

De la relation

DELSOL AVOCATS
LA QUALITÉ DE LA RELATION

#27 January 2023

The DELSOL Avocats
newsletter



Henri-Louis DELSOL & Emmanuel KAEPPELIN
Managing partners

At a time when the trend is towards investing in regions, we are committed to supporting our clients in their operations in France and elsewhere. Industrial revitalization, training, regional planning and the protection of natural areas are all challenges that we are pleased to take up in the matters on which you seek our help.

However, we believe that the turbulence that our economy, and more generally our civilisation, are experiencing should not lead us into self-isolation.

The benefits of free trade and international commerce remain undeniable. In fact, David Ricard's comparative advantage theory has definitely withstood the test of time. Beyond the strictly economic aspects, which legitimately motivate businesses, the free movement of people and goods remains the best guarantee of peace between nations.

This is why, at DELSOL Avocats, we have decided to make international development our main focus in 2023.

Our goal is to offer you optimal support in your international projects such as entering new markets, partnerships, research and development, and external growth. In 2022, we have worked on some fifty international projects and we know that our clients still have great potential for development. Having us at their sides can be an asset for the success of their projects.

We are therefore going to strengthen our ties with the two networks in which we are members (Telfa and Parlex), which are present in some thirty countries, by increasing our participation in seminars, our involvement in practice groups bringing together specialists in the same field, and by working on the development of good practice guides, etc. We also encourage our lawyers to go on temporary assignments to other firms abroad, in order to improve their language skills, but also to maintain strong relationships with our networks.

International is also a culture that needs to be nurtured: we encourage all our lawyers and employees to improve their English (through individual classes, a shared library, subscriptions to English-language press, writing articles and newsletters in English and Italian, etc.).

So we take this opportunity to wish you: Une belle et heureuse année ! Happy New Year! Ein gutes neues Jahr! Feliz año! Buon anno!

Increased international activity

At DELSOL Avocats, we assist our clients, whether they are French and have international projects or are foreign and are involved in operations in France. The Firm's field of action thus extends to all continents, and cases with an international component represent an increasingly significant part of our activity.

Our teams are able to coordinate our clients' projects, assist them in understanding foreign (for our French clients) and French (for our foreign clients) legal practices and in negotiating and drafting investment contracts, industrial or commercial partnership agreements, and resolving their disputes.

The Firm's international development has increased in recent years through the integration of partners and associates from international firms.

DELSOL Avocats also maintains close relations with partner firms who are leading players in their respective jurisdictions. The Firm is a member of two international networks, PARLEX and TELFA (see box on page 4). These firms bring together lawyers whose working methods, demand for quality and responsiveness, and billing rates are similar to our own.



DELSOL Avocats has also decided to capitalise on the proximity of our Lyon office to Italy to set up an «Italian desk» and thus boost our transalpine activities. This service is provided by several bilingual partners and associates (see box on page 3) who form a key team for French-Italian issues, capable of advising both Italian companies established on French territory and French companies developing business in Italy.

DELSOL Avocats is proud to be an independent French business law firm with a strong international footprint.

Non-profit organisations: how to reach out to the world!

Many French organisations, whether associations, foundations, congregations or endowment funds, carry out their activities beyond the borders of France, not only in Europe but also throughout the world; at the same time, similar organisations that are mainly established abroad take action and raise funds through campaigns in France.



Lionel DEVIC Partner
"Non-Profit Organisations – Social and solidarity-based entrepreneurship"

Be it in the fields of culture, religion, humanitarian assistance, science or sport, organisations governed by French law frequently take action at the international level, either as part of a federation or in cooperation with or in support of actions developed outside France.

Therefore, in addition to considerations relating to governance, respect for the image of entities and for the social missions of these organisations, other aspects concerning taxation, particularly in the area of fundraising, and the recognition of the legal status of French organisations abroad, are very often at issue and require our assistance.

In the European Union, the legal personality of a French entity is generally recognised; and in the context of coordinating actions and sharing common resources, the EEIG (European Economic Interest Grouping) can make things easier, since plans for the status of European organisations or foundations are still at a standstill for mostly... fiscal reasons!

It is also possible to rely on foreign umbrella foundations, such as the Fondation de France in France, for example.

In other countries, where there are no local entities already present as partners, then **dedicated organisations** must be created, from scratch (often with the help of correspondents from the PARLEX and TELFA networks, or some of our friends). In this case, account must be taken of the different approaches depending on the country's

legal tradition, both with regard to common law, and to our own civil law practices.

