

FRANCE GUIDE

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A: EXCHANGE CONTROLS

Do France's exchange control laws restrict French nationals or residents from acquiring or holding US companies' stock? Do they restrict the expenditure of foreign exchange for that purpose?

No, they do not.

B: SECURITIES LAWS

B:1 Would an offering of Parent Stock to French nationals or residents necessitate compliance with registration or prospectus requirements under France's securities laws?

France has implemented the EU Prospectus Directive, which provides several possible exemptions from the requirement to submit and publish a directive-compliant prospectus for approval with the French regulatory authorities.¹ Two main exemptions, which may be useful for an offering of Parent Stock to employees who are either French citizens or residents, are described below.

First, Article 4(1)(e) of the EU Prospectus Directive provides an exemption from the requirement to publish a prospectus for securities offered to existing and former employees by their employer, if that employer (or its affiliate, e.g., the Parent Company) has securities admitted to trading on an *EU regulated market*. French regulations have, however, narrowed this exemption to include offers of only those securities that are of the same class as securities already admitted to trading. If the offering is of such securities, an information document providing information on the number and nature of the instruments being offered and the reasons for and details of the transaction will be sufficient. However, if a company has no equity or debt securities listed on any *EU regulated market*, it may need to publish a directive-compliant prospectus.

Second, under Article 3(2)(a), the obligation to publish a prospectus does not apply to offers, including offers to employees, that are addressed to fewer than 100 persons. Additionally, offers where the shares have a consideration of less than € 2.5 million (calculated over a 12-month period) and which concern financial instruments accounting for no more than 50% of the issuer's capital are not considered to fall under the *public offer* regime, and they therefore do not require a prospectus.

With respect to employee share option schemes and free shares, the Committee of European Securities Regulators ("CESR") publishes and updates a compilation of the common positions to which CESR members have agreed.² With the exception of Germany and Poland, CESR members concur that *non-*

1. The EU Prospectus Directive (2003/71/EC) is available by clicking here.

2. *Frequently asked questions regarding Prospectuses: Common positions agreed by CESR Members*, updated in September 2007, Ref. CESR 07-651; to read, visit www.cesr-eu.org/.

transferable options granted to employees do not fall under the EU Prospectus Directive because the directive applies only to *transferable securities*. Members agreed that at the time of converting or exercising a nontransferable option, there is no *public offer* within the meaning of the EU Prospectus Directive, merely the execution of a previous offer. Regarding *free shares*, the CESR considers that where securities are generally allotted free of charge, no prospectus should be required. However, where an offering presented as an offer of free shares is in fact “hidden” compensation, regulatory authorities may take another view.

The European Commission is aware of the problems that the EU Prospectus Directive causes for companies operating share schemes for their European employees. It has recently requested the CESR's assistance in developing a *light touch application* of the prospectus regime for employee share schemes, pending the likely amendment of the directive.³

B:2 Would such an offering require registration or licensing of either the French subsidiary or the Parent Company as a securities dealer or securities broker?

No, neither the Subsidiary nor the Parent Company must register or be licensed as a securities dealer or broker.

B:3 Do laws governing pooled investment funds apply to any of these plans?

No, laws governing pooled investment funds do not apply to any of these plans (unless the Parent Stock is held through a mutual fund vehicle and the employees subscribe for units of these funds rather than directly for shares).

C: LABOR LAWS

C:1 Do France's labor laws require that stock-based benefits be offered on a non-discriminatory basis?

No, France's labor laws do not require that employers offer stock-based benefits on a nondiscriminatory basis. However, the tax advantages of the *profit-sharing plans*, *optional profit-sharing plans*, and *business savings plans* (described in Question F:2 below) are available only if the employer offers the plan's benefits to all employees.

C:2 Do France's labor laws prevent the employer from withdrawing stock-based benefits at its discretion?

In principle, US law governs stock-based benefits offered by a US Parent to employees of its French Subsidiary (unless the Subsidiary grants the benefits directly). The benefits offered to the employees are, however, treated as part of

3. *Public Statement: CESR starts work on Employee Share Scheme Prospectuses*, December 13, 2007, Ref. CESR 07-825; available by clicking here.

their relationship with their French employer and, as such, are probably subject to French labor law, though this point remains unsettled.

French case law has recently specified the nature of stock-based benefits and the validity of the employer's termination of an employee's right to exercise options.⁴ Almost all stock-option plans condition the right to exercise on the employee's continued employment in the company; therefore, termination of the employment contract has the effect of canceling the right to exercise options. French case law recognizes the possibility of this occurring, **provided** the employee was duly informed of this possibility. Extrapolating from this proviso imposed by the courts, it appears that unilateral termination of stock-based benefits, if the employee was not aware of such a possibility at the time of subscription to the stock option plan, will not be accepted by the French courts.

Furthermore, for any employee whose dismissal is judged as abusive, the courts have recognized the employee's right to receive compensation for the prejudice caused by this action. Therefore, if the employer uses a discretionary right to terminate an award upon the cessation of employment, doing so could also give rise to an indemnification right for the employee if the termination were deemed abusive.

Rights upon termination

If an employee who is deprived of his options because of his termination then challenges that termination, a French court could decide that the employee's acts or omissions do not constitute "cause" with respect to the French labor laws, even though the behavior constituted "cause" under the provisions of the option plan. The court could even decide that the behavior does not constitute a "real and serious" motive of termination. On the basis of current French case law, optionees deprived of the right to exercise their options by virtue of a termination that is not based on "real and serious" motive are entitled to claim compensation for the financial damage they suffered by having unduly lost their right to this benefit.

C:3 Is the value of stock-based benefits included in the employee's compensation base for purposes of calculating social security contributions by the employer, mandatory severance pay, or termination benefits?

Stock-based benefits are generally considered as *income from salary*. They therefore are included in the employee's compensation base when calculating the employer's social security contributions, mandatory severance pay, and termination benefits.

4. Cass. Soc., 16 March 2005, n°2 - 47533 (654 FD) *Sté Go Sport*; Cass. Soc., 29 September 2004, n°2 - 40.027 (P+B+R+I).

The social security contributions on *salary income* comprise approximately 45% from the employer and 20% from the employee. The employee must also pay *social taxes* of 10%, assessed at the following rates: 7.5% for the *Contribution Sociale Généralisée* ("CSG"), 5.1% of which is deductible from the employee's taxable income; 0.5% for the *Contribution pour le Remboursement de la Dette Sociale* ("CRDS"); and 2% for the *Prélèvement Social* (the *social levy*).

