INVEST IN EUROPE
INFORMATION LETTER

EUROPE

➢ UPDATE CUSTOMS CODE : A DECISIVE BUT NOT FINAL STEP !

The EC Regulation n°450/2008 of the Parliament and the Council of the 23rd of April 2008 establishing the Community Custom Code has finally been published in the OJEU (Official Journal of the European Union) L 145 of 4th June 2008.
This Regulation follows the previous decision of the Parliament and Council in relation with a paperless environment for custom and trade.
This modification is the "Modernization" section of the ongoing reform, and is added up to the "Security" section of the EC Regulation n°648/2005 of the Parliament and the Council of 13th April 2005, itself completed by the EC Regulation n°1875/2006 of the Commission of 18th December 2006 (OJEU L 360 of 19th December 2006).

Regulation 648/2005 specified the major axis of the reform: implementation of a risks management framework and introduction of an obligation to present summarized entry and exit declarations taking up prior arrival and departure information for the goods that will be taken into account by the new systems ICS (Import Control System) and ECS (Export Control System); the **Authorized Economic Operator (AEO**) statute softening the new requirements for any enterprise fulfilling common criteria in relation with control systems, financial solvency and records of the operator.

Regulation 1875/2006 introduced a computerized control system for exports and a common electronic information system for the AEOs data.
In order to assist Member States in the implementation of those new rules, the European Commission published the **AEOs Guidelines the 29th June 2007**.

Last, the administrative decision n° 07-066 of 19th December 2007 (published in the French Custom Official Report n°6741 of 24th December 2007) specified the 3 types of certificates provided by the AEO: a "custom simplification" certificate, a "security and safety" certificate, and a complete certificate.
This "Security" section shall be implemented progressively:

- From the **1st of January 2008** for the **measures in relation with the grant of AEO statute**. The global outcome (less than a thousand applications for the whole European Union) remains disappointing. In France, over around 40 applications, only 2 certificates have been delivered by the French authorities. This very limited success is certainly due to the limited advantages given to the AEOs regarding the preliminary summarized declarations (ICS ECS). However, there is no doubt that this statute will quickly become a competitive advantage. Some companies have already decided to make it a conditional part of their calls for tenders.
Moreover, the statute will be the condition for the grant of the future Single Community Custom Clearing Procedure (SCCCP).
At last, the mutual recognition with the United States that will probably emerge in 2009 (within the C-TPAT program/Customs Trade Partnership Against Terrorism) will be a strong incentive for AEO applications.

The applicant company shall first answer an auto-evaluation survey before being subject to an audit by the Regional Audit Service under the control of the unit constituted within the Custom Head Office (office E3). Obtaining period will hardly be less than 4 to 6 month.

- From the **1st of July 2009** for the definition of the **required data and the formalities related to the deposit by electronic mean of the prior entry and exit information**. For this entry into force, operators are still waiting for the publication of the implementing measures of the code (DAC) which are still under discussion; they are concerned about this delay less than a year before the D-day.
- Other measures of the new code will come into force within a 5 year period after the coming into force of the Regulation of 23rd April 2008. Notably, the Single Window that allows operators to carry out their declarations with the custom desk of their choice, whatever is the route of the goods, will not be available before 2011.
- Generally, the E-customs community program (phasing out of actual declarations) will be fully implemented in 2013.

Beyond the innovations related to the Security section and the phasing out of formalities, the new custom code includes important innovations in relation with the basic rules:

- **Customs regimes** are simplified and limited to 3 categories: the released for free circulation, export, and peculiar regimes (themselves including the transit, the storage, the specific use and the processing);
- In relation with **custom debt**, the issue of fair and identical treatment in all the Member States has been raised along with the possibility of a unique and global guarantee for all regimes taken together; especially, the new code brings together the current measures in relation with *a posteriori* non recovery following a mistake by the custom authorities (article 220) and the measures in relation with remission or in equity reimbursement (article 239);
- **Custom representation** (direct or indirect) will not be the exclusivity of the commissioners only as it is currently the case in France;
- The **Contradictory** improves: every decision that might have unfavorable effects for the concerned party shall be motivated and shall come with a suspensive right of appeal;
- Litigation: the three-year **prescription** is extended to ten years when facts are punishable under criminal law; the French code prescribing a thirty-year prescription in this case shall comply with the new rule.

