French Finance Act for 2022

January 2022
The 2022 Finance Act (FA) was definitively adopted by the French Parliament on December 15, 2021. Below are presented the main measures of interest to companies.

**International tax**

- **Making withholding taxes applicable to non-resident companies compliant with European Union law and adjusting the withholding tax deferral mechanism for loss-making foreign companies (FA art. 24)**

The Finance Act provides for various measures concerning withholding taxes levied in France on income received by beneficiaries established outside of France. The main measure aims to ensure the compliance with EU law of various domestic withholding taxes applied to income received by non-resident companies, which were recently found to be contrary to the freedoms guaranteed by the Treaty on the Functioning of the EU (TFEU) by the French Supreme Court. In addition, the Finance Act modifies the system of refund and temporary deferral of withholding tax introduced by the Finance Act for 2020 for loss-making foreign companies.

1/ The compliance of withholding taxes in Articles 119 bis, 2, 182 A bis and 182 B of the FTC

In a decision of November 22, 2019 (No. 423698, SAEM de gestion du Port-Vauban) the French Supreme Court ruled that the withholding tax under Article 182 B of the FTC (applicable to non-salaried income) is contrary to the principle of freedom to provide services, guaranteed by Article 56 of the TFEU, insofar as it does not authorize to take into account the professional expenses incurred by a non-resident service provider in the withholding tax base, whereas a service provider established in France is subject to the tax on a net basis.

In another decision of May 11, 2021 (no. 438135, UBS Asset Management Life Ltd), the French Supreme Court also ruled that the impossibility for a British life insurance company receiving French-source dividends to deduct certain expenses (in this case technical provisions) from the withholding tax base under article 119 bis, 2 of the FTC, was contrary to the principle of free movement of capital.

Drawing the consequences of these decisions, the Finance Act for 2022 modifies the existing withholding tax systems by allowing the calculation of the withholding tax base on a net basis and no longer on a gross basis. This will be achieved with the following two mechanisms:

- **Lump-sum allowance for income subject to withholding tax under Art. 182 B of the GTC**

For non-resident legal entities and organizations established in the EU (or in a State party to the EEA agreement and having concluded an administrative assistance agreement with France to combat fraud and tax evasion) receiving income from French sources falling within the scope of Article 182 B of the FTC, a flat-rate allowance representing expenses equal to 10% of the sums or products is now provided for when
the withholding tax is levied. It should be noted that such a flat 10% deduction already applies to the withholding tax provided for in Article 182 A bis of the FTC to sums paid for artistic services provided or used in France by a non-resident service provider.

❖ Deduction of actual expenses for income subject to withholding taxes under Articles 119 bis, 2, 182 A bis, and 182 B of the FTC

The Finance Act also provides for the possibility (which will be codified in Article 235 quinquies, I of the FTC), for beneficiaries of sums or products subject to withholding taxes under Articles 119 bis, 2, 182 A bis and 182 B of the FTC, to obtain the restitution, a posteriori, of the taxes levied, up to the difference between the tax levied (calculated on a gross basis) and the tax calculated on a basis net of the acquisition and conservation expenses directly linked to the income. This possibility of restitution will however be subject to the double condition that:

○ The expenses in question would be deductible if the beneficiary were established in France, and ;
○ The taxation rules in the beneficiary's State of residence do not allow him to deduct the withholding tax.

Regarding the withholding tax under Articles 182 A bis and 182 B of the FTC, the refund will concern exclusively non-resident legal entities and organizations established in the EU or in the EEA. On the other hand, for the withholding tax of article 119 bis, 2 of the FTC, the refund will concern not only non-resident legal entities and organizations established in the EU or in the EEA, but also those established in States located outside the EU or the EEA, provided that the State is not uncooperative and that the shareholding held in the company or the distributor organization does not allow the beneficiary to participate effectively in the management or the control of this company or this organization.

Note: this difference in the scope of the new measures is explained by the nature of the fundamental freedoms at stake. In the context of the withholding taxes of articles 182 A bis and 182 B of the FTC, it is the principle of freedom to provide services that opposes the calculation of the withholding tax on a gross basis. But this fundamental freedom, guaranteed by the TFEU, cannot be invoked by a taxpayer established outside the EU. On the other hand, with regard to the withholding tax of article 119 bis 2, the fundamental freedom at stake is the free movement of capital which is enforceable by all taxpayers whether or not they are established in the EU, provided, however, that for those established outside the EU, their shareholding in the distributing company or organization does not allow them to participate effectively in its management or control (which corresponds to the perimeter of application of the freedom of movement of capital).

The application for refund must be filed with the non-resident tax department by December 31 of the second year following the year of payment of the withholding tax. The request for refund must be accompanied by all the supporting documents necessary to calculate the amount of the refund.

2/ Clarification of the terms and conditions of application of the withholding tax refund/deferral mechanism for loss-making foreign companies

The Finance Act for 2020 has introduced a mechanism for the restitution and temporary deferral of withholding tax for loss-making foreign companies, codified in
Article 235 quater of the FTC. This mechanism applies for all the withholding taxes provided for in articles 119 bis, 182 A bis, 182 B, 244 bis, 244 bis A and 244 bis B of the FTC. A foreign company with a loss may now request the refund of sums paid in respect of a withholding tax or a levy at source. These sums are then subject to a deferred taxation, equal to the amount of the withholding tax refunded. The deferral ends when the company becomes profitable again. In order for the deferral to be maintained, the company must also provide the French tax authorities with an annual declaration of its taxable income as well as a follow-up statement of the income and profits whose taxation is deferred.

The implementation of this new regime has, however, brought to light difficulties linked, on the one hand, to the uncertainties as to the order in which the deferred taxes relating to several fiscal years become payable, in the event that the company becomes profitable again, and, on the other hand, to the deadlines for filing refund requests, which taxpayers used to consider as too short (this deadline was three months following the end of the fiscal year during which the event giving rise to the withholding tax or the levy for which the refund is being requested occurred).

The 2022 Finance Act therefore modifies the regime by specifying that when the taxes carried forward relate to different fiscal years, the forfeiture of this carry forward applies in priority to the oldest taxes.

In addition, the time limit within which the beneficiary of the income may request the refund of the withholding tax will now be the 31st of December of the second year following the assessment of the tax.