It is important to distinguish between social security contributions and social taxes. They are used for different purposes, are assessed at different rates, and are collected differently. *Social security contributions* are levied at the specified rates from both employer and employee; they are deductible when calculating taxable income; and they vary from one company to the next, depending on the rates of the pension scheme. *Social taxes* are paid only by the employee; the rates for each component are based on complicated formulas; and not all the components are deductible.

Note that benefits granted under a *qualified stock option plan*, *profit-sharing plan*, or *business savings plan*⁵ may, under certain conditions, be exempt from social security contributions and will not be considered when calculating the base for mandatory severance pay, termination benefits, or benefits from special tax incentives.⁶ These benefits are **not** exempt, however, from social taxes.

C:4 Is it lawful to deduct sums from an employee's paycheck to fund participation in these plans (assuming the employee's prior authorization)?

Under French law, deduction from an employee's paycheck is possible only if the employer has paid an advance on salary, an account, or a loan. In the event that deduction is allowed, the French Labor Code prohibits withholding from employees' remuneration above 1/10 of the monthly salary. As participation in these plans is neither an advance on salary nor an account or a loan, it will not be lawful to deduct sums from an employee's paycheck to fund their participation. Employees can, however, use sums they have saved in a *business savings plan* to fund participation in these plans.⁷

5. See Question F:2 for *profit-sharing* and *business savings plans*.

6. Note that *acquisition gain* and *discount income* are, under certain circumstances, subject to social security contributions; see Question D:3.

7. See Question F:2.

D: TAXATION OF STOCK OPTIONS

PLEASE NOTE: The French tax authorities will agree that a foreign employee share plan (e.g., a stock option plan or free share plan) qualifies for tax purposes as long as the plan complies with the mandatory conditions set out in the Commercial Code and the Tax Code. Indeed, in two recent official guidelines,⁸ the tax authorities distinguished the mandatory conditions from the formal conditions (which may be adjusted depending on applicable foreign law). Although the guidelines address the grant of free shares, this principle should also apply to the grant of stock options.

D:1 At what stage (if any) does the employee become subject to tax in France (i.e., upon grant, vesting, exercise, or resale of the optioned stock)? How is the tax computed?

The French Tax Code specifies a tax treatment only for *qualified stock option plans*. For *nonqualified stock option plans*, the standard rules for employment-related gains and income apply. Since the Tax Code does not specifically address the treatment of *nonqualified stock options*, however, the timing of taxation is not well settled. The common practice among American companies with employees in France is to treat the date of exercise as the tax point, and to treat the excess of the shares' fair market value on that date over the exercise price as the amount subject to taxation. This approach is consistent with one source of governmental advice.⁹ However, based on a strict reading of the law, the appropriate time for taxation is when the advantage is freely available to the employee, which—depending on the specific situation—could also be the vesting date.

Consequently, upon vesting or exercise of the options (as may be applicable, under the circumstances), any difference between the market value at the applicable date and the exercise price is treated as *salary income*, subject to social security contributions from the employer and employee, and income tax from the employee. The employer pays the greater part of the social security contributions, and the rate varies from one employer to another.¹⁰ The average rate is approximately 40% to 50% for the employer and approximately 23% for the employee. *Salary income*, net of social security contributions and after a 10% lump-sum deduction for professional expenses, is subject to the progressive rates of income tax and social taxes at the universal rate of 8%.¹¹

The difference between the sale price of the optioned stock and the market value at vesting (or exercise, as applicable) should be treated as capital gain.

8. Administrative Guidelines 5F-14-05, 24 May 2005; and 5F-17-06, 10 November 2006.

9. See Article 12 of the French Tax Code and Administrative Guidelines 5F-9-95, 22 May 1995; see also Rép. Baeumler: AN 14/05/2001, p. 2810, n° 50871.

10. It depends, in particular, on the size of the company and the function of the employee.

Capital gains realized are subject to income tax at the flat rate of 27% (including *social taxes* and *social levies*¹² at the universal rate of 11%), whether or not the stock is listed on a stock exchange, provided that the total amount of sales by the employee of listed and unlisted securities exceeds € 20,000 in the year.¹³ If the total value of the securities sold during the year in question does not exceed € 20,000, the capital gains are not subject to any income tax.

Furthermore, subject to certain conditions,¹⁴ the tax basis of the capital gain may be reduced by one-third each year, after a five-year holding period starting from the subscription of the shares, but only for purposes of the income tax due on capital gains (i.e., *social taxes* and *social levies* are still due).

D:2 Is the Subsidiary entitled to a tax deduction or any other tax benefit as a result of providing the stock option benefit? How is the deduction or other tax benefit computed?

This issue is not addressed in the French Tax Code or in administrative guidelines issued by French tax authorities. However, the Subsidiary should be entitled to a tax deduction if it is charged by the Parent for one of the following expenses:

- Expenses directly linked to the acquisition of the shares and the sale of the shares to employees, excluding overhead expenses (e.g., financial expenses relating to the holding of the shares by the Parent are not deductible).¹⁵
- Capital losses resulting from exercising options, where the Subsidiary purchased the Parent Stock on the market (not newly issued stock); the capital loss amounts to the difference between the purchase price paid by the Subsidiary and the exercise price.

Social security contributions paid by the Subsidiary in relation to the options are also deductible.

11. For income received in 2006, the amount of the lump-sum deduction for professional expenses is no less than € 396 and no more than € 13,328. In 2006, income tax rates ranged between 0% and 40%. See Article 75, I of Finance Law for 2006, dated 30 December 2005. Both the 7.5% CSG and the 0.5% CRDS (see Question C:3) are assessed on 97% of the gross salary income.

12. The *social levies* are *Prélèvement Social* and *Contribution Additionnelle au Prélèvement Social*; see also Question C:3.

13. The 2008 Finance Act is likely to increase the flat rate to 29% and the limit to € 25,000.

14. That is, the issuing company is subject to corporate income tax and has its seat either in a European Union Member State or in a country or territory that is a member of the European Economic Area and that has concluded a tax treaty with France which contains a clause for administrative assistance.

15. Note, however, that at least one court has found otherwise; see Lower Court of Versailles, n°00-3661, 7e ch, 30 May 2003, SA EMC France.

D:3 Do the laws in France provide more favorable tax treatment for stock option plans that meet specific requirements?

Yes, the French Tax Code provides that stock options granted by French companies in accordance with the French Commercial Code, Articles L.225-177 to L.225-186, benefit from a special tax treatment. The Code extends this treatment to stock options granted by a foreign company that is the direct or indirect parent or subsidiary of the French company in which the employees perform their activities.¹⁶ This extension is applicable provided that conditions of the foreign stock option plan are consistent with the Commercial Code provisions, as detailed below. For purposes of this law, a parent/subsidiary relationship is deemed to exist when the parent company holds a 10% or more equity interest in the subsidiary.

