M&A Legal Developments in France in 2014

ONLINE CONFERENCE

HOST : GIBSON DUNN & CRUTCHER LLP

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INTRODUCTION : A RAPID PACE OF LEGAL REFORMS, FOR BETTER OR FOR WORSE...

- In 2014, the French Legislator and Government enacted and implemented major, deep-reaching reforms in multiple areas of French law, and in particular those relating to M&A transactions

- The Law on Job Security, the Florange Law, the Decree on Foreign Investments, the Law on the Social Economy and the Ordinance of July 2014 are the most significant M&A legal developments in France in 2014; they cover many aspects of both private and public M&A transactions, from the scope of the governmental authorizations necessary to invest in France, the defenses against unsolicited takeovers, the enforceability of shareholders' agreements (and share purchase agreements) and the corporate governance of French companies, to the consultation process of the employees' representatives, the new employees' right to offer to purchase their company and the new obligations to be complied with prior to shutting down or relocating French business sites

- Whether these reforms will achieve the radical changes they purport to trigger remains to be seen. Some of these reforms were long-awaited (*e.g.*, the improvement of the enforceability of shareholders' agreements and share purchase agreements, the streamlining of the consultation of the employees' representatives). Others have sparked prolonged public debates and are still challenged (*e.g.*, the Law Florange, the Law on the Social Economy). Nonetheless, these reforms are now applicable, and investors shall take them into account in structuring their M&A transaction opportunities in France

- This presentation also highlights recent, significant changes to French and EU tax law and case law that should be of interest to investors contemplating M&A transactions in (or involving) France

M&A Legal Developments In France – Corporate Law

1. STRENGTHENING OF GOVERNMENTAL CONTROL OVER FOREIGN INVESTMENTS IN FRANCE
2. STRENGTHENING OF DEFENSES AGAINST UNSOLICITED TAKEOVERS
3. IMPROVEMENTS OF THE ENFORCEABILITY OF SHAREHOLDERS' AGREEMENTS (AND SHARE PURCHASE AGREEMENTS)
4. HARDENING OF CORPORATE GOVERNANCE RULES

STRENGTHENING OF GOVERNMENTAL CONTROL OVER FOREIGN INVESTMENTS IN FRANCE

EXTENSION OF THE LIST OF STRATEGIC SECTORS

- Foreign investments in France are free and do not require prior authorizations by the French Government unless they relate to certain strategic sectors

- On May 14, 2014, in the wake of public debates on cross-border transactions (*e.g.*, GE/Alstom) and upon request of Mr. Arnaud Montebourg, then French Minister of Economy and a strong defender of so-called French business patriotism, the French Government enacted Decree n° 2014-479 the main purpose of which is to extend the list of strategic sectors in which no foreign investment may be made unless it has been authorized by the Ministry of Economy pursuant to the French foreign investments regulation (FI Regulation)
  - When rumors about a potential takeover of Danone by PespiCo spread in 2005, the French Government also modified the FI Regulation

- The Decree has extended the existing blocking powers of the Ministry of Economy over foreign investments in **six business sectors**, ***i.e.*, (1) energy supply, (2) water supply, (3) transportation networks and services, (4) electronic communication networks and services, (5) operations essential for defense and security of France** and **(6) public health**, **to the extent the activities concerned are essential to preserve the public order or security in and/or the national defense of France**

- The FI Regulation covers the acquisition by EU or non-EU investors of the business or the (direct or indirect) control of French companies






STRENGTHENING OF GOVERNMENTAL CONTROL OVER FOREIGN INVESTMENTS IN FRANCE

<table>
<tr><th rowspan="2">Strategic sectors</th><th colspan="2">Authorization required for investments in France made by</th></tr>
<tr><th>EU investors</th><th>non-EU investors</th></tr>
<tr><td>Gambling (except for casinos)</td><td>NO</td><td rowspan="14">YES</td></tr>
<tr><td>Regulated private security activities</td><td rowspan="6">Only for the acquisition of certain businesses (not for change of control)</td></tr>
<tr><td>Defense against biological and chemical terrorist attacks</td></tr>
<tr><td>Intelligence</td></tr>
<tr><td>IT security certification</td></tr>
<tr><td>Security goods or services used on sites or plants governed by the French code of defense</td></tr>
<tr><td>IT technologies for dual use (military and/or non military) technologies</td></tr>
<tr><td>Cryptology</td><td rowspan="6">YES</td></tr>
<tr><td>Activities classified as defense secret</td></tr>
<tr><td>Arms industry</td></tr>
<tr><td>Activities with (directly or indirectly) the Ministry of Defense</td></tr>
<tr><td>Sectors added by the 2014 Decree, i.e. energy supply, water supply, transportation networks and services, electronic communication networks and services, operations essential for defense and security of France, public health</td></tr>
</table>

STRENGTHENING OF GOVERNMENTAL CONTROL OVER FOREIGN INVESTMENTS IN FRANCE

THREE STEPS FI AUTHORIZATION PROCEDURE

1. *Determine whether the FI authorization procedure is applicable*

- In case of any doubt on the applicability of the FI authorization procedure, right for the investor to ask in writing the Ministry of Economy whether its contemplated investment falls within the scope of such procedure (in particular the "essential to preserve the public order or security" qualification)
- The information request shall be accompanied with sufficient information on the contemplated transaction and the parties thereto as well as on the target company or business
- The information request shall be made by the investor or jointly by the investor and the seller/target company

2. *If the FI authorization procedure is applicable to the contemplated investment*

- The authorization request shall be filed by the investor prior to the completion of the contemplated investment
  - The legal documentation may be signed prior to the authorization, but the closing of the contemplated investment shall be subject to the authorization
- Any authorization request shall include detailed, specific information on the contemplated transaction and the parties thereto (*e.g.*, ultimate controlling person(s)) as well as on the target company or business

3. *Decision by the Ministry on the authorization request*

- The Ministry of Economy shall issue its decision within 2 months, and it may :
  - authorize the contemplated transaction (i) unconditionally or (ii) subject to specific conditions or undertakings by the investor (*e.g.*, the carve-out of certain activities)
  - reject the authorization request on the (almost discretionary) grounds of the public order or security and/or the national defense, which results in the obligation for the parties not to complete the transaction
- The 2-month period for the Ministry to issue its decision starts to run only as from the date on which it has been provided with all the relevant information

STRENGTHENING OF DEFENSES AGAINST UNSOLICITED TAKEOVERS

- On March 29, 2014, the French Legislator enacted Law n°2014-384 with a view to :
  - reinforcing legal defenses against creeping and hostile takeovers of French listed companies
  - preventing the shut down of business sites in France ; this objective of the law results from public debates on ArcelorMittal's decision to shut down its business activities on the Florange site and is the reason why the law is referred to as "Florange Law" (please see below "Labor Law")

NEW LEGAL DEFENSES AGAINST UNSOLICITED TAKEOVERS – HOSTILE TAKEOVERS

- **The board of directors of the target company is now authorized to take almost any defensive decisions (*e.g.*, to use the shareholders' authorizations to issue new equity instruments) with a view to defeating the tender offer, unless the shareholders' authorizations or the articles of association of the target company provide otherwise**
  - Prior to the Florange Law, the "passivity rule" was applicable, *i.e.*, the board of directors of the target company could generally not take defensive measures unless they had been specifically approved by the shareholders or they consisted in seeking competing offers from other offerors (white knights)