In addition, non-resident legal entities or organizations will benefit from a six months period (as opposed to three months previously) to file the annual declaration showing a loss allowing to maintain the tax deferral.

All of the provisions of Article 24 are applicable to WHT for which the taxable event occurs on or after January 1, 2022.

**Clarification of ATAD 2 rules (FL art. 14)**

As a reminder, the ATAD 2 Directive (Directive 2017/952 of 29 May 2017) was adopted with a view to extending the scope of the measures to neutralize hybrid mismatches arrangements, initiated by the ATAD 1 Directive (Directive 2016/1164 of 12 July 2016). Both directives are directly inspired by the recommendations of the final report on Action 2 of the OECD BEPS project. Article 45 of Law no. 2019-1479 of 28 December 2019 transposed the measures to combat hybrid mismatches into Articles 205 B, 205 C and 205 D of the FTC.

This text was only lightly discussed by Parliament when it was transposed into French law. The tax administration's comments on the provision, which were published on 15 December, shed some light on the new rules, without however answering all the issues still outstanding.

As a reminder, "hybrid mismatches" are defined as those that create a tax mismatch, which can be either a "deduction without inclusion" or a "double deduction".

1/ Deduction without inclusion
Six of the hybrid mismatches are cases of "deduction without inclusion": a deduction of a payment from the taxable base in the jurisdiction in which the payment has its source without a corresponding inclusion for tax purposes of the same payment in the other jurisdiction. A tax mismatch is attributable to:

- differences in the legal characterization of a financial instrument or entity;
- differences in the allocation of payments made to the hybrid entity under the laws of the jurisdiction where the hybrid entity is established or registered and the jurisdiction of any person with a participation in that hybrid entity;
- differences in the allocation of payments between the head office and permanent establishment or between two or more permanent establishments of the same entity under the laws of the jurisdictions where the entity operates;
- to the fact that the payment is disregarded under the laws of the payee jurisdiction;

In case of deduction without inclusion, the main rule to eliminate the hybrid effect (FTC art. 205 B, III-1, a) provides that the State of the payer must deny the deduction of such payment.

Except for financial instruments, the text does not specify the time limit within which the inclusion must take place. The French tax authorities consider in this respect that the inclusion must take place in respect of the financial year during which the payment is made, subject to certain exceptions (BOI-BIC-BASE-80-20 n° 30). For hybrid financial instruments, the inclusion must take place in respect of a financial year beginning within 24 months of the end of the financial year in respect of which the corresponding expense was deducted (FTC art. 205 B, I- 8°,b). While the directive, following the recommendations of the BEPS report, mentions that the inclusion can take place within 12 months or within a "reasonable period", the French transposition is less flexible, in that it imposes a maximum period for the inclusion to take place.

2/ Double deduction

"Double deduction" situations occur in case the same payment, expense or loss is deducted both in the jurisdiction in which the payment has its source, the expenses are incurred or the losses are incurred and in the other jurisdiction.

In the case of double deduction, the main rule for eliminating double deduction is that the deduction shall be allowed only in the State where such payment has its source, the expenses are incurred or the losses are incurred.

The French rules also provide that the elimination rule does not apply where the double deduction relates to income subject to double inclusion in respect of the same financial year or in respect of a financial year that begins within 24 months of the end of the financial year in respect of which the charge was initially deducted. The Directive, on the other hand, does not provide for any time limit.

3/ Clarification of the 24-month period

The initial text of the Finance Act for 2020 raised issues regarding the application of this 24-month period, in particular regarding the time at which the taxpayer must eliminate the hybrid mismatch (i.e. reinstate the expense).
The Finance Act for 2022 answers some of these questions by specifying when an expense that has not been included within the 24-month period must be disallowed.

Thus, when a payment made in respect of a financial instrument has not been included in the taxable income of the payee established outside France at the end of the period provided for in Article 205 B, I-8°, b), the corresponding amount must be added back to the income subject to corporation tax in France of the company that made the payment at the end of the last financial year that began within 24 months after the end of the financial year in respect of which the expense was initially deducted. The same provisions apply in the event of a double deduction not followed by a double inclusion within the same 24-month period.

This amendment to Article 205 B of the FTC therefore specifies that the initial deduction of the expense is allowed in the first place, both for a payment made in respect of a hybrid financial instrument or in the case of a double deduction, while the neutralization provided for by the ATAD 2 rules only occurs if inclusion (or double inclusion) has not taken place by the end of the 24-month period.

Example: a French company and a (related) US company close their financial year on 31 December. The French company makes a potentially hybrid payment in respect of a financial instrument to the US company for the year ended 31 December N. The French company will be able to deduct the expense for the year ended 31 December N. It may deduct the expense for that year. It will have to reintegrate it for the financial year ending 31 December N+2 if the corresponding income has still not been taxed at that date.
French corporate income tax

- Temporary tax depreciation option for business assets (FA art. 23)

Article 23 of the Finance Act for 2022, amending Art. 39, 1-2° of the FTC, codifies a general prohibition, for tax purposes, of the amortization of the “fonds commercial” (hereinafter referred to as “goodwill”), while providing a temporary exception to this principle.

According to article 212-3 of the French General Chart of Accounts (PCG), goodwill consists of intangible elements of acquired goodwill which are neither valued nor recorded separately in the balance sheet and which contribute to the entity's business potential.

From a book point of view, article 214-3 of the PCG establishes a presumption that the use of goodwill is not limited in time. In principle, therefore, goodwill is not amortized for book purposes and must be tested for impairment at least once a year. However, this presumption is rebutted if it can be shown that there is a foreseeable limit to the use of the goodwill, which is then depreciated over its useful life, or over 10 years if this period cannot be reliably determined.

In addition, small companies are authorized by article 214-3 of the PCG to amortize over 10 years goodwill they have acquired, without having to justify a limited period of use. This simplification exempts them from having to perform an annual impairment test. Small companies are those that do not exceed two of the following three thresholds: balance sheet total of €6 million, net sales of €12 million and average number of employees during the year of 50.

The French Supreme Court recently ruled that there was a disconnection between book and tax rules on the particular subject of depreciation of the goodwill of small businesses (CE Avis 8 September 2021, n°453458), on the ground that only assets with a limited period of use may be subject to depreciation (see in particular CE 1 October 1999, n° 177809), this condition being common to tangible and intangible elements. Concerning intangible elements, the French Supreme Court regularly rules that intangible elements representing a certain clientele attached to the business may be subject to depreciation provided that:

- it is normally foreseeable, at the date of their acquisition, that their beneficial effects on operations will end at a given date
- they are dissociable from the other elements representing the customer base.