Tax treatment of discounts and gains

The tax treatment depends on the type of income the employee realizes, which may be classified as *discount income*, *acquisition gain*, or *capital gain*. The applicable treatment for each is described next.

Tax treatment applicable to discount income

Discount income is the difference between the shares' fair market value at grant and the exercise price. A discount may be granted, under French corporate law, only if the shares are publicly traded, and it cannot exceed 20%.

If the *discount income* does not exceed 5% of the fair market value of the shares on the date the option is granted, no taxation occurs upon exercise of the options. If the discount income does exceed 5% of the fair market value, the excess is taxed at the time the option is exercised, as *salary income*.¹⁷ To avoid double taxation, the Tax Code provides that, when determining the taxable *acquisition gain*, any excess discount taxed at exercise is added to the exercise price.¹⁸

Tax treatment applicable to acquisition gain

Acquisition gain is the difference between the fair market value of the shares at exercise and the exercise price.

The acquisition gain is subject to tax when the optioned shares are sold. The tax treatment will depend on whether the optioned shares are sold **before** or **after** a period of four years from the date of grant, as follows:

- **SOLD BEFORE HOLDING PERIOD EXPIRES:** If the shares are sold **before** the expiration of the four-year holding period, the favorable tax treatment does not apply, and the acquisition gain is treated as *salary income*.¹⁹ However, the favorable tax

16. Tax Code Article 80 *bis* III.

17. See Question D:1 for a description of the social security and tax treatment of *salary income*.

18. Tax Code Article 150-0 D-8.

treatment remains applicable if the early disposal occurs for one of the following reasons:

- »» dismissal or forced retirement (at the employer's request), provided the options have been exercised at least three months before such event;
 - »» disability (as defined by the French Social Security Code); or
 - »» death (the option may not be exercised/the stock may not be sold by the employee's heirs more than six months after the date of death).
- SOLD AFTER INITIAL HOLDING PERIOD EXPIRES: If the shares are held in registered form rather than bearer form (or kept in a dedicated bank account if the foreign law does not permit shares in registered form) and are not sold or converted into bearer shares before the end of the four-year holding period, the income tax rate applicable to acquisition gain will depend on whether the optioned shares are retained for two additional years beyond the four-year holding period and whether the acquisition gain exceeds € 152,500.
 - »» HELD FOR FOUR YEARS: After the four-year holding period, if the recipient does not retain the optioned stock for an additional two years, the acquisition gain is taxed at 43.5% (30% tax; plus the global rate of 13.5% for *social taxes, social levies, and a special social security tax*²⁰) for the portion of the gain under € 152,500; and at 53.5% (40% tax; plus 13.5% for *social taxes, social levies, and the special social security tax*) for the surplus.

If it would be more favorable, the acquisition gain may be taxed as *salary income*,²¹ subject to proper election by the employee. If the employee does elect, the *social taxes, social levies, and additional special social security tax* will be due at the global rate of 13.5%, plus the progressive income taxes. Whatever the election, the acquisition gain is not subject to social security contribution by either employer or employee.
 - »» HELD FOR SIX OR MORE YEARS: After the four-year holding period, if the recipient holds the optioned stock for a further two years, the acquisition gain is taxed at 29.5% (16% tax; plus 13.5% for *social taxes, social levies, and special social security tax*) for the gain under € 152,500; and 43.5% (30% tax; plus

19. See Question D:1 for the social security and tax treatment of *salary income*. The Tax Code provides for a method to limit the impact of the progressive income tax rates: Determine the taxable income to be reported in this case in two steps. First, divide the employee's realized gain by the number of years between the date of grant of the option and the date of sale of the shares. This amount is added to the employee's other taxable income. Second, multiply the incremental tax so computed by the same number of years, to determine the amount of tax on the gain. See Article 163 *bis* C II of the Tax Code.

20. This additional, *special social security tax* is due for options granted after October 16, 2007. See also *note a* under the table immediately below, for details on the special tax.

21. But note that the employee will not benefit from the *quotient familial* (which takes account of the taxpayer's family status).

plus 13.5% for *social taxes, social levies, and special social security tax*) for the surplus.

As a convenience for the reader, this complicated tax treatment is summarized in the following table:

TIME OF TRANSFER	TAX RATE ^a
<i>Transfer BEFORE expiration of four-year holding period^b</i>	Acquisition gain treated as salary income, subject to progressive rates of income tax and to social security contributions (both employer and employee's shares)
<i>Transfer AFTER expiration of four-year holding period...</i>	
<i>...and BEFORE expiration of additional two years...</i>	<i>...and acquisition gain is less than €152,500: RATE IS 43.5%</i>
<i>...and BEFORE expiration of additional two years.</i>	<i>...and acquisition gain is more than €152,500: RATE IS 53.5%</i>
<i>Transfer AFTER expiration of four-year holding period...</i>	
<i>...and AFTER expiration of additional two-year holding.</i>	<i>...and acquisition gain is less than €152,500: RATE IS 29.5%</i>
<i>...and AFTER expiration of additional two-year holding.</i>	<i>...and acquisition gain is more than €152,500: RATE IS 43.5%</i>

a. Please note that the Social Security Financing Act enacted on November 23, 2007, provides for a special 10% tax, borne by the employer, either on the value of the option (as determined for the consolidated accounts) or on 25% of the value of the shares on the date of grant. This tax will be due in the month following the date of grant and will apply also to foreign companies. Moreover, a new provision increases the *social levies* and *social taxes* from 11% to 13.5% through the creation of a 2.5% *additional social security tax* on the acquisition gain. All rates include *social taxes, social levies, and the additional social security tax*.

b. Or if the shares are not kept in registered form (or in a dedicated bank account).

To protect the Subsidiary from incurring an obligation to pay social security contributions on the employee's acquisition gain, the option agreement should contain a clause preventing the employee from selling the shares acquired under the plan for four years from the date of grant. Since French law provides that the restriction on selling shares acquired under a stock option plan cannot exceed three years from the date of exercise,²² the option agreement can achieve this goal by imposing one of the following two restrictions:

- The employee cannot exercise the option until one year after the date of grant,

22. Commercial Code Article L.225-177.

nor sell or otherwise dispose of the acquired shares until three years after the date of vesting, except if the employee is in one of the situations in which, under law, the four-year holding period does not apply (see details on these exceptions above); or

- The employee cannot exercise the option until four years after the grant.