- The use by the board of directors of defensive measures to defeat the tender offer may raise difficult legal issues relating to the respect of the best corporate interest of the target company and its shareholders. The board of directors of the target company will likely seek advises from independent legal and financial advisors in order to reduce the risks that the target shareholders or the offeror challenge its decisions

- **The new rule will be debated at upcoming 2015 shareholders' meetings : *e.g.*, Danone**

STRENGTHENING OF DEFENSES AGAINST UNSOLICITED TAKEOVERS

NEW LEGAL DEFENSES AGAINST UNSOLICITED TAKEOVERS – CREEPING TAKEOVERS

Reduction of the "speeding ratio" from 2% to 1%

- **Tender offer now mandatory for any person already holding between 30% and 50% of the target company and whose ownership interest goes up by 1% or more on any 12-month period**
  - Prior to the Florange Law, the applicable threshold was 2%
- The reduction of the "speeding ratio" was anticipated by market players since it had already been proposed by the report of the experts group set up by the AMF in 2008, *i.e.*, the "Field Report"
- Although it does impose additional scrutiny by the investors on the management of their ownership interests in French listed companies, this new rule is expected to have limited impacts on the actual control of listed companies
  - Where an investor already holds more than 30% of a listed company, it often already controls it (*e.g.*, the average quorum at shareholders' meetings of French listed companies is approx. 60%)
- The new rule would have had more impacts had it been accompanied by the reduction from 30% to 25% of the other threshold triggering the obligation to launch a mandatory tender offer on a French listed company

STRENGTHENING OF DEFENSES AGAINST UNSOLICITED TAKEOVERS

NEW LEGAL DEFENSES AGAINST UNSOLICITED TAKEOVERS – CREEPING TAKEOVERS

Mandatory minimum 50% threshold for any tender offer to be successful

- **Tender offer now automatically declared unsuccessful if offeror does not obtain at least 50% of the target company**
  - Prior to the Florange Law, voluntary tender offers could be conditioned upon obtaining any % up to 2/3rd of the target company, and mandatory tender offers could not be conditioned upon obtaining a given % of the target company
- This new rule is a reaction against certain precedents where the offerors are considered as having successfully made creeping takeovers by launching voluntary tender offers at rather unattractive prices to obtain the minimum percentage of shares necessary to control the target companies (*i.e.*, slightly over 30%) without having to (i) launch mandatory tender offers and comply with the rules relating to the minimum price of mandatory tender offers and/or (ii) purchase up to 50% of the target company
  - See the tender offer of Axel Springer on seloger.com in 2010, and of Siego on Valtech (2009)
- The new rule should result in an increase of the premiums paid by offerors since they generally want to make sure the offer is successful
- **The new rule should have significant impacts on the structuration of tender offers, in particular that of mandatory tender offers following the acquisition of controlling ownership interests**
  - *E.g.*: under the former rules, the offeror would typically purchase a controlling block of shares (*e.g.*, 35%) and then launch a mandatory tender offer (with no 50% threshold for the offer to be successful) ; under the new rules, where the mandatory tender offer does not reach the 50% threshold, the portion of shares resulting from the block trade exceeding the mandatory tender offer 30% threshold (*i.e.*, 5% in our example) gives no voting right until the offeror comes to hold more than 50% of the target company as a result of a new, successful tender offer reaching the 50% threshold. The structure of this kind of tender offers may become based on commitments to tender

STRENGTHENING OF DEFENSES AGAINST UNSOLICITED TAKEOVERS

NEW LEGAL DEFENSES AGAINST UNSOLICITED TAKEOVERS – CREEPING TAKEOVERS

Double voting right	❑ **Registered shares held for at least 2 years now automatically give right to double voting right unless the articles of association of the target company provide otherwise** ▪ Prior to the Florange Law, registered shares held for at least 2 years could give double voting right only if the articles of association so provided ❑ Concerns have been raised against this new rule, in particular by (a) proxy advisors, who have generally opposed this new rule which they consider as an unfair hurdle against tender offers and (b) foreign investors, who do generally not hold their shares in registered form and may, therefore, not be eligible to the new rule ❑ The actual impact of the new rule will depend on whether French listed companies decide to apply the new rule or to opt for the right to provide in their articles of association for the "one share one vote" rule ▪ Prior to the Florange Law, double voting right applied in more than 50% of the CAC40 companies (pursuant to their articles of association). The clauses of the articles of association providing for double voting rights in force prior to the Florange Law will remain in full force and effect, even if they provide for more than 2 years to obtain double voting rights ❑ **This new rule will be debated at upcoming 2015 shareholders' meetings** : GDF Suez, Air Liquide, BNP Paribas, Capgemini, Crédit Agricole, EDF, l'Oréal, Orange, Renault, Unibail-Rodamco, Veolia, Vinci, Vivendi

OTHER RECENT DEVELOPMENT – REGULATORY PRACTICE BY THE AMF	
Timetable of competing tender offers	❑ In 2014 for the first time, the AMF used the powers resulting from Article 232-12 of its Regulation in order to speed up the timetable of competing tender offers ▪ After more than 18 months of judicial proceedings, offers and counteroffers by Fosun/Ardian and Global Resorts on Club Med, a French listed company operating leisure and sport businesses worldwide, the AMF decided to impose an accelerated timetable for the competing offers

IMPROVEMENTS OF THE ENFORCEABILITY OF SHAREHOLDERS' AGREEMENTS (AND SHARE PURCHASE AGREEMENTS)

DETERMINATION OF THE SHARE PRICE AND SPECIFIC PERFORMANCE	
Share price	❑ *Legal regime applicable until 2014* ▪ Under French law, in the event of a dispute between the parties the share price under shareholders' agreements, share purchase agreements and/or articles of association often ends up being determined by a legal expert designated pursuant to Article 1843-4 of the French Civil Code ▪ Until 2014, the expert was free to determine the share price without complying with the provisions of the relevant articles of association, shareholders' agreements and/or share purchase agreements, which resulted in serious difficulties in enforcing the provisions of said articles of association or agreements ❑ *New legal regime* ▪ **Pursuant to Ordinance n° 2014-863 of July 31, 2014 and the decision of the French Supreme Court dated March 11, 2014, the expert designated pursuant to Article 1843-4 shall now comply with the relevant provisions of the articles of associations, shareholders' agreements and/or share purchase agreements** ▪ In addition, by its decision dated September 16, 2014, the French Supreme Court also clearly confirmed that any expert designated pursuant to Article 1843-4 shall determine the share price as of a date that is as close to the completion date of the transaction as possible
Specific performance	❑ **By its decision dated January 28, 2014, the Court of Appeal of Paris confirmed the right for the judge of first instance acting in <u>summary proceedings</u> to order the specific performance of drag-along undertakings provided by a shareholders' agreement in the context of the sale of a target company** ❑ It is reasonable to consider that such injunctions in summary proceedings may also be ordered with respect to other type of shareholders' undertakings (preference rights, tag-along rights, etc.) where the conditions for the specific performance of such undertakings are met