This case law could be interpreted as leading to a certain connection between accounting and taxation for companies other than small businesses, at least as far as the principles are concerned. However, in practice, the French Supreme Court has never given a positive decision authorizing the tax deduction of depreciation of goodwill.
From now on, the disconnection between accounting and taxation is provided for by law and even the demonstration of the limited use of goodwill will no longer allow for a tax deduction of the depreciation recorded in the accounts.

However, as a temporary exception, the Finance Act provides that "depreciation recorded in the accounts of companies in respect of goodwill will be allowed as a deduction for acquisitions made from 1 January 2022 until 31 December 2025".

In accordance with the report of the Finance Committee (AN, 1st reading), this measure is intended to provide a significant tax benefit to transfer of businesses during the current phase of economic recovery.

In view of the general nature of this provision, the deduction therefore allows tax deduction, for business assets acquired between 2021 and 2025, both for:

- amortization recognized over 10 years by small businesses, even if the goodwill concerned does not necessarily have a limited useful life,
- amortization of goodwill recognized by all companies, regardless of their size, as long as the limited period of use of the business can be demonstrated so it can be amortized for accounting purposes.

Additional rules are provided for companies benefiting from the measure if they have also recognized a depreciation, deductible for tax purposes.

- **Introduction of a tax credit for collaborative research (FA art. 69)**

As a reminder, the Finance Act for 2021 abolished, for expenses incurred as of January 1, 2022, the mechanism permitting to double, for the calculation of the R&D tax credit, R&D expenses subcontracted to public or similar organizations. This measure was not compatible with state aid regulations.

As a compensation, the law introduces a tax credit for expenses invoiced to companies by research and knowledge dissemination organizations ("ORDC") in the context of collaboration contracts concluded between January 1, 2022 and December 31, 2025.

According to the explanatory memorandum to this article, collaboration contracts are contracts for the joint support of research projects by a company and one or more research organizations. They are based on a sharing of risks and results related to the project and differ from traditional subcontracting in that they rely on cost sharing, but do not give rise to the invoicing of a commercial margin by the research organizations. The results of the project benefit to all the parties involved.

This new tax credit, codified in Article 244 quater B bis of the FTC, will be applicable to industrial, commercial or agricultural companies, which will enter into a collaboration contract with organizations that meet the definition given by the European Commission Communication 2014/C198/01 on the framework for state aid for research, development and innovation. These same organizations must be approved by the Ministry of Research as ORDCs. They must also be unrelated to the contracting company, within the meaning of Article 39.12 of the FTC.
The collaboration contract must be concluded before the start of the collaborative research work. It must also:

- provide for the invoicing of research expenses by the organizations at cost price;
- set the common objective pursued, the distribution of research work between the company and the organization, and the terms for sharing risks and results, which may not be attributed in full to the company;
- provide that the expenses invoiced for the research work may not exceed 90% of the total expenses incurred in respect of the operations provided for in the contract;
- and allow the organizations to have the right to publish the results of their own research conducted in the context of the collaboration.

The benefit of the tax credit will also be subject to the following conditions:

- the expenses must relate to research work carried out within the EU or in a State party to the EEA agreement that has concluded an administrative assistance agreement with France to combat tax fraud and evasion;
- the research operations must be carried out directly by the research organizations. However, the latter may call upon other approved organizations to carry out certain work required for these operations, if the contract so provides.

The tax credit will be equal to 40% of the sums invoiced by the ORDCs (50% for SMEs within the meaning of European law), with a maximum of €6 million per year. The basis for the tax credit must be reduced by the amount of public aid received by the organizations for operations carried out under the collaboration contract. Similarly, public aid received by the company itself for the eligible operations must be deducted from the basis of the tax credit, whether this aid is definitively acquired or refundable. When this aid is refundable, it is added to the tax credit calculation bases for the year in which it is refunded.

The expenses taken into account in the basis of this new tax credit cannot be used to calculate the R&D tax credit or any other tax credit.

On the other hand, the €100 million threshold that determines the applicable R&D tax credit rate will now be assessed including expenses eligible for the tax credit for collaborative research.

Use and potential refund of the tax credit will be made under the same conditions as for the R&D tax credit. In this respect, any excess may be reimbursed immediately to certain companies (including but not limited to SMEs).

The law also provides that disputes relating to this new tax credit may be brought to the R&D Advisory Committee (new Article 1653 F of the FTC). Companies will also be able to apply for a specific ruling or an audit on request under the same conditions as for the R&D tax credit.

The new scheme will apply to expenses invoiced under collaboration contracts concluded on or after January 1, 2022.
- **Compliance with the innovation tax credit (FA art. 83)**

The innovation tax credit provided for in Article 244 quater B, II-k of the FTC is extended by two years and will therefore apply to innovation expenses incurred by SMEs until December 31, 2024. In addition, the system has been brought into line with European law. To this end, the flat-rate used to assess operating expenses is repealed for expenses incurred as of January 1, 2023. As of the same date, the standard rate of the tax credit will be raised from 20% to 30% and the increased rate applicable to overseas operations will be raised from 40% to 60%.

- **Extension of the eligibility period for the status of young innovative company (FA art. 11)**

Article 44 sexies-0 A of the FTC (resulting from the Finance Act n°2003-1311 for 2004) created the status of young innovative company (“Jeune Entreprise Innovante” “JEI”), which allows eligible companies to benefit from various tax breaks, in particular a period of total exemption from income tax for the first profitable financial year, followed by a period of 50% rebate, each for a maximum period of 12 months.

Until now, these advantages were only granted to companies created less than eight years ago, a condition assessed at the end of the fiscal year for which the company claims to benefit from the advantages of the status of JEI. The 2022 Finance Act extends by three years the period of eligibility for this status, allowing companies created less than 11 years ago to benefit from such status.

- **Implementation of measures to facilitate the transfer of businesses (FA art. 19)**

Article 19 of the law implements some of the measures announced as part of the French "Self-employed Plan" last September, including several provisions aimed at facilitating the transfer of businesses. Among these measures, some are temporary and linked to the sanitary crisis, others are permanent. These new provisions apply to corporate income tax for financial years ending on or after 31 December 2021 and to income tax on capital gains for the year 2021.