Tax treatment applicable to capital gains on disposal

Capital gain is the difference between the shares' fair market value at exercise and the sale price when sold to a third party. Any capital gain is subject to income tax at a 27% flat rate²³ (16% tax; plus *social taxes* and *social levies* at the global rate of 11%), provided that the total amount of sales by the employee of listed and unlisted securities exceeds € 20,000 in the considered year.²⁴ If the total value of the securities sold during the considered year does not exceed € 20,000, the realized capital gains are not subject to income tax at all. Moreover, the employee is allowed to set off any capital loss that may be realized upon the sale of the stocks against the *acquisition gain* and, to the extent not used, excess capital losses may be carried forward for the following 10 years.

Furthermore, subject to certain conditions,²⁵ the tax basis of the capital gain may be reduced by one-third per year, after a five-year holding period starting from the subscription of the shares; this applies to the tax on capital gains only (i.e., the reduction does not apply to the *social taxes* and *social levies*).

Conditions applicable to stock option plans

The tax regime described above applies only if the foreign plan satisfies the conditions set forth in Articles L.225-177 to L.225-186 of the French commercial Code. The main requirements are as follows:

- NATURE OF THE OPTION PLAN: The option can be either an option to subscribe for new shares, meaning that the exercise of the option results in a capital increase in the company (a *subscription plan*), or an option to purchase existing shares (a *purchase plan*). With respect to purchase plans, the French Commercial Code provides that the company must purchase the optioned stock before the options become exercisable and hold the stock until the options are exercised or lapse.
- CONDITIONS OF ISSUANCE: The decision to grant stock options must be made by the authority that is entitled to modify the share capital (usually the shareholders). The grants must, in particular, comply with the following rules:
 - »» The plan must be a true share option plan and not simply a means to subscribe for or buy shares. This means that the exercise price must be defini-

23. Likely to be increased to 29% by the 2008 Finance Act.

24. Likely to be increased to € 25,000 by the 2008 Finance Act.

25. See footnote 14 for the conditions.

tively determined on the day the option is granted (and not, for example, upon exercise).

- »» Under all of the company's subscription plans, the aggregate number of optioned stock cannot exceed one-third of the company's share capital.
- »» Under all of the company's purchase plans, the aggregate number of shares it holds cannot exceed 10% of its share capital.
- »» Options must be effectively granted to participants within 38 months from the date of the competent corporate body's decision to grant stock options.
- »» In the situation where the company's stock is listed on a stock exchange:
 - »» no option can be granted less than 20 dealing days after payment of a coupon giving the right to a dividend or to an increase of capital; and
 - »» no option may be granted (i) within 10 trading days before and after the date on which the consolidated accounts—if any, or, alternatively, the yearly accounts—are made public; or (ii) in the period between the date on which the company's corporate bodies become aware of information which, if made public, could substantially impact the market value of the company's shares and the date that is 10 trading days after the information has been made public.
- OPTION EXERCISE PRICE: If the stock is listed on a stock exchange, the option exercise price cannot be less than 80% of the average quoted price of the stock during the 20 stock-exchange trading days preceding the day on which the option is granted. Moreover, if the plan is a purchase plan, the option exercise price cannot be less than 80% of the average purchase price of the stock held by the company. If the stock is not listed, the option exercise price cannot be less than the stock value on the date of grant.
- PARTICIPANTS: The board of directors may grant options to all employees; or to individual employees (but in such a case, capital loss with respect to newly issued shares will not be deductible); or to legal representatives (officers) exercising executive duties²⁶ but not to individuals who are only directors (*administratives*) or to employees or representatives who individually hold more than 10% of the company's capital on the date of grant. If the company granting the options is not listed on a stock exchange, the legal representatives who may be offered options are only those exercising executive duties in the company issuing the options (i.e., not legal representatives of the French subsidiary).

The possibility to participate in a plan implemented by a parent company whose shares are not listed is therefore limited to participants who have

26. E.g., chairman of the board (*Président du Conseil d'Administration*), managing directors (*Directeurs Généraux*), deputy managing directors (*Directeurs Généraux Délégués*), members of the management board (*Membres du Directoire*), managers (*Gérants*).

an employment agreement. In other words, the President or General Manager, for example, of the French subsidiary of a non-listed US company cannot be granted stock options benefiting from the special tax regime, unless that individual has concluded an employment agreement with the subsidiary in addition to his appointment as legal representative/officer.

The directors may decide either (a) that the options cannot be exercised by the chairman of the board, the managing directors, the deputy managing directors, members of the management board and managers before they cease to exercise their functions; or (b) that the named individuals are required to hold a specified number of shares relating to the options as registered shares until the individual ceases his functions.

Tax-filing requirements

The Subsidiary and the plan participants must comply with tax-filing requirements set forth in the French Tax Code.²⁷

Subsidiary's responsibilities for the year during which the option is exercised:

- (a) CERTIFICATE—The French Subsidiary must provide each participant, at the latest by February 15th of the year following that during which the option has been exercised, with a certificate indicating the Subsidiary's name and address; the dates on which the options were granted and exercised; the number of shares purchased, with the subscription or acquisition price; and the amount of the taxable *discount*, if any.²⁸ The Subsidiary must also send a copy of this certificate to the tax office with which it files its corporation tax returns before February 15th of the year following that during which the option has been exercised.
- (b) DADS RETURN—In addition, the French employer is required to report—in the annual wage return (“DADS”) that it will file in the year following the year of the exercise of the option—the amount of any taxable discount.²⁹

Subsidiary's responsibilities for the year during which shares are sold or no longer registered in the name of the employee, before the end of the minimum holding period:

- (a) CERTIFICATE—In this case, the French subsidiary has to send the French participant and the tax office where the participant files annual income tax returns, before February 15th of the year following that during which the optioned stock has been sold or is no longer registered, a certificate indicating the date of the sale; the dates of grant and exercise of the options; the number of

27. Tax Regulations No. 4 N-2412. See Tax Code Article 91 *bis* of Annex 2 for the requirements. The tax authorities have also extended this tax treatment to employees of the French establishment (branch) of a foreign company.

28. See the definition in Question D:3 of *discount income*.

29. Tax Code Article 87.

shares involved; the subscription or purchase price of the shares; and the value of the shares at the date the option was exercised.

- (b) SALARY SLIP—A salary slip must be issued for the *acquisition gain*.³⁰
- (c) DADS RETURN—The French employer is required to report the amount of such taxable *acquisition gain* in the DADS return that it will file in the year following the year of sale of the optioned stock.³¹

Subsidiary's responsibilities for the year during which the shares are sold, after the end of the minimum holding period:

No tax and social security formalities are imposed on the French employer when shares are sold after the end of the four-year holding period.

