DOING BUSINESS IN FRANCE

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Lefèvre Pelletier & associés Avocats

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The "Doing Business in France 2005" edition has been universally praised by Lefèvre Pelletier & associés clients and foreign correspondent law firms. Striving to continue that success, our dedicated team has revamped the 2006 edition in order to enhance its contents and facilitate as much as possible the understanding of French law. More than just an update of the 2005 edition, the 2006 edition contains new sections, such as information concerning the European Company statute or a comparison table of the main Commercial Company formats under French law.

As a result the 2006 edition offers its readers a unique and readily understandable synthesis of the key provisions of French business laws and regulations applicable to almost any foreign investment into France, our goal being to highlight as many important issues as possible in a nutshell.

However, real property as well as financing and banking matters have been left out as these matters are covered in several dedicated documents published by the firm and which are available upon request.

The year 2005 has seen numerous legislative changes and consequently this issue supersedes and replaces the 2005 issue.

However, this brochure or any part of its content does not amount to legal advice. Consequently, we strongly recommend the hiring of competent French legal counsel at the time of preparing, or carrying out, or managing any specific new investment in France.

Lefèvre Pelletier & associés ("LPA") was founded in 1983 and is now one of the leading independent law firms in France. The firm comprises over 140 lawyers and 30 partners, and provides clients with legal expertise in Business Law, Mergers and Acquisitions, Real Estate, Tax, Litigation, Banking and Insurance, and Labour Law.

About 50% of the matters handled by LPA have an international dimension, whether inbound or outbound.

Our teams are recommended in prestigious legal guides such as Legal 500, Chambers and Partners and Global Counsel 3000.

LPA's professional services are offered mainly in English, French, German, Dutch and Chinese.

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I Setting up a business in France

1 Representative Offices

Setting up a business in France may start with the creation of a representative office or a liaison office.

A representative office or liaison office *(bureau de representation or bureau de liaison)* is an establishment intended to carry out preliminary operations such as research and advertising, to secure contacts and to gather and supply information for a foreign parent company. In France, a representative office is not entitled to participate in any type of commercial activity, such as the signing of contracts for sales orders (under the penalty of being considered a permanent establishment for tax purposes such as in the case of a commercial branch - see under 3 below).

The French representative office of a foreign company does not have any separate legal status nor is it considered to be a commercial company. Foreign companies are therefore liable for all of the activities of their representative offices in France.

2 Branch Offices

Foreign companies that wish to conduct commercial or industrial activities in France may set up a branch office (*succursale*). The office's manager may be authorized to represent and establish connections for the foreign parent with respect to third parties. However, commercial contacts must be entered into under the name and on behalf of the foreign parent, as a branch office is not an independent entity and does not have full legal capacity. The foreign company is therefore also liable for all of its activities.

3 Differences between a Representative Office and a Branch Office

The activities of a representative office are far more limited than those of a branch office. Indeed, a company seeking to develop its activities in France will be restricted by the fact that a representative office cannot undertake any activities other than those listed under **1** above, particularly within the areas of commerce and trade. These activities are viewed as preparatory and/or ancillary to any trade activities. Moreover, the persons in charge of a representative office are not empowered to represent the foreign company and therefore are not allowed to enter into contracts under the name and on behalf of the foreign company such as in the case of a branch.

Where an office set up in France is intended only to collect market data and/or provide technical support while all orders, deliveries, invoicing, etc. are handled from outside France, a representative office might be an appropriate choice.

In practice, however, it may prove difficult for a foreign company to carry out activities in France, even of a preparatory and ancillary character, without conferring the power to act on its own behalf to its local office. Indeed, it may hamper the development of activities and require the conversion of the representative office into a branch which, in turn, would require a new registration process. Therefore, it may be preferable to register the office as a branch from the outset, depending on the aims of the presence to be established.

Under the majority of the tax treaties signed by France, a representative office is not considered a permanent establishment and is therefore not liable for corporation tax in France. However, a branch office will be considered as a permanent establishment and liable for all commercial taxes on French-source income. For more information concerning French taxation, please refer to section V.

A procedure now exists under French law to obtain an advance tax ruling in order to ensure that the representative office shall not be considered as a permanent establishment by the French tax authorities.

4 Distribution Networks

In France, the distribution of products and services is possible through a number of channels.

4.1 Independent Distributors

A distributor (an individual or a legal entity) purchases goods from a supplier and resells them for his own account on the market to his clients. A distributor does not act on behalf of the supplier and is remunerated only on the basis of the profit margin resulting from his purchase and resale activities. As an independent entrepreneur, he is consequently responsible for the risks of his business.

Distribution agreements may be exclusive or non-exclusive in nature. Minimum sales quotas can be provided for. Where exclusivity of resale is provided for, the distributor has the exclusive right to sell the supplier's products or goods within a given territory. Otherwise, the distributor has no exclusive rights and the supplier's goods may also be sold on the market by other distributors. Where exclusivity of supply exists, a distributor may not sell competing products. Such exclusive supply agreements must be limited to a ten-year period.

Exclusive supply distribution agreements are valid under national and/or EC anti-trust laws where they are not imposed by a party in a dominant position and where they do not obstruct competition. Case law has admitted such agreements mainly in the distribution of luxury goods and high-tech products.

Selective distribution networks may also be set up by suppliers who wish to select their distributors carefully according to their special skills, reputation, or technical ability. The selected distributors are not bound by any exclusive supply agreement with the supplier and can usually sell competing products. This kind of agreement is also common in the distribution of luxury goods and high-tech products as well as in various other sectors.

Distribution networks are frequently set up in the form of a franchise. The Franchiser grants the right to use his distinctive signs (trademark, etc.), discloses his expertise to the Franchisee and provides assistance. The Franchisee pays royalties to the Franchiser and covers all investments required to set up his business with the assistance and reputation of the Franchiser.

4.2 | Sales Intermediaries

Sales intermediaries are either independent professionals such as agents (*agents commerciaux*), brokers (*courtiers*), or employees (V.R.P.: *voyageurs-représentants-placiers*).

Agents do not act in their own name but act as a go-between between buyer and seller. As a result, they are not parties to the contracts entered into with buyers, but they may be empowered to sign sales contracts in the name of and on behalf of their principals. In fact, such contracts are deemed to be entered into between their principal and the customer.

The tasks of agents are to promote the activities of their principals within a given territory, to act in good faith and to report to the principal. The intermediary's remuneration is fixed or, more often than not, commission-based. Agents are self-employed or legal entities. Consequently, they are not acting under an employee-employer relationship with the principal.

Agents benefit from specific statutory protection deriving from EC law. The termination of their contracts is governed by strict regulations and they are normally entitled to compensation when their contracts are terminated. This compensation often equates to two years' commission. Agency relationships are also covered, tax-wise, by bilateral tax treaties.

A broker (*courtier*) identifies potential contracting parties and puts them in contact with each other. He may not sign contracts on behalf of his principal and is not a party to the sales contract. He receives a commission and is not normally entitled to any compensation on termination of his brokerage contract.

Sales representatives (*VRP*) are considered to be employees. They receive a salary (in general, a fixed amount plus a commission on sales volume) for visiting customers and potential customers in a given territory and securing orders from such customers. Sales representatives are entitled to specific compensation on termination of their employment contracts by their employer.

II | Creating a Legal Entity in France

1 | Introduction

Of the various company formats available under the French Commercial Code, only the three most popular ones are described herein: the *Société Anonyme* (a limited liability company, hereafter "SA"), the *Société à Responsabilité Limitée* (a small-size limited liability company, hereafter "SARL"), and the *Société par Actions Simplifiée* (a simplified limited liability company, hereafter "SAS"). These three formats offer limited liability (corporate veil) to their shareholder(s). Specific comments are made, under 9 below, on the new European Company statute.

1.1 | SA

The SA is the most elaborate structure. Applicable regulations to SA are sometimes seen as complex and burdensome. It requires a minimum of seven shareholders and considerable capital investment. Its management structure is quite formal, although two different regimes are available. The shares of an SA, unlike any other form of company *format*, can be listed on a stock exchange.

1.2 | SARL

The SARL was designed for small businesses. Its shares may be held by only one shareholder, capital investment is a minimum of €1, and its management structure is less formal. An SARL can be an ideal structure for a small subsidiary of a foreign parent or of foreign shareholders.

1.3 | SAS

The SAS is a more recent structure, often appropriate for a holding company or a wholly-owned subsidiary of a foreign group of companies. It is a stock company like the SA and requires the same capital investment, but it can be owned by a single shareholder (for example, the foreign parent company) and its management structure is very flexible. The SAS is now becoming the most popular corporate form in France (other than for small companies).

The following is a summary of the main aspects of these company formats. A summary comparison table is also reproduced below.

2 | Share Capital and Minimum Number of Shareholders

Except for certain regulated activities, the SA requires a minimum share capital of €37,000 (€225,000 if the SA goes public), 50% of which must be paid on the incorporation date (the remainder must be paid within the following five years). A minimum of seven shareholders is required, and each Director must be a shareholder (directors' qualifying shares).

The SARL requires a minimum share capital of €1. The share capital is freely determined by the Articles of Association and only 20% must be paid on the incorporation date (the remainder must be paid within the following five years). The SARL requires only one shareholder, but is limited to a maximum of one hundred shareholders.

The SAS is subject to the same share capital requirements as an unlisted SA, but may if so desired have only one shareholder either at the time of incorporation or at any time thereafter.

3 | Share Transfers

The shares in an SA are negotiable and can be listed on a stock exchange. Shareholders can agree to certain types of restraints on share transfers. A single transfer of shares is subject to a 1.1% registration duty (with a cap at €4,000 per transfer) or, if the company mainly holds real estate assets, a 5% registration duty without any upper limit but with a €23,000 rebate[1].

The "shares" in an SARL are not negotiable, but are transferable in the same way as interests in a partnership. Not only is it possible to provide for a great range of restraints on share transfers in the Articles of Association, but the law requires transfers of shares to third parties to be first approved by a majority of the existing shareholders. Transfers of SARL shares are subject to a registration duty of 5% with a €23,000 rebate[1].

The shares in an SAS are negotiable but cannot be listed on a stock exchange. Almost any form of restraints on share transfers or indirect change of control can be agreed upon by the shareholders (including preventing indirect acquisitions through acquisition of the shares of an existing shareholder, prohibiting the sale of shares during a fixed period of up to ten years, exclusion provisions, etc.). The registration duties are the same as for an SA.

4 | Shareholders' Meetings

4.1 | SA

In an SA, an Ordinary Shareholders' Meeting must be held at least once a year, and no later than six months after the end of the company's financial year, to approve the audited accounts of the company (annual financial statements). Decisions are taken by simple majority (quorum of 1/5 on first call, no quorum requirement on second call).

In addition to approval of the accounts, the following powers are expressly reserved to Ordinary Shareholders' Meetings:

- allocation of the year's profits or losses;
- appointment or dismissal of Directors (or Members of the Supervisory Board);
- appointment of the statutory auditors;
- dismissal of Members of the Executive Board (if applicable);
- approval of agreements between the company and a Director or General Manager (or member of the Supervisory Board, if applicable).

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(1) *€23,000 rebate for 100% of the shares in the company, reduced as a* pro rata *of the actual percentage of shares sold.*

An Extraordinary Shareholders' Meeting is called each time an amendment to the Articles of Association is sought (e.g. change of purpose, change of company name, change of registered head office, increase in share capital, etc.). Decisions are generally taken by a 2/3 majority (quorum of 1/4 upon first call, 1/5 thereafter), except for such issues as capitalization of reserves (simple majority) or of conversion of the SA into another company format (unanimity or qualified majority according to the new company format chosen).

4.2 | SARL

Ordinary Shareholders' Meetings must be called once a year, as in an SA, for the purpose of approving the annual accounts, allocating profits and losses, and appointing or dismissing the manager and/or the statutory auditors, if applicable. Ordinary resolutions require a simple majority (quorum of 1/2 on first call, no quorum requirement thereafter). When the SARL has a sole shareholder who is also the company's manager (*gérant*), the filing of the accounts with the local Commercial Court is considered as sufficient without the need to proceed to a formal approval process of these accounts.

An Extraordinary Shareholders' Meeting is called each time an amendment to the Articles of Association is sought (e.g. change of purpose, change of registered office, increase in share capital). Such resolutions generally require a 3/4 majority, except for such matters as capitalization of reserves (simple majority), change of the company's nationality and conversion into an unlimited liability company or an SAS (unanimity), authorization for transfers of shares to third parties and for pledges of shares (majority of voting rights + majority of number of actual shareholders). Pursuant to Law No. 2005-882 of 2 August 2005, which entered into force on 3 August 2005, such shareholders' resolutions require a 2/3 majority for all newly created SARL and those which have amended their Articles of Association accordingly (with a quorum of 1/4 or 1/5, on the first and second call respectively).

Regarding formalities, shareholders' meetings in an SARL require less preparation: less information needs to be sent to the shareholders prior to the meeting, as postal voting is possible for all types of resolutions except the approval of the annual accounts (although videoconferencing or teleconferencing is permissible in an SA and in an SAS, subject to certain conditions).

4.3 | SAS

The law provides for great flexibility. The only mandatory rule applicable to an SAS having more than one shareholder is that certain decisions must be taken by the shareholders "collectively" (i.e. via a meeting, written consultation or videoconference, teleconference, etc.): decisions concerning capital modifications, mergers, de-mergers, winding-up, conversion of the SAS into another company format, appointment of statutory auditors, approval of annual accounts and allocation of results. Other decisions may usually be delegated to the SAS management.

5 | Management

5.1 | SA

Two management regimes are available for an SA: the standard one-tier regime consisting of a Board of Directors, and the German-inspired, two-tier regime consisting of a Supervisory Board and an Executive Board.

5.1.1 Board of Directors Regime

- **Directors**

The Board of Directors consists of a minimum of three and a maximum of eighteen directors, whether individuals or legal entities, who are appointed at an Ordinary Shareholders' Meeting for a maximum of six years (or three if named in the initial Articles of Association). The Board of Directors takes decisions by a majority vote of the directors present or represented. Its decisions are valid only if a quorum of 1/2 of its members are present. Representatives of the employees' Works Council (*Comité d'Entreprise*), if one exists, must be invited to attend Board Meetings (companies with over 50 employees must have a Works Council).

Directors must own (or be assigned) at least one share ("directors' qualifying shares") or a number of shares greater than that specified in the Articles of Association.