1/ Facilitating the transfer of leased businesses

Capital gains realized on the sale of a business may benefit from the following exemptions:

- exemption of capital gains on the sale of a business on retirement (FTC art. 151 septies A): this system applies, subject to conditions and exclusively in terms of individual income tax, to the sale of an unincorporated business, or of all the shares held by a taxpayer carrying on his professional activity in a partnership. It may also benefit the partner of a partnership when the partnership transfers its business;
- exemption, within certain limits and under certain conditions, in particular the carrying on of the business for 5 years, of capital gains realized on the transfer of an unincorporated business, of all the rights or shares of a partnership in which the transferor carries on his professional activity, or of a complete branch of activity by a partnership, the latter exemption also applying, under certain specific conditions, to companies subject to corporate income tax (FTC art. 238 quindecies).

Until now, these two measures could be applied to the transfer of a business under a business lease agreement, but only on the condition that the business is transferred to the lessee.

The Finance Act relaxes the conditions of application of these two measures to businesses leased under business lease contracts by authorizing the transfer to any person other than the lessee, when the latter does not take over the business, provided that the transfer of the business includes all the elements contributing to the operation of the business.

2/ Increase of the exemption ceiling for the transfer of a sole proprietorship or a complete branch of activity

The law also raises the exemption ceilings provided for in Article 238 quindecies of the FTC. These ceilings, which apply based on the value of the items transferred, are raised as follows

- from €300K to €500K for a total exemption;
- from €500K to €1,000K for a partial exemption.

3/ Temporary extension of the transfer period to benefit from the exemption provided for in the event of the retirement of the sole trader or the manager

For the application of the provisions of Article 151 septies A of the FTC relating to capital gains exemptions in the event of retirement, it is stipulated that the time period between the retirement and the sale must not exceed 24 months. Where the termination of employment and retirement are not concurrent, it is the later of these two events that is taken into account in assessing the 24-month period, it being specified that the sale may take place before or after the termination of employment or retirement.

Because of the sanitary crisis, Article 19 of the law provides for a temporary increase of this period to 36 months for entrepreneurs who have retired between 1 January 2019 and 31 December 2021, when this retirement has taken place before the transfer.

A similar adjustment is planned for the regime codified in Article 150-0 D ter of the FTC, which provides that managers of SMEs subject to corporate income tax who sell their company shares upon retirement may benefit from a €500,000 allowance. For the application of this measure, the period between the retirement and the sale is also increased from 24 to 36 months when the retirement precedes the sale. This last
measure, initially intended to apply to sales and buybacks carried out between 1 January 2018 and 31 December 2022, has been extended until 31 December 2024.

4/ Tax credit for manager training: amount doubled for companies with less than ten employees

The amount of the tax credit for the training of managers, provided for in Article 244 quater M of the FTC, is doubled for micro-companies within the meaning of EU law, with fewer than 10 employees and a turnover or balance sheet total of less than €2M. For these companies, the tax credit will thus be equal to twice the number of hours of training multiplied by the hourly rate of the minimum wage, still within the limit of 40 hours per calendar year and per company. These new provisions apply to training hours carried out from 1 January 2022.

Finally, the tax credit for manager training, which was initially due to end on 31 December 2022, is extended and will apply to training hours carried out until 31 December 2024.
VAT and Customs measures

VAT measures

- VAT payable on supplies of goods on the date of receipt of the advance payment (FA art. 30, I, 8°)

Until now, the rules on the chargeability of VAT in the event of a down payment were different depending on the nature of the transaction (supply of goods or supply of services).

As far as supplies of goods are concerned, VAT due in respect of down payments was payable when the chargeable event occurred, namely when the goods were supplied (i.e. in general at the time of transfer of ownership of the goods). Thus, the payment of a down payment in respect of a supply of goods did not entail the payment of VAT, which occurred at the time of the subsequent supply of the goods.

As far as services are concerned (and except in the case of an election for payment of VAT on accrual basis “Option pour le paiement de la TVA sur les débits”), VAT is in principle immediately payable at the time of the down payment (FTC art. 269).

In order to bring French legislation into line with Articles 65 and 66 of the VAT Directive, the Finance Act for 2022 aligns the regime of down payments for sales of goods and services. The VAT applicable to the down payments invoiced by the supplier will now be due as soon as the down payment is collected, i.e. before any delivery of the goods.

This legislative amendment is in line with the decision of the Administrative Court of Appeal of Nantes (CAA Nantes, 28 May 2021, N° 19NT03579, SAS Technitoit) in which the Court held that Article 269, 1° of the FTC was contrary to Article 65 of the VAT Directive, according to which VAT is chargeable as soon as a deposit is paid, irrespective of the nature of the transaction. Moreover, the French system did not fall within the derogations provided for in Article 66 of the VAT Directive.

The new provisions will require companies to change their process, to manage the payment of VAT on down payments, to adapt the configuration of their information systems, to modify the format of down payment invoices (VAT must be included), to amend the corresponding contractual provisions with customers and/or suppliers and finally to anticipate the financial impacts in terms of input and output VAT.

This measure will enter into force on 1st January 2023, to allow economic operators to prepare for these changes.

The French tax authorities would publish comments to clarify the implementation of this new provision, in particular for contracts that will be signed before its entry into force and whose application will continue after that date.

- Possibility for operators in the financial sector to opt for the taxation of their operations, operation by operation (FA art. 30, I, 5°)

The Finance Act for 2022 modifies the terms of the VAT option for operators in the financial sector, (FTC art. 160 B) for banking and financial transactions. The scope of the option remains unchanged and only the terms and effects of the option are modified.

As a reminder, banking and financial transactions are in principle exempt from VAT pursuant to Article 261 C of the FTC, taxable persons may opt for the VAT liability of these transactions.
pursuant to Article 260 B al.2 of the FTC, subject to the exclusion of certain transactions that remain exempt pursuant to Article 260 C of the FTC.

The scope of the option remains unchanged. But while until 31 December 2021, the rule provided that once the option was exercised, VAT had to be applied to all eligible transactions, it is now possible to choose whether to apply such option for VAT for each eligible transaction.