Participant's responsibilities for the year during which the option is exercised:

The participant/employee must report the amount of the taxable discount (if any) on his individual tax return and attach to the return a copy of the certificate delivered by the French Subsidiary.

Participant's responsibilities for the year during which the shares are sold, before the end of the minimum holding period:

Where the sale of the shares takes place before the end of the mandatory holding period, the participant/employee must report, in the annual income tax return filed in the year following the year of the sale, the *acquisition gain* arising from the option exercise (possibly reduced by the value of the taxable discount already taxed at the time of the exercise of the option; see explanation above), which will be taxed as *salary income*; and the *capital gain* arising from the sale of the shares.³²

Participant's responsibilities for the year during which the shares are sold, after the end of the minimum holding period:

When selling shares after the end of the mandatory holding period, the participant/employee must report *acquisition gain* and *capital gain* in the annual income tax return filed in the year following the year of the shares' sale (and the capital gain on Form 2074).

30. See the definition in Question D:3 of *acquisition gain*.

31. Tax Code Article 87.

32. The participant must also report the capital gain on Form 2074.

RESTRICTED STOCK, RSUs (RESTRICTED STOCK UNITS), AND PERFORMANCE STOCK

D:4 At what stage (if any) does the employee become subject to tax in France (i.e., upon grant, vesting, exercise, or resale of the restricted stock/RSUs/performance stock)? How is the tax computed?

The French Tax Code sets out a specific tax treatment only for *qualifying free stock grants*.³³ For *nonqualifying stock grants*, the value of the stock at vesting date (i.e., upon the lapse of restrictions, if any, when the stock becomes available to the employee) is treated as *salary income*, subject to social security contributions from the employer and employee, and income tax from the employee.³⁴

For awards of Restricted Stock, the shares are considered to be available to the employee (and therefore taxable) only upon vesting, not at the time they are initially granted. Similarly, when RSUs or Performance Stock vest and thus become available to the employee, the value of the shares is taxable at that time. At the time of taxation, the employer pays the greater part of the social security contributions, and the rate varies from one employer to another.³⁵ The average rate is approximately 40% to 50% for the employer and approximately 23% for the employee. *Salary income*, net of social security contributions and after a 10% lump-sum deduction for professional expenses, is subject to the progressive rates of income tax and social taxes at the universal rate of 8%.³⁶

The difference between the sale price of the stock and the value of the stock when the stock becomes available to the employee is treated as a *capital gain*. Capital gains realized are subject to income tax at the flat rate of 27% (including *social taxes* and *social levies*³⁷ at the global rate of 11%), whether or not the stock is listed on a stock exchange, provided that the total amount of sales by the employee of listed and unlisted securities exceeds € 20,000 in the year.³⁸ If the total value of the securities sold during the year in question does not exceed € 20,000, the capital gains are free of all income tax.

Furthermore, subject to certain conditions, the tax basis of the capital gain may be reduced by one-third each year, after a five-year holding period starting

33. This treatment is described below, in Question D:6.

34. Administrative Guidelines 5F-9-95, 22 May 1995; see also Rép. Baeumler: AN 14/05/2001, p. 2810, n° 50871.

35. It depends, in particular, on the size of the company and the function of the employee.

36. For income received in 2006, the amount of the lump-sum deduction for professional expenses is no less than € 396 and no more than € 13,328. In 2006, income tax rates ranged between 0% and 40%. See Article 75, I of Finance Law for 2006, dated 30 December 2005. Both the 7.5% CSG and the 0.5% CRDS (see Question C:3, above) are assessed on 97% of the gross *salary income*.

37. The *social levies* are *Prélèvement Social* and *Contribution Additionnelle au Prélèvement Social*; see Question C:3.

38. The 2008 Finance Act is likely to increase the flat rate to 29% and the limit to € 25,000.

from the acquisition of the shares, but only for purposes of the tax due on capital gains (i.e., *social taxes* and *social levies* are still due).³⁹

D:5 Is the Subsidiary entitled to a tax deduction or any other tax advantage as a result of providing the restricted stock/RSUs/performance stock? If so, at what stage? How is the deduction or other tax benefit computed?

This issue is not addressed in the French Tax Code or in administrative guidelines issued by French tax authorities. However, the Subsidiary should be entitled to a tax deduction if it is charged by the Parent for one of the following expenses:

- Expenses directly linked to the acquisition of the shares and the sale of the shares to employees, excluding overhead expenses (e.g., financial expenses relating to the holding of the shares by the Parent are not deductible).⁴⁰
- Capital losses resulting from exercising options, where the Subsidiary purchased the Parent Stock on the market (not newly issued stock); the capital loss amounts to the difference between the purchase price paid by the Subsidiary and the exercise price.

Social security contributions paid by the Subsidiary in relation to the options are also deductible.

D:6 Do the laws in France provide more favorable tax treatment for these stock benefits, if they meet specific requirements?

The French Tax Code⁴¹ provides for a favorable tax regime for free stock granted to employees and officers, provided that the grant is made in accordance with the provisions of the Commercial Code.⁴² Under this regime, the *acquisition gain*—that is, the value of the shares granted for free, determined at the date of vesting—is subject to a flat rate tax of 43.5%.⁴³ The subsequent *capital gain*, calculated as the difference between the sale price and the value on the date on which the shares vested, is subject to income tax at the rate of 27%, pro-

39. That is, the issuing company is subject to corporate income tax and has its seat either in a European Union Member State or in a country or territory that is a member of the European Economic Area and that has concluded a tax treaty with France which contains a clause for administrative assistance.

40. Note, however, that at least one court has found otherwise; see Lower Court of Versailles, n°00-3661, 7e ch, 30 May 2003, SA EMC France.

41. Tax Code Articles 80 *quaterdecies* and 200-A-6 *bis*.

42. Commercial Code Articles L.225-197-1 to L.225-197-3.

43. This rate includes *social taxes*, *social levies*, and an additional, *special social security tax* at the global rate of 13.5%, unless the beneficiary elects to report the gain as *salary income* (which may be more favorable since the maximum income tax rate is 40%). In such case, no social security contributions will be due (from either the employee or the employer), but the *social taxes*, *social levies*, and *special social security tax* will be due at the rate of 13.5%, not 8%. For details regarding the treatment of *salary income*, please refer to Question D:4.

vided that the total amount of sales by the employee of listed and unlisted securities exceeds € 20,000 in the considered year.⁴⁴ If the total value of the securities sold during the considered year does not exceed € 20,000, capital gains realized are not subject to income tax at all. Moreover, the employee may offset any capital losses realized upon sale of the stocks against the acquisition gain, and, to the extent not used, excess capital losses may be carried forward for the following ten years.