Even there are still blurred areas and several field the Modernization did not cover, it is beyond doubt that the Regulation of the 4th of June will be an important step in the History of the Custom Union which is celebrating 40 years this year.

➢ EUROPEAN FUNDING CALLS FOR PROPOSAL

Ds is constantly following new developments in European financing funds. We have got the expertise ensuring our clients visibility, monitoring, and assistance throughout European funding applications. This call for proposal is a piece of information about financed actions, deadlines and specifics criteria's for projects opened and

financed by European Funding. Don't hesitate to contact us for more information and funding!

- **EIDHR – Democratic Republic of Congo**

Program: EIDHR - European Instrument for Democracy and Human Rights – Country support scheme
Domains Concerned: **Social Affairs, Public management, local development, Humanitarian, Human rights, Cooperation and Development**

This call for proposal is in relation with the financing of actions designed to strengthen the role of civil society, to facilitate conciliation of group interests, and to consolidate political participation and representation in the DRC through micro-projects implemented by local NGOs.

Closing Dates: 2009-04-30
Applicants: Universities, Development NGOs, Associations

Regions: Democratic Republic of Congo

- **FP7 – Cooperation – Energy – Second Generation Biofuels – EU Brazil Coordinated Call**

Program: FP7 – Cooperation – 5 Energy, FP7 – EU Framework Program for research, Technological Development and Demonstration Activities
Domains Concerned: **Energy, Environment, Research**

The objective of energy research under FP7 is to aid the creation and establishment of the technologies necessary to adapt the current energy system into a more sustainable, competitive and secure one. It should also depend less on imported fuels and use a diverse mix of energy sources, in particular renewable, energy carriers and non polluting sources.

Closing dates: 2009-05-05
Applicants: Corporations, Research Centers, SMEs, Universities

Regions: EU Member States, Brazil

- **EU Gateway Program - Business mission in Japan**

Program: EU GATEWAY
Domain Concerned: **Environmental & Energy-related technology, Information & Communication Technology, Commerce, Construction & Building technology, Healthcare & Medical technology**

Call for proposal for business mission in Japan. The objective is to open opportunities for European companies to develop their business in Japan.

Deadlines: 2009-05-04
Applicants: SMEs, Corporations

Regions: EU Member States

- **Non-State Actors and Local Authorities in Development - Actions in partner countries - Tunisia**

Program: NON-STATE ACTORS AND LOCAL AUTHORITES IN DEVELOPMENT
Domains Concerned: **Public management, Agriculture – Fisheries, Local Development, Humanitarian, Environment, Human rights, Coop. & Development**

The objective is the support of actions presented by Non-Stats Actors which aim at promoting an inclusive and empowered society in Tunisia. Published by the EC Delegation in Tunisia.

Closing Dates: 2009-05-18
Applicants: Development NGOs, Federations, Unions,

Regions: EU Member States, Tunisia

FRANCE

The Law on the Modernization of the Economy (LME) of 4 August 2008 published in the Official Journal on 5 August 2008 includes a series of social and fiscal measures. The following are the provisions that we felt could be the most relevant for Asian companies wishing to invest, or the ones that are already developing their activity in France.

I. Measures relative to the research tax credit

II. Alteration of the (social and fiscal)system for impatriates

I. Research tax credit: modifications made to the exemption procedure

Companies wishing to obtain a research tax credit (CIR in French) can ask the tax department, before carrying out the operations in question, to determine if their incurred R&D expenditures are eligible for this system.