This measure is in line with case law and in particular the decision of the French Supreme Court of 9 September 2020 (n° 439143), relating to the option concerning the rental of unfurnished premises for professional use.

As before, the VAT option must be exercised by a simple letter informing the tax authorities of the taxable person's intention to opt for taxation.

Subject to confirmation by the French tax authorities on the practical implementation, which are expected during the first quarter of 2022, the option for VAT should thus be materialized for the taxable person by the mention of VAT on the invoices issued.

The actors of the sector will have to understand and anticipate the impacts related to this taxation "operation by operation" regarding the rights to deduct input VAT of their clients, the impact on salary tax as well as in terms of invoicing.

As the article of law does not provide details concerning the date of application of this measure, it applies from 1st January 2022.

- Clarification on the VAT base of the transactions supplied in return for the delivery of a multi-purpose voucher (MPV) in the absence of information on the underlying transaction (FA art. 30, I, 7°)

The provisions of Article 266, 1, a bis of the FTC are amended by Article 30 of the Finance Law with regards to the taxable basis applicable where a multi-purpose voucher (MPV) is issued.

As a reminder, an MPV includes all vouchers that do not meet the definition of a single-use voucher (SUV). This is a voucher allowing its holder to receive goods or services in respect of which the place of taxation and/or the VAT rate are not determined with sufficient precision at the time of the issuance of the voucher to calculate VAT.

Pursuant to Article 256 ter 2 of the FTC, transfers of MPV prior to their use are not subject to VAT. Taxation occurs at the time of the physical delivery of the goods or the performance of the service, all the elements allowing the determination of the amount of VAT to be paid being then known.

Further, to bring Article 266 1, a bis of the FTC into line with Article 73 bis of the VAT Directive (further to a request by the European Commission dated 28 June 2021), the Finance Act for 2022 amends this article which now states that, in the absence of information on the consideration paid in exchange for the voucher, the taxable amount of the supply of goods or services carried out in connection with the MPV is equal to the monetary value indicated on the MPV or in the corresponding documentation.

In the absence of specific provision in the law, the entry into force of this measure occurs on 1st January 2022.
• **Adjustment of the rates of 5.5% and 10% in the agri-food sector (FA art. 30, I, 10°, a)**

Currently, a distinction must be made between the reduced rate of 5.5% applicable to products intended for human consumption in their unaltered state (FTC art. 278-0 bis, A, 1) and the intermediate rate of 10% which applies:

- when they are not intended for human consumption in their unaltered state, for products of agriculture, fishing, fish farming and poultry farming which have not been processed and are intended for use in the preparation of food products or in agricultural production (FTC art. 278 bis, 3°);
- raw materials, compound food and additives used to feed animals that are fed, bred or held for the production of food for human consumption (FTC art. 278 bis, 4°).

The distinction between products intended for human consumption and those intended for use in agricultural production was based on the destination of the products since the French tax authorities considered that the rate of 5.5% applied solely to products sold directly to distribution, catering or consumer professionals and that, conversely, these products were deemed not to be intended for human consumption in their unaltered state when sold to a workshop, slaughterhouse or intended for a grow-out phase before consumption (BOI-TVA-LIQ-30-10-20, n°25).

The Finance Act for 2022 puts an end to this distinction and subjects to the reduced rate of 5.5% all products intended for human consumption, regardless of their stage of processing within the production chain (FTC art. 278-0 bis amended), it being specified that this reduced rate remains inapplicable for all products excluded by the old version of Article 278-0 bis of the FTC (alcoholic beverages, confectionery products, etc.).

Thus, the following are now subject to the reduced VAT rate of 5.5%:

- food products intended for human consumption;
- products normally intended for use in the preparation of such food products;
- products normally used to supplement or replace such food products.

In addition, article 278 bis, 3° to 5° (as amended) now specifies that the intermediate rate of 10% applies to products for agricultural use when they are normally intended for use in agricultural production and are not intended for animal feed. This applies to products of agricultural origin which have not undergone any processing, fishery, fish or poultry products which have not undergone any processing and live foals.

The scope of the intermediate rate of 10% for products intended for animal feed is also specified. Are subject to this rate, food products intended for animal feed, products normally intended for use in the preparation of such feeding products and those normally used to supplement or replace such feeding products if they belong to one of the following categories:

- Products of agriculture, fish, fish farming or poultry farming origin which have not undergone any processing;
- Raw materials, compound feeding products or additives intended for food-producing animals themselves intended for human consumption.

This simplification will enter into force on 1st January 2022.

• **New requirements for tax representatives for companies not established in the European Union (FA art. 30, I, 14°)**
When a person not established in the EU is liable for VAT or must fulfil reporting obligations in France, he is required to appoint a taxable representative established in France and accredited by the French tax office. However, this rule is not applicable to persons established in non-EU State with which France has a legal instrument on mutual assistance having a scope similar to that provided for in Council Directive 2010/24/EU of 16 March 2010.

There are currently no specific legal conditions relating to taxable persons who may be appointed as tax representatives. The conditions of designation and liability are only specified in regulations issued by the French tax authorities.

Thus, in order to strengthen the conditions for the accreditation of tax representatives and to guarantee the recovery of VAT due by foreign operators, the Finance Act introduces, for tax representatives, conditions of fiscal and economic morality, obligations of means and the obligation to prove sufficient financial capacity or guarantees.

In this regard, tax representatives will now have to meet the following three conditions (FTC art. 289 A, IV as amended):

- absence of serious and repeated infringements of the tax provisions by the representative and/or its managers, no responsibility engaged for insufficient assets and no management ban;
- administrative organization and human and material resources in line with its mission;
- financial solvency in line with its obligations as a representative or financial guarantee up to a quarter of the sums arising from these obligations or if these sums are not determinable, by a financial guarantee equal to a sum determined by decree.

In addition, the tax office may withdraw the accreditation of the representative if he ceases to meet these conditions or if he fails to comply with the obligations to declare and pay taxes on behalf of the persons he represents or on his own account.

In addition, these provisions will also apply to the intermediary appointed by a taxable person established outside the EU when the latter makes distance sales of goods imported into the EU and decides to declare these sales via the “IOSS” one-stop shop (FTC art. 298 sexdecies H, I, C, 2°).

For new accreditations taking place from 1st January 2022, all conditions must be met from that date.