In matters of taxation, the Firm is involved in securing the **collection of donations** and gifts in France when they are to be used in foreign countries. European case law makes it easier for general interest activities based in EEA member countries. However, it is much more difficult for French organisations to grant tax advantages to sponsors who are tax residents abroad, or for foreign entities to organise fundraising in France. In this area, the French authorities tend not to be prompt in responding to requests that are nevertheless regularly made.

Finally, the firm has solid experience in helping foreign organisations adjust to French legal and fiscal obligations, which are often more elaborate than in other countries. This is especially true of religious activities

which, unlike very many countries, are not considered to be in the general interest.

Takeover of Olympique Lyonnais by the American John Textor

DELSOL Avocats is proud to have advised Holnest, the family holding company of Jean-Michel AULAS, on the sale of Olympique Lyonnais football club to Eagle Football Holdings LLC, controlled by John Textor. A multi-disciplinary team experienced in US practices was involved on both the corporate aspects (Henri-Louis DELSOL, Vincent GUEVENOUX, Doriane CHEVILLOT) and the financial aspects (Frédéric SUBRA, Maïlys de MEYER) of the deal.



Jean-Michel AULAS,
CEO, Olympique Lyonnais

«DELSOL Avocats' knowledge of US M&A practices, and their technical skill and availability throughout the negotiations, were a real asset for the success of the project», says Jean-Michel AULAS.

The fiscal challenges of setting up abroad

Different types of entities

The local establishment of a French business can take different forms:

- **A liaison office or branch** (for business development or logistics activities): as long as this establishment does not create a commercial presence, it will not, in principle, constitute a permanent establishment and therefore a taxable entity.
- **A commercial presence constituting a permanent establishment:** in this case, a choice must be made between the recognition of this

establishment (with a great deal of accounting and tax management done solely by the French company but for two countries) or creating a subsidiary.

- **A takeover of a local distributor:** In this case, the problem will be the integration of this distributor and, in particular, the question of whether the prices applied with the latter should be maintained or adjusted in the event of major changes in operating conditions.

Overall consistency through the transfer pricing policy

When establishing a group in several countries, and when certain financial thresholds are reached, **transfer pricing** documentation complying with both French and local standards for the countries in which the subsidiaries are established should be drafted (even if the OECD standards have led to relative harmonisation in this area).

It is important to note that market prices are applied for flows between group companies but also for non-recurring transactions between them, such as sales of assets or company

reorganisations. For these reorganisations, special attention should be paid to situations where an activity is discontinued in one country and taken over in another because this can be analysed as a form of transfer of goodwill, with consequences on both corporate tax and registration fees. We will end with a few words on digital technology.

In the event of global digital activity, the question today is whether the group's transfer pricing policy should be changed in anticipation of OECD Pillar 1, which aims to tax profits at the place of consumption and no longer according to the location of the IP.



Julien MONSENEGO, Partner
Samuel VINCENT, Associate
"Corporate Taxation"

Practical aspects of establishing French companies in Italy

DELSOL Avocats assists French clients with their projects to set up business in Italy, particularly through the creation of subsidiaries or the acquisition of target companies, offering effective support thanks to our knowledge of specific Italian practices and standards and our network of transalpine professionals. Italian and French law have similarities, due both to their common origins and to European harmonisation, but there are major differences in contractual and business practices.

Here is an overview of some of the practical aspects to bear in mind when setting up a business in Italy.



Philippe DUMEZ, Partner
Gloria MILLEPEZZI, Lawyer at Lyon and Turin bars
"Mergers & Acquisitions – Corporate law"

Creating a subsidiary in Italy

Local specificities may arise in this context and particularly impact the content of the articles of association and the incorporation procedures. The **choice of corporate form and the drafting of articles** require good knowledge of Italian legislation and case law in order to produce compliant documents. Incorporating a company in Italy generally requires the involvement of a lawyer, but above all of a notary (who will draw up the deed of incorporation) and a chartered accountant, (*commercialista*), who will handle the registration of the new entity with the tax administration and the legal secretarial duties throughout

the company's existence. It is also necessary to comply with the obligations laid down by the **anti-money laundering standard**, which is quite strictly applied by banks in Italy where the cash contributions of the future founders are deposited.