- **Directors and contracts of employment**

At all times, no more than one-third of the Directors may hold contracts of employment with the SA. Moreover, such employment must relate to an activity or responsibility distinct from that of their management function. A Director is prohibited from becoming an employee, but an employee may assume directorship functions if certain strict conditions are fulfilled. If these conditions are not met, the existing employment contract will be deemed suspended until expiration of the Directorship. It is important to note that the employee status of a Director is open to the challenge of the French unemployment fund at the time the Director-employee contract is terminated by the employer.

- **President General Director**

One of the Directors, who must be an individual (not a legal entity), is elected President. The President is typically the Chairman of the Board of Directors. The exact management and/or representation powers of the President must be set forth under one of the two options below:

- the President is vested with all management powers (he is then known as the *Président Directeur Général*, or PDG); or
- such management powers are vested in a second individual, the General Director (*Directeur Général*, or *DG*), in which case the President's role is limited to organising and chairing the Board of Directors' meetings.

The choice of one of these options is made by the Board of Directors and these options must be reflected in the Articles of Association.

While the PDG's appointment can be revoked at any time by the Board without compensation (other than for removal in injurious circumstances), the DG may also be dismissed at any time, but will be entitled to damages if dismissed without just cause.

- **Management powers**

The PDG or DG (depending on the option made as indicated immediately above) have the broadest powers to act in all circumstances on behalf of the SA, within the SA's corporate purpose, and subject to the powers reserved by law to the shareholders' meetings. Regarding third parties, an SA is bound by the acts of its Board of Directors and its PDG or DG even where these are beyond the company's corporate purpose, unless the company can prove that the third party was fully aware (or could not have been unaware, depending on circumstances) that such acts were contrary to or beyond the company's purpose and therefore should not have acted accordingly. However, the company is not bound by guarantees which were not authorized by the Board.

Internal limitations of powers for the PDG or the DG, even if contained in the Articles of Association, are not enforceable against third parties.

An individual who is not a national of an EU or OECD Member State must obtain prior authorization from the French authorities before being appointed to the position of PDG or DG, called a foreign trader's card (*carte de commerçant étranger*) but replaced recently by an *autorisation préfectorale*. This formality can cause delay in the incorporation process of a new entity and may be quite burdensome. Consequently, it requires careful preparation and advanced planning. The same requirement also applies to the President of the Executive Board of an SA, the President or General Director of an SAS, the manager of an SARL or the legal representative of a branch.

5.1.2 Executive Board and Supervisory Board Regime

- **Overview**

The two-tier Board System consists of an Executive Board (*Directoire*) and a Supervisory Board (*Conseil de Surveillance*). This type of structure gives rise to increased formalities and is not normally recommended where there is a desire to keep things simple. This structure may however be considered appropriate where there are several groups of shareholders within an SA and it is therefore necessary to distinguish the management of the company (by the Executive Board) from its control (by the Supervisory Board).

- **Supervisory Board**

The Supervisory Board of an SA consists of up to eighteen members who must be shareholders and who cannot be members of the Executive Board. Among other powers, the Supervisory Board may question the appropriateness of any management action taken by the Executive Board, appoint the members of the Executive Board, propose the removal of a member from the Executive Board, and authorize agreements between the company and members of the Executive Board or the Supervisory Board. No more than one-third of the Members of the Supervisory Board may hold contracts of employment, but these can be concluded before or after appointment to the Board. As in the case of Board of Directors members, strict conditions apply for the dual status of employee and officer (in this case, member of the Supervisory Board.)

- **Executive Board - management powers**

The Executive Board of an SA is vested with the widest powers to act in all circumstances on behalf of the SA save for (i) the powers expressly reserved by law to the Supervisory Board or to the General Meeting of Shareholders, and (ii) restrictions with respect to the Executive Board's powers provided for in the Articles of Association. The role and position of the Executive Board (the members of which act collectively) with respect to third parties is largely the same as that of the PDG or DG in an SA managed by a Board of Directors. Executive Board Members can hold employment contracts subject to the same conditions as those referred to above for members of the Supervisory Board, except that the law does not provide for a maximum number of employment contracts among Executive Board members. A President of the Executive Board who is not an EU or OECD Member State national must obtain a Foreign Trader's Card prior to his appointment to that office. Executive Board members may be dismissed at any time without compensation by the Supervisory Board.

5.1.3 Maximum Number of Offices

An individual may generally not hold more than one mandate as the (or a) General Manager or as an Executive Board Member in a French SA (in groups of companies, this number may be increased to two). Nor may he generally hold more than five mandates as a Director or as a Supervisory Board Member in French SA (except in groups of companies, but this maximum still applies to mandates as President). Finally, an individual may not hold an aggregate of more than five mandates as a General Manager, an Executive Board member, a Director and/or a Supervisory Board member. Again, special rules apply to groups of companies. For the purposes of calculating these limitations, permanent representatives of mandated companies are deemed to exercise such mandates in their own name. As one can see, such calculations may sometimes be complex in the case of groups of companies.

5.2 | SARL

An SARL is managed by one or more Managers (*Gérants* or *Conseil de Gérance*) who must be individuals (not legal entities) but need not be shareholders. The *Gérant* of an SARL has, in the absence of specific limitations contained in the Articles of Association (which, as we have seen with the SA company format, would not be enforceable against third parties), extensive powers to perform all acts of management in the interest of the company.

These powers are, however, still subject to the specific powers reserved by law to the Shareholders' Meeting or decisions of the sole shareholder, as the case may be, and the corporate purpose of the SARL.

A *Gérant* may be employed by the company during his mandate, provided that his employment relates to a distinct and real activity or responsibility, and provided that he is not a majority shareholder (this condition is implied by the requirement that he reports to the company). This second condition is critical.

Indeed, the dual status of a manager of an SARL having an employment contract with that SARL is extremely delicate with regards to French unemployment funds if the manager's contract is ever terminated. Consequently, such dual status arrangement require timely legal advice if possible.

An individual who is not an EU or OECD Member State national must obtain a Foreign Trader's Card prior to his appointment as *Gérant* of an SARL.

Gérants may be dismissed at any time by a resolution passed by a simple majority of shareholders. A *Gérant* may claim damages for wrongful dismissal if dismissed without just cause.

The same individual can be the *Gérant* of an unlimited number of SARLs.

5.3 | SAS

The management structure of an SAS is highy flexible provided that the position of President is filled. Indeed, the Law provides that the SAS must be represented by a President.

General Directors may be appointed with or without the same management powers as the President. It is also possible to have Deputy General Directors as well as a Board of Directors or any type of internal committee, without the latter being generally recognized as having any existence vis-à-vis third parties.

Officers of the SAS are not subject to the special rule pertaining to the maximum number of mandates applicable in an SA. However, strict conditions apply to the cumulative status of officer of an SAS and employee of the same legal entity, particularly for the President and General Director(s). Generally, however, these conditions are less strict than in an SA.

An individual who is not an EU or OECD Member State national must obtain a Foreign Trader's Card prior to his appointment as President or General Director of an SAS.

6 | Statutory Auditors

In an SA, at least one principal statutory auditor and one alternative statutory auditor must be appointed in the Articles of Association or at the first Shareholders' Meeting, for a renewable period of six years.

Shareholders of an SARL must appoint at least one principal statutory auditor and an alternative statutory auditor where two of the three following criteria are met:

- balance sheet total €1,550,000
- net turnover €3,100,000
- number of employees 50

The SAS is subject to the same statutory auditor requirements as the SA.

7 Limitations to the Powers of Management

7.1 SA

A PDG or DG may not alone direct the SA to provide a guarantee for a third party (even a subsidiary) unless prior authorization has been obtained from the Board of Directors. Unauthorized guarantees are not enforceable against the SA.

Nor may the PDG or DG (nor any member of the Board of Directors or of the Executive and Supervisory Boards) of an SA direct his company (unless the SA is a financial institution) to grant a loan to him personally, or guarantee a loan granted to him. Such unauthorized loans or guarantees are null and void.

Apart from this, officers of an SA may legally enter into contracts or transactions with the SA. These contracts must generally be approved in advance by the Board of Directors (or Supervisory Board) and subsequently be ratified at the annual Ordinary Shareholders' Meeting pursuant to a special report issued by the company's statutory auditor (these contracts and transactions are called *conventions réglementées*). The rationale behind the system is that these transactions are likely to create a conflict between the officer's personal interest and that of the SA; if ratification is not obtained, the contract or transaction is still valid but the officer may have to compensate the company if the latter were to sustain a loss as a result thereof. Where the contract or transaction relates to a contract or transaction entered into in the ordinary course and at arm's length conditions, it generally needs to be declared to the statutory auditor.

7.2 SARL

The *Gérant* of an SARL is generally allowed to grant guarantees on behalf of the SARL.

However, like the officers of an SA, the *Gérant* cannot grant himself a loan from the SARL or use the SARL to guarantee a loan granted to him.

Aside from this, the *Gérant* of an SARL may legally enter into a contract or transaction with the SARL he is managing. These contracts or transactions need not be approved in advance, as described above for an SA, but they must be ratified by the shareholders. Generally, this notification takes place at the time of approval of the annual accounts pursuant to a special report issued by the statutory auditor (or by the manager if there is no statutory auditor). If, however, the contracts or transactions are entered into in the ordinary course and at arm's length conditions, they are not subject to shareholders' ratification.

7.3 SAS

The President and General Director(s) of an SAS are generally in the same position as managers of an SARL with respect to the SAS issuing loans and guarantees as well as contracts or transactions entered into between themselves and the SAS. Note that when the SAS has only one shareholder, contracts or transactions entered into between these officers and the SAS need be reported only in the minutes of the sole shareholder's resolutions without any other formality (i.e. there is no need for either ratification by the sole shareholder nor for any special report to be issued by the statutory auditor of the SAS). In any case, unlike in an SA, no advance authorization process exists.

8 Management Liability

8.1 Civil Liability

The Directors and PDG/DG of an SA, like the *Gérant* of an SARL and the President and General Director(s) of an SAS, may, in certain circumstances, be held personally liable for any loss incurred by the company they manage or by any third party. The Commercial Code identifies three negligent acts for which officers may be held liable (qualifying as tort under French law):

- breach of the mandatory and regulatory provisions governing the company;
- breach of the provisions of the Articles of Association of the company;
- deliberate or negligent misconduct in the management of the company, including fraudulent misconduct.

8.2 Liability in the Event of Bankruptcy

The potential liability of officers of all types of French companies, including *de facto* or shadow managers, is increased when the company becomes subject to insolvency proceedings resulting from its inability to pay debts as they become due with cash and cash equivalent assets (this criterion is known as *cessation de paiements*).

This regime has been modified by Law No. 2005-845 of 26 July 2005, which entered into force on 1 January 2006.

In such circumstances, a manager who is held negligent by the Courts may be ordered to pay to the bankrupt estate the amount required to satisfy all creditors' claims (i.e. the liabilities exceeding the amount of the company's assets) (*responsabilité pour insuffisance d'actif*, formerly known as *comblement de l'insuffisance de passif*), provided that such insufficiency of funds was caused, totally or partially, by the manager's negligence. This tort action is now limited to the case of a judicial winding-up (*liquidation judiciaire*) or cancellation of recovery plans negotiated with creditors under specific proceedings aimed at preventing the winding-up of companies.

When a company begins judicial winding-up, its manager may be held liable for payment to creditors of all or part of the company's debts (*obligation aux dettes sociales*), if he is found liable for any of the offences listed below:

When the manager has:

- used company's assets as if they were his own;
- used the company as a cover for carrying out personal business transactions;
- misused company assets or credit, contrary to the company's interests and for personal purposes;
- mismanaged the company for personal ends in a way which resulted in the company's inability to provide payment for debts due;
- misappropriated the company's funds or hidden assets, or fraudulently increased the company's liabilities.

The above two sanctions cannot be imposed cumulatively and their statute of limitation is three years. One of the main differences between the two is that the *obligation aux dettes sociales* leads to direct payment to creditors (the aim is punitive) whereas the *responsabilité pour insuffisance d'actif* leads to payment to the company itself (the aim is indemnity).

Moreover, in the following cases a manager can be forbidden to manage any company or business in the future (*faillite personnelle*):

When he has:

- carried out management functions while prohibited from doing so;
- made purchases in view of sales below market value, or otherwise employed ruinous means for obtaining cash in order to delay commencement of bankruptcy proceedings;
- caused the company to assume excessive obligations for no consideration;
- caused a creditor to be paid while the company was actually unable to pay;
- obstructed the completion of rescue or bankruptcy proceedings.

8.3 Criminal Liability

Managers can also be held liable for a number of offences, which are defined not only in the Criminal Code (fraud, breach of trust, criminal insolvency, misappropriation of company funds, etc.), but also in various other statutory instruments, such as the General Tax Code (tax evasion), the Employment Code (breach of health and safety conditions, employment of children, etc.), and the Commercial Code.

In particular, the Commercial Court contains sanctions which may apply at all stages of the company's existence, whether upon its incorporation, at the time of Shareholders' Meetings, upon increases in share capital, dissolution, etc. Hence, a manager of a French company may face sanctions for:

- distributing fraudulent dividends;
- publishing an inaccurate balance sheet which conceals the true financial situation of the company;
- misusing the company's assets;
- abuse of his management position for personal purposes.

Finally, it should be noted that the above liability grounds and sanctions can apply both to official managers (*de jure*) or to unofficial or shadow managers (*de facto*); they also apply when the manager is a legal entity.

■ ■ ■

The main characteristics of SA, SARL company formats and SAS previously described are summarized in the comparison tables found on the following pages.