PREFERRED SHARES	
Buy-back of preferred shares	❑ **Ordinance n° 2014-863 of July 31, 2014 has implemented long-awaited clarifications of certain legal rules applicable to the buy back of preferred shares issued by French companies** ▪ The Ordinance governs the buy back of preferred shares other than upon a decision of the shareholders' meeting ▪ The provisions relating to the buy back shall be set forth in the articles of association of the target company prior to the subscription of the preferred shares by the investors ▪ The buy back of preferred shares shall be at the option of the target company ▪ The buy back of preferred shares shall be completed on the basis of an equal treatment of all the holders of the preferred shares of the same category ▪ After it has bought back its preferred shares, the target company may (i) hold them (within the limit of 10% of its share capital and 10% of the preferred shares of the same category), (ii) cancel them (by means of a share capital reduction) or (iii) sell or transfer them (by any means) ❑ **The main point : the buy back of preferred shares may not be at the option of the holders** ▪ Prior to the Ordinance (and in the absence of specific legal provisions on this matter) it was generally considered that the buy back of preferred shares could be at the option of the holders ; this is no longer permitted, and serious questions also arise as to whether it is permitted to provide for the automatic buy back of preferred shares upon the occurrence of certain events or conditions ▪ Many commentators and representatives of investors and French companies have already called for the modification of this legal constraint

HARDENING OF CORPORATE GOVERNANCE RULES

COMPOSITION OF THE BOARD OF DIRECTORS	
Appointment of women as directors	❑ *French non listed companies* : Law n° 2014-873 of August 4, 2014 has amended certain legal provisions relating to the mandatory appointment of women as directors of French <u>non-listed</u> companies ▪ For companies having an average headcount of at least 250 permanent employees and generating revenues or having a total balance sheet of at least €50 million, women shall represent at least 40% of the board of directors as from the first shareholders' meeting deciding on the appointment of any director held on or after January 1, 2017 (if headcount superior to 500) or January 1, 2020 (if headcount between 250 and 499) ❑ *French listed companies* : The provisions of Law n° 2011-103 of January 27, 2011 came into effect in 2014 with respect to French <u>listed</u> companies ; these companies shall now have a board of directors including no less than 20% of women, such % to be increased up to 40% by no later than 2017 ❑ Any nomination in violation of the obligation to have a balanced representation of women and men at boards of directors of listed or non listed companies is sanctioned by the nullity of the nomination, but the decisions taken at the board's meetings to which the relevant director participated are valid
Appointment of employees' representatives as directors	❑ Law n° 2013-504 of June 14, 2013 (Law on Job Security) introduced new requirements for employees' representation in companies having more than 5,000 employees ▪ Now, 1 employees' representative must be appointed in any of these companies where the number of directors is less than or equal to 12 ; 2 employees' representatives must be appointed if such number is more than 12 ▪ Companies within the scope of the new requirements had to comply with it by no later than 2014 ❑ Any violation of the obligation to appoint employees' representatives may result in the : (i) right for the employees to obtain in summary proceedings an injunction ; and (ii) risk that the related decisions of the board of directors be considered as null and void

HARDENING OF CORPORATE GOVERNANCE RULES

CONTROL BY THE SHAREHOLDERS	
"Say on pay"	❑ As a result of recent modifications of the French corporate governance rules (AFEP-MEDEF Corporate Governance Guide), many French listed companies applied the "say on pay" rule with respect to their top executive officers' compensation for the first time at their general shareholders' meetings held in 2014 ▪ This matter will be heavily discussed (again) at the upcoming 2015 shareholder's meetings ❑ Although the shareholders' vote is advisory only, in the event the vote is negative, the board of directors shall publicly disclose how it will address the concerns expressed by the shareholders' negative vote ❑ Certain proxy advisors and investors have conditioned their positive say on pay vote on the implementation of new control mechanisms : *e.g.*, claw-back undertakings by the executive officers of banks and financial institutions ❑ Proposed changes to the EU Directive might result in the future implementation of a binding shareholders' vote
Sale of strategic assets	❑ Following the sale of SFR by Vivendi and of its energy business by Alstom, concerns have been raised that these transactions were decided by the boards of directors of Vivendi and Alstom, respectively, without the prior approval of the shareholders ▪ Under French law (contrary to UK law), the board of directors may decide to sell any assets without the prior approval of the shareholders, unless such sale would result in a change of the corporate purpose of the company ❑ In 2014, the AMF set up an experts group to review the authorization process of this kind of transactions for <u>listed</u> companies. The AMF's consultation will be completed by the end of March 2015, but the experts group has already recommended to modify the French corporate governance rules (AFEP-MEDEF Corporate Governance Guide) to provide for an advisory vote of the shareholders on the sale of the main assets of any French listed company, *i.e.*, assets representing more than 50% of the revenues, value and/or earnings of the selling company

M&A Legal Developments In France – Labor Law

1. SNAPSHOT OF RECENT REFORMS
2. REFORMS OF THE INFORMATION AND CONSULTATION OF THE EMPLOYEES' REPRESENTATIVES
3. REFORMS REGARDING THE TRANSFER OF FRENCH COMPANIES AND BUSINESS SITES

SNAPSHOT OF RECENT REFORMS

Signing of the National Agreement For a New Economic and Social Model between the employers' representatives and the trade unions on January 11, 2013