Acquiring targets in Italy

Despite the different practices between France and Italy, our team is able to manage the specificities in each area of such an operation. For example, whereas a share transfer agreement is necessary in France, in Italy an option contract, in which the parties reciprocally confer the right to exercise a sale option and a purchase option, must be drawn up. **The structure of the ALG** (assets and liabilities guarantee), where there is one, also differs in the two countries: while it is usually inserted directly into the transfer agreement in

Italy, it is a separate contract in French practice. The demands of the natural person seller who is an Italian tax resident also have an impact on the choice of closing date. Under the temporary tax provisions, the transferor is entitled to an option giving him the right to a favourable capital gains tax regime, provided that he files a report on the valuation of the interest sold by 15 November of the year of the sale, and that he pays a «substitute» tax, at a lower flat rate, but which increases over time. This option can therefore encourage the parties to finalise the sale within timeframes that are nothing like they are in France. Finally, in terms of corporate concentration, **M&A transactions** involving companies exceeding certain revenue thresholds must be disclosed to the Italian competition authority. And the thresholds differ to those applied in France.



Italian Desk

The Italian Desk brings together the firm's lawyers who can provide Italian professionals with comprehensive services in Italian for their transnational business and also assist French companies wishing to develop their business in Italy. Some are Italian, others have studied and/or worked in Italy, either in companies or in Italian law firms.

Operating from our Paris and Lyon offices, the Italian Desk provides clients with advisory and litigation services on the legal issues they face, including mergers and acquisitions, corporate law, taxation, employment, real-estate and construction law.

The regulatory requirements applicable to the import and export of human biological samples

Human biological samples (HBS) - i.e. cells, tissues, organs or blood products of human origin - are valuable sources of information that may be transferred across national borders.

Under French law, importing and exporting HBS from or to France **requires an authorisation from** (i) the Ministry of Research when it is for scientific purposes or (ii) the National Agency for the Safety of Medicines and Health Products (ANSM) when it is for therapeutic purposes.

In addition, anyone bringing HBS into France must ensure that the

samples have been obtained or collected with the **prior consent of the donor** and that no payment has been made to the latter.

The **law of the country** to or from which the HBS are imported or exported must also be complied with, which involves working closely with a law firm located in that country. Beyond the regulatory requirements, the legal and operational conditions

of the transfer of HBS are defined, in practice, by Material Transfer Agreements (MTA), which relate in particular to intellectual property rights, compliance with regulations on personal data protection or the sharing of responsibilities between the parties.

Here again, the assistance of a foreign law firm is necessary if the parties choose to subject their MTA

to foreign law. We master the aspects of French law applicable to the import and export of HBS and are used to working with our colleagues in the TELFA and PARLEX networks, to which the Firm belongs, on aspects covered by foreign law.



Gaëlle MERLIER, Partner
Bastien PAVEC, Associate
Camille NICOLAÏ, Associate
"Life Sciences"

...clients with the screening of foreign direct investments in France



Pierre GOUGÉ, Partner Edouard PIQUE, Associate
«Mergers & Acquisitions – Corporate law»

Among the measures taken to support its foreign clients investing in France, DELSOL Avocats pays particular attention to following the procedure for screening foreign direct investments in France in connection with the Minister for the Economy. There are three conditions for this procedure to apply:

- the involvement of a foreign investor, defined as (i) any natural person of foreign nationality, (ii) any natural person of French nationality who is not domiciled in France within the meaning of Article 4 B of the French Tax Code, (iii) any foreign entity, and (iv) any French entity controlled by one or more of the persons or entities mentioned in (i), (ii) or (iii);
- an investment in a French entity, defined as (i) any acquisition of control (within the meaning of Article L. 233-3 of the

French Commercial Code), (ii) the direct or indirect crossing, alone or in concert, of the threshold of 25% of voting rights, and lastly, (iii) the acquisition of all or part of a business line;

- the conduct by the entity in which the investment is made of one or more activities which are involved, even occasionally, in the exercise of public authority or are likely to prejudice public order, public security or national defence interests (known as «sensitive activities»).

The application for authorisation is filed by the investor. Within 30 days of receiving the application (phase 1), the Minister of the Economy makes his decision and states:

- either that the investment does not come under the regulations;
- or that it does and is authorised;
- or that it is subject to the regulations but further examination is required, in which case the application moves to phase 2.

After receiving notice of the start of the second

phase, another period of 45 working days begins, at the end of which the investment is either refused or authorised, subject to compliance with certain conditions.

With regard to the aim of protecting national interests, the most common conditions relate to the governance of the target company or the implementation of measures to ensure the protection of information deemed sensitive and confidential.

In any event, be it during the application for authorisation or monitoring compliance with the conditions, meticulous preparation is required when the applications are submitted and dialogue with the Ministry of the Economy is ongoing.

