

# The Budget Act for 2020 has been successfully enacted

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by GFD AVOCATS

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On December 27, 2019 the Constitutional Council validated the main measures established by the Budget Act for 2020 (**the Act**)<sup>1</sup>. The Act was enacted on 29 December 2019.

Numerous amendments were proposed by the Senate, especially with regards to property wealth tax, but these amendments were overwhelmingly rejected by members of Parliament (**MPs**). There is one notable exception. MP increased the non-tax-deductible share of costs and charges on capital gains on participations from 12 to 13.29%. This amendment was successfully removed by the Senate.

The Act's key objectives include, the transformation of the tax credit for the energy transition, the abolition of the housing tax and the reduction of income tax due by households in the lower income tax brackets. The Act also introduces several provisions relating to companies and managers, a summary of which is given below.

## I. Measures impacting companies

### a. Provisions adopted without major modification

The majority of the provisions affecting businesses have been adopted without major changes.

#### *i. The gradual decrease in corporate tax is set at a slower pace for large companies*

The Law provides that the reduction of the early corporate tax will be slower for companies with a turnover of at least € 250 million.

Turnover	Taxable bracket	Financial year				
		2018	2019	2020	2021	2022
CA < 7,63 M€	0 à 38 120	15 % <sup>(1)</sup>				
	38 120 à 500 000	28%	28%	28%	26,50%	25%
	> 500 000	33,1/3 %	31%			
7,63 M€ ≤ CA < 250 M€	0 à 500 000	28%	28%	28%	26,50%	25%
	> 500 000	33,1/3 %	31%			
CA ≥ 250 M€	0 à 500 000	28%	28%	28%	<b>27,50%</b>	25%
	> 500 000	33,1/3 %	<b>33,1/3%</b>	<b>31%</b>		

<sup>(1)</sup> Subject to compliance with certain conditions of ownership of the share capital

<sup>1</sup> Decision n° 2019-796 DC 27 December 2019

ii. *Transposition of anti-hybrid rules*

As a reminder, the Act replaced the current anti-hybrid provisions of Article 212 I. B of the French Tax

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Despite an attempt by the Senate to introduce an exception for the banking sector, the new anti-hybrid provisions were adopted without major changes.

iii. *Transfer of an isolated asset*

The Act allows to tax over a period of five years capital gains resulting from the transfer of an isolated fixed asset from France to another Member State. Such a possibility was previously restricted to capital gains resulting from the transfer to another Member State of the seat or of an establishment of a company.

iv. *Transposition of the VAT Directives*

The transposition of the directives relating to the VAT system was adopted without modifications<sup>2</sup>.

The Directive on the VAT Regime for Electronic Commerce aims to simplify VAT obligations as from 2021 for companies conducting cross-border online sales of goods or services to final consumers and to ensure that VAT on such transactions is properly paid to the Member State where the customer is located.

Currently, the distance sales VAT regime allows operators to apply the VAT of the Member State of dispatch within the limit of a specific turnover threshold determined by the Member State where the customer is located (e.g. € 35 000 in France). This threshold is to be reduced to € 10 000 for all Member States. The VAT of the recipient's State could then be declared and paid to a one-stop shop situated in the Member State of the supplier.

In addition, imports of goods of low value (less than € 150) from non-EU countries are to be exempt from VAT subject to the filing with the new one stop shop regime.

VAT is to be paid by internet platforms that have facilitated the following sales to the final consumer:

- either the sale of imported goods of low value; or
- the distance sale of goods by a taxable person not established in the European union to a non-taxable person.

These platforms would be imposed specific obligations including the keeping of a register of sales, in order to facilitate reviews by tax authorities.

The Act also simplifies certain rules on intra-Community supplies.

Currently, when the goods are dispatched, by a taxable person or on their behalf, from another Member State to France, to a French customer where they are stored in call off stocks before being acquired by the client, the assignment to France by the supplier is treated as an intra-Community acquisition in France and subject to French VAT.

<sup>2</sup> Directive (EU) 2017/2455 December 5, 2017; Directive (EU) 2018/1910 Council December 4, 2018

According to the Act, this transaction would be treated as an exempt intra-Community delivery in the Member State of dispatch and as a taxable intra-Community acquisition for the acquirer in the Member State of delivery.

In a chain of transactions taking place before goods are shipped to another Member State, new rules harmonize national practices and facilitate the implementation of the Court of Justice of The European

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number in the State of departure of the goods.