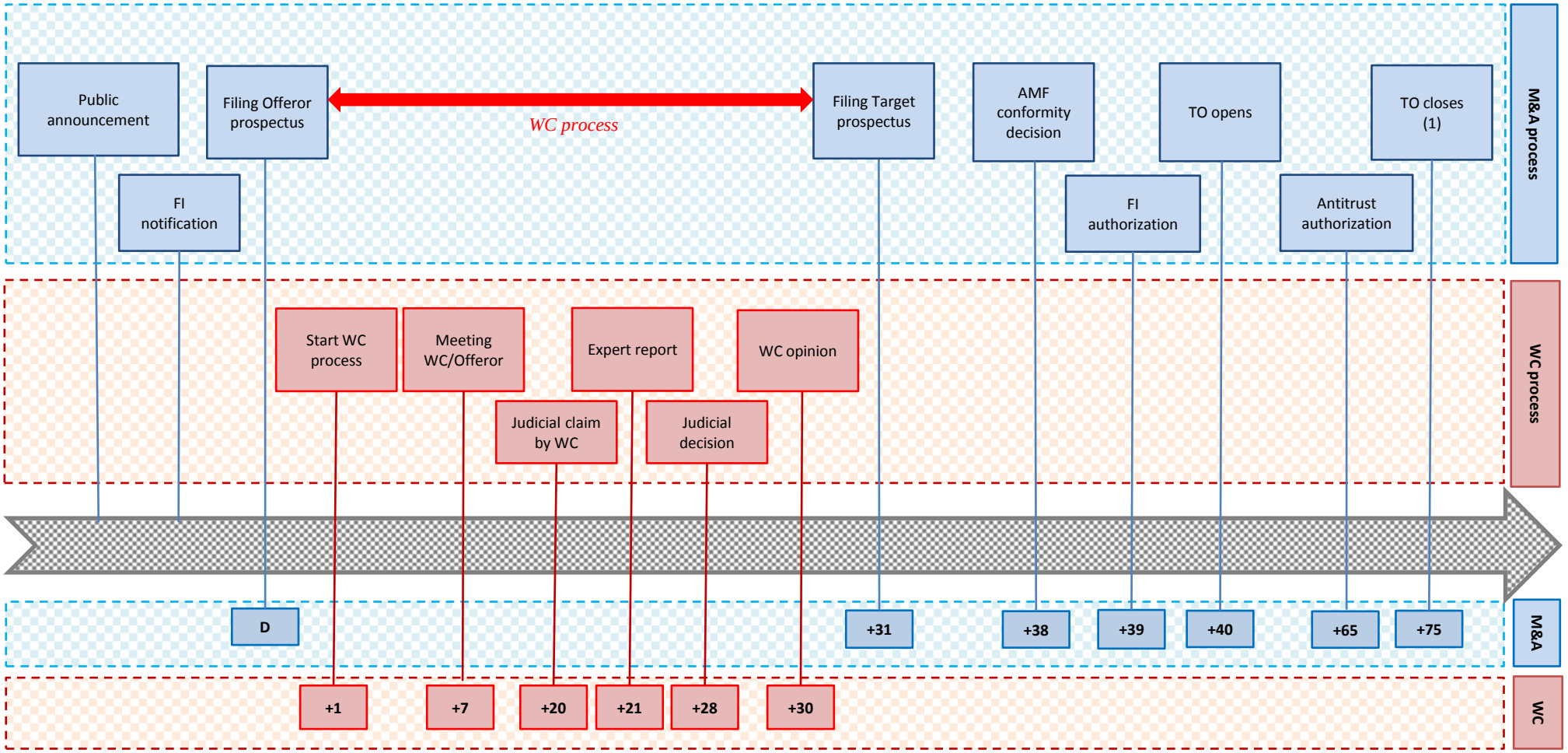
- Enactment of Law n° 2013-504 on June 14, 2013 as implemented by Decree n°2013-1305 of December 27, 2013 and referred to as the "Law on Job Security"
  - **Streamlining of the consultation procedures of the workers' council (and the health and safety council) to prevent the risk that the workers' council (or the health and safety council) unduly delays the contemplated redundancy plan or reorganization**
  - New obligation to consult each year the workers' council on the strategy
  - Mandatory appointment of employees' representatives as directors of large companies
- Decision by the French Constitutional Court dated March 27, 2014 on the initial version of the Florange Law dated February 24, 2014
  - The Constitutional Court considers that certain sanctions of the violation of the obligation to seek a purchaser provided by the initial version of the Florange Law are not constitutionally valid
- Enactment of the final version of Law n° 2014-384 on March 29, 2014, referred to as the "Florange Law"
  - **Obligation for any company of at least 1,000 employees that contemplates to shut down a business site to seek a purchaser**
  - **Mandatory consultation of the workers' council of any listed company that is the target of a solicited or unsolicited tender offer**
- Enactment of Law n° 2014-856 on July 31, 2014, referred to as the "Law on the Social Economy"
  - Revised sanctions of the violation of the obligation to seek a purchaser to comply with the decision of the French Constitutional Court
  - **Right for employees of small-cap, profitable companies of less than 250 employees to be informed of any contemplated sale of their company and to offer to purchase such company**

STREAMLINING OF THE INFORMATION AND CONSULTATION	
Overview	❑ **The Law on Job Security intends to limit the maximum duration of the consultation of the workers' council and the health and safety council so as to prevent the latters from refusing to issue their respective opinions and thereby unduly delaying the consultation process** ❑ The management and the representatives of the relevant trade unions (redundancy plans) or the workers' council (other consultation matters) may agree on the maximum duration of the consultation process ; otherwise, the two councils shall now issue their respective opinions within certain legal time limits, *i.e.*, 2 to 4 months (redundancy plans) or 1 to 4 months (other consultation matters) ❑ **Upon the expiration of these time periods, the consultation process stops, whether or not the two councils have actually issued their opinions**
Analysis	❑ *Redundancy plans :* The consultation process of the workers' council and the health and safety council has been rather efficiently clarified ▪ However, before the employer may implement the redundancy plan, the Labor Administration shall now approve/validate it ; it is clear that the employer will obtain the Labor Administration's approval more easily in the event it has reached an agreement with the trade unions on such plan ❑ *Other consultation matters (e.g., change of control, sale of subsidiary) :* The new regulation is focused on the workers' council so that certain issues relating to the duration of the information and consultation involving health and safety councils will have to be clarified by subsequent regulations and the courts ▪ *E.g.*, Should any refusal or delay by the health and safety council (where it is involved) to issue its opinion delay the consultation process of the workers' council, since the latter needs the opinion of the former to be fully informed ? ❑ *Concerning both redundancy plans and other matters* : **it will be important to follow up on how disputes over the information provided to the employees' representatives by the management will be decided by the Labor Administration and the courts, since the courts may decide to extend the duration of the consultation process if they consider that the employees' representatives have not been provided with sufficient information**

EXTENDED SCOPE OF THE INFORMATION AND CONSULTATION	
Overview	❑ ***Tender offer :*** **The workers' council of the target company shall now be consulted and issue its opinion before the board of directors of the target company may issue its recommendation on the tender offer** ▪ Not applicable if the initiator already owns more than 50% of the target company ❑ *Strategy : T*he employer must consult with the workers' council at least once a year regarding the company's strategy for the coming years and its anticipated impact on the business, headcount, work organization and the use of contractors, temporary agency workers and short-term employment contracts
Analysis (tender offer)	❑ Prior to the Florange Law, the opinion of the workers' council was included in the public documentation relating to the tender offer to the extent only this opinion was available when such documentation was issued, which meant that the workers' council could not unduly delay the tender offer timetable by refusing to issue its opinion. **Now that the opinion of the workers' council of the target company shall be issued prior to the recommendation of the board of directors on the tender offer and included in the public documentation relating to the tender offer, there is a risk that the consultation process delays the timetable of the tender offer** ▪ The workers' council shall issue its opinion within 1 month from the filing of the tender offer ▪ Precedents : Havas (2014), Club Med (2014) ❑ **Disputes over the information provided to the workers' council are likely in the event of a hostile tender offer because the offeror will resist requests for confidential information by the workers' council**

CONSULTATION OF THE EMPLOYEES' REPRESENTATIVES IN CASE OF TENDER OFFER

CASE STUDY : DELAY OF TENDER OFFER TIMETABLE



(1) If TO successful (50% threshold), it shall reopen (additional 4/6 weeks)