Furthermore, subject to certain conditions, the tax basis of the capital gain may be reduced by one-third each year, after a five-year holding period starting from the acquisition of the shares, but only for purposes of the tax due on capital gains (i.e., *social taxes* and *social levies* are still due).⁴⁵

Both the *acquisition gain* and the *capital gain* are subject to tax at the time the shares are sold by the employee/officer.

Please note that the Social Security Financing Act enacted on November 23, 2007, provides for a special 10% tax, borne by the employer, on either the value of the free stock on the date of grant or the value of the shares as determined for the consolidated accounts. This tax will be due in the month following the date of grant and will apply as well to foreign companies. Moreover, a new provision increases the *social levies* and the *social taxes* from 11% to 13.5% through the creation of an additional 2.5% tax on the *acquisition gain*.

Pursuant to administrative guidelines from the French tax authorities,⁴⁶ this favorable regime is applicable to grants made by a parent company established in a foreign country in favor of employees or officers⁴⁷ who perform their activities in a French subsidiary, provided that the parent holds 10% of the shares issued by the subsidiary⁴⁸ and that the foreign plan complies with the provisions of the French Commercial Code, Articles L.225-197-1 to L.225-197-3. The guidelines specify that the favorable regime may apply to foreign plans approved after January 1st, 2005.

44. The 2008 Finance Act is likely to increase the flat rate to 29% and the limit to € 25,000.

45. That is, the issuing company is subject to corporate income tax and has its seat either in a European Union Member State or in a country or territory that is a member of the European Economic Area and that has concluded a tax treaty with France which contains a clause for administrative assistance.

46. Administrative Guidelines 5 F-14-05, 24 May 2005; and 5 F-17-06, 10 November 2006.

47. Namely, the chairman of the board (*Président du Conseil d'Administration*), managing directors (*Directeurs Généraux*), deputy managing directors (*Directeurs Généraux Délégués*), members of the management board (*Membres du Directoire*), managers (*Gérants*).

48. Commercial Code Article L.225-197-2.

Conditions applicable to qualifying Restricted Stock and RSUs

To benefit from the favorable tax regime, the foreign stock plan (i.e., the Restricted Stock and RSUs) must comply with Commercial Code Articles L.225-197-1 to L.225-197-3, particularly the following rules:

- The shares granted must be genuine equity securities with an uncertain return.
- Stock may not be granted to individuals who hold more than 10% of the stock of the company; moreover, the grant of free stock may not result in any individual holding more than 10% of the stock issued by the company.
- The total number of shares granted for free may not exceed 10% of the total stock issued by the company.
- Stock issued by a parent company may be granted to the officers of its French subsidiary only if the parent is a listed company.
- Grants made to French residents must take place within 38 months from the date the foreign plan is adopted by the foreign company's shareholders (or by any other corporate body entitled to adopt such a plan under applicable law). Nevertheless, the 38-month period can be exceeded as long as (i) the period is in line with foreign applicable law and (ii) the period has a definite term.
- More importantly, the following restrictions apply to the stock granted to French-resident individuals:
 - »» The grant of the stock is complete only after a vesting period specified at the initial time of grant. Note, however, that French law provides for a minimum vesting period of two years.
 - »» The French beneficiaries must then hold the shares for at least two years after the shares vest, meaning that the shares are freely assignable only after a minimum period of four years from the date of grant (the company may always provide for longer vesting/holding periods).
 - »» Nontransferability periods must be complied with, except in case of the employee's death or disability (as defined by the Social Security Code).
 - »» With stock listed on a stock exchange, no stock can be sold (i) within 10 trading days of the date on which the consolidated accounts—if any, or, alternatively, the yearly accounts—are made public; or (ii) in the period between the date on which the company's corporate bodies become aware of information which, if made public, could substantially impact the market value of the company's shares, and the date that is 10 trading days after the information has been made public. Nevertheless, the nontransferability period may differ under foreign applicable law, as long as the applicable law provides equivalent guarantees.
 - »» The directors may decide **either** that the stock cannot be sold by the chairman of the board, managing directors, deputy managing directors, members of the management board, and managers before they cease their

functions **or** that the specified individuals must hold a predetermined number of stocks as registered shares until they cease their functions.

In practice, it will be necessary to examine each plan carefully to determine whether it complies with the provisions of the French Commercial Code. If the plan does not so comply, it will be necessary to adopt a so-called *sub-plan*, setting forth rules applicable to French participants, in order to ensure that the Subsidiary and employees benefit from France's favorable tax and social security regime.

TAX WITHHOLDING

D:7 Is the Subsidiary required to withhold a portion of the value subjected to taxation in connection with any of the foregoing awards or benefits?

There is no tax withholding mechanism for French-resident employees/officers, but any sums considered *salary income* (and therefore subject to social security contributions and *social taxes*⁴⁹) face automatic withholding of the employee's portion of these contributions by the employer. The amounts withheld are paid directly to the Social Security Administration.

E: RECEIPT OF STOCK AS A BONUS OR AT A DISCOUNT

E:1 Is an employee taxed under French law who receives Parent Stock as a bonus or without payment, or who purchases Parent Stock at a discount from its market price?

The general rule is that where an employee or officer is granted the right to acquire stock at a discount or for free, the corresponding benefit is considered *salary income*, subject to social security contributions from the employer and employee, and income tax from the employee, as soon as the stock becomes available to the employee/officer.⁵⁰

E:2 Is the Subsidiary entitled to a tax deduction or other tax benefits as the result of providing these stock-related benefits? If so, how is the deduction or other tax benefit computed?

This issue is not addressed in the French Tax Code or in administrative guidelines issued by French tax authorities. However, the Subsidiary should be entitled to a tax deduction if it is charged by the Parent for one of the following expenses:

- Expenses directly linked to the acquisition of the shares and the sale of the shares to employees, excluding overhead expenses (e.g., financial expenses

49. See explanation under Question C:3.

50. Administrative Guidelines 5F-9-95, dated May 22, 1995; see also the text at fns. 9 and 34, above. See Question D:1 for the social security and tax treatment of *salary income*.

relating to the holding of the shares by the Parent are not deductible).⁵¹

- Capital losses resulting from exercising options, where the Subsidiary purchased the Parent Stock on the market (not newly issued stock); the capital loss amounts to the difference between the purchase price paid by the Subsidiary and the exercise price.

Social security contributions paid by the Subsidiary in relation to the options are also deductible.