This allows a pragmatic approach to be taken to this procedure.

Networks

PARLEX is a multi-disciplinary international network of 30 independent business law firms which, for more than 50 years, has been working to provide access to legal professionals in 28 countries by offering clients their in-depth knowledge of their respective domestic markets.

DELSOL Avocats joined PARLEX in 2007. Pierre GOUGÉ, Partner, is an active member of the network.



Founded in 1989, TELFA (Trans-European Law Firms Alliance) was born out of the need to support the cross-border transactions of law firms' clients in the various European jurisdictions. Its offer is very complementary to that of PARLEX and provides a better network of territories.

DELSOL Avocats joined TELFA in 2013. Emmanuel KAEPPÉLIN, Managing Partner, sits on the network's Board of Directors.

The Firm's partners and associates take part in various events, conferences and discussion groups organised by these networks, which are always an opportunity for very interesting exchanges.

...the US group DataBank, a leading American DataCenters operator, and its subsidiary in France, zColo

Our Real Estate (Adrien WILLIOT and Cyprien de SCORBIAC), M&A – Corporate law (Pierre GOUGÉ and Edouard PIQUE), Employment Law (Elsa LEDERLIN and Arthur HITIER) and Public Law (Renaud-Jean CHAUSSADE) departments regularly advise and assist the international Houston-based group (USA) DataBank, which specialises in DataCenters.

DataBank has 74 Data Centre sites in total, located mainly in the USA, but also in France and the UK, with buildings covering an overall area of 250,000 m².

DELSOL Avocats handles all the legal issues of DataBank's entities in

France. The Firm has particularly taken part in renegotiating certain commercial leases of DataBank's French sites, in an operation involving major restructuring work for a site in Vélizy, in the day-to-day management of individual and collective labour law matters,

in negotiations of its business agreements and partnerships and, more generally, in capital transactions on behalf of the group's main shareholder, as well as the signing of public procurement contracts for hosting services.

DELSOL Avocats works with DataBank's French teams and their General Legal Counsel who is based in Houston, but also with members of the US-based transaction teams on certain issues.

Adrien WILLIOT
Partner
«Real Estate»



La presse en parle...



Frédéric DOUET penned an article on 9 November 2022 in the magazine Gestion de Fortune, on gradual and residual donations: « *Les libéralités graduelles et les libéralités résiduelles* ».



Xavier DELSOL was interviewed for an article on donating a company published in Droit & Patrimoine on 7 October 2022, taking the example of the US company Patagonia whose founder announced the transfer of his company's

shares to a non-profit organisation working to combat the environmental crisis: « *Donner sa société-Mode d'emploi* ».

Jean-François DEFUDES wrote an article on electronic billing and how to anticipate a reform with major impacts on the organisation of companies in the Magazine Option Finance/ Option Droit & Affaires, of 5 September 2022. In the same issue, Julien MONSENEGO took part in the editorial round table on tax audits and transfer pricing.

Philippe PACOTTE and Arthur LAMPERT penned an article titled « *Pas de consultation du CSE d'établissement sur des mesures concernant plusieurs établissements* » in issue no. 548 of the magazine Jurisprudence Sociale Lamy, of 23 September 2022.

Arnaud LAROCHE was interviewed by Les Echos for an article on business leaders who transfer their company to a foundation: « *Ces dirigeants qui cèdent leur entreprise à une fondation* ».

Les Echos

Frédéric DOUET wrote an article in the newspaper Les Echos of 1 September 2022, under the title « *Inflation et barème d'imposition sur le revenu* ».



Predictice

Jeanne BOSSI MALAFOSSE and Apolline LEFAURE penned an article titled « *Google Analytics: un outil non conforme au RGPD* » featured on the blog Predictice on 27 July 2022.

In July 2022, the magazine Ingénierie Patrimoniale published an article by Mathieu LE TACON, Léa ZERILLI, Eve DAUVOIS and Sophie MORAINÉ titled « *Les opérations d'apport-cession* » and an article by Mathieu LE TACON and Justine MARLOT titled « *Les modalités d'externalisation d'actifs avant la cession de l'entreprise* ».

Philippe PACOTTE and Solène BOROCOCCO wrote an article on the non-payment of overtime for employees under a flat-rate pay contract who work on Sunday in issue 551 of Jurisprudence Sociale Lamy, of 7 November 2022: « *Pas de paiement d'heures supplémentaires pour un salarié soumis à une convention de forfait en jours travaillant le dimanche* ».