REFORMS REGARDING THE TRANSFER OF FRENCH COMPANIES AND BUSINESS SITES

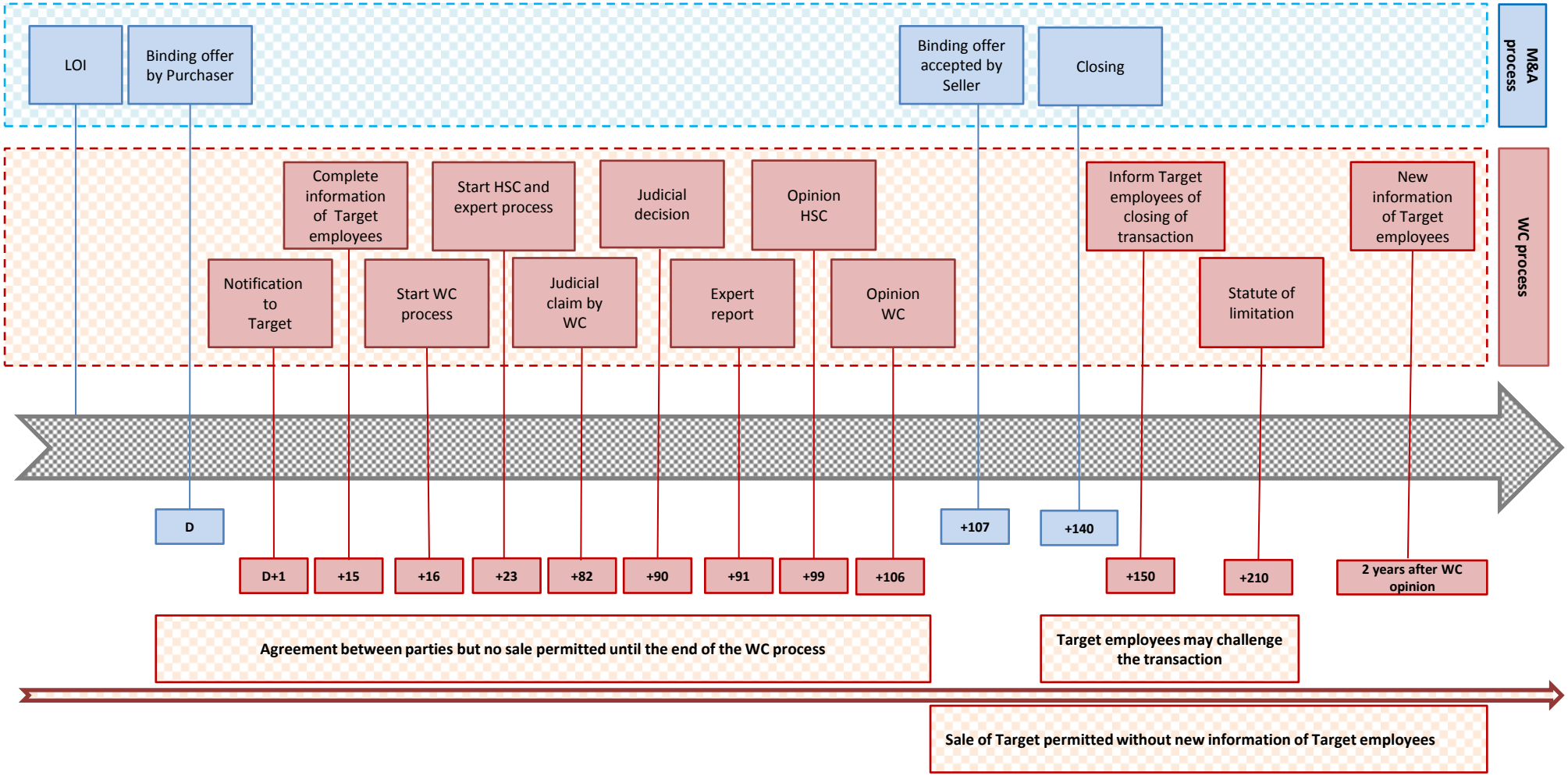
OBLIGATION TO SEEK A PURCHASER PRIOR TO SHUTTING DOWN A BUSINESS SITE	
New constraint	❑ **Any company of at least 1,000 employees that contemplates to shut down a profitable business site and implement a redundancy plan shall (i) seek a purchaser** and (ii) justify its acceptance or refusal of any purchase offer ▪ The company has actually sought for a purchaser, *i.e.*, obligation to be as diligent and proactive as any seller would be in the context of a voluntary sale process ▪ The workers' council has been duly (a) informed of the contemplated shut down (b) involved in the company's effort to seek a purchaser and (c) consulted on any purchase offer that the company wishes to accept ❑ The new regulation should be applicable to relocation and offshoring ❑ **No legal obligation for the company to accept a purchase offer, but any refusal of a purchase offer shall now be justified** ▪ The Labor Administration should not be entitled to assess whether the company's decision is right from a business, financial or strategic standpoint, provided such decision is reasonably justified
Sanction	❑ The Florange Law initially provided that any bona fide offer may only be refused if it could jeopardize all the businesses of the company. The Constitutional Court quashed this provision. The Florange Law has been amended and now provides that in the event of any failure by the company to comply with its obligations, the Labor Administration may : ▪ ask for the reimbursement of certain public subsidies granted over the last 2 years in relation to the business site to be shut down ▪ refuse to approve the redundancy plan
Precedent	❑ In November 2014, Gelpat (a French producer of pastries) purchased part of the business of Panavi (70 employees), a French subsidiary of Vandemoortele (Belgium) ; the French State actively supported the transaction (*e.g.*, subsidies to the purchaser)

REFORMS REGARDING THE TRANSFER OF FRENCH COMPANIES AND BUSINESS SITES

RIGHT FOR THE EMPLOYEES TO MAKE AN OFFER TO PURCHASE THEIR COMPANY	
New constraint	❑ **Right for employees of small-cap (*i.e.*, revenues of less than €50 million or total balance sheet of less than €43 million), profitable companies of less than 250 employees to :** ▪ **be informed of any contemplated sale of (a) the business of or (b) a majority ownership interest in their company** ▪ **offer to purchase such business or ownership interest** ❑ Right applicable to privately-held and (theoretically) listed companies ❑ **Where this right is applicable, no sale may occur for a certain time period (generally 2 months) as from the information of all the employees of the target company** ▪ The focus shall be on ensuring that <u>all</u> the employees receive the information required so that the applicable time period during which no sale may occur starts to run ; the new regulation provides for detailed notification process and forms to be complied with by the employer ❑ **The exact scope of the new regulation is heavily debated and will have to be clarified by the courts :** ▪ It is generally considered that the new regulation is : (1) applicable to sales between companies of the same group, (2) not applicable to contribution of assets, (3) not applicable to sales of majority interests in the holding company (not subject to the regulation) of a subsidiary that would have been subject to the regulation should the sold shares have been those of such subsidiary, (4) not applicable to mergers ❑ Although this new regulation has been heavily criticized, it is applicable for now
Main point	❑ **The seller has no obligation to accept any offer made by the employees, so it turns into essentially annoying complexities and risks**
Sanction	❑ **The violation of the employees' right may result in the sale of the target company being null and void**