APPOINTMENT OF MANAGEMENT	**SARL** By shareholders' decision which must represent more than 1/2 of shares.	**SAS** Freely determined in the Articles of Association.	**SA** **1. Board of Directors' structure:** Board members are appointed by the Shareholders' Meeting by majority vote (at least 1/2 of the shares). **2. Executive Board and Supervisory Board structure:** - Members of the Executive Board are appointed by the Supervisory Board; - Members of the Supervisory Board are appointed by the Shareholders' Meeting.
REPRESENTATION WITH REGARD TO THIRD PARTIES	**SARL** Any "gérant"	**SAS** - President; and possibly a Collective Managing Body provided that its appointment is recorded on the Registry of Commerce extract of the SAS: - General Manager and/or Deputy General Manager(s).	**SA** **1. Board of Directors' structure:** - General Manager and/or Deputy General Manager(s), provided that their appointment is recorded on the Registry of Commerce extract of the SA; or - The Chairman of the Board if he is also entrusted with executive powers. **2. Executive Board and Supervisory Board structure:** - The Chairman of the Executive Board; - Executive Board members (provided that their appointment is recorded on the Registry of Commerce extract of the SA).
TERM OF OFFICE OF MANAGEMENT	**SARL** Freely determined in the Articles of Association (certain time limitations apply)	**SAS** Same as SARL	**SA** Same as SARL
PROCEDURE TO ADOPT RESOLUTIONS BY THE MANAGEMENT BODIES (e.g. convocation, quorum, votes, minutes)	**SARL** Mainly compulsory	**SAS** Freely determined in the Articles of Association (with certain exceptions)	**SA** Same as SARL

DIRECTORS QUALIFYING SHARES	**SARL** No obligation for *Gérant(s)* to be a shareholder.	**SAS** No obligation for any Management body to hold shares in the company.	**SA** **1. Board of Directors' structure:** Each member of the Board must hold at least one share in the company (unless the ownership of additional shares is required by the Articles of Association). **2. Executive Board and Supervisory Board structure:** Each member of the Supervisory Board must hold at least one share in the company (unless the ownership of additional shares is required by the Articles of Association).
REVOCATION OF MANAGEMENT	**SARL** The "gérant" can be dismissed by shareholders' decision representing at least 1/2 of the shares.	**SAS** Freely determined in the Articles of Association.	**SA** **1. Board of Directors' structure:** - Board members may be dismissed at will by the Shareholders' Meeting (simple majority); - The Chairman of the Board or the General Manager may be dismissed with good cause by the Board. **2. Executive Board and Supervisory Board structure:** - Executive Board members may be dismissed with good cause by the Shareholders' Meeting; - Members of the Supervisory Board may be dismissed at will by the Shareholders' Meeting (simple majority).
NEED FOR A STATUTORY AUDITOR	**SARL** When two of the following three criteria are met: - Total assets on the balance sheet of at least €1.55m; - Net turnover of €3.1m; or - 50 or more employees.	**SAS** Compulsory	**SA** Same as for SAS
APPROVAL OF ANNUAL ACCOUNTS	**SARL** Approval must be made by the shareholders in an Ordinary Shareholders' Meeting every year within 6 months following the close of the (12-month) fiscal year.	**SAS** Same as for SARL	**SA** Same as for SAS

FOREIGN TRADER'S CARD (*autorisation préfectorale*) Whether President, general Managers, Gérants, etc...	**SARL** A Foreign Trader's Card (*autorisation préfectorale*) must be obtained prior to being able to exercise management functions that allow the cardholder to bind a French company towards third parties on a regular basis. However the possession of the card is no longer necessary for (i) citizens of a Member State of the European Union/EEA (ii) citizens of a OECD country [2] or (iii) holders of residence permit.	**SAS** Same as for SARL	**SA** Same as for SARL
DECISIONS RESERVED TO VOTES OF SHAREHOLDER(S)	**SARL** **Ordinary Shareholders' Meeting:** - Approval of annual accounts; - Appointment of the statutory auditor and alternate auditor (if required); - Appointment of the *gérant(s)*. **Extraordinary Shareholders' Meeting:** All decisions entailing a modification of the company's Articles of Association (e.g. modification of the corporate purpose, head office transfer, etc.).	**SAS** **Shareholder(s)' decisions** - Approval of annual accounts; - Appointment of statutory and alternate auditors; - Appointment of the President and/or General Managers. As opposed to SA and SARL rules, certain decisions that entail a modification of the SAS Articles of Association may be adopted by the President without the shareholders' prior consent (e.g. head office transfer, modification of the company's name, etc.). When the SAS has only one shareholder, decisions may be adopted by written deed in lieu of a meeting.	**SA** **Ordinary Shareholders' Meeting:** - Approval of annual accounts; - Appointment of statutory and alternate auditors; - Appointment of the members of the Board of Directors/ members of the Supervisory Board. **Extraordinary Shareholders' Meeting:** All decisions entailing a modification of the company's Articles of Association (e.g. modification of the corporate purpose, head office transfer, etc.) Meetings by remote communication. (e.g. teleconference or video-conference) is permitted by law under certain conditions and subject to certain limitations.
FORMALITIES FOR TRANSFERS OF SHARES	**SARL** Specific deed which must be registered with the tax authorities and corresponding amendment to the Articles of Association; Registration tax of 5% of total sale price or FMV whichever is higher (after certain deductions).	**SAS** Share transfer form (*ordre de mouvement*) and specific tax form (n°. 2759) Appropriate entries in the SAS share registry (*registre des mouvements de titres*) Registration tax of 1.1% of total sale price or FMV whichever is higher (capped at **€4,000**) per transfer.	**SA** Same as for SAS

[2] *Pursuant to Ordinance No. 2004-279 of 25 March 2004.*

TAX REGIME	**SARL** Corporate Income Tax	**SAS** Same as for SARL	**SA** Same as for SARL
ISSUE OF DEBENTURES	**SARL** May issue debentures provided that (i) a statutory auditor has been appointed and (ii) the shareholders have approved three sets of annual accounts.	**SAS** May freely issue debentures	**SA** Same as for SAS
LISTING ON STOCK EXCHANGE	**SARL** NO	**SAS** NO	**SA** Only with minimum share capital of €225,000.

9 | European Company

The European Company Statute, adopted by Member States on 8 October 2001 and effective since 8 October 2004, has created a legal framework for a new kind of corporate entity, the European Company or '*Societas Europaea*' ("SE"). It consists of a Regulation setting out the core company law framework and an accompanying Directive concerning employee involvement in the management of the SE.

France has added the Directive to its national laws by means of Law No. 2005-842 dated 26 July 2005, referred to as the *"Loi Breton,"* in the interest of economic modernization and confidence. The long-awaited implementing Decree has been passed recently (Decree No. 2006-448 of 14 April 2006.). It is thus now possible to incorporate a SE in France.

The SE gives companies operating in more than one Member State the opportunity to operate as a single company throughout the European Union with a single set of rules, rather than through subsidiaries incorporated under different national laws.

9.1 | Employee Involvement

According to the Directive, no SE may be registered unless an agreement on arrangements for employee involvement has been reached. These arrangements will always cover prior information and consultation rights, and may also cover employee participation to the Board(s) of the SE in certain circumstances (e.g. where such rights might exist within one of the companies forming the SE and if certain other requirements are met).

These arrangements for employee involvement are to be freely negotiated between the management and employees' representatives, unless a decision has been taken not to proceed with such negotiation and to rely on national information and consultation rules.

If the period for negotiation has expired without a satisfactory agreement having been reached and the management wants to pursue the registration of the SE, the standard rules on employee involvement contained in the Directive shall apply.
See also section 4.7 of Chapter VII 'Working in France'.

The Regulation applies to all SE matters covered by its provisions. In the case of other matters not covered by the Regulation the following provisions apply, with the same order of priority in which they are mentioned:

1. New provisions of the French Commercial Code and French Employment Code (pursuant to the "*Loi Breton*"); 2. Provisions applicable to French SA; and 3. Provisions of the SE's Articles of Association.

9.2 | Means of Incorporation

There are four principal methods of creating an SE:

- merger of SAs, provided that at least two of them have registered offices and head offices in two different Member States;
- formation of a holding SE between SAs and/or SARLs provided that at least two of the them have registered offices and head offices in two different Member States or have had a subsidiary for the past two years governed by the laws of a different Member State;

- formation of a subsidiary SE by subscription of its shares by companies, provided that at least two of them have registered offices and head offices in two different Member States or have had a subsidiary for the past two years governed by the laws of another Member State;
- conversion of an existing SA into a SE, provided that the former has had a subsidiary for the past two years in another Member State.

Both the registered office and the head office of a SE must be located within the same Member State, which limits forum-shopping alternatives.

The SE enjoys legal personality. Its share capital shall be not less than €120,000 and shall be divided into shares: no shareholder shall be liable for more than the amount he subscribed (limited liability company).

The SE shall comprise (i) a general Shareholders' Meeting; and (ii) either a Board of Directors, or the combination of Supervisory Board plus Executive Board, depending on the form adopted in its Articles of Association.

9.3 | Transfer of the Registered Office

Moving the registered office of a SE to another Member State is initiated with the publication of a transfer proposal. The transfer proposal shall also be filed with the clerk's office of the relevant Commercial Court. The decision to move requires the same majority as required for a modification of the Articles of Association of the SE and may not be taken until at least two months after publication of the transfer. Furthermore, the relocation of the office may not take effect until a certificate has been provided by a notary public confirming that the relevant formalities have been complied with and that the rights of shareholders and creditors together with the public interest have been adequately protected.

9.4 | Tax

In the absence of specific tax provisions provided by the Regulation, the SE is subject to the corporate tax laws of the Member State in which it is incorporated.

Employee representation issues associated with the European company are addressed under section 4.7 of Chapter VII 'Working in France.'

III | Acquiring a Company in France - An Outline

The aim of this section is to set out, in very general terms, certain important considerations that need to be taken into account by foreign (non-French) investors wishing to acquire shares in a French company. This section does not cover asset deals.

It is assumed for the purpose below that a French target company has already been identified. As a result, the various approaches which may be adopted in France in view of finding a suitable target are not covered in this section.

1 | Letters of Intent

The subject of letters of intent under French law is not an easy one, as their general scope and the extent to which they may or may not be binding are not always easy to define. The current trend is for French Courts to treat documents of intent as creating some kind of legal relationship and commitment. As a result, a prospective purchaser who has signed a document in which his intention to purchase clearly appears must, as a general rule, show very good cause if he later on withdraws from the transaction.

It should also be borne in mind that the validity of a condition precedent under French law requires that objective criteria be set forth to determine whether or not it shall be considered as fulfilled by the parties. By contrast, if a condition precedent is drafted in such a way that the party who is saddled with the obligation can effectively control whether the condition is fulfilled or not, the whole condition and the underlying obligation may be deemed void by the French Courts. When drafting condition precedents, one should therefore generally avoid using phrases such as “in X's absolute discretion” or “in form and substance satisfactory to X”.

2 | Warranty Agreements

When we act on behalf of the prospective purchaser of a French target company, we encourage our clients to obtain from vendors the appropriate warranties and indemnities concerning the company and its business. As a general rule, share deal documentation, that is subject to French law, is not drafted in exactly the same manner as that used in the United Kingdom or in the USA. This is not so much a question of language (as might be believed, owing to the mandatory use in certain circumstances of the French language), but rather the fact that these contracts shall be subject to the analysis and interpretation of the French Courts and that the latter will do so on the basis of French legal provisions and general principles (including those contained in case law or the French Civil Code).

Warranty provisions need to be backed up by appropriate security in order to ensure effective recourse by the purchaser against the vendor based on the terms of the warranty.

3 | Senior Management

Although this is not a *legal* issue, we would stress that, when purchasing a French target company, it is extremely important to ensure that adequate management resources are in place to run the target company efficiently once it has been acquired. This is all the more important when two cultural systems are involved. After all, running a French company successfully for a non-French investor requires special management skills and a certain degree of cultural awareness. In simpler terms, we would recommend that a senior French executive who understands the two cultures well and who is able to bridge any gaps should run the target company, or that the company be run by a non-French executive who knows France well enough to understand the values prevailing within a French company. All of this may seem rather obvious, but we have seen foreign investors launch enthusiastically into the purchase of a French company, only to contact us some six months after the acquisition to ask us to recommend a good management consultant.

4 | Tax Considerations

4.1 | Registration Fees

Since 1 January 2006, as already set out in the preceding comparative table of three company formats, the acquisition of shares in French commercial companies is subject to the following transfer tax duties (*droit de mutation / droit d'enregistrement*):

- In the case of a SARL, 5% of the sale price (or fair market value if higher) with a €23,000 deduction when 100% of the shares of the SARL are sold (otherwise, the deduction must be reduced in due proportion to the percentage of capital acquired);
- In the case of an SA or SAS, 1.10% of the sale price (or fair market value if higher) with a ceiling of €4,000 per transaction.

As an exception to the above, the acquisition of shares in any company whose holdings consist mainly of real estate is, under the standard regime, subject to 5% transfer tax duties on the sale price (or fair market value if higher).

In contrast with a stock purchase, the acquisition of a business as a going concern (*fonds de commerce*) (asset deal) is subject to the following transfer tax duties:

Part of value < €23,000: flat rate (€15)
Part of value > €23,000: 5% (no ceiling)

The assets of the business as a going concern are also generally subject to VAT.

As one can see, whenever confronted with the choice of acquiring either the stock or the going concern of an SA or SAS, it is generally less costly to acquire the stock rather than the assets. However, each case must be considered separately since a stock deal will also entail the assumption of any existing liabilities (disclosed or hidden).

4.2 | Capital Gains

If the vendor is a French resident for tax purposes, he/she/it may be liable for tax on capital gains on the sale of shareholdings.

4.3 | Tax Leverage Effect

In general, it may be more advantageous for purchasers of French target companies to establish first a holding company in France to serve as an investment vehicle to acquire 100% of a target company and then to form a single tax group between the two companies (i.e. the target and the vehicle). This is particularly true where the financing is essentially in the form of borrowed funds, possibly from other companies within the purchaser's group.

Indeed, this type of approach may allow the purchaser to deduct the financial costs incurred from the pre-tax profits of the target company. Where the lender is a direct shareholder, however, the deduction of interest is subject to certain conditions.

In order to benefit from this type of approach, companies must fulfil the conditions for the constitution of a tax group, essentially as follows: ownership by the parent company of at least 95% of the share capital of its subsidiaries (i.e. the French target company) and use of the same fiscal year for all of the companies forming the tax group, with each being liable for corporation tax.

Thorough legal advice (and in-depth tax analysis in particular) is required before any serious consideration of this type of leverage structure in order to acquire a French target company.

5 Acquiring a Bankrupt Company

The new French insolvency regime adopted by Law n° 2005-845 of 26 July 2005 and as implemented by Decree n° 2005-1677 of 28 December 2005, has modified the regime for acquiring distressed companies, whether under the new *procédure de sauvegarde* or under the revamped *redressement judiciaire*. This new regime is mainly set forth under Articles L 626-1 to L 626-35 of the Commercial Code.

There is no possibility for a total sale of the business under the *procédure de sauvegarde*: the contents of the proposed recovery plan under that regime is very similar to the continuity plan under the former *redressement judiciaire* procedure.

The rules governing the *redressement judiciaire* are, for the most part, the same as those defined by the legislator within the framework of the new *procédure de sauvegarde*. One of the major innovations of the new regime is that, from now on, the sole purpose of the *redressement judiciaire* procedure is also for a continuity plan to be drafted. A total or partial sale of the business is now considered only as a method of liquidating the company, should the debtor be unable to turn the company around on its own. In this way, the law establishes a hierarchy between a continuity plan and a sale of the business that did not exist before.