Work highlights

Acquisition

Investment in Naxicap partners

Sustainability-linked bond subscription

Fundraise

Acquisition in the Netherlands

Launch of the 1st 100% philanthropic tech investment fund

Acquisition of interest

Investor advice on the MBO of F2A

Minority interest acquisition

Acquisition

Spotlight on...



... capital transactions prior to the sale of a business, new social economy financing models, GDPR and sensitive data, and whistleblowers.

Mathieu LE TACON, Jean-Baptiste AUTRIC, Jeanne BOSSI MALAFOSSE and Philippe PACOTTE have analysed these various topics of current legal affairs.

You can find these video podcasts and the previous episodes in the video library accessible by scanning the QR Code above.

New financing models of the
SOCIAL ECONOMY



GDPR
and sensitive data



CAPITAL TRANSACTIONS
prior to the sale of a business



WHISTLEBLOWERS



Événements

8 December 2022

Delphine BRETAGNOLLE and Amaury DUMAS-MARZE took part in a conference organised under the scientific guidance of Nicolas BORGA, who lectures at Jean Moulin Lyon 3 University, and Jean-François GUYONNET, judicial administrator, on the theme of "Restructuring: the asset disposal plan."



7 December 2022

Philippe DUMEZ took part in the Forum de l'entrepreneuriat in Lyon on 7 December 2022 and gave a conference on the legal framework of creating and taking over a business.

9 November 2022

DELSOL Avocats was at the Palmarès du Droit event organised in Lyon by Le Monde du Droit and received awards in three categories: Public Law (Silver trophy), Environment (Bronze trophy) and Tax (Bronze trophy).

13 October 2022

Raphaël ORY was an expert at the conference on the topic of solutions for managing international subsidiaries organised by Lyon Place Financière.



30 September 2022

Jeanne BOSSI MALAFOSSE took part in the Convention on Health Analysis and Management 2022 (CHAM) from 30 September to 1 October in Chamonix, in the context of the debate on Forecasting.

27 September 2022

Jean-François DEFUDES a ran a webinar on the topic of electronic billing (analysis of the reform and review of the latest developments).

20 September 2022

Jeanne BOSSI MALAFOSSE, Apolline LEFAURE and Maëva MANAUD ran a webinar on new EU regulations (DGA, Data Act, DSA, DMA and AI) and the GDPR.

Our lawyers, our international ambassadors

Considering that the firm's lawyers are international ambassadors, several initiatives have been taken to give them the opportunity to meet their foreign colleagues and develop their activity beyond our borders.



Léa ZERILLI travelled to London, for example, to meet the tax lawyers at the firms Blickrothenberg and Wedlake Bell to decide which synergies we can create together for the future. By the end of the year, Léa will obtain status as sports agent lawyer and will thus be able to continue developing her work assisting professional footballers from abroad.



Anouchka VIÉ completed a three-week mission at the London law firm Bates Wells, which is a member of the PARLEX network. She worked with their Non-Profit Organisations team, the largest in the British market.



Apolline LEFAURE, Maëva MANAUD and Gabriela PINTILESCU took part in the annual Associates Meeting organised by TELFA in Tallinn, Estonia, on the theme "Blockchain and cryptocurrencies".

These meetings were all an opportunity for rewarding exchanges as part of a process to continuously improve the Firm's services for our clients

Annual Endowment Fund Competition



For some 15 years, DELSOL Avocats has been supporting associations through patronage actions. Each year, following the competition organised by its endowment fund, DELSOL Avocats allocates donations to innovative philanthropic projects.

On 20 October 2022, at the Forum National des Associations & Fondations organised in Paris, the three finalists presented their projects to a panel of judges composed of Gaëlle MERLIER and Lionel DEVIC, partners, and Sophie ROUXEL, Event manager of the Forum - Les Echos Le Parisien.

The 1st prize (€20,000) was awarded to the Fratries Endowment Fund, whose project aims to create inclusive habitats in the form of shared housing for young people with mental disabilities (or with autistic disorders) and young workers.

The 2nd prize (€12,000) went to the association Le domaine de l'aube, which is overseeing the creation of a medical centre - the first contemporary building of its kind in the Rhône-Alpes Auvergne region - for palliative care patients and their families.

Finally, the 3rd prize (€7,000) was awarded to the association Grâce au jardin, which has set up a market gardening and integration farm.

DELSOL Avocats is pleased to support these associations and enable them to carry out meaningful projects for the good of mankind.

View the pictures of this great event via the QR code below:

