same shareholder holds more than 50 percent of the share capital or of the voting rights of the entity
- investments made from an EU member state by an investor that holds more than 33 percent of the direct or indirect shareholding or voting rights and that has already been authorized to acquire control of the entity.

Non-compliance with this prior authorization regime constitutes a criminal offence, which may be punishable by a maximum 5-year prison sentence and a maximum fine equal to two times the amount of the investment.

Moreover, if the prior authorization has not been obtained, the agreement (and/or commitment directly or indirectly materializing the foreign investment) is deemed null and void.

Additionally, some categories of investments in France must be the subject of an administrative report to the exchange control authorities, such as:

- the formation of a new French company by a non-resident
- the acquisition by a non-resident of all or a part of a French company's branch of activity

- any operation carried out by a non-resident on the share capital of a French company, provided that at the end of the operation the company is owned more than 33.33 percent by non-residents
- the previously mentioned operations carried out by a French company, at least 33.33 percent of whose share capital or voting rights are owned by a non-resident
- expansion of the activities of an existing company where the amount at stake is over EUR1.5 million
- acquisition of agricultural land (except for wine-producing businesses)
- liquidations of foreign investments in France.

The following operations are exempt from this administrative declaration requirement:

- creation or extension of the activity of an existing French business held directly or indirectly by a foreign business
- increase of an ownership interest in a French business held directly or indirectly by a foreign business, when made by an investor that already holds more than 50 percent of the capital or voting rights of the French business.

Lastly, some categories of investments must be reported to the Banque de France for statistical purposes, notably:

- any operation between related companies (i.e. loans, deposits, etc.) over EUR15 million
- real estate investments
- acquisition or sale of a French company by a non-resident over EUR15 million
- acquisition or sale of real estate in France by a non-resident over EUR15 million
- liquidations of foreign investments in France.

Note that these rules are fully applicable to mergers and takeovers.

## Choice of entity for investing in France

Commercial companies are divided into joint stock companies (*sociétés de capitaux*) and partnerships (*sociétés de personnes*).

The most frequently used company forms in France are the SA (corporation), the SAS (simplified joint-stock company) and the SARL (limited liability company).

## Corporation, *Société Anonyme* (SA)

- Earnings are taxed once at the corporate level.
- Distributions of earnings are at first subject to a 3 percent contribution payable by the distributing company (unless the distribution occurs within the same tax consolidated group).

- Distributions of after-tax earnings are also taxed at the shareholder level. France reduces the financial effect of taxing corporate profits twice (at the entity and recipient levels) through a 40 percent tax deduction for individual shareholders. There is no deduction for dividends paid to a company. However, if the parent company owns at least 5 percent of the French subsidiary's share capital and keeps the shares for at least 2 years, the parent company is eligible for the 95 percent dividend exemption provided for by article 145 of the French Tax Code. The 5 percent share is taxed at the current tax rate. However, within a tax-consolidated group, dividends eligible to the participation exemption regime on dividends are subject to a 1 percent taxation as of the first year of tax consolidation (for FYs ending on or before 31 December 2015, these dividends were 100 percent tax-exempt as of the second year of tax consolidation).

- Minimum share capital for an SA is EUR37,000.

- Shareholders have limited liability for the company's debts.

- There is no maximum number of shareholders (minimum seven for listed-companies and two for non-listed companies).

## Limited liability company, *Société à Responsabilité Limitée* (SARL)

- Minimum share capital is EUR1.

- Minimum number of shareholders is one.

- Maximum number of shareholders is 100.

- The shareholders must give their prior majority approval to the transfer of SARL shares to third parties.

- Shareholders may participate in the management of the company.

- Taxed according to the same rules as an SA (except for family-owned SARLs, which may elect to be taxed as look-through entities).

## *Société par Actions Simplifiée* (SAS)

- Minimum number of shareholders is one.

- Both companies and individuals may be shareholders.

- Minimum share capital is EUR1 (introduced in *loi de Modernisation de l'économie-LME*, dated 4 August 2008).

- Taxed in the same way as an SA.

- Shareholders have limited liability for the company's debts.

- Restriction regarding public offering.

### **General partnership, *Société en Nom Collectif* (SNC)**

- No minimum or maximum capital requirements.
- Minimum of two partners.
- All the partners are jointly and severally liable for the partnership's liabilities.
- Not taxed at the entity level (unless an election for corporate tax is made).
- Partners are taxed on their share of earnings, whether or not distributed.

