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FRENCH FINANCE BILL 2020: FIRST FRENCH GLOBAL ANTI-HYBRID RULES AND TAX MEASURES IN AN INTERNATIONAL ENVIRONMENT (PART 1/3)

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The French Parliament adopted several new corporate tax, individual income tax and tax litigation measures in the 2020 Finance Bill, which was passed on 28 December 2019. Most of these new tax rules came into force on 1 January 2020.

This is the first of a series of three linked articles focussing on specific aspects of France's 2020 Finance Bill which we believe will be of the special interest to our readers. This article examines France's first global anti-hybrid regulations and tax measures in an international environment.

> "The 2020 Finance Bill introduces a new global anti-hybrid limitation."

IMPLEMENTATION OF THE ANTI-HYBRID RULES IN THE EU ATAD DIRECTIVES

The 2020 Finance Bill transposes into French domestic law the provisions of the ATAD 1 and ATAD 2 directives that are designed to tackle hybrid instruments and hybrid entities.

These directives provide, for transposing into the domestic law of each Member State of the European Union ("EU"), rules to eliminate mismatches in relation to payments between affiliated entities arising from the different legal characterisation of an instrument or an entity by two jurisdictions (between Member States of the EU or with third jurisdictions).

For instance, a hybrid mismatch may take the form of a financial arrangement that results in a deduction in one country without the taxation of the corresponding receipt in the other.

Under the new anti-hybrid rules, if a payment is tax-deductible by a paying entity established in France without that payment being included as a taxable receipt of the beneficiary of such payment, France can disallow the tax deduction for such payment. The Financial Bill also transposes a new mechanism called "imported hybrid", which will require a careful review not only of the tax treatment at the level of the beneficiary of a payment made by a French taxpayer, but also of the entire chain of cash repatriation from France up to the ultimate beneficiary. The Financial Bill provides, however, exceptions to the anti-hybrid rules, notably for professional financial operations or when the imported hybrid benefit is counteracted by another country.

These new rules apply to **fiscal years ("FYs") starting on or after 1 January 2020**, except for those related to reverse hybrids, which will apply to **FYs starting on or after 1 January 2022**.

REPEAL OF THE "OLD" ANTI-HYBRID INTEREST EXPENSES DEDUCTION LIMITATION

Due to the implementation of the anti-hybrid rules of the ATAD 1 and ATAD 2 directives as described above, the Bill repeals the existing anti-hybrid rule (i.e. former requirement of a minimum taxation of 25% of French corporate income tax ("CIT") of non-French tax resident lenders for interest to be tax deductible at the level of French borrower) as from 1st January 2020.

CHANGES TO THE PLANNED REDUCTIONS IN THE CORPORATE TAX RATE FOR LARGE COMPANIES

Following the initial proposed reduction in the French standard CIT rate for companies with taxable income of €250 million or more for FYs starting on or after 1 January 2019, the 2020 Finance Bill modifies the CIT rates as follows:

- For FYs starting on or after 1 January 2020, a 28% CIT rate applies to the first €500,000 of taxable income and a 31% CIT rate applies to taxable income exceeding €500,000 (instead of the 28% CIT rate initially proposed); and
- For FYs starting on or after 1 January 2021, a 27.5% CIT rate will apply (instead of the 26.5% CIT rate initially proposed).

The reduction in the French CIT rate for companies with revenue lower than €250 million remains unchanged: a **28% CIT** rate for FYs starting on or after 1 January 2020 and a 26.5% CIT rate for FYs starting on or after 1 January 2021.

For FYs starting on or after 1 January 2022, a **25%** CIT rate will apply for all companies, including large companies.

The withholding tax rate applicable to certain French-source income and gains (e.g. a capital gain on the sale of shares (i) constituting substantial participations or (ii) in real estate companies) is accordingly adjusted to 28%.

FOR THE FIRST TIME, DETAILED FRENCH GLOBAL ANTI-HYBRID RULES HAVE BEEN ADOPTED.

ADJUSTMENTS TO WITHHOLDING TAXES APPLICABLE TO NON-RESIDENT COMPANIES TO COMPLY WITH EU LAW

Following a decision of the EU Court of Justice dated 22 November 2018 (C-575/17, Sofina SA), the 2020 allows some foreign entities in a tax loss position to claim a refund of:

- The withholding taxes on dividends provided by article 119 bis of the FTC;
- The withholding taxes provided by article 182 A bis and 182 B of the FTC; and
- The levies on capital gains upon the transfer of shares related to real estate or real estate assets provided by articles 244 bis, 244 bis A, and 244 bis B of the FTC.

The eligible foreign entity will ultimately have to pay the tax when it becomes profitable or if the relevant annual tax compliance requirements are not fulfilled. This measure applies to FYs starting **on or after 1 January 2020**.

The net profits of French branches of non-resident companies are deemed to be distributed and subject to a 28% withholding tax. The 2020 Finance Bill provides that such withholding tax should be recalculated if the non-resident company can demonstrate that the distributions, which are subject to withholding tax under article 115 quinquies of the FTC, arise from foreign-source profits or from French-source profits which have not been disinvested outside France. This rule is now consistent with a recent decision of the French Supreme Administrative Court (CE, 10 July 2019, n°412581, Cofinimmo) and applies to FYs starting **on or after 1 January 2020**.

"The eligible foreign entity will ultimately have to pay the tax when it becomes profitable or if the relevant annual tax compliance requirements are not fulfilled."

NEW LIST OF NON-COOPERATIVE STATES AND TERRITORIES FROM 1ST APRIL 2020

A Decree dated 6 January 2020 amends the list of non-cooperative states and territories ("NCST"). The French NCST rules can trigger a 75% withholding tax on payments made by a French company to an entity established or having a bank account in an NCST and other significant adverse French tax consequences.

From 1st April 2020, the new list of NCST includes the following countries or territories:

- American Samoa;
- Anguilla;
- Bahamas;
- British Virgin Islands;
- Fiji;
- Guam;
- Oman;
- Panama;
- Western Samoa;
- the Seychelles;

- Trinidad and Tobago;
- the US Virgin Islands; and
- Vanuatu.

READ PART TWO HERE OR TO READ PART THREE HERE.

KEY CONTACTS

ROMAIN GIRTANNER
PARTNER • PARIS

T: +33 1 76 40 15 68

rgirtanner@wfw.com

GILLES CERVONI
SENIOR CONSULTANT • PARIS

T: +33 1 76 40 15 81

gcervoni@wfw.com

HÉLÈNE IBOS
COUNSEL • PARIS

T: +33 1 76 40 16 20

hibos@wfw.com

MARIE-CHARLOTTE DE CASALTA
SENIOR ASSOCIATE • PARIS

T: +33 1 76 40 16 43

mdecasalta@wfw.com