Liquidation must occur when the insolvency of the company is proven and when it is clearly impossible to turn the company around. The purpose of liquidation is to wind up the business and dispose of the debtor's assets by a single or multiple sale. In the event of a sale, the liquidation is governed by new rules (ordinary regime).

The parties involved in the procedure that are appointed by Courts are a receiver and a creditors' representative; the receiver will have to collect offers, draw-up the plan, give notice of layoffs and, more generally, conclude any instruments needed to prepare the plan. The creditors' representative will have to collect the opinions of creditors and take reception of the sale price in order to distribute it to the various creditors.

In order to encourage transparency, the law requires prior disclosure of the assets to be assigned subject to certain conditions defined in the implementing decree. The liquidator is also obliged, before distributing sums within the framework of a *liquidation judiciaire*, to file a proposed distribution schedule with the Court registrar, which any interested party may consult and, if necessary, challenge.

Certain parties are prohibited or restricted from presenting acquisition bids: shadow or official managers of the insolvent entity or of its parent or related companies, any controllers appointed etc. The bids must in particular clearly identify any contemplated capital contributions and the financial terms of any loans being considered.

The offer that must be chosen is that which provides the most sustainable protection to jobs, creditors and comes with the best guarantees of performance.

The sale plan is approved by a Court judgment that can be appealed by the debtor.

If the sale plan is not carried out, it is abandoned (possibly with payment of damages), the company would go into a winding-up liquidation process.

6 Employment Law

6.1 Employment Contracts

Under Article L. 122-12 of the French Employment Code, in the event of a change in the legal status of the employer and, more specifically, in the event of any succession, sale, merger or other form of amalgamation or divesture of a business or of a legal entity (transfer of undertakings), all employment contracts in force on the date of the change shall continue to apply, by operation of law between the new employer and the personnel of the company in question. In other words, employment contracts are automatically carried over to the new employer.

Case law has extended the scope of application of this article to all transfers of an "autonomous economic entity that maintains its identity and whose activity is continued or acquired."

This principle would apply whether the acquisition takes the form of a stock deal or an asset deal, and with respect to the latter, to the extent of the link or association of the employment contracts with the assets transferred.

6.2 | Collective Bargaining Agreements

If the acquisition results in a change of employer, the employees of the transferred entity or business may benefit from the provisions of the collective bargaining agreement applied by their former employer for a period of twelve months, in the case where the collective bargaining agreements applied by the former and the new employers differ in contents.

Where the new employer has no collective bargaining agreement, the employees of the transferred entity shall no longer benefit from the provisions of their original collective bargaining agreement following the period stated above, and will benefit only from the legal and regulatory provisions in force.

6.3 | Mandatory and Voluntary Profit-Sharing

In the event of a merger, sale or spin-off, mandatory and voluntary profit-sharing schemes shall prevail. However, should such a merger or spin-off render these schemes inapplicable, they will no longer be valid. In this case, the new employer must begin negotiations within six months with a view to entering into new mandatory or voluntary profit-sharing schemes.

6.3 | Supplementary Pension and Providence Plans (Illness, Disability, Death)

French companies register their personnel with optional pension funds. They may also subscribe to a providence plan for employees with a view to giving them additional coverage in the event of illness, disability or death.

Any changes in the employer's legal status will affect the company's obligations with respect to these additional coverage schemes such that it may be necessary to harmonise the status of all personnel employed by the acquirer's group.

7 | Foreign Investment Rules

Since 1996, any "foreign" investor, whether EU or non-EU investor, may generally make direct investments in France without any prior inspection by the French authorities. However, foreign investments must generally be reported to the French government in various instances and quite early on in the investment process. Such reporting is made for statistical purposes and does not amount to any kind of control. As indicated above, this also applies to investors from EU Member States. This formality is not burdensome but requires preparation in advance, in particular when facing acquisition by investment funds or through specific investment vehicles, whether incorporated in France or elsewhere.

Recent Decree No. 2005-1739, dated 30 December 2005, codifies the regulations in Articles L 151 *et seq.* and R 151 *et seq.* of the Monetary and Financial Code (CMF) which are applicable to foreign investments in France and French investments abroad. In particular, the provisions of the Ministerial Order of 7 March 2003, which still applies pending the arrival of a new Ministerial Order to replace it, are addressed by these regulations.

The principle is one of freedom, as the decree stipulates that the financial relations between France and other countries shall not be subject to restrictions, even though certain transactions may continue to be subject to administrative or statistical filing requirements and prior authorization, as described below.

7.1 | Administrative Filing

Certain investments made in French companies by non-French investors (or by French investors outside of France) must be communicated to the French Treasury via administrative filing. For example, the creation of a new company or the acquisition of a stake exceeding 33.33% of the French target's share capital must be notified (some exceptions apply).

7.2 | Prior Authorization Regime

Under the terms of Article L 151-3 of the Monetary and Financial Code, foreign investments require prior authorization, in particular when they concern an activity linked to the exercising of public authority, or to activities likely to be prejudicial to law and order, public safety or national defence. Only foreign investments in eleven (11) specific business sectors are concerned by this prior authorization process, notably those of biotechnology (due to the production of antidotes destined to combat terrorism), computer system security, and defence secrets.

These provisions distinguish whether or not the investment emanates from (i) Member States of the Euro- pean Union (EU) or a country from the European Economic Area (EEA), or (ii) countries other than those belonging to the EU and the EEA. The regime governing the former is more flexible than that applicable to the latter.

Three types of investments in a company whose registered office is domiciled in France are likely to require prior authorization where the investor is a private individual of non-EU or non-EEA nationality or a legal entity whose registered office is located outside of the EU or EEA:

- Takeover as defined by Article L 233-3 of the French Commercial Code;
- Direct or indirect acquisition of a branch of activity, in whole or in part;
- Where the investment exceeds the 33.33% threshold of either direct or indirect ownership of the share capital or control of the voting rights.

Authorization must be requested from the French Minister of Economy, who has two months to respond; failure to respond within the deadline is deemed to constitute tacit authorization. The Ministry's refusal must be justified either by a serious risk of breach of criminal law, or by a threat to the French national interest.

7.3 | Other Declaratory Measures

Certain foreign investments are subject to filing requirements with the French authorities:

- Certain operators are still required to submit monthly statistical filings to the Banque de France for operations exceeding a fixed value;
- Certain operations give rise to unnamed filings to the Treasury Department.

7.4 | Penalties

If the above filing requirements are not fully satisfied, certain penalties (fines, and in certain cases, custodial sentences) may be imposed. Consequently, compliance with the above requirements is highly advisable throughout the life of the foreign investment (i.e. acquisition, increase of capital, change of control, divestiture).

Further information on these different regimes is available upon request.

8 | French Merger Rules

Pursuant to the French merger rules set out in Articles L. 430-1 to L. 430-10 of the Commercial Code, the acquisition of one company by another must be notified and authorized by the Minister of Economy when the acquisition meets all three of the following conditions:

- the combined aggregate worldwide turnover, excluding tax, of all of the undertakings concerned exceeds €150 million;

- the aggregate turnover, excluding tax, generated in France by at least two of the undertakings concerned exceeds €50 million;

- the concentration does not fall within the scope of the EC Merger regulation.

The second condition is understood as requiring that at least two of the undertakings each by themselves generate turnover exceeding €50 million in France.

Within the framework of an acquisition, it is necessary to take into account the turnover of the following enterprises: the purchaser and the target. The total turnover of the seller is not taken into account, unless it will exercise control over the target together with the purchaser/new investor.

If the above conditions are met, the Minister of Economy must be notified of the transaction, which may not be implemented prior to clearance.

In substance, the Minister of Economy must examine the operation within five weeks (in certain cases up to eight weeks) of receipt of full notification from the parties.

At the end of this period, the Minister of Economy may either find that the operation does not fall under French merger rules, or authorise it, provided that the parties comply with certain commitments accepted by the parties after negotiation with the Minister. If no decision is returned within five (or possibly eight) weeks, the planned acquisition is deemed to be authorized.

If the Minister considers that the planned concentration is likely to affect competition and that the parties' commitments are not sufficient to compensate the competition restrictions, the matter is referred to the Competition Council for an opinion which must be given within three months. The Minister of Economy has from four to seven weeks following the opinion of the Competition Council to make a decision on the planned acquisition. The Minister of Economy may either authorise the concentration with the proposed commitments by the parties, or disallow it.

It is possible to give notice of an acquisition project leading to a concentration before the conclusion of the purchase agreement by the parties provided at least that a letter of intent has been signed or a memorandum of understanding (*accord de principe*) has been entered into.

IV | Joint Ventures

To date, there exists no specific definition of a joint venture in French domestic law. The term "joint venture" refers to any written civil or commercial agreement (depending on the nature of the venture's operations) between two or more parties according to which they agree to collaborate in the running of a given enterprise.

A joint venture may be a new business or the merger of one or more businesses already owned by the parties concerned. It may or may not be incorporated.

When setting up a joint venture, the following main issues need to be considered by the parties:

- the appropriate structure (new company, acquisition of a company, partnership structure, etc.);
- the contributions by each party (assets, existing businesses, provision of services, etc.);
- intellectual property (transfer of technology, rights developed under the joint venture);
- funding requirements (initial capital, future financing, third-party lending, etc.);
- control and management (day-to-day management, board of directors, disputes);
- introduction of new parties (terms and conditions);
- restrictive covenants (reasonable and enforceable);
- term (specific term, premature termination under certain circumstances).

The structure of a joint venture depends, among other things, on the nature and size of the future business, the commercial and financial objectives of the parties and the tax implications for each party.

A joint venture can be established through a contractual joint venture agreement, a non-registered partnership, a registered partnership, a limited liability company, or an economic interest grouping.

1 | Contractual Joint Venture Agreement

A contractual joint venture agreement is an agreement between parties which sets out, in principle, the scope of the venture, the methods of financing and profit-sharing, the obligations and commitments of each party, and the conditions under which the agreement will be terminated.

2 | Non-Registered Partnership

In France, the traditional legal form for a joint venture is the *société en participation* (SEP).

The partners sign the Articles of Association (*Statuts*) of the SEP, although their identity is not revealed to third parties (but must be declared to the tax authorities). It is a secret partnership governed by the provisions of Article 1871 of the Civil Code.

The main features of the SEP are:

- there are no incorporation formalities;
- it is not a legal entity;
- shareholders have unlimited liability;
- there is a large degree of contractual freedom.

3 | Registered Partnership

The *Société en Nom Collectif* (SNC) is governed by the French Commercial Code.

The SNC, unlike a British partnership, for example, is a corporate entity with its own legal personality (although, under French law, legal personality does not necessarily carry with it limited liability, see below).
It may be defined as a corporate entity consisting of at least two persons (corporate or individual), who must each have the status of traders (*commerçant*).

The main characteristic of the SNC and SEP, unlike other corporate entities under French law, is that all of its partners, whether or not they are managers, are unconditionally and severally liable for all of the partnership's debts. Even when a partner leaves the SNC, he remains liable for the debts incurred by the company prior to his departure. He may not, however, be held liable for debts incurred after notice that he has ceased to be a partner in the company has been published and filed with the local Trade and Companies Register (*RCS*).

3.1 | Incorporation

As an SNC is essentially a contractually-closed company, the drafting of its Articles of Association requires very careful attention, particularly with regard to the definition of its purpose, management powers, profit-sharing and the distribution of any surplus following liquidation.

Owing to the unlimited liability of its partners, there are no minimum share capital requirements for an SNC, although exceptions may be made where a certain amount of share capital is required for specific activities. Nor is there any compulsory payment on issue, and contributions may be paid at a later date.

An SNC must appoint a principal statutory auditor and an alternative statutory auditor where two of the following three criteria apply: (i) balance sheet total: €1,550,000, (ii) net turnover: €3,100,000, and (iii) number of employees: 50.

An SNC exists as an independent entity as of the date of its registration with the local Court. Registration is only possible after certain conditions are met, the most important of which are the execution of the Articles of Association by its members and compliance with certain formalities in terms of publicity.

3.2 | Management

Each partner has full power to bind the SNC vis-à-vis third parties with respect to transactions meeting its business purpose. The SNC is managed by one or more managers, appointed either in the Articles of Association or in a subsequent instrument. They can be private individuals or legal entities and are not necessarily partners. The managing director can be dismissed, but he is entitled to damages if dismissed without just cause.

Limitations with respect to a manager's powers imposed in the Articles of Association or at the time of his appointment are valid and effective only between the manager and the partners of the SNC, but not vis-à-vis third parties.

Certain decisions require the unanimous approval of all of the SNC partners, such as:

- the dismissal of a manager when all of the partners of the SNC are managers or when the dismissed manager is a partner of the SNC named in the Articles of Association. The consent of the manager to be dismissed is however not required;
- the continuation of the activities of the SNC despite the dismissal of a manager in the circumstances set out in the paragraph above. The consent of the manager to be dismissed is not required;
- the transfer of the SNC interests;
- the continuation of the activities of the SNC despite the liquidation or bankruptcy of one of its partners.

Any change in the management of the SNC must be registered with the Court in order to be effective vis-à-vis third parties.

Managers who are not partners of the SNC may also be called upon to make up the assets of the SNC in the event of its liquidation while insolvent.

3.3 | Transfer of Partnership Interests

Interests in an SNC cannot be represented by negotiable instruments, but only by non-negotiable interests (*parts sociales*). As a matter of public policy, any transfer of interests in an SNC (even between partners) is subject to the unanimous and prior written consent of all of the members of the SNC.

The transfer of interests must be formalised in a written agreement and since 1 January 2006 has been subject to a 5% registration duty, as in the case of shares in a SARL with a €23,000 deduction when 100% of the interests are sold (otherwise the deduction must be reduced in due proportion to the actual percentage of interests acquired).

The transfer of interests takes effect only as of the date of notification to the SNC's manager(s).

With regard to third parties, the change in membership of an SNC is effective only from the date of the abovementioned notification and once various publicity formalities have been completed. These include the filing of two originals of the transfer agreement with the local Court.

3.4 | Voluntary Liquidation

An SNC may be dissolved for the same reasons as any other corporate entity under French company law.

An SNC may also be automatically dissolved, unless otherwise stipulated in the Articles of Association, under certain specific circumstances, for example the death or bankruptcy of one of the partners. Furthermore, there may be cases where an SNC is dissolved due to the dismissal of one of its managers, unless its partners vote unanimously in favour of the SNC's continuation.

Where an SNC is put into voluntary liquidation, the creditors are fully paid and the remaining assets of the SNC are distributed among the members in accordance with the Articles of Association. This can be a long and costly process in the absence of specific provisions in the Articles of Association.