RIGHT FOR THE EMPLOYEES TO MAKE AN OFFER TO PURCHASE THEIR COMPANY

CASE STUDY : ADDITIONAL COMPLEXITIES



M&A Legal Developments In France – Tax Law

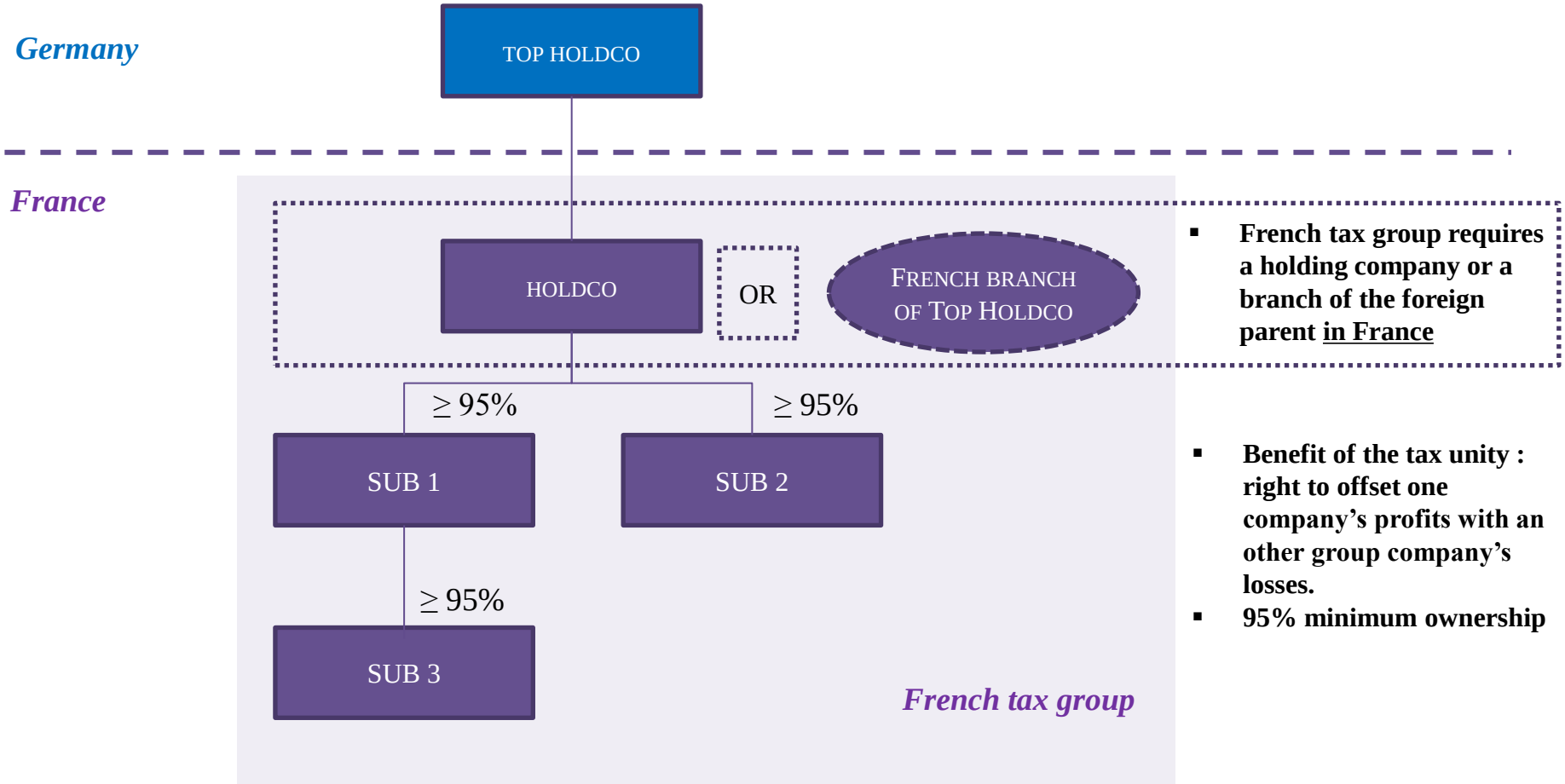
1. NEW RULES FACILITATING FRENCH TAX GROUP
2. NEW RULES FACILITATING THE USE OF FRENCH TRUSTS (*FIDUCIE*)

NEW RULES FACILITATING TAX UNITY

FRENCH TAX GROUP PRINCIPLES	
Purpose of French tax group	❑ Consolidate the positive and negative earnings of French companies controlled by the same holding company for corporate income tax purposes (CIT)
Main benefits of French tax group	❑ CIT is assessed at the tax unity level by combining the profits and losses of the group members ; losses and carry forward losses of one company can be used to offset the profits of another group company ❑ Group carry forward tax losses are protected in the event of a change of activity or restructuring ❑ Intragroup dividend distributions are tax free (no 5% tax leakage and no 3% tax on intragroup dividend distributions) ❑ Group members are considered as a single entity for French thin capitalization rules ❑ Intragroup transactions are neutralized
Main requirements	❑ 95% ownership of the subsidiaries by the parent company ❑ Same financial year period ❑ Group companies must be subject to CIT ❑ Parent company not owned by 95% or more by a French company subject to CIT

FRENCH TAX GROUP PRINCIPLES

CLASSIC VERTICAL STRUCTURE (BEFORE THE 2014 REFORM)



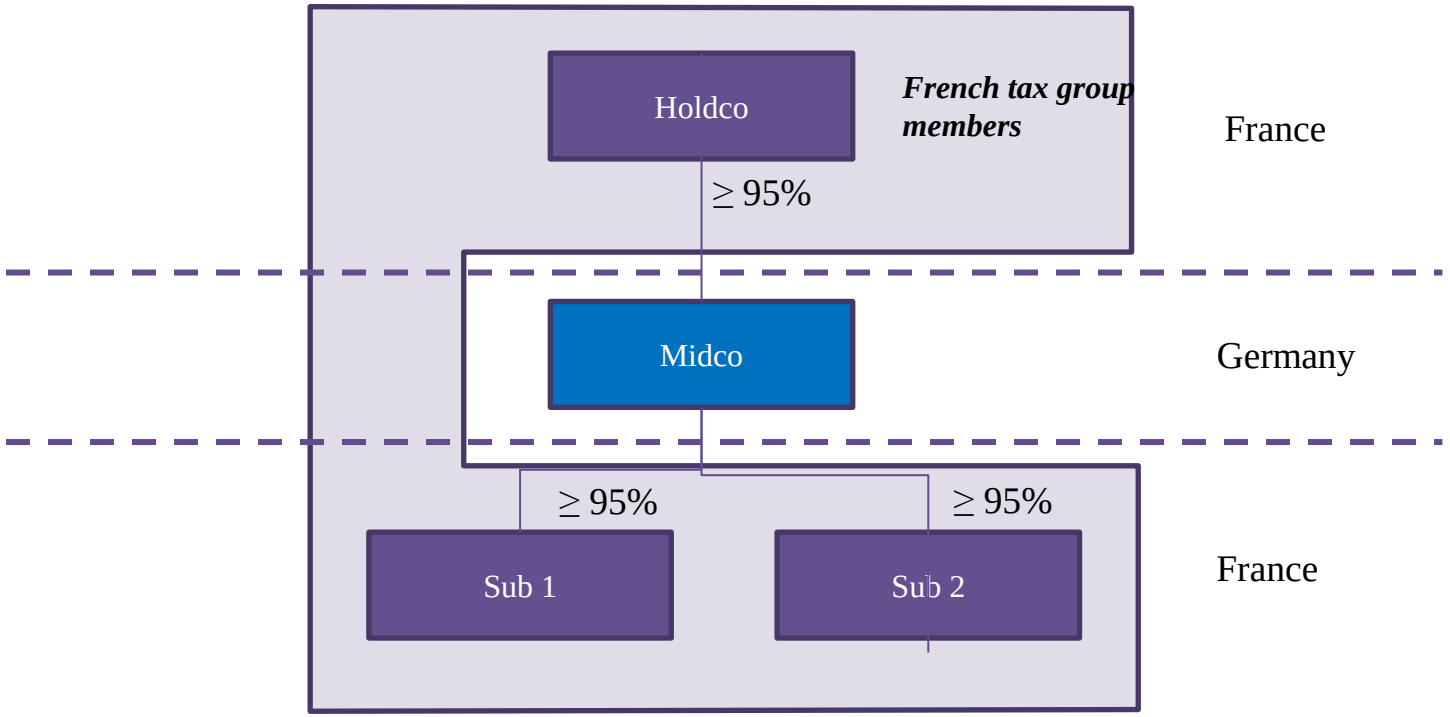
- **French tax group requires a holding company or a branch of the foreign parent <u>in France</u>**