Tax representatives accredited before that date have until 1 January 2024 to comply with their new financial obligations of solvency or guarantee (FTC, art. 289 A, IV, A, 3°), it being specified that the other conditions (FTC, art. 289 A, IV, A, 1° and 2°), relating to tax and economic morality and the adequacy of the organization as well as human and material resources, must be complied with as of 1 January 2022.

- **Constitutional compliance of the penalty for sale without invoice (FA art. 142)**

In a recent decision, the French Constitutional Council invalidated the penalty applicable in case of sale without invoice (FTC Art. 1737, I par. 4), on the ground that such a penalty was in breach of the principle of proportionality.

The Finance Act amends corresponding provisions and implements a fine, the amount of which can vary depending whether the unbilled transaction has been recorded in the accounts or not.

Accordingly, a sale or a service carried out without the issuance of an invoice and not booked is sanctioned by a fine of 50% of the amount of the transaction, capped at €375,000 per year. The professional client may be jointly and severally liable for the payment of this fine.
If the transaction has been booked, the fine is reduced to 5% of the amount of the transaction and may not exceed €35,000 per financial year.

This new sanction is aligned with that applicable in commercial law (French Commercial Code Art. L. 441-3 to 441-5). The same penalty applies in the event of failure to issue the bill provided for in the case of real estate work provided to individuals pursuant to Article 290 quinquies of the FTC.

These new provisions are applicable from 1st January 2022 to ongoing verification and litigation procedures.

**Customs measures**

- Declaration of exchange of goods (DEB/intrastat return): compliance with European Union law of VAT rules (FA art. 30)

The Finance Act implements new rules related to Community statistics relating to the trading of goods between EU Member States (FA Art. 30, I, 15° and 16°).

Accordingly, the Finance Act repeals Article 289 C of the FTC relating to the declaration of statistical data (DEB/Intrastat) and provides for two separate declarations to replace the latter: the statistical survey and the recapitulative statement. These changes will apply to transactions for which the statistical declaration or recapitulative statement is required for a period started after 1st January 2022.

1/ The statistical survey

This statistical survey will be requested from a list of defined companies (called "sample"), *prima facie* very close to the population of companies filing an intrastat in 2021 (note to operators of 18th October 2021).

The survey covers EU trade both for introduction and dispatch and is intended to provide input data on external trade.

Note that the "country of origin" of the shipment has been added, as well as the "customer identification number" for regime 29 (specific operations other than exempt deliveries and transfers of stocks such as working operations, toll manufacturing, BtoC distance sales, sales to the armed forces...), and the codes for the nature of the transaction have been modified.

2/ The recapitulative statement

The recapitulative statement was already provided for in Article 289 B of the FTC but was until now included in the intrastat.

It only applies to shipping flows. However, regime 29 transactions such as supplies of goods for contract work, reshipments of goods after contract work, etc. will not be included in the recapitulative statement but only in the statistical survey (if the thresholds are exceeded).

Companies liable for this obligation will have to complete and submit spontaneously the statement monthly on the dedicated web portal.

An automatic pre-filling tool will be offered to enterprises that have been interviewed in the statistical survey to reduce their administrative burden.
The French customs authorities also specify that the criteria for filing these two declarations will not be the same and will depend on the regime codes as well as the annual amounts to be declared. Thus, the threshold of €460,000 for shipment will only apply to the statistical declaration while the recapitulative statement will need to be filed from the first euro.

- **Reverse charge of import VAT: extension of the reform of import VAT to non-taxable legal persons who are identified for VAT purposes (FA art. 30)**

The compulsory reverse charge regime for import VAT is extended to non-taxable legal persons in respect of their transactions, for chargeable events occurring from 1st January 2022.

As import VAT is now paid to the French tax authorities (and no longer the French customs authorities), operators will need a French intra-EU VAT number valid from 1st January 2022, to comply with the standard VAT regime (filing of a monthly CA3 declaration).

To ease the process, the VAT return will be pre-filled by the tax administration from the 14th of the month following the payment of import VAT, based on the information provided by the customs authorities.

It should be noted that the chargeability corresponds to the moment the goods are released for free circulation or temporarily admitted with partial relief from import duties, or in practice, at the time of obtaining the stamp to be removed (“BAE” in French)).

The tax administration clarified this concept in a note dated of 23th November 2021:

- "in the case of a normal customs declaration, import VAT is payable in respect of the month in which the stamp to be removed (BAE) was obtained ;
- in the case of a simplified customs declaration, import VAT is also payable in respect of the month in which the customs declaration obtains the BAE, even if it is regularized (i.e. linked to a global supplementary declaration) during the following month."

The link between the import bases declared to customs and the import VAT reported on the VAT returns will be based on the valid VAT identification number provided by or on behalf of the importer.

The pre-filled data on the CA3 return will have to be checked by the operators and amended if necessary, bearing in mind that they remain responsible for the accuracy of the data reported on their returns, even if a registered customs representative (customs broker or RDE ) is used. To facilitate these checks of the pre-filled data, a dedicated space will be available on douane.gouv.fr website, allowing the taxpayer to obtain the details of the transactions considered.

Operators will have to adapt their processes to ensure adequate VAT compliance related to their imports.
Transposition of DAC 7

- New obligations for e-commerce platform operators (FA art. 134)

Article 134 of the Finance Act repeals the existing system provided for in Article 242 bis of the FTC and transposes the provisions of the DAC 7 Directive (hereinafter the Directive) which aims, as regards platform operators, to introduce a standardized reporting obligation for the benefit of tax administrations (Recital 7 of the Directive).

According to the opinion of the general rapporteur of the Finance Committee in the National Assembly on the Finance Bill, this article "faithfully transposes the stipulations of the Directive and is in line with measures largely initiated by national law" (Report AN No. 4787, 2nd reading).

The provisions of Article 242 bis of the FTC before its amendment by the present Finance Act had established two obligations for platform operators:

- an obligation to inform persons carrying out transactions through these platforms of their tax and social security obligations;
- an obligation to file with the French tax authorities an annual document summarizing certain user identification information, the status of the users, the number and gross amount of transactions carried out and the details of the bank account to which the income is paid.