F: ACQUISITION OF PARENT STOCK IN TRUST

F:1 If an employee of the Subsidiary elects to make contributions to a stock purchase plan comparable to the Parent's IRC Section 401(k) plan, as a way to fund retirement benefits, would taxation of the amounts contributed and the employer's matching contributions be deferred under the laws of France until a distribution of the retirement benefits is made?

No, taxation is not deferred (save for the employer's contributions, if these can be considered to be unavailable to the employee within the meaning of French law).

F:2 If not, are there similar arrangements available under the laws of France that permit deferral of taxation on a portion of income until retirement?

French law provides a number of schemes that enable employees to acquire stock (including Parent Stock) with the employer's financial assistance and that benefit from tax incentives.⁵²

Business savings plans

A *business savings plan* can be instituted on the employer's initiative or by its agreement with the employees' representatives. It can be implemented within one enterprise only (the "PEE"), or it can be a multiple-enterprises plan (the "PEI"). The plan must permit all employees to join but can require up to three months' seniority for participation.

Contributions to the business savings plan can be investments from *profit sharing plans* [explained below], payments made by an employee up to a limit of 25% of annual remuneration, and matching contributions by the employer. The *employer's contribution* (which can be in free shares, valued as of the vesting date) is limited to € 2,662.08 per employee or three times the employee's contribution, whichever is smaller. If, however, the employee elects to purchase

51. Note, however, that at least one court has found otherwise; see Lower Court of Versailles, n°00-3661, 7e ch, 30 May 2003, SA EMC France.

52. See Articles 22-30 of Ordinance No. 86-1134 of 21 October 1986, as amended by Law No. 94-640 of 25 July 1994.

shares issued by the employer or another *company of the employer's group*,⁵³ the employer may increase its contribution (for 2008) by an additional € 2,129.66.⁵⁴

If an employee receives several contributions from several companies, they will be grouped together for purposes of calculating the maximum *employer's contribution* allowed. When grouping a *business savings plan* and a *multi-enterprise plan*, the maximum employer's contribution for 2008 is € 2,662.08 altogether; it will increase to € 4,791.74 for 2008 if the employee elects to purchase shares issued by the employer or another company of the employer's group.

Contributions to a *business savings plan* must be invested in a French collective investment fund governed by Article 20 of Law No. 88-1201 of December 23, 1988, and approved before creation by the *Commission des Opérations de Bourse*.⁵⁵ The fund may invest contributions in shares listed on stock exchanges in EU Member States or a nonmember state in the European Economic Community (provided that the AMF has not blacklisted the stock exchange); or shares issued by the employer or by any other company of the employer's group. If, however, the contributions are invested in securities issued by the employer itself, the creation of a fund is not compulsory.

Shares so acquired must be held for a minimum of five years, and the business savings plan's rules can require a longer period of unavailability. (This five-year period of unavailability is, however, not applicable if the proceeds of the sale of the shares are used to subscribe or purchase shares pursuant to a *qualified employee stock option plan*.) In either event, the shares or the proceeds of their sale must become immediately available to the employee upon the occurrence of:

- a marriage or *Pacte Civil de Solidarité* ("PACS"; i.e., civil marriage);
- birth of a third child;
- divorce or termination of a PACS, when the employee keeps guardianship of at least one child;
- permanent disability of the employee, a child, or a spouse (or the person with whom the employee has a PACS);
- death of the employee or a spouse (or the person with whom the employee has a PACS);
- termination of the employment contract;

53. A *company of the employer's group* is any issuing company that directly or indirectly controls at least 10% of the employer's capital or that is directly or indirectly controlled by a common parent holding at least 50% of the employer and the issuer's capital.

54. The employer can pay 8% of an annual published number, plus a further 80% of that figure.

55. See Article 6 of Decree No. 89-623 of 6 September 1989. The *Autorité des Marchés Financiers* (AMF) was created in August 2003, replacing what had been three separate regulatory authorities: the *Commission des Opérations de Bourse* (COB), the *Conseil des Marchés Financiers* (CMF), and the *Conseil de Discipline de la Gestion Financière* (CDGF).

- creation of a business by the employee, a child, or a spouse (or the person with whom the employee has a PACS);
- acquisition of a principal residence; or
- excessive debt (in certain cases; see Article L.331-2 of the Consumer Code).

The employee's contributions to the business savings plan are not deductible for income tax purposes. The employer's contributions, if within the specified limits, are fully tax-deductible and exempt from social security contributions; but, immediately upon the employer's contribution to the plan, they are subject to the social taxes—CSG and CRDS—for a global amount of 8% on 97% of the contribution amount.⁵⁶

Dividends and capital gains received from securities invested in the plan are not taxable in the hands of the employee as long as they are reinvested in the plan. Distributions from the plan are also exempt from income tax if they are made more than five years after the investment to which they relate. They are, however, subject to *social taxes* (8.2% CSG and 0.5% CRDS on the sums paid) and to *social levies* of 2.3%.⁵⁷

Plan d'Epargne Pour La Retraite Collective (the PERCO)

The business savings plan called *Plan Partenarial d'Epargne Salariale Volontaire* (the "PPESV"), which was established under a law effective in February 2001, has been cancelled by a new business savings plan for retirement, *Plan d'Epargne pour la Retraite Collective* (the "PERCO"), created by a law entering into force on August 21, 2003. The PERCO is a mechanism that allows the savings made in the PEE or PEI to be liquidated at the time of retirement, either by way of payment of capital or payment of a life income.

The PERCO can only be implemented if the participants also have the possibility to opt for a PEE or a PEI. The employer's contribution per employee is limited to € 5,324.16 (for 2008) per participant and per year or three times the employee's contribution, whichever is smaller. In case of simultaneous contribution to a PERCO and a PEE or PEI, the two caps for the employer's contribution are distinct.

Shares so acquired must be held until retirement. However, the shares or the proceeds of their sale must become immediately available to the employee upon the occurrence of the employee's death or death of a spouse (or the person with whom the employee has a PACS); the employee's right to unemployment benefits expiring; permanent disability of the employee, a child, or a spouse (or person with whom the employee has a PACS); acquisition of a principal resi-

56. See Question C:3 for an explanation of *social taxes*.

57. See Question C:3 for an explanation of *social levies*.

dence; or some cases of excessive debt (under Article L.331-2 of the Consumer Code).

The employee's contributions to the *business savings plan* are not deductible for income tax purposes. Dividends and capital gains received from securities invested in the plan are not taxable in the hands of the employee as long as they are reinvested in the plan.

The employer's contributions are subject to *social taxes* (CSG and CRDS, for a global amount of 8% on 97% of the amount). Sums over € 2,300 will be subject to an additional 8.2% as a special social tax. Further, if the employer's contribution exceeds € 5,324.16 (for 2008), the sums are subject to social security contributions as *salary income*.