- **Benefit of the tax unity : right to offset one company's profits with an other group company's losses.**
- **95% minimum ownership**

FRENCH TAX UNITY PRINCIPLES

2008 : Papillon ECJ decision and subsequent tax reform	▪ Right for a French subsidiary to become a member of the French tax group even if it is held <u>indirectly</u> by a French parent through a foreign company

Situation after the Papillon tax reform :
Vertical <u>indirect</u> tax unity is now allowed



- **But still no right to set up a French tax group if the parent (Holdco) is not established in France**

FRENCH TAX UNITY PRINCIPLES	
NEW HORIZONTAL TAX UNITY (AFTER THE 2014 REFORM)	
"SCA Group Holding BV" ECJ 2014 Decision	❑ The European Court of Justice (ECJ) has decided that the Dutch fiscal unity rules breach EU law, because they do not allow a fiscal unity between 2 Dutch 'sister' companies held through a joint EU/EEA parent company
Financial law for 2015	❑ As of January 1, 2015, France has amended its French tax unity principles to comply with the SCA Group Holding ECJ decision ❑ A foreign company which is tax resident in a EU or EEA State (Iceland, Norway and Lichtenstein) can set up a French tax group with its French subsidiaries without being established in France

NEW RULES FACILITATING TAX UNITY

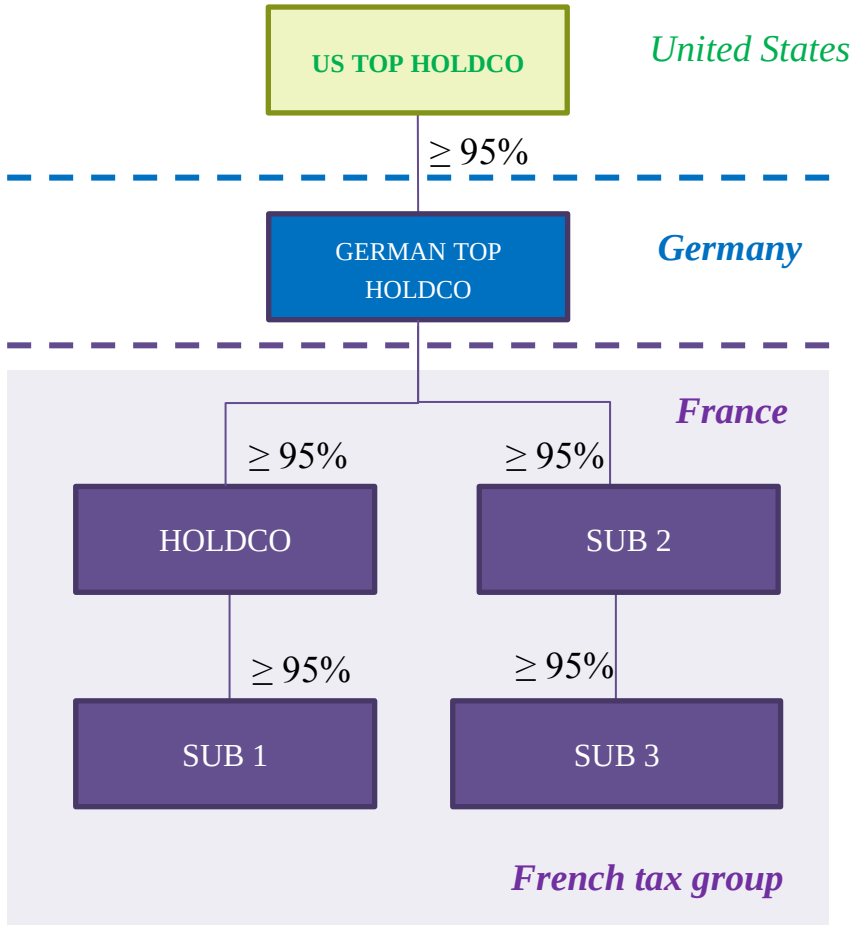
FRENCH TAX UNITY PRINCIPLES	
NEW HORIZONTAL TAX UNITY (AFTER THE 2014 REFORM)	
Main requirements	❑ The French subsidiaries must be subject to CIT and 95% held by the foreign company, directly or indirectly ❑ The foreign parent company must be subject to the equivalent of CIT in its State of residence ❑ The foreign company is tax resident in the EU or EEA ❑ The foreign parent company must not be directly held by 95% or more by a French company or a EU/EEA foreign company (but (i) indirectly is allowed and (iii) direct ownership by *e.g.* a US company is allowed)
Main Consequences	❑ Only the profits and losses of the French subsidiaries are aggregated (not the profits or losses of the foreign parent) ❑ No need for the foreign parent company to establish a French permanent establishment in order to set up a French tax group with its French subsidiaries ❑ Other usual benefits of the tax unity regime : intragroup transactions are neutralized

FRENCH TAX UNITY PRINCIPLES

NEW HORIZONTAL TAX UNITY (AFTER THE 2014 REFORM)