4 Limited Liability Company

It is also possible to use one of the limited-liability structures (or others) as described in Chapter II "Creating A Legal Entity in France" for an incorporated French joint venture. In this respect, it should be noted that the SAS structure was actually designed with a view to being used as a vehicle for joint ventures. The adoption of one of these available company formats means that the joint venture shall be governed by the same provisions as those highlighted in Chapter II above; in this case, there will be a need for the provisions contained in the joint-venture agreement, those contained in the articles of association and those applicable to the particular company format chosen contained in the French Commercial Code to coexist with, complement - and not contradict - each other.

5 Economic Interest Grouping

5.1 The French EIG

An EIG is not substantially different from an SNC, but its activity is usually limited to enabling its members to pool their resources in order to facilitate or develop their respective economic activities. An EIG remains totally independent of its members' own businesses. This type of structure is generally put in place when carrying out joint initiatives that would otherwise prove difficult on an individual basis, such as research, marketing studies, advertising campaigns, and the collective purchasing of office space. EIGs benefit from a greater degree of flexibility in terms of their organisation and operations.

An EIG exists as an independent entity from the date it is registered with the Court. Registration is only possible after certain conditions have been met, the most important of which is the signing of an initial contract. This contract may take the form of a simple contract or of a notarised deed if property is transferred to the EIG.

An EIG is formed for a determined period of time according to the objectives agreed upon by its members.

It is essential to define the aims of an EIG clearly. It must have an economic purpose that is an extension of the economic purposes of its members. Each member must remain economically and operationally independent of the EIG outside those particular areas in which common action by the members of the EIG has been agreed upon.

The EIG is managed and administered either by one or more individuals or by a legal entity. If a legal entity is to be appointed as the EIG's manager, it must designate a permanent representative who will assume the same liabilities, under civil and criminal law, as if he were himself the manager.

Managers may be dismissed at any time by the members of the EIG.

Managers may bind the EIG with regard to third parties where they act in accordance with the aims of the EIG.

As in the case of a legal entity (see Chapter II), any limitations with respect to a manager's powers as regards third parties shall not be enforceable against third parties (unless it can be proven that the third party had prior knowledge of such limitations).

The members are empowered in general meetings to take any decision and, unless otherwise provided for in the contract, all decisions must be made unanimously. The contract shall contain provisions for general meeting sessions, which may be freely defined.

All members are jointly and severally liable for all debts incurred by the EIG towards third parties.

Where a member fails to fulfil his obligations and thus proves detrimental to the EIG, the latter may claim damages and seek to exclude the member as a result of such behaviour.

Once a profit is made and entered in the accounts, and regardless of whether it remains within the EIG or is distributed, each member of the EIG is taxed directly in proportion to his interest in the EIG, whether or not he is a resident of France for tax purposes.

In the same way, members are directly liable for losses incurred by the EIG in proportion to their interest therein. Such losses may be deducted from their own taxable income or turnover. In other words, no decision at the members' general meeting to distribute profits/losses among members is necessary.

The EIG is often regarded as transparent for tax purposes since taxation and deduction are made directly at the members' level and not at that of the EIG.

The rules governing liquidation may be set out in the contract. In the absence of such provisions, the general meeting takes the necessary decisions. After payment of the EIG's debts and liabilities, its remaining assets (if any) are distributed to its members in accordance with the stipulations of the contract. Where no such provisions exist, the assets are distributed equally among the members, irrespective of their individual contributions.

After dissolution and liquidation, the EIG ceases to exist. However, creditors are entitled to sue any member who is responsible for the debts of the EIG.

5.2 | The European EIG

EU law (Regulation No. 2137/85) allows for an even more flexible structure: the EEIG. Its purpose is to facilitate cross-border development and collaboration within the EU.

The purpose of an EEIG is identical to that of a French EIG. Private individuals carrying out an economic activity within the EU, irrespective of their nationality (i.e. legal entities whose head office is located in an EU member State) may also be members of an EEIG.

An EEIG may establish its head office in France if its main administrative offices are located in France or if one of its members has its main administrative office in France.

In accordance with European regulations, domestic laws with respect to the leasing of EEIG office space shall apply (i.e. tax, labour, competition and intellectual property law).

V | Taxation

1 | Corporate Income Tax (CIT)

All companies incorporated in France in a commercial form are liable to CIT: this is the case for the SA (*Société Anonyme*), SAS (*Société Anonyme Simplifiée*), and SARL (*Société à Responsabilité Limitée*), and, under a specific election, for partnerships such as SNC (*Société en Nom Collectif*), SEP (*Société en Participation*), and EIGs (in the absence of election to CIT, these entities are treated as look-through entities from a tax point of view).

A company having a mere representative office is not subject to CIT in France, provided it has a limited auxiliary and preparatory function.

1.1 | Taxable Base

1.1.1 | Territoriality and CFC Rules

Foreign companies carrying on an activity in France through a permanent establishment are subject to French corporate income tax on French source profits generated by this permanent establishment.

Contrary to most jurisdictions, France does not apply the principle of taxation on a worldwide basis for companies, but a territorial approach. CIT is therefore due on profits derived from business carried out in France, and only in France, which means that profits of foreign activities (permanent establishment/branch) realised by a French company are, as a general rule, not taxable in France, nor are foreign losses realised by such branches deductible in France.

French CFC rules however provide an exception to this rule for branches or subsidiaries of a French company located in tax havens. Under Article 209B of the Tax Code, French companies which directly or indirectly hold at least 50% of the shares in a company located in a tax haven, or have a branch in such a location, are subject to French corporate income tax on profits made by the foreign subsidiary or branch. A company is deemed to be established in a tax haven if its income is subject to an effective rate of taxation which is less than 50% of the French rate of taxation on similar income. There are however safe harbour rules for companies or branches which have a genuine commercial or operational activity.

1.1.2 Computation of Taxable Income

Taxable income is based on accounting income, subject to some adjustments, the main ones being summarised below.

1.1.2 (a) Depreciation: Goodwill and land cannot be depreciated. Other fixed assets must be depreciated according to one of the following methods:

- Straight-line depreciation: annual depreciation

depends only on the number of years of normal useful life for the assets in question. The rates usually applicable for straight-line depreciation vary from 2% to 25%. For instance, rates are from 2% to 5% for commercial buildings, 10% to 20% for office equipment, and 20% to 25% for motor vehicles.
- Declining balance depreciation: this method applies to plant, machinery and tools. However, goods which were already in use at the time of purchase are excluded from accelerated depreciation. Where the duration of depreciation is less than three years, the declining balance method is not permitted.
- Some specified assets benefit from a 12-month depreciation method. This concerns for example purchased software, pollution-control buildings, and energy saving assets under specific conditions.

1.1.2 (b) Dividends: Dividends received by companies holding a 5% stake of the financial and voting rights of the distributing subsidiary are not subject to CIT except for an amount of 5% corresponding to deemed related expenses. The company must hold the shares for at least two years.

The Finance Bill for 2005 extended the exemption of dividends under the parent-subsidiary regime to shares without voting rights, provided that the parent company holds at least 5% of the capital and voting rights of its subsidiary. As a consequence, dividends on securities which have no or only partial voting rights, e.g. preference shares (as provided for by Ordinance 2004-604 of 24 June 2004), can now benefit from this exemption.

1.1.2 (c) Capital gains: Capital gains are generally subject to the standard corporate income tax rate of 33.33%. However, gains on long-term portfolios benefit from the more favourable regime applicable to long-term capital gains. This regime applies to disposals of shares held for at least two years and recorded as long-term portfolios in the accounts. Shares qualifying for the parent/subsidiary regime (holdings of more than 5% of financial and voting rights) automatically benefit from this regime. The rate applicable to these gains is 8% in 2006 and 0% in 2007, except for a portion of 5% of the capital gain (deemed related expenses) which will remain subject to standard corporate income tax rate. However, the reduced rate of 15% continues to apply if the subsidiary can be qualified as a real property company.

1.1.2 (d) Other tax adjustments: Some expenses are not tax-deductible. These must be added back for tax purposes, e.g.:

- Corporate income tax, tax on company vehicles, tax penalties;
- Some reserves (e.g. reserves for certain types of compensation for dismissal);
- Depreciation of company passenger cars is limited to a purchase price of €18,300 including VAT.

There are also some tax adjustments resulting from derogatory rules on taxation on a mark-to-market basis of certain types of income (e.g. FX gains and losses on debts and receivables, mutual funds, listed derivative financial instruments.).

1.1.2 (e) Thin capitalization rules: As a general rule, interest accrued during a tax year is deductible (contrary to the situation in several countries, and despite the fact that France now exempts capital gains on shares).

However, specific measures limit the deductibility of interest paid by a company to affiliated companies. The Finance Bill for 2006 introduced a reform of thin capitalization rules as from 1 January 2007.

These rules apply to interest paid between affiliated parties, without now requiring that the lender is a direct shareholder of the company paying the interest. The definition of affiliated companies includes direct or indirect control, as well as common control by a third party.

The maximum rate of deductible interest is still the main effective rate applied by credit institutions for floating rate loans to companies with an initial duration of over two years (4.21% for 2005). However, a higher rate may be used where this corresponds to the rate that the borrowing company could have obtained from third-party banks in similar conditions. The maximum rate applies to interest paid to affiliated parties even if not direct shareholders, but the exception to the market rate only applies in the case of direct or indirect control, or common control.

Interest can only be deducted if the share capital of the borrowing company is fully paid up.

The law provides three cumulative criteria to define thin capitalization:

- Firstly, the average of the advances granted by affiliated companies in a group to a borrowing company should not exceed one-and-a-half times the amount of its stockholders' equity. The latter is defined in the same way as for accounting purposes and includes retained earnings, regulated provisions, and net income for the year. The company can freely decide to refer to the amount at the beginning or the end of the year.
- Secondly, the amount of interest paid to affiliates should not exceed 25% of current income increased by interest and depreciation of assets.

- Moreover, companies which receive interest from affiliated companies are only subject to the above limitation if the interest paid exceeds the interest received from such companies (i.e. no limitation is possible if the company is a net lender within the group).

The conditions are cumulative, i.e. only the excess portion of interest under the most favourable rule cannot be deducted. The portion of the interest exceeding the higher of the two limits remains deductible if it is less than €150,000.

The excess non-deductible portion of interest for one financial year can be carried forward to following years, subject to the application of the same limitation rule to those years. The deferred deduction will be subject to an annual rebate of 5% as from the second year of deferral. Specific rules apply to tax-consolidated groups.

There are several exceptions to this regime: the law excludes cash pooling entities, credit institutions, leasing companies, and credits granted on the occasion of normal business transactions. The law also permits a company to avoid these rules when it can establish that its overall debt-to-equity ratio is not lower than the ratio of its consolidated group.

1.1.2 (f) Tax-consolidated group: Affiliated companies subject to CIT may elect for the tax consolidation regime. Under this regime, a French company (the head of the tax group) agrees to pay corporate income tax based on the consolidated net income of subsidiaries that are at least 95% controlled and which elect to be included in the tax-consolidated perimeter.

The group taxable income is computed by adding together the taxable results of each company belonging to the tax group, with certain tax adjustments.

The French company that is head of the tax group must not be directly held for more than 95% by another French company that is subject to CIT. The tax consolidation regime is optional and is effective for a renewable period of five years.

The tax consolidation regime is largely used for structuring LBO and M&A transactions in order to match funding and acquisition costs against the target's profits. There are however some traps which should be avoided, including debt creation rules, which can severely restrict interest deduction.

Thorough legal advice must be sought before contemplating any operation of this type.

1.1.2 (g) Transfer pricing: As a rule, France follows the generally accepted OECD guidelines on transfer pricing. The French tax authorities are allowed to request a resident entity to provide information regarding transactions with affiliated non-resident companies, information on the transfer pricing method used by the entity, and details of the activities and the tax treatment applicable to them. Failure to reply to the tax authorities within the requested time limit may result in tax adjustments.

1.2 Taxation and Treatment of Tax Losses

The standard CIT rate is 33.33% plus a social contribution of 3.3% assessed on CIT (if companies pay CIT exceeding €763,000), i.e. an effective tax rate of 34.43% except for long-term capital gains (see above).

Where the result is a tax loss, this may be carried forward with no time limit (except in the case of a significant change in the company's activity) and offset against any future profits taxable at the standard CIT rate or against a specific category of long-term capital gains. Tax losses may also be carried back three years, in which case the company benefits from a tax credit. This tax credit may be used to pay CIT during the subsequent five years. If, at the end of this period, the tax credit has not been fully used, the balance may be refunded to the company.

1.3 Minimum Corporation Tax (IFA)

Companies subject to CIT are also subject to a minimum corporation tax (IFA) which depends on the turnover realized by the company. The minimum corporation tax (IFA) is distinct from CIT and is payable even in the absence of any profits. No IFA is due by companies whose turnover is less than €200,000. The annual IFA varies between €700 and €100,000 for companies with a turnover net of tax of between €200,000 and €500,000. Above €500,000, IFA is equal to €110,000.

2 VAT

As in all EU Member States, VAT applies to most economic operations in France according to the principles of the 6th VAT Directive. There are however some special rules, such as the possibility of electing to submit financial services to VAT. The normal rate is 19.6%, but a reduced rate of 5.5% applies to some goods (e.g. food) and services (e.g. transportation of people).

3 | Payroll Taxes

These taxes are charged independently of social contributions.

3.1 Apprenticeship Tax and Other Payroll Taxes

French companies are subject to an apprenticeship tax assessed at 0.5% of gross salaries paid during the previous year. Expenses incurred to support apprentices or investments in apprenticeship programmes are deducted from the tax due.

Other taxes, such as the continuing professional training levy (*participation-formation continue*) or construction tax (*contribution 1% logement*), apply to companies employing at least 10 people.

3.2 Salary Tax

This tax only applies to companies that are not liable for VAT on at least 90% of their turnover (i.e. mainly companies in the financial sector). Companies with a VAT ratio of below 90% are liable for salary tax on the ratio of turnover exempt from VAT to total turnover (e.g. if the VAT recovery ratio is 40%, the proportion to be taken into account for salary tax is 60%). The base for payroll tax corresponds to gross salaries multiplied by this proportion. An average rate of 12% (the rate is progressive and goes up to 13.6%) is then applied to this base to compute the payroll tax liability.

4 Other Taxes on Companies

4.1 Turnover Tax

Companies whose gross turnover amounts at least to €760,000 are subject to this tax (*contribution sociale de solidarité des sociétés*), equal to 0.16% of their turnover during the previous calendar year.

4.2 Business Licence Tax (taxe professionnelle)

The business licence tax is a local tax whose rate is fixed each year by the local authorities and which is assessed on two elements:

- the administrative rental value of real estate;
- 16% of the gross book value of other fixed assets (this may include rented or leased assets).