These simplification measures are accompanied by an amendment which makes the supply of an intra-Community VAT number by the purchaser and the declaration of a Trade of Goods Declaration (TGD) substantive conditions for VAT exemption.

In the context of the various simplifications above, the Act imposes more complex compliance obligations on warehouses and introduces a public list of platforms that do not meet the repeated requests from the tax administration to comply with VAT rules.

### *v. Simplification of VAT recovery on import*

The provision which simplifies the recovery of import VAT by submitting from 2022 the declaration and payment of VAT by a taxable person under the common rules (self-assessment in most cases), is adopted without modification.

### *vi. Clarification of the VAT regime for investment funds*

The provision which takes note of the case law of the CJEU<sup>4</sup> by exempting from VAT all organizations with characteristics similar to French collective investment schemes is adopted without major modifications.

### *vii. Electronic invoicing*

The progressive introduction of the obligation to issue electronic invoices between VATable persons is maintained. The content of these invoices will be automatically collected by the tax authorities.

## b. Provisions that have been subject to significant amendments

### *i. Withholding taxes applicable to non-resident corporations*

According to Article 115 quinquies of the FTC, profits earned in France by foreign companies are deemed to be distributed by the foreign head office. As a result, they are subject to the withholding tax provided for in Article 119 a, 2 of the FTC. It is possible, however, to request a refund of the withholding tax if it is demonstrated that the actual distributions by the foreign head office were lower than the amount of the profits made in France. A judgment of the French administrative supreme court (Conseil d'Etat) held that this French-style "branch tax" was inconsistent with EU freedom of establishment<sup>5</sup>. It took that position on the basis that a company having its head office in a Member State of the European Union (or is party to the agreement on the European Economic Area) is not

<sup>3</sup> CJEU, C-386/16, July 26, 2017, Toridas UAB; CJEU, C-628/16, February 21, 2018, Kreuzmayr

<sup>4</sup> CJEU C-595/13 - Fiscale Eenheid X

<sup>5</sup> CE July 10, 2019, Société Cofinimmo, n° 412581

allowed to reduce the taxation when the French profits have not been transferred out of France. The Act solves this inconsistency with European Union treaties.

Additionally, changes in the French legislation are proposed in order to allow the reimbursement of the dividend withholding tax for French-source dividends paid to a company in the deficit position. They result from the case law of the CJEU<sup>6</sup>, which held that EU law was opposed to withholding tax levied on the basis of French-source dividends paid to a company in a deficit position.

The withholding tax can be refunded if the corporate shareholder to which the dividend is paid:

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claims relating to taxes, similar to that provided for by the European Union.

However, the payment becomes due when the shareholder is back to a profit position.

MPs restricted these benefits to companies located in a Member State of the European Union or in another State party to the Agreement on the European Economic Area which has concluded an administrative assistance agreement with France in order to combat against tax fraud and tax evasion.

### *ii. Adjustment to the French research tax credit*

The operating expenses lumpsum amount taken into account for the calculation of the Research and Innovation Tax Credits (CIR and CII) is lowered from 50 to 43% of direct expenses.

MPs have introduced certain restrictions on subcontracting expenditure in order to limit successive subcontracting which may give entitlement to the CIR.

### *iii. Tax credit for donations*

The tax credit for donations is to be reduced to 40% of the total amount of gifts exceeding 2 million euros instead of 60% currently.

Note that the basis of the tax credit is in principle limited to the higher of 5% of the turnover or € 10 000. Parliamentarians have reinforced this alternative ceiling for SMEs by raising it to € 20 000.

## c. Provisions added by MPS and senators

### *i. Limitation of the deductibility of financial charges is reduced for "autonomous" companies*

A safe heaven provision allows a company to obtain an additional deduction of 75% of the sums exceeding the common law ceiling (the higher of 30% of the fiscal EBITDA or € 3 million) if its ratio of financial autonomy (equity over all assets) is not lower than that of consolidated group.

This advantage is extended to all companies which are not part of a consolidated group and which could not, by definition, provide such proof.