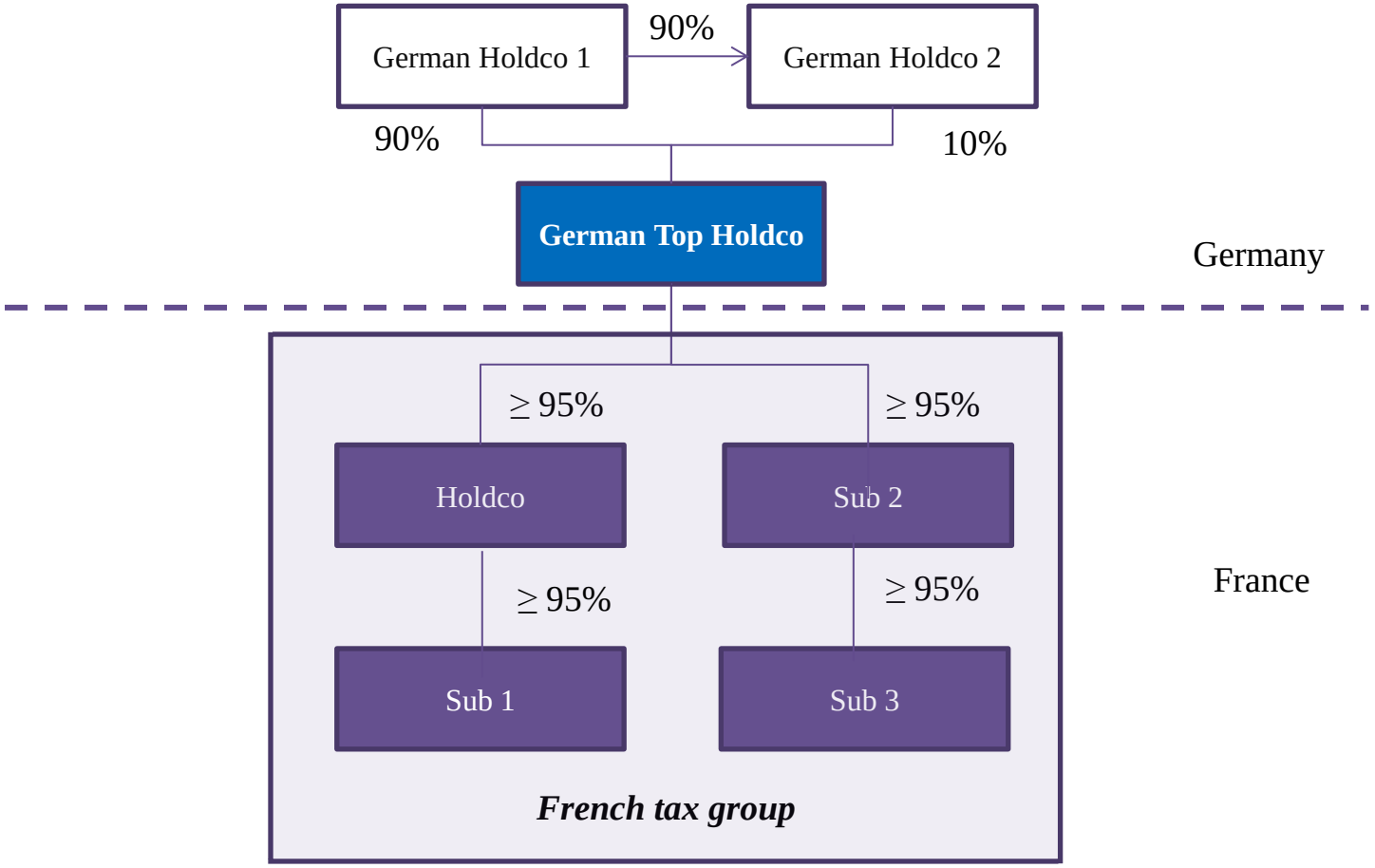
French Financial Law for 2015 :

- As of January 1, 2015, an EU company may s**et up a French tax group with its French subsidiaries without being established in France.**
- No need to interpose a French holding or a French branch anymore. The holding of the French subsidiaries can be the parent EU company of the group.
- Main benefits :
  - Cost savings
  - No capital gains tax in France on the sale of the subsidiaries directly held by the foreign company
  - Easier cash repatriation from France to the foreign parent



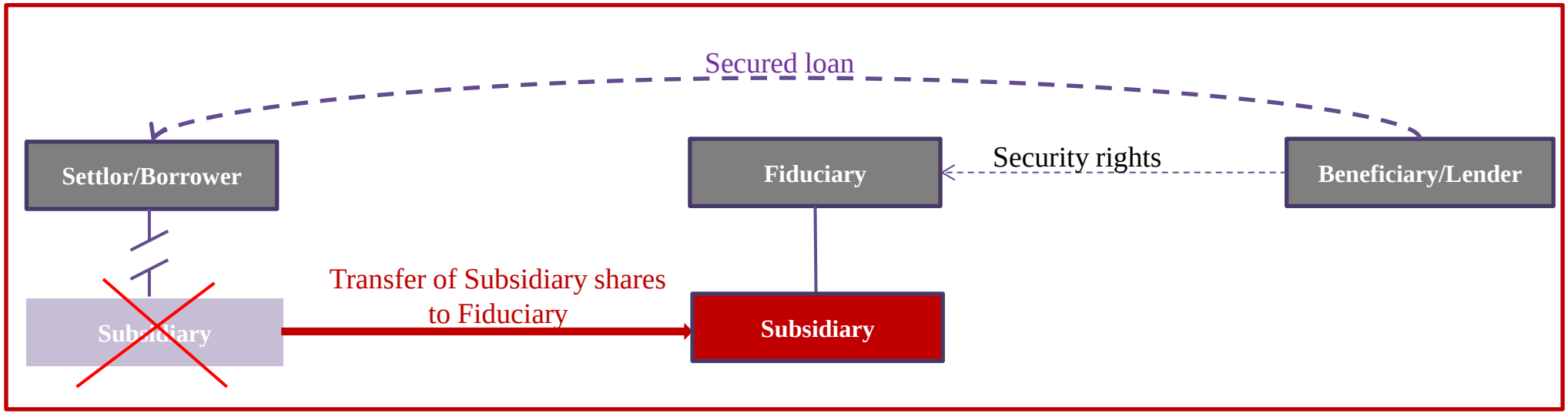
FRENCH TAX UNITY PRINCIPLES

NEW HORIZONTAL TAX UNITY (EXAMPLE 2)



PRESENTATION OF THE *FIDUCIE* REGIME	
Presentation of the French Fiducie	❑ *Fiducie* is a contract whereby the Settlor transfers all or part of its assets, rights or securities to a Fiduciary that maintains them separately from its own assets and acts according to specific objectives for the benefit of its beneficiaries or the Settlor ❑ *Fiducie* is a temporary transfer of ownership ; the assets transferred to the Fiduciary are no longer part of the Settlor's assets ❑ The assets allocated to the *Fiducie* become a distinct pool of assets of the fiduciary
Main purpose of the Fiducie	❑ The Fiducie may be used for two main purposes : ▪ *"Fiducie sureté" :* the Borrower's assets are allocated to the *Fiducie* (in the hands of the Fiduciary) as a collateral to guarantee the Borrower's obligations *vis à vis* the Lender ▪ *"Fiducie gestion" :* the Settlor's assets are allocated to the *Fiducie* in order to be managed according to certain rules in favor of a Beneficiary

NEW RULES FACILITATING THE USE OF FRENCH TRUSTS (*FIDUCIE*) – TAX NEUTRALITY IS ACHIEVED



Before 2015	*After 2015*
❑ The transfer of the Subsidiary to the Fiduciary triggers the exit of the Subsidiary from the Settlor's tax group (no aggregation of profits and losses anymore and tax group exit costs). ❑ Dividends paid by the Subsidiary are taxed at 34.43% instead of 1.72%.	❑ Subsidiary' shares transferred to Fiduciary still deemed to belong to the tax group of Settlor (aggregation of profits and losses ; no tax group exit cost) ❑ Subsidiary's shares transferred to Fiduciary still eligible to the parent-subsidiary dividend exemption : 1.72% tax rate (subject to 5% minimum ownership for 2 years)

USEFUL INFORMATION

Questions	❑ **Gibson Dunn & Crutcher's lawyers are available to assist in addressing any questions you may have regarding the matters covered by this Presentation** ❑ **Please contact the Gibson Dunn lawyers with whom you usually work or the following lawyers in the firm's Paris office :** ❖ **BERNARD GRINSPAN (+ 33 1 56 43 13 00, bgrinspan@gibsondunn.com)** ❖ **JÉRÔME DELAURIÈRE (+ 33 1 56 43 13 00, jdelauriere@gibsondunn.com)**
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