Companies are liable for business licence tax on each physical location where a business is carried on as of 1 January each year. The rates differ significantly depending on the place of business (they may vary from 0% to 30%). In some cases, temporary exemptions may apply depending on local authority decisions, the sector of activity or the type of business carried on. In any case, this tax may not exceed 3.5% to 4% of the company's added value (gross margin). However, companies whose turnover is higher than €7,600,000 are subject to a minimum tax equal to 1.5% of the company's added value.

4.3 Registration Fees on Corporate Transactions

Companies are subject to registration fees at different rates when they are incorporated, during their existence, and on winding-up, depending on the nature of the transaction.

4.3.1 Capital Contributions to Companies

Capital contributions in cash or assets (including real estate or goodwill) are either exempt (contribution at the time of incorporation) or subject to limited registration fees (up to €500), to the extent they are made by a company subject to CIT in exchange for shares.

In other cases, registration fees applicable in the case of a sale (see below) may apply.

4.3.2 Winding-up of a Company

Deeds providing for winding-up are subject to a fixed fee of up to €500. Winding-up may trigger a 1.1% fee assessed on net equity or more where certain assets are attributed to one shareholder.

4.3.3 Sale of Shares

Sales of shares are subject to a 1.1% registration fee assessed on the sale price and capped at €4,000 per sale, or 5% if the company is a real property company or a partnership (applies mainly to the SNC and SARL forms).

4.3.4 Sale of Goodwill

The sale of goodwill is subject to a 5% registration fee, assessed on the sale price.

4.3.5 Sale of Real Estate

The sale of real property located in France is subject to French registration fees levied at a rate of 5.09% and assessed on the sale price.

5 | Taxation of Individuals

French residents are taxed on their worldwide income. Non-residents are only taxed on their income from French sources (salaries paid to non-residents are subject to a withholding tax). Employees seconded from abroad can benefit from favourable rules on expatriation packages. Dividends are taxed with a 40% rebate on the taxable base.

Personal income tax rates vary from 0 to 40%, plus general social security tax (*CSG*), whose rate varies between 6.6% and 11%.

Capital gains on securities are taxed at 16% plus CSG of 11% where the annual proceeds are in excess of €15,000. A recent law provides new rebates on the taxable base on gains on shares held for at least 6 years.

6 | Withholding Taxes

6.1 | Dividends

The internal withholding tax rate is 25%. However, tax treaties generally provide for a withholding tax with a rate varying from 0% to 15%.
Dividends distributed to a holding company located in the EU are not subject to withholding tax if the EU holding company holds at least 20% of the distributing company's share capital for at least two years (15% for dividends distributed between 2007 and 2008 and 10% for dividends distributed after 2009).

6.2 | Branch Tax

Profits realized by French permanent establishments of foreign companies are deemed to be distributed to non-French residents for tax purposes and are subject to a 25% withholding tax. However, branch tax is not levied on profits of French branches of companies which are resident in EU Member States and are subject to corporation tax in their home countries. Furthermore, most tax treaties allow this branch tax to be reduced or avoided.

6.3 | Interest on Securities and Loans

Under Article 125 A-III of the French Tax Code (FTC), a 16% withholding tax is levied on interest paid to non-French residents for tax purposes. However, according to the provisions of Article 131 *quater* of the FTC, interest paid to a non-resident lender may, under certain conditions, be exempt from any tax withheld at source. Moreover, tax treaties generally provide for total or partial exemption.

6.4 | Management Fees and Royalties

Under Article 182 B of the FTC, service fees and royalties paid to a foreign company are subject to a 33.33% withholding tax. Both EU rules and tax treaties provide wide-ranging exemptions from this tax.

6.5 | Capital gains on shares

Capital gains on shares realized by non-French residents for tax purposes are not taxable in France except for sales of:

- shares by a seller owning a substantial stake in the company (more than 25% of the company), which can be taxed at source at a rate of 16% (Article 244 *bis* C of the FTC), unless a double taxation treaty allows such tax to be avoided;
- real property companies (where the company's assets consist mainly of French real estate), which can be taxed at source at a rate of 33.33% (Article 244 *bis* A of the FTC).

7 | Specific Rules Relating to Real Property Assets

7.1 | Capital Gains on Real Property

According to Article 244 *bis* A of the FTC, capital gains realised by foreign companies on the sale of real property in France are subject to withholding tax at a rate of 33.33% if they are located outside France, or at 16% if the capital gain is realized by individuals who are EU nationals, directly, or through partnerships or look-through entities whose partners are located within the EU. However, this withholding tax is not levied if the real property is used to carry on a business in France.

7.2 | 3% Tax on Real Property Assets Owned by Foreign Companies

Legal entities which directly or indirectly own real property assets or rights over real property located in France are liable to an annual tax equal to 3% of the market value of the real property assets or rights. However, the following may benefit from tax exemption:

- companies whose real property assets in France make up less than 50% of their French assets;
- companies whose shares are listed on a stock exchange;
- companies established in countries which have signed an administration assistance agreement with France, or whose head office is located in a country with which France has signed a tax treaty containing a non-discrimination clause to the extent that they provide the French tax authorities with information concerning their shareholders, who may also be subject to the 3% tax or be exempted under the same conditions.

VI | Bankruptcy

Bankruptcy and winding-up proceedings in France were governed until recently by the Commercial Code and the Decree of 27 December 1985. Law no. 2005-845 of 26 July 2005 (effective as of 1 January 2006) and implementing decree no. 2005-1677 of 28 December 2005 have significantly modified the matter with the aim, among other things, of simplifying and adapting the existing proceedings while at the same time improving the tools available to prevent French businesses from being wound-up. A new procedure, named the safeguard procedure (*procedure de sauvegarde*) has been embodied in the Commercial Code and was inspired, to certain extent, by the US Chapter 11 proceedings.

Cross-border aspects of bankruptcy in France must also be contemplated either in light of EC Regulation no. 1346/2000 of 29 May 2000 on insolvency proceedings or in light of the standard French principles applicable to international private law, and case law.

These aspects are not dealt with in the present Chapter nor are the available proceedings for voluntary arrangements with creditors, generally before the bankruptcy stage is reached, such as the *mandat-ad-hoc* (counselling proceedings) or the *conciliation* (mediation proceedings).
A certain overlap does exist between the bankruptcy prevention mechanisms and the judicial ones.

The main objectives of bankruptcy proceedings under French law are, in order of priority:

- to preserve the activities of distressed companies and enhance prospects for recovery;
- to save jobs; and
- to pay creditors.

From a foreign investment perspective, the importance given in France to jobs (and consequently, the unavoidable costs of preserving them) is considered particularly disadvantageous to possible rescue plans.

The traditional bankruptcy proceedings under French law are receivership (*redressement judiciaire*) and judicial winding-up (*liquidation judiciaire*).

1 | Commencement of Proceedings

When a French company reaches the stage where it is unable to honour its outstanding liabilities due with its available (cash or cash equivalent) assets (known as *cessation de paiements*), its representative must file a petition with the local Commercial Court within 45 days as of the *cessation de paiements* (if he has not first opted for the conciliation proceedings). The Court must then decide either (i) to place the distressed company in receivership (*redressement judiciaire*) (for example, if the company has reached the stage of *cessation de paiements* while under the conciliation scheme), or (ii) to liquidate it immediately (*liquidation judiciaire*) if there is no possibility of recovery or if it has ceased its activities.

The Court may also seize the assets of all related companies at any moment should it be proven that the defaulting company was created to defraud creditors or that the assets of the companies within a group (including those of the distressed French company) are intermingled.

2 | Professional Bodies

Upon commencement of proceedings, the Court appoints the following persons:

In the event of receivership:

- a receiver who will be responsible for (i) temporarily assisting the management of the company while the debtor remains in possession and continues to manage the company in person; and (ii) preparing a recovery plan;
- a creditors' representative who will represent the creditors and record and verify their claims.

In the case of winding-up:
- a liquidator, generally the same person as the receiver;
- the creditors' representative, who will be vested; with the power to sell the assets and apportion the funds between creditors;
- a Judge to handle the proceedings (the *Juge Commissaire*).

3 | Creditors

Secured and unsecured creditors whose claims existed before the company was placed in receivership or liquidation proceedings by the Court ("pre-bankruptcy creditors") must file their claims with the creditors' representative within two months of publication of the Court's opening judgment in a legal gazette known as the "*BODACC*". This deadline is extended by two months for creditors residing outside the French territory. Pre-bankruptcy creditors are barred from all claims or payments (automatic stay of proceedings), except at the time funds are apportioned according to their respective rank. In this respect, the employees, the receiver, the creditors' representatives and the liquidator, as well as the post-bankruptcy creditors whose claims have materialized after the company was placed in receivership, are granted preferential rights for payment of their claims in priority to the pre-bankruptcy creditors.

A maximum of five creditors may be appointed by the Court as supervisors or controllers. As such, all information pertaining to the proceedings will be forwarded to them and they will be consulted prior to any decision.

Should a retention of title clause be expressly provided for in contractual documents, the supplier shall be entitled upon delivery of the goods to the bankrupt company (at the latest before the company is placed in receivership or wound-up) to reclaim possession of these goods or to recover the purchase price thereof, as he will be recognized as the legal owner of the goods.

The Court may also decide at any time to fix the date of *cessation de paiements* within a minimum of eighteen months preceding the date on which the company was placed in receivership or it was decided to liquidate it. In certain specific circumstances provided for by law, it is possible to claim back payments made to creditors between the date on which the *cessation de paiements* is deemed to have started and the date on which the company is placed in receivership or wound-up (this period is called the suspected period or *période suspecte*): certain contracts entered into or transactions completed during that period are either void or voidable by courts.

4 | Solutions

4.1 | Recovery Plan

Since 1 January 2006, the aim of Receivership has been solely the continuity of the business through a recovery plan (*plan de continuation*) with its current management. Creditors may be required under the plan to defer payment of their claims for a maximum period of ten years.

4.2 | Liquidation

Also since 1 January 2006, the total or partial sale of the business is one of the modalities of the judicial winding-up proceedings in cases where the debtor himself is no longer capable of managing the business towards recovery (see also section 5 of Chapter III, 'Acquisition of a Bankrupt Company').

5 | Penalties

The Commercial Code contains various civil and even criminal penalties against legal and *de facto* or shadow managers who have mismanaged a company which is subsequently placed in receivership or wound-up. These are summarised in the section entitled "Liability in the event of bankruptcy" (See paragraph 8.2 of Chapter II 'Creating a Legal Entity in France').

VII | Working in France

Relations between employers and employees in France are governed by the following main regulations:

- The Employment Code (*Code du travail*)

The Employment Code provides the minimum legal terms and conditions of employment.

- Collective bargaining agreements (*conventions collectives*)

Collective bargaining agreements are negotiated at a regional or national level between representing both employers and employees, and cover specific sectors of activity. The collective bargaining agreements provide employees with more favourable provisions than under general legislation.

- Collective company agreements (*accords collectifs d'entreprise*)

Collective company agreements are negotiated at company level and also provide employees with more favourable provisions than the relevant collective bargaining agreements.

- Practices (*usages*)

Practices are rules applicable within a company by virtue of the employer's power of decision making (e.g. yearly bonuses).

- Internal regulations (*règlements intérieurs*)

Internal regulations, which cover only discipline, hygiene and safety, must be established by the employer in companies with at least twenty employees.

- Employment contracts

Employment contracts must observe the applicable rules (i.e. the provisions laid down in the legislation, collective bargaining agreements, company bargaining agreements, etc.). These may also provide employees with more favourable provisions than those contained in the Employment Code.

Specific language requirements apply. Generally, all official documents pertaining to working in France must be written in the French language.

1 | Employment Contracts

Employment contracts may be concluded for a fixed or an indefinite term.

1.1 | Fixed-Term Contracts

These must be formalised in a written agreement which includes specific provisions, notably the precise reason why they have been concluded for a fixed-term basis (e.g. replacement of another employee, temporary increase in activity, etc.). Fixed-term contracts can only be concluded for specific and temporary tasks. However, the examples above reflect the limitation of this type of contract. If the task is not of a specific and temporary nature, the contract should be for an indefinite term, with all of the relevant legal consequences regarding, notably, its termination (see below).

Fixed-term contracts are terminated on the date provided or when their purpose is achieved. They may also be terminated before the date provided in four instances only: resignation of the employee justified by his/her hiring by another employer under an indefinite term employment contract, mutual consent of the parties, *force majeure*, or serious misconduct (*faute grave*).

In principle, the term of fixed-term contract may not exceed eighteen months. If the contractual relationship is continued after the normal term, the applicable contract provisions be-come valid and binding for an indefinite term.

At the end of the fixed-term contract, an indemnity corresponding to 10% of the total gross remuneration received by the employee during the contract must be paid to the employee.

1.2 | Open-Ended Contracts

Indefinite-term contracts may be drafted in any form. However, the European Directive dated 14 October 1991 provides that employers must inform employees in writing of the essential terms of their contracts (e.g. place of work, job position and status, job description, etc.).

Consequently, it is strongly recommended that an employment contract or, at the very least, a letter of employment be drafted. These documents must be drafted both in French and in the employee's native language.

An indefinite-term contract may be terminated at any time, by virtue of a notice period, by:

- an employee who wishes to resign and who is not obliged to give any reason for his resignation;

- the employer, who must be able to prove that the termination was justified by a real and serious cause (*cause réelle et sérieuse*) on either personal grounds (e.g. misconduct) or economic grounds.

The formal procedure to be followed by the employer to terminate the contract and to determine the level of indemnity payable depends on the nature of the termination (whether a dismissal or a lay-off), the number of employees concerned, the employee's seniority, status and age, and the provisions of the applicable collective bargaining agreement(s), etc.

Where a serious offence (*faute grave* - which is restrictively defined by French case law) is committed by an employee, the severance indemnity and the notice period indemnity do not have to be paid to the employee.

Employment termination is generally viewed by foreign investors as quite formal, time-consuming and expensive. It requires in all cases careful preparation and specific legal advice.

In certain circumstances, the unilateral modification by the employer of a key characteristic of the employment contract may be held by the employee and by French labour courts as equivalent and amounting to a termination, without equal consideration being given to the employer's decision-making prerogatives.

1.3 Contrat de Travail "Nouvelles Embauches" (CNE)

Ordinance 2005-893 dated 2 August 2005 has implemented the CNE, which is a specific indefinite-term employment contract that may be entered into by any company with twenty or fewer employees

The CNE is equivalent to the traditional indefinite-term contract described above, except that the employer is allowed to terminate the CNE "at will" during the first two years of employment by means of registered letter with acknowledgment of receipt.

