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'Buying a business or a company in France'

A business can be run without creating a company or through a company.

A business run out of a company is usually called a "*fonds de commerce*".

The legal and tax aspects of the acquisition of a *fonds de commerce* and of a commercial company are very different.

I – THE ACQUISITION OF A "FONDS DE COMMERCE":

A *fonds de commerce* is defined as all the means which a merchant uses to create and satisfy his clientele.

A *fonds de commerce* usually comprises the right to the commercial lease, the goods, the equipment, the business's trading name and the clientele without which a business cannot exist.

The *fonds de commerce* can never comprise buildings. The building required to run the business either belongs to a physical person or to a non-commercial or commercial company.

The sale (or purchase) of a *fonds de commerce* is subject to relatively cumbersome formalities which are intended to protect the buyer as well as the seller's creditors.

A – The terms of sale (or purchase):

- Even if not formally required by law, the sale agreement for a *fonds de commerce* must be put in writing. The agreement must include the main characteristics of the *fonds de commerce*, such as the trading name, the goods and the right to the commercial lease.
- The sales agreement must include a certain amount of compulsory information. It must specify the origin of title of the *fonds de commerce*, the charges

(guarantees) over the *fonds de commerce*, the turnover and profits and the main terms of the commercial lease.

- The sale agreement must be registered at the Tax Office. It must also be published in a newspaper of legal advertisements and in the Official Gazette of Civil and Commercial advertisements (B.O.D.A.C.C), which is an official newspaper of commercial advertisements.
- The buyer must be registered with the Trade and Companies' Register (*Registre du commerce et des sociétés*) if this formality has not already been performed.
- In certain areas, the local council has a right of pre-emption, giving them a right of first refusal to acquire the business. The local council must be informed so the right of pre-emption can be performed or removed.

Finally, when a citizen of a European country wishes to buy a *fonds de commerce* in France, he must register at the local town hall within three months of his arrival in France. A citizen of a non-European country must apply for a residence permit (*carte de séjour*) authorizing him to work in France.

B – The consequences of selling the *fonds de commerce*:

Once the sale is performed, the seller must hand the buyer all the account books. The seller must also undertake not to compete against the buyer.

When the advertising formalities have been performed, (see above), the seller's creditors have 10 days from the last advertisement to oppose the payment of the price.

They can also offer a higher price if they consider that the price offered for the *fonds de commerce* is insufficient.

C – Taxation:

1 - Tax paid by the Buyer: Registration duty (droits d'enregistrement):

Registration duty: Sales of *fonds de commerce* are subject to a 3% duty on the tax band between €23,000 and €200 000 and 5% duty on the band above €200,000.

A lower rate applies to sales to employees or members of the seller's family.

There is also a reduced rate in certain geographical areas providing the purchaser undertakes to run the business for a minimum of 5 years.

2 – Tax paid by the Seller: capital gains tax (plus-value):

Capital gains tax on the sale of a *fonds de commerce* differs depending on whether the *fonds de commerce* is sold by an individual or by a company :

- The *fonds de commerce* is sold by an individual: Income tax:

The law *makes* a distinction between a sale within a period of less than two years ("short-term capital gains") or over two years ("long-term capital gains"). Except for case when exemptions apply, in the first case, tax is charged at the normal rate of income tax. In the second case, tax is applied at a reduced rate of 31,50% including social security levies.

- The *fonds de commerce* is sold by a company: Corporation tax :

The capital gain is taxed at the normal rate for the corporation tax (the 33.33%) with no distinction between short-term and long-term capital gains.

II – THE ACQUISITION OF A COMMERCIAL COMPANY:

A – The legal and tax implications:

Commercial companies in France are usually created in the form of a limited liability company (*société à responsabilité limitée* (SARL)), a public limited company (*société anonyme* (S.A)) or a simplified joint-stock company (*société par actions simplifiée* (SAS)).

This information sheet only deals with these three types of companies.

1 – Buying a limited liability company (société à responsabilité limitée (SARL):

(i) Legal aspects:

A limited liability company (SARL) is purchased by acquiring the shares in the company belonging to a/the shareholder(s).

The buyer must acquire at least 51% of the share capital in order to gain control of the company.

Before the acquisition, a check must be made whether the share transfer has to be approved by the others shareholders.

The following principles apply to a limited liability company (*SARL*):

- A shareholder transferring company shares must be authorized by the others shareholders.
- Transfers of shares between shareholders are unrestricted in principle. Nevertheless, the Articles of Association can restrict this right.
- Transfers of a shareholder's shares to his or her spouse, children or parents are in principle unrestricted. However, the Articles of Association may again require the approval by the other shareholders.

From a formal point of view, the transfer of company shares must be recorded in a private agreement, which is either registered at the Tax Office or notarized.

The instrument must be served to the company, either by filing to the company, or by service through a court bailiff.

These instruments must then be registered at the competent Trade and Companies' register (*Registre du commerce et des sociétés*).

(ii) Tax aspects:

Tax payable by the buyer:

Registration duty: the sale is subject to 3% duty, irrespective of whether it is recorded in an instrument or not.