Distributions from the plan are also exempt from income tax. However, the revenues and capital gain are subject to *social taxes* (8.2% CSG and 0.5% CRDS) and *social levies* of 2.3% when the employee asks to receive either the capital or a life income.

Profit-sharing plans

French law provides that companies employing 50 or more persons must create a profit-sharing plan (*accord de participation*) for the employees' benefit (companies employing fewer than 50 persons may create optional plans). Sums allocated to employees under the compulsory profit-sharing plan must generally be held in the plan for five years. They are exempt from income tax and social security contributions but are subject to *social taxes* (7.5% CSG and 0.5% CRDS on 97% of the amount).⁵⁸ Income arising from the sums held in the plan are subject to *social taxes* and *social levies* at the global rate of 11% upon distribution.

Sums allocated to employees under a mandatory plan are unavailable for a five-year period except if the employee decides to invest in the employer's *business savings plan*. Sums paid by the employer are fully tax-deductible, exempt from social security contributions and from taxes based on salaries.

Optional profit-sharing plans

The optional profit-sharing plan (*accord d'intéressement*) is a purely optional system, which can be set up in any company as long as it is in conformity with the regulation concerning personnel representation. Sums allocated to these plans cannot exceed 20% of the total gross salary income paid by the company or a sum equal to half of the amount of the annual social security ceiling (€ 16,638 in 2008) per employee. Subject to those two conditions, they are exempt from social security contributions; subject to social taxes; and subject to income tax for the employee unless within 15 days following payment, the employee transfers the money into a savings plans (PEE, PEI, or PERCO).

58. See Question C:3.

F:3 Under this type of plan, would the Subsidiary be entitled to a tax deduction for the amount of its matching contributions?

The Subsidiary is entitled to a tax deduction for its matching contributions, subject to ordinary limitations on the payment of remuneration (e.g., nonexcessive remuneration).

G: GAIN TO SUBSIDIARY

Will the Subsidiary realize a taxable gain if it sells Parent Stock pursuant to an employee benefit plan for a price exceeding the Subsidiary's cost of acquiring the Parent Stock?

Yes, the Subsidiary realizes a taxable gain, generally speaking, if it sells Parent Stock for a price exceeding the Subsidiary's cost of acquisition.

H: STAMP DUTIES

Are there any stamp duties payable by the employee who acquires Parent Stock?

Generally speaking, there will be no transfer tax upon the employee's purchase of Parent Stock.

I: STOCK EXCHANGE LISTING

Would the answers to any of the questions above be more favorable, either to the employee or the Subsidiary, if the Parent Stock were listed on a stock exchange in France?

As long as the Parent is listed on a recognized, regulated stock exchange, there is no effect for either the employees or the Subsidiary. If the Parent is not already listed on an *EU regulated market*, listing the Parent Stock on a French exchange would allow the Parent to take advantage of the employee share scheme exemption under the EU Prospectus Directive (provided that its scheme satisfies the other requirements of the exemption). However, if the Parent is listed on both a foreign exchange and the French exchange, only the French quotation will be taken into account for French tax purposes.

J: OTHER CONSIDERATIONS

J:1 Are there other laws or regulations that an employer should consider when extending US-style stock benefit plans to employees in France?

Noncompete provisions

Pursuant to French labor case law, a noncompete clause, to be valid, must (i) be necessary to protect the legitimate interests of the employer; (ii) be limited in time and geography; (iii) be specific as to the activities it prevents the employee from performing; and (iv) provide the payment of a financial consideration. Finally, it must not have the effect of preventing the employee from finding a new job. The terms of the covenant must be negotiated with each

employee, and the clause's terms and specific remuneration must be expressly accepted by the employee and proportionate to the employee's obligation.

Often the specifics of the remuneration are provided by the applicable collective bargaining agreement. This is why such undertakings are usually included in employment contracts or in an amendment to the employment contract, and it is always signed by the employee. Inserting the details in the stock-option plan itself is very unusual in France and would most probably be deemed unenforceable.

Consultation of the Workers Council

If the stock benefit plan is implemented in France and such implementation triggers a modification in the daily organization of the employing company, the Workers Council (i.e., employee representatives) must be consulted prior to its implementation. This will typically be necessary when, for example, a majority of the employees are covered by the stock benefits, or the options involve more than 10% of the company's share capital.

Plan documents in French

Case law does not require that the documents for a stock benefit plan be translated into French when the plan is not directly offered by the subsidiary but by a parent company located outside of France. However, observers foresee that case law will evolve in the near future toward mandatory translation of these agreements into French.

J:2 Are there cultural issues that an employer should consider when extending US-style stock benefit plans to employees in France?

Other than the issues discussed above, there are not.

J:3 What laws in France seek to protect the privacy of employees?

The French Data Protection Law, enacted in 1978, provides that any data collection process must be implemented in such a way as to enable the data-subject to benefit from the following fundamental guarantees:

- the right to freely agree to the use of any data collected identifying him/her;
- the right to have the collected data be accurate, complete, and up-to-date;
- the right to access and request rectification of the data collected;
- the right to object to data collection for legitimate reasons.

J:4 Are electronic signatures on an agreement or other document enforceable in France? If so, is any special certification or other formality required?

Under a French law of March 13, 2000, an *electronic signature* consists of a reliable process of identification that safeguards its link with the instrument to which it relates. Absent proof to the contrary, the reliability of that process is

presumed where an electronic signature is created, the identity of the signatory is secured, and the integrity of the instrument is safeguarded, subject to certain conditions laid down by the decree of March 30, 2001.

The *electronic signature* is deemed reliable:

- (d) When it is *secure*, that is:
- »» it results from a reliable process of identification that safeguards its link with the instrument to which it relates;
 - »» it is personal to the signatory;
 - »» it is created, by means that the signatory can keep under control and guarantee, with the instrument to which it relates; and
 - »» the link is such that any modification of the instrument can be detected.
- (e) When it is established by a secured process of creating electronic signatures that complies with certain conditions, and compliance with those conditions is certified by an administrative body.

In practice, therefore, using one of the technologies that has been approved by the French authorities is advisable.

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fication of employment contracts, stock option plans, and European and international transfer of employees and litigation. She has represented Diebold, The Timken Company, Hudson Highland, and other US, French, and UK multinationals in labor and employment law and litigation matters. Ms. Pierce has dual citizenship (French and American) and degrees from Université de Paris X-Nanterre (Master's in Business Law and Master's in Anglo-American Law with honors 1998); and Northwestern University (Dean's List; LL.M. with honors 1999).

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