### **Limited partnership, *Société en Commandite Simple* (SCS)**

- No minimum or maximum capital requirements.
- Minimum number of shareholders is two general partners (*commandités*).
- Two categories of partners: general partners (*commandités*) and limited liability partners (*commanditaires*).
- General partners are jointly and severally liable for the company's debts.
- Liability of the limited liability partners is limited to the amount of their contribution to the SCS's capital.
- General partners are subject to income tax on their share of the SCS's income, whether or not distributed.
- The limited liability partners' share of SCS income is subject to corporate tax at the SCS level. Dividend distributions to limited liability partners are taxed at their level under normal tax rules.

### **Limited stock partnership, *Société en Commandite par Actions* (SCA)**

- Minimum share capital for SCA is EUR37,000.
- Minimum number of shareholders is one general partner (*commandité*) and three limited liability partners (*commanditaires*).
- General partners (*commandités*) are jointly and severally liable for the SCA's debts.
- Limited liability partners (*commanditaires*) are considered as shareholders and their liability for the SCA's debts is limited to the amount of their capital contribution.
- Taxed as an SA.

### **Group relief/consolidation**

There is a special tax regime for groups of companies. A French parent company and its 95 percent-owned subsidiaries may elect to be treated as a group so that corporate income tax is imposed on the aggregate of the profits and losses of the group members.

The group may be composed of a parent company holding directly 95 percent or more of all its subsidiaries. A group may also exist if the 95 percent shareholding is held through other subsidiaries. Such subsidiaries can be located in France or an EU country (although in the latter case, the foreign intermediary subsidiary is excluded from the tax-consolidated group). The Corrective Finance Act for 2014 extended the scope of the tax consolidation mechanism to 'horizontal' tax-consolidated groups (i.e., between French-resident sister or cousin companies with their parent company established in another EU or EEA member state). Thus, one of the French sister or cousin companies is entitled to become the head of a French tax group subject to specific conditions.

To qualify for group treatment, all the companies must be subject to French corporate tax.

An election for this special regime is made for a period of 5 years. A new company may be included in the group. If a company leaves the group, adjustments must be made, which can be expensive for the parent company.

The group profit is taxed at the standard rate of corporate tax. The group profit or loss is the sum of all the members' profits and losses.

For FYs starting in 2016 and later years, the rule providing for neutralization of the 5 percent taxable share for dividends paid between entities of a French tax consolidated group is repealed. However, the taxable share is reduced to 1 percent (i.e., effective taxation of approximately 0.33 percent) for dividends that are received by a company (that is a member of a French tax group) from another company of the tax group or from a company established in an EU or EEA member state if this company, had it been French, would have met the conditions of being a member of the tax group. The 1 percent taxation applies from the first year of membership and to each level of shareholdings.

The advantages of group treatment are as follows:

- netting of the profits and losses of the companies of the group
- double taxation is avoided, so dividend distributions made within the group are exempt from corporate tax (but only up to 99 percent as of 1 January 2016, as explained above).
- tax-neutrality for transfers of assets and for transactions within the group (but clawed back if the group terminates or one company leaves the group).

The main drawbacks of the tax group regime are as follows:

- potential increase in the corporate income tax rate (depending on the group's overall turnover, the exceptional contribution of 10.7 percent can apply; the contribution is repealed for FYs ending after 2016)

- potential increase in the company value added contribution rate (depending on the group's overall turnover)
- potential limitation on the deduction of interest expenses (application of the Charasse amendment rule and appreciation of the EUR3 million threshold at the group level for application of the general limitation of the deductibility of interest expenses).

## Transfer pricing

Where the companies involved in a cross-border reorganization have had commercial relationships before the transaction, it may be necessary to review, modify or amend the transfer pricing agreement in force in order to avoid any potential transfer pricing reassessment.

Companies with a turnover or gross assets of over EUR400 million (or companies held directly or indirectly by such an entity by more than 50 percent as well as companies holding directly or indirectly more than 50 percent of such an entity) are required to maintain at the disposal of the tax administration documentation justifying the transfer pricing policy with affiliated companies.

For tax audits launched as of 1 January 2015, failure to provide the documentation to the French tax authorities (after formal notice) entails a fine of up to the higher of:

- (i) 0.5 percent of the amount of the transaction for which complete documentation has not been provided; or
- (ii) 5 percent of the transfer pricing reassessment (in base).

The penalty cannot be less than EUR10,000.