Thus, during this period of time, the employer does not have to prove that the termination was based on real and serious cause, contrary to the termination of a standard indefinite-term employment contract.

However, an employer terminating a CNE during the first two years will have to pay the employee 8% of the total gross remuneration received by the employee since the beginning of the CNE. An amount of 2% of this total gross remuneration will also have to be paid to the French Employment Administration.

After the first two-year period, the CNE becomes a standard indefinite-term employment contract.

2 Especial Employment Tribunals

Disputes between employers and employees are referred to special Employment Tribunals (*Conseil de Prud'hommes*), i.e., the French labour court.

However, in order to avoid legal proceedings, employers and employees may decide to reach a settlement.

3 Working Conditions

3.1 Remuneration

Remuneration is freely negotiable between employers and employees.

However, remuneration must be equal to at least the minimum rate of pay provided by the applicable collective bargaining agreement or by French law (*salaire minimum interprofessionnel de croissance*, or *SMIC*). From 1 July 2005, the minimum monthly legal wage is €1,217.91, corresponding to a full-time job (i.e. 151.67 hours/month).

3.2 Working Time

At present, the legal working week in France is thirty-five hours, generally spread over five or six days. In principle, working on a Sunday is forbidden. Overtime is allowed under certain conditions and gives rise to the payment of additional salary.

Managing executives (*cadres dirigeants*), legally defined as the persons who are entrusted with responsibilities justifying freedom in the organisation of their work, who are entitled to bind the company contractually and who are granted the highest level of compensation in the company or the branch, are not subject to working time limitations.

Organisations representing both employers and employees in certain sectors of activity, and employers and employees at a company level have negotiated collective bargaining agreements and collective company agreements concerning the reduction of working hours.

These agreements may provide that employees whose working time cannot be predetermined and who have real autonomy in the organisation of their work are subject to working time defined in days rather than hours. This number of days cannot be higher than 218 per year. The employment contract of the employees concerned must include specific provisions regarding working time.

3.3 Paid Leave

According to French law, and unless an applicable collective bargaining agreement provides employees with more favourable provisions, employees are entitled to five weeks' paid leave, corresponding to two and one-half days of leave per full month worked during the year of reference (i.e. from 1 June to 31 May).

4 Employee Representatives

Employee representation is specifically provided for under French Employment Law. The nature and number of employee representatives to be appointed depend on the number of employees.

Candidates for such positions and former elected representatives are covered by special Employment Law protection to the extent that an employer's ability to discipline them or terminate their contract is restricted (e.g. special authorization for dismissal must be requested and received from the French Employment Administration).

4.1 Employee Delegates (*délégués du personnel*)

They are elected by employees in companies with more than ten employees.

Employee delegates represent employees with respect to the application of Employment Law.

4.2 Works Council (*comité d'entreprise*)

A Works Council must be established in companies with at least fifty employees. Where the company has more than one geographical location (with at least fifty employees at each location), a local Works Council must be established for each, along with a central Works Council (*comité central d'entreprise*).

The role of the Works Council is to address all social and economic matters. It must be consulted before any significant changes are adopted in the company or each time that an acquisition is being planned by the company. However, it must be noted that the Works Council cannot veto any such changes. Moreover, the Works Council must be informed of the company's general status. The absence of necessary information may constitute an offence (*délit d'entrave*) which may be punishable by a fine and/or custodial sentence.

Delegates to the Works Council may also attend meetings of certain corporate bodies of French legal entities, such as the Board of Directors or Shareholders' Meetings of an SA or the President of an SAS (even if in the latter case the meeting takes place with only one person). However, the delegates hold consultative powers only, without meaning that their right to attend these meetings would amount to any actual participation of employees in the management of the legal entity.

4.3 Group Committee (*comité de groupe*)

Parent companies and subsidiaries must create a Group Committee, which must not however replace the existing Works Council. The Group Committee gathers only social and economic information concerning the activities of the companies in the group.

4.4 Safety, Hygiene and Working Conditions Committee (*comité d'hygiène, de sécurité et des conditions de travail*)

A Safety, Hygiene and Working Conditions Committee must be established by companies with at least fifty employees.

4.5 Trade Union Representatives (*délégués syndicaux*)

In companies with at least fifty employees, one or more trade union representatives may be designated (depending on the number of employees) to represent their union vis-à-vis the company management.

Whereas employee delegates represent the employees with respect to the application of Employment Law, union representatives can demand improvements in the collective status of staff (i.e. increases in remuneration).

4.6 European Works Council (*comité d'entreprise européen*)

French law provides for the obligation to set up a European Works Council or an information process on cross-border issues, particularly those affecting employee interests.

Such a system is compulsory in groups with a least one thousand employees located in the EU and EEA Member States covered by EU Directive 94-95 and having at least one company with at least one hundred and fifty employees in at least two of those states. This special negotiation group can decide either to set up a European Works Council or an information process.

4.7 Special Provisions Applicable in European Companies (*sociétés européennes*)

As already indicated under section 10 of Chapter II 'Creating a Legal Entity in France,' the Law of 26 July 2005 provides for the obligation to set up a special negotiation group in connection with the preparation of the incorporation in France of a European company

(SE). This requirement applies to each French company taking part in the incorporation process of an SE.

This negotiation group shall define the information and consultation process to be followed on employment issues, as well as the level at which the employees' representatives intervene in the SE's management. The group may also decide to apply the related legal provisions of the states where the SE has employees.

Should no agreement be concluded within the special negotiation group, a European Company Committee (*comité de la société européenne*) shall then be set up.

The European Company Committee, once in place, must be informed of the SE's economical and financial information.

5 | Individual Right of Employees to Vocational Training

Pursuant to a recent law, certain employees in France are entitled to an individual right to vocational training, Employees who have worked for a minimum of one year under an indefinite-term contract, and employees who have worked for a minimum of four months under a fixed-term contract are entitled to twenty hours of vocational training per year (upon request). These hours may be cumulated over a six-year period, with a ceiling of one hundred and twenty hours of vocational training provided to each employee.

Part of the vocational training may take place outside the employee's normal working hours. In this case, the employee will be paid for these vocational training hours. In addition, the company must pay for the employee's training and transportation expenses.

Conversely, in the case where the employee follows his vocational training during his working hours, he will be granted the same remuneration as if he had worked normally for his employer.

This individual right of the employee to vocational training may be transferred from the former employer to the new employer in case of dismissal of the employee, except in the case of gross misconduct by the latter.

6 | Social Security

In principle, the French social security regime applies to all employees carrying out a salaried activity in France irrespective of their nationality (public policy) (see point 7.2 below).

The social security system provides employees with the following coverage:

- health insurance (i.e. in the event of illness, disability or death) and retirement pension fund insurance administrated by the French social security organisation (*Union pour le Recouvrement des cotisations de Sécurité Sociale et des Allocations Familiales, or URSSAF.*);
- unemployment insurance covered by the unemployment fund (*Association pour l'Emploi dans l'Industrie et le Commerce, or ASSEDIC*).

The French social security system is financed by contributions from both employers and employees. The average for the employer's share of contributions is around 40% of the employee's remuneration (thus a salary of €100 would actually cost the employer €140), whereas the employee's share is around 20%.

7 | Expatriates in France

Listed below are the general rules governing foreign employees carrying out a salaried activity in France (i.e. employees sent to France to work in a French subsidiary of a foreign parent) whose initial employment contract has been entered into with a company located in their country of origin.

Here, a distinction must be made between temporary assignments and definitive assignments, corresponding, respectively, to a secondment (*détachement*) or an expatriation (*expatriation*).

7.1 | Employment Law

No formal definition of secondment or expatriation is given in French Employment Law.

However, French Social Security Law provides a definition of the above terms.

7.1.1 Secondment

A seconded employee is one who has been sent abroad (i.e. to France) for a relatively short period (i.e. generally between six months to two years).

Usually, the employee remains contractually bound to the originating company which sent the employee to

France. In practice, the employment contract with the initial employer is supplemented with specific provisions applicable during the secondment.

7.1.2 Expatriation

An expatriate employee is one who has been sent abroad (i.e. to France) for a longer period (i.e. generally for more than one year).

The employee is therefore contractually bound to the French company. In practice, the employment contract with the initial employer (the originating company) is terminated and a new local employment contract is entered into between the expatriate and the French company.

7.2 | Social Security Law

7.2.1 Principle: Affiliation to the French Social Security Regime

In principle, any employee working in France (irrespective of nationality) must be affiliated to the French social security regime.

If an employee is the sole representative of a foreign company in France (*représentant isolé d'une firme étrangère en France*), he is responsible for ensuring that his employer's obligations are fulfilled. This is particularly important with respect to the drafting of pay slips, the payment of social security contributions and the drafting of annual declarations relating to social data (*déclaration annuelle des données sociales*).

7.2.2 Exception: Non-affiliation to the French Social Security Regime

Foreign employees may remain under the social security regime of their country of origin through application of EU rules or where a bilateral social security treaty exists.

EU rules:

EU regulations require that the following conditions be met by employees in order to be covered by their national social security systems (see Article 14 of EU Regulation No. 1408/71):

- the employee must perform a specific task on behalf of his employer;
- the envisaged duration of the assignment must not exceed twelve months, and may be renewed once if the original mission is not achieved within the original twelve-month period due to unforeseen circumstances;
- the employee must not be sent to replace another seconded employee who has finished his own temporary mission before the arrival of the new employee.

In order to maintain an employee's social security coverage in his EU country of origin, the employer must request a certificate from the competent social security authorities of that country (i.e. form E 101 for a secondment of less than one year and E 102 in the event of a renewal).

France has concluded bilateral social security treaties with thirty-six countries. Each of these agreements provides specific conditions to be fulfilled by employees in order to remain under the social security regime of their country of origin. These agreements provide for a maximum period of coverage in their country of origin (e.g. USA: five years).

8 | Immigration Law

Any foreigner, whether on secondment or expatriated, must have a work permit prior to carrying out a salaried activity in France, unless he is exempt from that requirement.

8.1 | Citizen of an EU or EEA Member State or of Switzerland

In application of the principle of free movement of workers within the EU, nationals from EU and EEA Member States as well as those from Switzerland may freely perform a salaried activity in France and do not require a work permit, subject to temporary restrictive provisions applicable to nationals of the new EU Member States (except for nationals of Malta and Cyprus).

EU nationals need only obtain a special EU residence permit (carte de séjour de ressortissant d'un Etat membre de l'Union Européenne) within three months of their arrival in France. This permit is valid for ten years and becomes permanent after its first renewal.

8.2 | Foreigners from Other Countries

Foreign employees who are not nationals of any EU or EEA Member State, or from Switzerland, and who wish to carry out a salaried activity in France must hold:

- a temporary residence permit with the word "employee" printed on it (*carte de séjour temporaire portant la mention "salarié"*) or a residence permit (*carte de résident*) if their activity is not temporary;
- a temporary work permit (*autorisation provisoire de travail*) and a temporary residence permit (*carte de séjour temporaire*) if their activity is temporary;

8.2.1 Permits for Non-temporary Workers

Temporary residence permit showing work authorization:

A temporary residence permit with the word "employee" printed on it may be granted after obtaining a work permit from the French Authorities. This type of permit, which is valid for one year and may be renewed, authorises foreigners to carry out a salaried activity of a non-temporary nature in France, in a specific professional sector and within a determined geographical area.

Full residence permit (*carte de résident*):

A residence permit, which is valid for ten years and may be renewed, is granted to foreigners who are able to prove uninterrupted residence in France for the last three years and who can justify their means of existence.
Foreigners who are granted this residence permit may perform any salaried or independent activity without any special authorization.

8.2.2 Permits for Temporary Workers

Temporary work permit (*autorisation provisoire de travail*):

A temporary work permit may be granted to foreigners who cannot be granted a temporary residence permit with the word "employee" printed on it (see above), or a residence permit (see above), and who intend to work for an employer during an initial period not exceeding one year. The duration of this permit may exceed nine months; it may be renewed.

Temporary residence permit (*carte de séjour temporaire)*:

Foreign temporary workers must hold a temporary residence permit referring to the temporary work permit.

9 Disclosure Systems within French Companies

In contrast with the provisions of the Sarbanes-Oxley Act, French case law has recently refused to authorize French companies to implement internal systems under which employees are asked to disclose to management any behaviour by colleagues that is in breach of the law or in breach of company rules.

Indeed, in the 2006 "*Commission Nationale Informa-tique et Libertés*" (CNIL) disapproved of the plans of two multinational companies that wished to implement these "ethics systems" in France, finding that such types of systems would be in contradiction with the principle of employees' freedom at work and also that these systems are viewed as encouraging disloyalty.

However in a decision of 8 December 2005, the CNIL reviewed its position and now accepts such denouncement system's, subject to certain conditions. These systems shall in particular be limited to cases involving accounting, bank and corruption.

10 Control and Disclosure of the Remuneration of Directors of French Listed Companies

A very recent law on "economic modernization" modified the applicable rules with respect to the remuneration of directors in French listed companies, more particularly as regards the control and disclosure of the directors' remuneration.

Pursuant to this law, any financial commitment made by a French listed company to the benefit of any of its directors since 1 May 2005 concerning remunerations or benefits, regardless of whether such remunerations and benefits are paid in connection with their capacity as directors or as employees (e.g. in the event of a golden parachute or a non-compete agreement) must be approved beforehand by the Board of Directors of the company concerned and by its Shareholders' Meeting.

The annual management reports of French listed companies must also mention the total remunerations and benefits of any kind whatsoever paid to each director during the previous fiscal year.

Furthermore, the management report shall describe and distinguish the basic, variable and exceptional elements composing directors' remuneration and benefits, and specify the criteria according to which they have been calculated or the circumstances in which they have been established.

Finally, the management report shall indicate all commitments of any kind made by the company to the benefit of its directors which correspond to the elements of remuneration, indemnities or advantages linked to the commencement, termination or change of the directors' functions (golden parachute, non-compete agreement, etc.). In this respect, please note that the above-mentioned commitments made by the company towards its directors before the enactment of this law must also be mentioned in the management report each year.

11 Employees' savings schemes (*"Epargne salariale"*)

11.1 Mandatory profit-sharing scheme (*"accord de participation"*)

Companies employing at least fifty persons during at least 6 months of their financial year, must set up a mandatory profit-sharing scheme as from said financial year. Such plans will provide eligible employees with profit-sharing premiums, which attract a favourable tax and social contributions.

11.2 Voluntary profit-sharing scheme (*"accord d'intéressement"*)

To motivate their employees, companies may set up voluntary profit-sharing schemes to provide eligible employees with an incentive bonus, should defined targets be reached.
Subject to certain conditions, such bonuses benefit from favourable treatment as regards tax and social contributions.