Article 134 of the Finance Act makes three sets of changes to this regime:

- it maintains the obligation to provide information in a "refreshed" article 242 bis even though such obligation is not prescribed by the Directive. It is reasonable to assume that this circumstance does not make the transposition of the Directive non-compliant, since the obligation to provide information has a different purpose from that of the Directive insofar as it is a question of reminding users of their tax and social obligations and not of organizing the declaration of relevant information for the benefit of the tax authorities. Moreover, that obligation pre-existed under French law;
- it creates five new articles under the heading "declaration of electronic matchmaking platform operators": Articles 1649 ter A to 1649 ter E of the FTC, which transpose the reporting obligation set out by the Directive,
- it amends the articles of the FTC relating to the sanction of these obligations.

These new provisions will enter into force on 1 January 2023, with the Directive providing for a first declaration by operators of 2023 income by 31 January 2024 at the latest, as well as automatic exchange of information between Member States from February 2024.

1/ The platform operators concerned

The platform operators concerned are defined both by the transactions between users arranged through the platforms ("relevant activities" according to the Directive) and by their attachment to France or the European Union (territoriality).

As regards the relevant activities, Article 1649 ter A, I new of the FTC refers to platform operators who "make available to users a device allowing the linking, by electronic means, in order to carry out, directly or indirectly, sales of goods, provision of services by natural persons, rental of a mode of transport or rental of immovable property ... ».

This article is in line with the definition of the relevant activities in the Directive (section 1 (8) of the annex to the Directive), even if it retains the concept of "provision of a service by natural
persons' while the Directive retains the concept of "personal service", defined by the Directive as "a service involving time- or task-based work performed by one or more individuals, acting either independently or on behalf of an Entity, and which is carried out at the request of a user, either online or physically offline after having been facilitated via a Platform". Despite the difference in terminology, there is no doubt that the law applies the same concept as the Directive.

As regards territoriality, Article 1649 B applies to three categories of platform operators:

- platform operators resident in France;
- non-resident platform operators incorporated under French laws, or having their place of management in France or having a permanent establishment in France (hereinafter the three connecting factors). However, these non-resident operators may be exempted from the obligation if they have a connecting factor with another Member State if they fulfil the reporting obligations in one of these States. This is a first difference with the former regime of Article 242 bis of the FTC. The former regime - like the new one - targeted all operators, whether they were established in France or in another territory. However, in the latter case, the operator could not avoid the obligation merely because he was established in another Member State and made a declaration there, since there was no automatic exchange of the information provided. This is now possible because the Directive provides for the automatic exchange of information between Member States (recital 20).
- non-resident operators other than the previous ones and who have none of the three connecting factors with the EU (i.e. non-EU operators), but who facilitate sales, services, rentals of modes of transport or rental of immovable property by persons domiciled in a Member State or rentals of immovable property located in the Union and who choose to fulfil their obligation with the French tax authorities (rather than with another European tax administration). The Directive also provides for the exemption of the operator of a foreign platform (outside the European Union) from the obligation to declare in the Union when there is an adequate mechanism guaranteeing an exchange of equivalent information between the non-Union jurisdiction to which that operator belongs and a Member State when it relates to the activities falling within the scope of the Directive. Article 1649 ter B of the FTC provides for this possibility for the future in the event of an agreement between the such non-EU States and France.

It should be noted that Article 1649 ter B does not expressly provide for the case of operators resident in third countries who would facilitate the letting of immovable property in France (without having a permanent establishment there). Those operators prima facie do not fall into any of the three categories above. It seems to us that this is an omission, except to consider that these operators implicitly fall into the third category above. The condition of 'choice to fulfil its obligations before the French tax authorities' laid down for that category is not relevant and should therefore, in our view, be regarded as implicitly fulfilled.

2/ Sellers to be reported

Reportable sellers are defined in Article 1649 ter C of the FTC. The operator shall mention in his declaration the information relating to the sellers or service providers:

- who have, on the one hand, carried out reportable activities or received consideration for such transactions, and
- on the other hand, are either residents of France or an EU Member State or residents of a non-EU country that has concluded an agreement with France allowing the automatic exchange of information on transactions carried out through platforms, or have carried out real estate leasing operations located in one or more of these same States.

It should be noted that the law refers only to sellers or service providers and not to persons renting modes of transport or immovable property. It seems to us, however, that it is necessary to include lessors of immovable property since the second condition above relates to the leasing of immovable property. It seems that it is also necessary to include persons carrying out rental of modes of transport, in so far as they qualify as service providers.

It should also be noted that the obligation relates only to users on the seller or service provider side and not purchasers of the goods or services. This can be explained by the fact that the main purpose of the Directive is to put tax administrations in a position to control sellers and service providers, even if the information so obtained could also be used to audit buyers.

Finally, it must be remembered that the information is not limited to that of users resident in France since the French tax administration will aim to collect information for both itself and for foreign administrations. This is an important difference with the former regime of Article 242 bis of the FTC: for the record, a regulation issue by the French tax authorities (BOI-BIC-DECLA-30-70-40-10-13/08/2021 n° 20) used to mention that:

"the last paragraph of Article 242 bis of the FTC provides that the obligations provided for in 1° to 3°of Article 242 bis of the FTC apply to platform users residing in France or who make sales or services in France within the meaning of Article 258 of the FTC to Article 259 D of the FTC . Platform operators established in France or abroad thus fall within the scope of reporting obligations, as long as they have users making sales or services located in France within the meaning of the territoriality rules applicable to value added tax".

3/ The content of the declaration

The content of the declaration is provided for in Article 1649 ter A, II of the FTC and is very close to the contents of Article 242 bis of the FTC. It includes:

- the identification of each seller or service provider to be reported, as well as his State of residence: these elements are specified in Article 1649 ter D (see below). This is a difference with the former article 242 bis of the FTC which sent back to a decree for the definition of these elements (see Article 23 L octies of Annex 4 to the FTC);
- the total consideration received by each seller or service provider during each quarter and the number of transactions for which it was collected, as well as any fees, commissions or taxes withheld or levied by the platform operator during each quarter (note that former Article 242 bis provided for the number of transactions per calendar year to be indicated);
- where available, the identifier of the financial account into which the consideration is paid, as well as the identification of the account holder, if he is not the seller or service provider to declare (this information is not declared when the seller or service provider is resident of States not intending to use this information, the list of which will be fixed by decree);
- when the transactions consist in the rental of real estate: the address, the land registration number, the number of days and the type of rental.
The declaration will have to be submitted electronically by 31 January of the year following that in which the transactions were carried out, starting 31 January 2024.

