HARLAY

AVOCATS

LEGAL NEWSLETTER

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The Finance Act for 2019 and the Amending Finance Act for 2018 provide significant changes.

Voted at the end of December 2018, these finance acts bring numerous new provisions; the main tax measures are the following:

A. A new definition for the **"abuse of law"** (transposed from the European Union ("EU") Directive 2016/1164; 12th July 2016, article 6)

The Finance Act for 2019 inserted an article L64-A in the Tax Procedure Code enabling the Tax Authorities to « discard, as not legally binding, the acts accomplished with the **main motive** of evading or mitigating the tax burdens of the individual by means of seeking the benefits of literal enforcement of provisions or rulings against the objectives pursued by their authors". This procedure is henceforth extended to transactions **mainly motivated by fiscal concerns**. The provisions provided by the Finance Act for 2019 instigate now a dual mechanism for **abuse of law** (i) the standard **abuse of law by fraud** procedure and (ii) the new procedure allowing to discard acts **mainly motivated by fiscal concerns**, given that:

- Taxpayers are provided with the **same legal guaranties in the two procedures:** they can request the opinion of the Tax Committee on Abuse of Law;
- The new provisions **do not provide any specific sanctions** (General Tax Code's article 1729b has not been amended by the Finance Act for 2019 to make the 40% and 80% surcharges applicable to the acts mainly motivated by fiscal concerns)
- These provisions will be applicable to tax adjustments notified from January 1st, 2021, regarding acts executed from January 1st, 2020 onwards.

B. The fiscal regime for **distributions** has been adjusted

Dividends paid to a foreign subsidiary resident of an EU member state or, party to the European Economic Area ("EEA") Agreement, and subject to an equivalent to French Corporate Income Tax in said state, remain exempted; however the portion of non tax deductible expenses and charges is reduced from 5% to 1% for these dividends if the two companies, while not being integrated fiscally, satisfy the conditions to establish between them a tax consolidated group if both entities had been incorporated in France (i.e., identical fiscal year ends, over 95% equity participation of the parent in its subsidiary while not being owned over 95% by another company, subsidiary must have been controlled for over a year…)

C. French **tax consolidation regime** now complies with EU Laws, the main changes being:

- For entities belonging to the same tax group, 99% (100% formerly) of dividends paid between the consolidated companies are henceforth deductible from the overall group result (which has the same result including 1% of the dividends of the fiscal group's overall result) (article 216-I. 2° of the General Tax Code).
- A member of a tax consolidated group collecting dividends from a foreign subsidiary owned for more than one fiscal year and residing in a EU country or in a country party to the EEA Agreement and subject to an equivalent to the French Corporate Income Tax in said state, can henceforth deduct from its taxable result 99% of the dividends collected from said foreign subsidiary. This is subject to the condition that this subsidiary had satisfied the conditions to integrate the group if it had been a resident of France (which has the same result including 1% of the dividends of the fiscal group's overall result) (article 216-I. 2° of the General Tax Code).
- Debt waivers and direct or indirect subsidies granted among companies of a fiscal group are no longer offset to calculate the fiscal group's overall earnings.
- Quota for expenses and charges representing 12% of the long-term capital gains resulting from intra-group sales of equity securities, formerly offset to calculate the group's overall earnings, is henceforth taxable for share transfers implemented as from the 1st of January 2019.

D. New **thin capitalization** rules are reducing interest tax deductibility (transposed from EU Directive 2016/1164; 12th July 2016, article 4)

The new thin capitalisation framework replaces the previous « rabot » and removes the « Carrez » amendment. Thin capitalisation rules are now tougher: a company will henceforth be deemed under-capitalized by exceeding a 1.5 debt to equity ratio. The companies which are not deemed under-capitalized may deduct from their net financial costs the higher amount between (General Tax Code, article 212 bis, I & II):

- 3M€ per 12-month fiscal year
- 30% of the company's fiscal Ebitda (as defined by EU Directive 2016/1164: fiscal earnings before interests, taxes, depreciation, amortization and potential long-term gains or losses on sales of assets)

E. The **intellectual property rights proceeds** scheme has been modified to be brought into compliance with the "nexus" approach from the Base Erosion and Profit Shihfting ("BEPS") report:

Companies can submit net proceeds from sales or concessions of intellectual property assets to separate taxation at discounted rate. These net proceeds will be determined by calculating the difference between the revenues generated by the relevant asset and R&D expenditures related to this asset (article 238, General Tax Code).

F. The **exit tax** has been adjusted

The 2019 Finance Act does not completely remove the existing legislation but negates a major part of its effects turning it into a key element of the fight against abusive residency transfers (the exit tax relief period for unrealized gains is reduced to 2 years or, 5 years for taxpayers having a security portfolio exceeding 2.57M€ on the transfer date; the relief period is now granted automatically to taxpayers transferring their residence to an EU member state or to a jurisdiction having signed a double taxation agreement covering administrative assistance against tax evasion and fraud).

Harlay Avocats

Le Cabinet Harlay Avocats, en qualité de responsable de traitement, traite vos données personnelles conformément à sa charte relative à la protection des données, et notamment afin de vous adresser des informations utiles concernant l'activité de notre Cabinet et des actualités juridiques susceptibles de vous intéresser.

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Pour exercer ces droits, vous pouvez nous contacter à l'adresse suivante: dpo@harlaylaw.com.

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