For tax-consolidated groups, the parent company is required to file this declaration for both itself and each tax group member (for transfer pricing declarations filed on or after 1 January 2016). The documentation must be filed in the electronic form for each FY.

Finally, in compliance with the French administrative guidelines, companies are required to identify the jurisdictions where members of the tax group hold intangible assets or with which intragroup transactions occur.

For FYs ending as of 30 September 2013, these companies also have to file annually an abridged version of their transfer pricing documentation (within 6 months of the date of the tax return filing).

Finance Act for 2016 introduces a country-by-country reporting obligation (article 223 *quinquies* C of the French Tax Code) in accordance with Action 13 of the Organisation for Economic Co-operation and Development's (OECD) Action Plan on Base Erosion and Profit Shifting (BEPS). These reports will be subject to an automatic exchange between national tax authorities. This declaration aims at reinforcing the transfer pricing documentary obligations of multinational groups.

Two types of companies are subject to this declaration:

- companies that (1) create and draw up consolidated accounts; (2) belong to a group with a consolidated turnover in excess of EUR750 million; and (3) have foreign branches or hold or control, directly or indirectly, foreign entities (companies held by parent companies subject to the requirement to file a country-by-country reporting in their state of incorporation are not subject to this obligation)
- companies held by entities established in countries that do not participate in the automatic exchange of country-by-country reports: (1) the companies are held, directly or indirectly, by a legal entity established in a state that does not participate in the automatic exchange and would be required to file the country-by-country report if it were established in France; and (2) the companies are designated to file the report by the group to which they belong or have not demonstrated that another entity of the group established in a country that participates in the automatic exchange of country-by-country reporting has been designated to file the declaration.

The country-by-country report must include a breakdown, by country, of the group's earnings and aggregate economic accounting and information on the location and activities of the different members and entities of the group. The report must be filed in the electronic form for each FY. Failure to produce the report would be subject to a penalty in an amount up to EUR100,000.

The new country-by-country reporting requirements apply to FYs starting on or after 1 January 2016. Accordingly, the first reports are to be filed by the end of 2017 and automatically exchanged between the countries in 2018.

## Foreign investments of a local target company

Profits made by controlled foreign companies (CFC) established in low-tax countries and whose parent companies are subject to French corporate income tax are taxed at the French parent company's level. This treatment applies where the French company directly or indirectly holds more than 50 percent of the subsidiary's capital (5 percent if more than 50 percent of the CFC is held either by companies located in France or by companies that control or are controlled by said companies located in France).

In the case of undertakings controlled by French companies and located in low-tax jurisdictions, the burden of proof is shifted to the taxpayer.

This measure does not apply if the French parent company can prove that the main effect of the controlled subsidiary's operations is other than that of locating profits in a low-tax country (which is the case where the subsidiary is engaged in



an actual industrial or commercial business in the jurisdiction where its establishment or head office is located).

Further, article 209 B is not applicable to companies established in the EU unless the structure constitutes an artificial scheme that aims to avoid the application of French legislation.

## Comparison of asset and share purchases

### Advantages of asset purchases

- The purchase price (or a portion of it) can be depreciated or amortized for tax purposes (but not to the extent that it includes goodwill).
- A step-up in the cost base of individual assets for capital gains tax purposes is obtained.
- No previous liabilities of the company are inherited.
- It is possible to acquire only part of a business.
- There is greater flexibility in funding options.

### Disadvantages of asset purchases

- Possible need to renegotiate supply, employment and technology agreements, and change stationery.
- A higher capital outlay is usually involved (unless debts of the business are also assumed).
- May be unattractive to the seller, thereby increasing the price. Indeed, in most cases, capital gains derived from the sales of assets are subject to the standard corporate

tax rate whereas capital gains on shares benefit from an 88 percent exemption.

- Higher transfer duties (a transfer of goodwill is subject to higher registration tax than a sale of shares of an SA, SAS or SARL).
- Accounting profits may be affected by the creation of acquisition goodwill (at a consolidated level).
- The benefit of any losses incurred by the target company remains with the seller.

### Advantages of share purchases

- Likely more attractive to the seller, so the price is likely lower.
- May benefit from tax losses of target company (the target company retains its tax losses).
- May gain benefit of existing supply or technology contracts.
- Transfer duties are quite low.

### Disadvantages of share purchases

- Liable for any claims or previous liabilities of the entity.
- No deduction for the purchase price (but interest payable on acquisition financing may be deductible for the purchasing company).
- Less flexibility in funding options.

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