<sup>6</sup> CJUE 22 novembre 2018, C-575/17, Sofina SA

*ii. Certain provisions concerning mergers are introduced*

The Act introduces certain simplification to the tax regime for mergers:

- The transfer by the absorbed company of its deficits, non-deducted net financial charges and deduction capacity, is exempt from obtaining prior administrative authorization when it concerns a total amount of less than € 200 000 ;
- The simplified merger legal regime was extended to sister companies wholly owned by a common shareholder. The Act confirms that the preferential tax regime is applicable to such mergers. In addition, it specifies the procedures and ensure the consistency of the tax regime with the computation the holding period for the application of the parent-subsidary tax regime and the long-term regime on capital gains or losses on equity securities.

*iii. Extension of the scheme for young innovative companies*

The scheme for young innovative companies is extended until December 31, 2022.

## II. Articles of interest to natural persons

### a. Provisions adopted without major modification

#### i. *Repeal of taxation over several years of certain exceptional income*

The provision which puts an end to the taxation of retirement allowances over a period of four years, was adopted without modification.

#### ii. *Tacit declaration of income*

Taxpayers whose information for establishing taxable income is available to the administration and who have not made any amendment to their prefilled tax-return before the deadline, will be deemed to have submitted their tax return as prefilled.

This measure would apply to 2019 tax returns submitted in 2020.

### b. Provisions that have been subject to significant amendments

#### i. *Tax domiciliation in France of the directors of large French companies*

The Act provided from the outset for the tax domiciliation in France of the directors of large companies.

This provision has been the subject of numerous amendments in order to define its scope:

- The turnover of the companies concerned is reduced from € 1 billion to € 250 million;
- Managers have the possibility of demonstrating that they do not exercise their main activity in France and that they cannot therefore be domiciled there under this provision;
- Certain members of the Management Board are excluded from the scope;

This provision is applicable from 2019 for income tax and 2020 for the other taxes.

Although this new domiciliation rule has been explicitly approved by the Constitutional Council, it will apply subject to the provisions of international tax conventions signed by France, limiting its practical impact.

#### ii. *Use of data made public on social networks*

In order to fight against fraud, the Act introduced a provision which granted the tax authorities the right to carry out automatic processing of data published on social networks and matchmaking platforms. This approach was notably the subject of reservations by the French personal data protection authority (CNIL)<sup>7</sup>.

This provision was submitted to the review of the Constitutional Council which largely validated it. In fact, he considered that the legislator was pursuing an object of constitutional value in the fight against tax fraud and tax evasion and that the conditions and procedures for collecting and storing data were satisfactory.

### c. Provisions added by MPs and senators

#### i. *BSPCE*

Company founder share warrants, are securities which giving access to share capital reserved for employees or executives of new companies, commonly referred to as “BSPCEs”. Employees then benefit from the advantageous taxation of the 30% flat tax.

<sup>7</sup> Deliberation n° 2019-114 Septembre 12, 2019

The senators introduced a provision which extends the benefit of the subscription of such issued by companies which are resident on the territory of the European Union, or a State or territory having concluded with the France an administrative assistance agreement to fight tax fraud.

*ii. Alignment of withholding tax for non-residents to the withholding tax postponed to 2023*

The budget act for 2019 provided for aligning from 2020 the methods of taxation of French source salaries and pensions paid to non-residents with the source deduction. Parliamentarians established a moratorium until 2023.

The taxation on the basis of three tax brackets 0 to 20% will therefore remain applicable to the salaries and pensions received by non-residents in 2020, 2021 and 2022.

However, the lower brackets currently constitute a final taxation. This will no longer be the case as from 2021. Additionally, and the minimum tax (20 to 30%), raised by the budget act for 2019, is maintained, despite an attempt by the Senate to lower it.

*iii. Taxation of life insurance contracts signed before 1983*

The tax regime for life insurance contracts signed before 1983 is subject to "little retroactive" tax. In fact, the proceeds of such contracts were completely exempt from income tax, regardless of the date of payment of the premiums.

For premiums paid after October 10, 2019, the products will follow the current life insurance plan for contracts over 8 years old. They therefore benefit from an annual allowance (€ 4 600 for a single person or € 9 200 for a couple) and the reduced rate of 7.5% (12.8% for payments over € 150 000)

*iv. Increased flexibility for the tax regime for carried interest*

The favorable tax regime for carried interest was restricted to management teams representing at least 1% of total subscriptions.

In order to allow teams of large funds to benefit from such a tax regime, this minimum holding was reduced by the senators to 0.5% for investment structures with a capitalization in excess of one billion euros.

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