The seller's liability for capital gains tax:

The law differentiates between capital gains realized by private individuals and those realized by companies.

There are nevertheless allowances depending the holding period of the shares, and whether the shares are sold into members of a family or if the vendor is going to retire.

2 – The transfer of shares related to a simplified joint-stock company (*Société par Actions Simplifiée (SAS)*) or to a Public and Limited Company (*Société Anonyme (S.A)*) :

(i) Legal aspects:

In principle, the company's shares can be unrestrictedly transferred to the other shareholders and third parties outside the company.

Nevertheless, the Articles of Association may require these transfers to be approved.

Shares are transferred in a SAS or a SA by transferring shares from the transferor's share account to the buyer's share account. The transfer is formalized by a "*ordre de mouvement*" document signed by the buyer and the transferor.

The company registers the share transfer in the register of shareholders' accounts. The transfer of ownership title in the shares results from this registration and renders the transfer valid against the company and third parties.

2 - Tax aspects:

(i) Tax paid by the buyer:

Registration duty: the sale of shares is subject to a 0,1% tax. This duty is only payable for sales of shares in a public limited company listed on the stock market if the sale is formalized in an agreement.

(ii) The seller's liability for capital gains tax:

The law differentiates between capital gains realized by private individuals and those realized by companies.

There are nevertheless allowances depending the holding period of the shares, and whether the shares are sold into members of a family or if the vendor is going to retire.

3 – Negotiation of a liability or asset guarantee:

The buyer often negotiates an asset and/or liabilities guarantee to guard against the discovery of debts, especially tax and social security debts (non-payment of tax or social security debts by the seller) after the acquisition.

The asset/liability guarantee is also intended to protect against the unexpected reduction in the value of the assets after the purchase.

The liability/asset guarantee will specify the time frame during which the purchaser can enforce it.

It is usually between 3 and 5 years.

B – The consequences of the sale of the company on employees:

1. The obligation to inform employees and consult the Works Council (*Comité d'entreprise (C.E)*):

In companies having less than 250 employees, employees shall be informed of the sale of the company at least 2 months before the date of acquisition.

Also, when a company has a Work Council (compulsory in companies with over 50 employees), the latter must be informed and consulted when the company is sold.

The information and consultation procedure must occur before the sale is concluded.

Employer's failure to respect this procedure, constitutes the offence of interfering with staff representatives' rights (*délit d'entrave*) which is a criminal offence.

The works council only has a consultative opinion, and the company owner can go ahead with the transaction, even if the Work Council's opinion is negative.

2. What happens to employment contracts:

When there is a modification in the company's legal position, and especially in the event of a sale, the employment contracts are automatically transferred to the new employer according to article L 1224-1 of the Labour Code.

However, two concurrent conditions must be satisfied for this transfer to occur:

- The transfer must concern an '*independent economic entity*', i.e. a unit comprising people and assets for performing an economic activity, and,
- This activity must be continued or resumed by the new operator, keeping the unit's identity.

This condition concerning the identity is assessed on the date of the transfer.

In addition, the transferee is not obliged to inform the employees concerned individually.

Ongoing employment contracts are maintained under their terms with the old employer on the day of the transfer. Each employee keeps his or her job description and salary.

Collective bargaining agreements are usually called into question because the buyer is not the signatory.

C – Consequences under French and European competition law:

Mergers, contributions and takeovers of a company by another company are subject to the merger control legislation, and require authorization by the government department concerned or the European commission.

1 - This control is performed by the French Competition Authority if the following two thresholds are reached:

- When the parties to the merger have a total worldwide turnover excluding VAT of more than €150 million,
- The total turnover exclusive of VAT realized in France by at least two of the parties to the merger is over €50 million.

These thresholds are 75 and €50 million respectively if :

- At least two of the parties to the transaction operate one or more retail shops,
- When at least one of the parties to the transaction runs all or some of its business in one or more overseas departments or overseas territories.

At the end of the control, the French Competition Authority either authorizes the transaction completely or makes it conditional on the performance of certain conditions.

2 - The European Commission can also perform a control when:

- Firstly, the worldwide turnover realized by all the companies concerned is over €5 billion,
- Secondly, if at least two of these companies each realize more than €250 million of their turnover in the European Union.

D – Acquisition by non French or EU citizens:

If the acquisition is made by non French or EU citizens, a check must be made to see whether French legislation on foreign investments in France applies.

In principle foreign investments in France are unrestricted.

However certain investments require:

- The prior authorization of the Economy and Finance Ministry (*Ministère de l'Économie et des Finances*) if the investment is in sensitive areas (research, weapons, etc) and, or
- A declaration to the Economy and Finance Ministry (*Ministère de l'Économie et des Finances (Direction Générale du Trésor)*) if a foreign investor is creating a new business, acquiring all or some of the business division of an existing French company or performing a capitalistic operation inside a French company and will hold more than 33.3% of the capital as a result. There are numerous exceptions to this declaration obligation, especially if the investment in a French company is below €1,500,000 i.e.
- a statistical declaration to the *Banque de France* for a property investment or an investment of over €15 million in French companies, or to the Treasury Department for investments of over €1,500,000.