11.3 Company savings plan (*"plan d'épargne d'entreprise"*)

Companies can set up a company savings plan on a voluntary basis.

VIII Intellectual Property Rights

1 Trademarks

The French Trademark Law is codified in Articles L 711-1 to L 716-16 of the Intellectual Property Code (IPC) implemented on 1 July 1992. French law has also implemented European Community Directive No. 89/104 dated 21 December 1988 relating to the harmonisation of trademark laws within member states of the European Union.

Since 1 January 1996, a trademark may be registered at Community level (Community Trademark) and therefore benefit from uniform protection across the European Union.

1.1 Signs That May Be Used as Trademarks:

Article L 711-1 of the IPC contains a non-exhaustive list of signs that may be used as trademarks, such as:

- denominations of all forms: words, names, letters, numerals, etc.;
- figurative signs: labels, packaging, combinations of colours, designs, etc.
- musical signs: sounds, musical phrases, etc.

To be protected as such, a given trademark must be both available and distinctive. Trademarks that are the names of the wares or services used or intended to be used, or that are descriptive, or liable to mislead the public, particularly as regards the nature, quality or geographical origin of the goods or services or contrary to public policy, cannot be protected.

1.2 Search for Prior Rights

Under Article L 711-4 of the IPC, signs may not be adopted as trademarks where they infringe the following existing rights:

- a sign previously registered as a trademark for the same or a similar type of product or service or, in the absence of registration, a "well-known" trademark, as defined in Article 6 bis of the Paris Convention for the Protection of Industrial Property;
- a company name where there is a risk of confusion in the public's mind;

- a trade name or logo known throughout the national territory where there is a risk of confusion in the public's mind;
- a protected name of origin;
- a copyright;
- rights deriving from a protected industrial design;
- the personality rights of another person, particularly his or her surname, pseudonym or likeness;
- the name, image or repute of a local authority.

Before proceeding with an application for a trademark, it is highly advisable to research whether the sign has already been protected as a trademark or as a company name. The cost of such research is approximately €600 for a given category and €150 per additional category. Results are generally available within ten days of the request.

It should be noted that the French Trademark Office, the INPI, does not carry out any research on registration.

1.3 | Registration

A registration application must be filed by the creator (who may be either an individual or a company) or by a designated agent.

The INPI proceeds with a formal examination of the file in order to determine that the trademark meets the statutory criteria, that it does not violate public policy and that it is distinctive.

The INPI does not verify the availability of the sign and does not inform the owner of earlier trademarks if there is an infringement caused by the new one.

The application is published in the Official Journal for Intellectual Property (*Bulletin Officiel de la Propriété Industrielle*, or *BOPI*) within six weeks of the date of filing.

Any third party may submit written comments to the applicant within two months of publication; the applicant may respond. Any owner of a registered or well-known trademark or an exclusive licensee of a trademark (unless contractual provision to the contrary exists) may oppose a given application and request that it be rejected. Objections are then forwarded to the applicant and a hearing takes place before the Director of the INPI. The INPI must rule within six months.

Where an objection is rejected, a final review of the formal validity of the trademark takes place before it is registered and published in the BOPI. The trademark is then deemed registered retroactively from the date of application.

Applicants may extend the scope of their trademark internationally or within the EU within a period of six months, with retroactive effect to the date of application in France.
The owner of a French trademark who files an identical trademark application for the purposes of obtaining a Community Trademark, for identical goods or services, or for goods and services included in the specification of the prior French trademark, may claim the seniority of this prior trademark for the Community Trademark.

This seniority claim may be made when the Community Trademark application is made, or after its registration.

The main fees relating to the Community Trademark are as follows:

- €900 for application in up to three classes;
- €350 for filing an opposition to an application;
- €850 for registration in up to three classes;
- €1500 for renewal of a trademark in up to three classes.

The cost of a national application through an agent is approximately €500 for the first three classes and €75 for each additional class.

The fees charged by the INPI are as follows:

- €225 for registration of the trademark in up to three classes;
- €40 for registration in each supplementary class;
- €240 for renewal of a trademark up to three classes;
- €40 for renewal in each supplementary class;
- €310 for filing an objection to an application.

Trademarks are registered for a ten-year period and may be renewed indefinitely (the INPI does not notify the owner of the trademark of expiration or need for renewal).

2 | Patents

Current patent law in France is governed by Article L621-1 FF of the IPC which implements the Law of 2 January 1968 as amended by the Law of 13 July 1978. The IPC was also amended by the Law of 18 December 1996 to ensure its harmonisation with the ADPIC protocol of the World Trade Organisation Agreement.

2.1 | Conditions for the Patenting of an Invention (Article L 611-1 IPC):

- the invention must be new, i.e. it must not fall within the scope of what is taken to be "prior art" at the time the application is filed. The invention

must not have been disclosed, even orally, by the inventor himself, or described in a previous patent;
- the invention must involve an inventive aspect;
- the invention must have a possible industrial application.

2.1 Filing an Application for a Patent

The description of the invention must be clearly understandable.

A precise description consisting of the title, the technical field, the prior art which may help to understand the inventive aspect, drawings and at least one exact description of how to use the invention must be provided.

Apart from checking whether formal drafting requirements are met, the main purpose of the formal examination by an Examiner of the INPI is to determine whether the claimed invention is of a patentable nature and whether the claims cover one invention only. The Examiner then draws up a report intended to determine if the patent lacks innovation or inventiveness. This report is made at the applicant's request or no more than eighteen months following the date of filing. If the report shows that the prior art undermines the innovative nature of the invention, the applicant may provide explanations.

If the Examiner rejects the application, the applicant may appeal against this rejection before the Paris Court of Appeal.

There is no objection procedure in the French patent system.

Where the validity of a patent granted in France is challenged before the Courts, only the Judge is entitled to invalidate a patent (partially or totally) on legal grounds, including lack of inventive step. The Judge is in no way bound by the opinion of the Examiner as understood from the content of the latter's report.

2.3 Rights and Obligations of the Patentee

The patentee has exclusive rights with respect to the invention for a period of twenty years. He may use the invention or grant a licence to use it. He may be forced to license the invention if he fails to use it. He may also file further patents in the event of improvements.

The patentee must pay an annual fee to maintain the patent. If he does not make payment, the invention falls into the public domain.

The fees charged by the INPI are as follows:

- €35 for filing a "standard" application;
- €25 for filing an electronic application;
- €500 for the report;
- €85 to issue of the Official Certificate;
- annual fees, starting from €35 for the second year and increasing to €600 for the twentieth year.

It must be noted that since the implementation of the Decree of 2 August 2005 (i.e. 1 September 2005), these fees (except those relating to the annual fees applicable from the eighth year) have been reduced by 25%.

Legal fees and the fees of the Patent Agent vary according to the difficulty of the application.

2.4 European and International Patents

Any party may file a request for a European patent, either with the European Patent Office or the French Patent Office. Once issued, European Patents give rise to national patents.

However, if France is designated in a Patent Cooperation Treaty (PCT) application, the only means of obtaining protection in France by virtue of that PCT designation is via the European phase of the PCT; it is not possible to convert a PCT designation in France into a national patent application. The (PCT) allows applicants to file for an international patent at a given country's patent office.

Patent holders also benefit from a twelve-month period during which they are granted priority for filing in other signatory countries of the Paris Union Convention.

3 Design

3.1 Double Protection

Under French law, a design may be protected either by design law under Article L 511-1 of the IPC or by copyright law under Article L 111-1 of the IPC.

3.2 Registration Requirements

The innovative aspect of the design must as a general rule be apparent, but this is not an absolute condition, as a combination of elements which are already in the public domain may be new and therefore protected.

Protection is in fact granted to the appearance of the whole or a part of the product, resulting in particular from the features of its lines, contours, colours, shape, texture or materials. These features can be those of the product itself or its ornamentation. Any industrial or handicraft item, including inter alia parts intended to be assembled into a complex product, packaging, graphic symbols and typographic typefaces, but excluding computer programs, is deemed to be a product.

When a design is considered both as a new industrial design and as a patentable invention, it must be protected by a patent.

3.3 | Registration of a Design

The first person to register a design is assumed to be its creator.

Registration takes effect on the date of the filing of the application and continues for a period of five years, which may be extended by additional periods of five years up to a maximum limit of twenty-five years.

Designs or models registered before 1 October 2001 shall remain protected, without any extension being possible, for a period of twenty-five years from their date of registration. Designs or models whose protection has been extended, prior to 1 October 2001, for a new period of twenty-five years, shall remain protected until the expiration of that period.

Creators may wish to keep their designs secret. However, should they wish to base a claim on their design, their names will be disclosed before the claim is placed.

The filing fee for registering a design is €38.

4 | Copyright

Article L111-1 FF of the IPC, implementing Law No. 92-957 of 1 July 1992 (hereafter referred to as the Law of 1992), governs literary and artistic property.

Protection is granted to archetypal works. Protection is granted "regardless of the type, the form of expression, merit or purpose of such work" (Article L112-1 of the IPC).

An author holds intangible property rights with respect to his work, which include not only economic rights but also moral rights. The IPC recognises the author's economic right to determine who may perform or reproduce his work. Furthermore, it recognises the moral rights (*droits moraux*) of the author which include the author's right of paternity, of maintaining the integrity of his work, of divulging his work to the public, and of withdrawing his work from publication.

The author thus acquires not only freely assignable economic rights (e.g. performance and reproduction rights) but also moral rights which are perpetual, inalienable and irrevocable. This means that, notwithstanding the possible transfer of the economic rights, the moral rights remain vested with the author. Moral rights may therefore be raised by the author as a remedy of last recourse against the misappropriation or misuse of his work.

The rationale for such personal protection is that the author's work is a creation stemming from the author's personality.

Mere ideas are not protected by copyright law.

Copyright protection is not subject to any registration formality. Economic and moral rights are effective immediately upon the creation of the works to which they relate.

Protection ends seventy years after the author's death. In the case of a collective work, the term of the exclusive author's right shall be seventy years from January 1 of the calendar year following that in which the work was published.

5 | Software Protection

In France, computer programs are protected as intellectual works under the IPC.

Article 3 of Law No. 572987 of 11 March 1957, which governed literary and artistic property before the entry into force of the IPC, initially provided a comprehensive list of works that constituted intellectual works. This list included inter alia books, brochures and other literary, artistic and scientific writings, cinematographic works, musical compositions and illustrations, etc.

Law No. 85-660 of 3 July 1985 expanded this list to include other categories of works, including computer software.

When determining what aspects of computer programs are "original" for the purposes of establishing the degree to which they can be protected, the French Courts examine whether the program originated with the author, i.e. whether or not it is the author's own creation, and whether the developer's product embodies creative choices or merely reproduces standard programming solutions.

6 | Websites and Domain Names

Within the ".fr" zone (France), the assignment and administration of domain names is handled by NIC France (AFNIC) under a Naming Charter which requires that applicants provide their company registration certificate (*K-bis*) or a copy of a trademark registration with the domain name sought. Trademarks may be registered under a domain name terminating in ".tm.fr" or ".fr".

Where a domain name is confusingly similar to a trademark or another prior IP right, commercial parasitism or infringement may be invoked against the owner of the domain name.

7 | Company Names

The protection of company names in France is based on a first-come, first-served approach. The first person to register a name is thus entitled to prevent third parties from using that name for similar activities to avoid the risk of confusion in the mind of the average consumer.

Company names are protected by the civil Courts, who consider "passing oneself off" to be a tort under Article 1382 of the Civil Code.

It is therefore advisable to carry out a prior search on previously registered company names before registering a new company name. The same applies where a new trademark is to be registered.

8 | Counterfeiting and Other Violations

France disposes of a wide range of measures, both criminal and civil, to detect and prevent counterfeiting of trademarks and fraudulent imitation of a work.

Any infringement may give rise to criminal or civil proceedings.

Counterfeiting is considered a serious breach of public policy that justifies the intervention of the public authorities.

The general principle is that all types of evidence of acts of counterfeiting are accepted. Consequently it is not necessary to launch a specific procedure in order to produce evidence of counterfeiting that will be considered admissible by a Court.

Depending on the circumstances, the buying of goods bearing a counterfeit trademark and/or the communication of commercial documents issued by the counterfeiter and bearing such trademark may be sufficient. However, acts of counterfeiting may also be proven with the help of specially adapted procedures.

The most common way of proving counterfeiting is the counterfeit seizure procedure (Article L 716-7 IPC). For this seizure to be undertaken, a Court order must be requested by an attorney without the need to inform the counterfeiter.

If ordered, the seizure is conducted by a bailiff assisted by the police and a trademark attorney.

During the seizure, samples for proving counterfeiting can be retained and commercial documents consulted and copied in order to obtain information as to the origin and extent of the counterfeit operation.

Following the seizure, an action for judgement on the counterfeiting must take place within fifteen days, after which period the seizure becomes null and void.

The recording of counterfeiting acts can also be made by police officers when a complaint is lodged by the victim of the counterfeiting or within the context of an inquiry.

The police are granted quite broad powers in order to conduct questioning and investigate all of the elements related to the counterfeiting.

This power of seizure applies to audiovisual Works (Article L 335-1 IPC), trademarks (Article L 716-8-1 IPC) and designs and models (Article L 521-3-1 IPC).

Since 1994, customs authorities have also been entitled to seize products illegally bearing a trademark. The offending products are then seized and offenders fined between one and two times the value of the objects seized.

Upon request by the holder of the rights and upon proof of title, any goods presumed to be counterfeit may be seized for up to ten days. The holder of the rights and the Public Prosecutor are immediately informed.

Patents do not fall within the jurisdiction of the customs authorities.

Sentences under the IPC include a maximum of two years' imprisonment and a fine of €150,000.

Sentences are doubled in the event of repeated offences.

Legal entities may also be found guilty of counterfeiting. In this case, the maximum fine is five times higher than the maximum amount applicable to first-time offenders (Article 131-38 of the Criminal Code) and imprisonment is replaced by a temporary ban on conducting business for a period of up to five years. In some cases, the ban may be permanent.

Finally, an interlocutory injunction can be requested before both the Civil and the Criminal Courts.

Where the action has been introduced before the Courts in order to prevent the continuation of the alleged infringements, the plaintiff may ask the President for an interlocutory injunction, subject to a daily fine, or the furnishing of financial guarantees in order to ensure the compensation of the trademark owner.

However, such action is admitted only if the case appears well-founded and where the proceedings are introduced within a short time following discovery of the counterfeiting (Article L 716-6 IPC).

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