4/ Due diligence to be implemented

Article 1649 ter D, I of the FTC provides that "the operator (...) implements, including by means of the processing of personal data, the due diligence necessary for the identification" of the sellers or service providers to declare (including the elements relating to the tax residence and, where applicable, the tax identification numbers of these users, the references of the rented immovable property) and the persons holding the financial accounts on which the consideration has been collected.

The law states that the platform operator must verify the reliability of the information collected. "When after two reminders from the platform operator (...), a seller or service provider does not provide the necessary information (...), the operator (...) closes the account of the seller or service provider within a period of not less than 60 days and prevents the latter from registering again on the platform". This wording seems to indicate that the platform operator has the obligation to implement this procedure in case of default of the seller or service provider. The Directive, on the other hand, gave the choice between closing the account and withholding the consideration received until the seller or service provider had provided the requested information.

Finally, the law requires the platform operator to keep a register of the steps taken and the information collected necessary for the correct performance of his obligations, to be kept for 10 years. The Directive provides various clarifications that have not been taken up by the law. It will be interesting to read whether the administration will provide details on the nature of the expected steps (and it is to be wondered whether this register is not a kind of reliable audit trail of the information to be declared).

In any case, the due diligence provided for by the new text appears more demanding than under the former article 242 bis of the FTC.

5/ The obligation to register

Article 1649 ter E of the FTC provides that operators from non-EU countries who have chosen to fulfil their obligation with the French tax authorities must register with the latter in order to obtain an individual registration number.

6/ Sanctions

Article 134 of the Finance Act updates the sanctions for non-compliance by platform operators of their obligations.

As a reminder, failure to comply with the obligations provided for in Article 242 bis of the FTC in terms of informing platform users, failure or delay in filing the annual summary document or omission in this document is currently sanctioned by an uncapped fine equal to 5% of undeclared sums (FTC art. 1736 III in its version still in force).

The Finance Act amends Article 1736 of the FTC in order to replace this 5 % fine with a fixed fine capped at €50,000 which will apply from 1 January 2023:

- in the event of a breach of the reporting obligation provided for in the new Article 1649 ter A of the FTC;
- in the event of failure to comply with the due diligence obligations required to identify the sellers or service providers to declared, as provided for in Article 1649 ter D, I of the FTC;
- in the event of failure to comply with the obligation to provide these persons with the information transmitted to the tax authorities about them in accordance with Article 1649 ter D, II new of the FTC.

The fixed fine of up to €50,000 provided for in Article 1731 ter of the FTC in the event of failure by the platforms to inform their users of their tax and social obligations will continue to apply, including from 1 January 2023, in the event of non-compliance with the provisions of Article 242 bis in its new wording.

More generally, failure by the platforms to comply with their obligations was already likely to lead to the publication of the name of the operator on a “black list” (FTC art. 1740 D). These provisions are maintained and the wording of Article 1740 D of the FTC is adapted accordingly.

Finally, Article 134 of the Finance Act introduces a new Article 1740 E in the FTC, in order to provide for a formal notice procedure by the administration for third-country operators who have chosen to fulfil their reporting obligation in France, sanctioned by the withdrawal of the individual registration number in the absence of regularization by the operator (to our knowledge, however, the law does not specify the consequences of such withdrawal).

- **Implementation of joint controls by tax authorities of different Member States (FA art. 134)**

Transposing Article 8 ter of Directive 77/799/EEC, repealed by Directive 2011/16 of 15 February 2011, which reproduces and supplements the former provisions in its Article 12, Article L. 45 of the LPF already provides, in the version in force on 31 December 2021, for the possibility for the French tax authorities to agree with the administrations of another Member States to carry out simultaneous tax audits, each of them on the territory of their Member State, with a view to exchanging the information thus obtained.

Article L. 45 of the French tax Procedural Code (FPC) also provides that officials of the administrations of the other Member States of the EU, duly authorized by a written mandate from the applicant authority may, once authorized by the French administration:

- be present in the offices where the French agents perform their duties;
- attend administrative procedures conducted on French territory;
- interview taxpayers and ask them for information;
- review records and receive copies of the information sought.

For the purpose of these provisions, refusal by the taxpayer of the presence of an official of the administration of another Member State is treated like refusal opposed to a French agent, and exposes the taxpayer to the penalties provided for in Articles 1732 and 1734 of the FTC (i.e. mandatory assessment of income and fine of € 10,000 for refusal to communicate documents or information).

Directive DAC 7 (Directive 2021/514/EU of 22 March 2021) complements Directive 2011/16/EU by inserting a new Article 12 ter on joint controls, which are intended to be an additional tool available for administrative cooperation between Member States in the field of taxation.

The Finance Act transposes these new provisions by supplementing Article L. 45 of the FPC with new provisions relating to joint controls. Article L. 45 of the FPC is thus amended to provide that, for the application of tax legislation, where the examination of a case relating to one or more persons is of common or complementary interest with one or more Member States of the
European Union, the French tax administration may agree with the administration of the other Member State or States to carry out a joint audit, in a pre-established and coordinated manner.

In the event of a joint audit taking place on the French territory, the officials of the administrations of the other participating Member States must be duly authorized. The conduct of joint audits in France will be subject to compliance with French legislation. Officials from other Member States will be able to question taxpayers and examine documents in cooperation with French officials and gather evidence during audit activities.

In accordance with the Directive, a final report containing the conclusions of the joint control will have to be issued. The report shall mention the positions of the tax administrations involved in the audit, in particular the points on which the competent authorities participating in the operation have agreed. This report will be communicated to the taxpayer within sixty days of being prepared.

These new provisions will apply from 1 January 2024.

Some other additions are also made to Article L. 45 of the LPF. In particular, it is provided that the official language of administrative proceedings taking place on French territory is French, other languages may be designated as the working language, provided that the administrations concerned so agree. In addition, in the event of simultaneous control, foreign agents will not only be able to attend the administrative procedures conducted on French territory, as at present, but also, from 1st January 2023, participate in them by using electronic means of communication. Finally, it is specified that the information of taxpayers and requests for information by these foreign agents must be made in compliance with the procedural rules applicable in France. This measure will also apply from 1st January 2023.