To assess whether the project has the scientific and technical nature required to benefit from the CIR system, the tax department might seek, not only the opinion of

the Ministry of Research, but also, as of 1st January 2009, the opinion of the Company Oséo Innovation, a 100% subsidiary of the Public Corporation Oséo (article L 80 B, 3° of the Book of Fiscal Procedures). When the opinion given by the Ministry or by Oséo Innovation Company is positive, it is binding on the taxation department which can only reject the project based on a criterion other than the scientific and technical nature. The new drafting of the text expressly stipulates that the response from the tax department must be well-founded. It also anticipates that confidential data transmitted by the companies are protected by professional secrecy binding upon the consulted parties.

Moreover, as of 1st January 2010, companies will be able to directly ask the Ministry or Oséo Innovation if their project is of a scientific and technical nature that would allow them to be eligible for the CIR system (article L 80 B, 3° *bis* of the Book of Fiscal Procedures). The decision made by the consulted body will have to be well-founded, and will be declared to the tax department within three months. This second referral procedure will exist in parallel with the direct referral to the tax department.

II. Measures taken in favour of impatriates (CGI article 81 C)

2.1. Provisions regarding the social system and residency cards

- **Improvement of the social system**

The law provides the possibility for foreign employees to contribute or not to the French retirement pension system.

To be exempt from contributing to the retirement pension system, they will have to prove to already have a retirement pension, to not having been included in a French mandatory retirement pension system within five years preceding the request, and having been present for at least three months per year within a company established outside of France where they carried out their professional activity immediately prior to the request.

- **Residency card for high level foreign executives**

To encourage the establishment of high level foreign executives, a 10 year residency card can be provided to a lawfully established foreigner who provides France with an exceptional economic contribution.

No condition regarding the duration of prior stays will be required. Upon expiry of this card, an indefinite residency card can be provided to the foreigner who applies for it, unless this person's presence constitutes a threat to public order.

2.2. Tax measures: exemption of activity earnings

The exemption mechanism in article 81.B of the General Tax Code (CGI) still applies to employees who took up their positions before 1st January 2008. A new mechanism has been established (article 81 C of the General Tax Code) relative to people who have taken up their positions as of 1st January 2008.

- **Exemption of activity earnings and exemption of earnings from foreign sources**

The new system applies to employees and directors fiscally qualified as employees (for example, the CEO of a joint-stock company, the GM, the chairman of the executive board, the minority manager of a PLC etc.). This includes not only people who come to work in France as part of a group's international mobility, but also people who are directly recruited abroad by French companies, and who work for a foreign company that has no link with the French company. Moreover, and with the prior approval of the Ministry of Economy and Finance, other people who can be subject to the system include non-salaried persons who provide an exceptional economic contribution to France, or who carry out, in France, an activity requiring special skills, etc.

The impatriate must not have been a tax resident of France during the five calendar years before s/he takes up the position. The impatriate must also become a tax resident of France, based on one of the three following criteria: the establishment of his/her tax domicile in France, or that of the main location of his/her residence or that of the performance of his/her main professional activity.

Impatriates will be exempt from income tax in France until December 31st of the fifth year following the year in which they take up their positions, on the following earnings:

- Firstly, on the elements of their compensation directly related to the performance of their activity in France:

This is the actual amount of the impatriation premium. Employees and corporate officers directly recruited abroad can opt for an inclusive 30% exemption on their compensation. However, the exemption only applies provided that the impatriate's compensation subject to income tax is at least equal to the compensation paid with regard to similar functions within the same company or a similar company. Any possible difference would be included in the impatriate's taxable compensation.

- Moreover, on the fraction of the compensation relating to the activity carried out abroad:

This exemption is de jure and applies to all of the collected sums (it had previously been limited to 20% of the taxable compensation in France). Benefiting from this measure requires the interval spent abroad to have been solely and directly in the employer's interests.

When the impatriate can benefit from both measures, s/he must opt:

- For the overall ceiling of the granted exemptions (impatriation premium and fraction of the compensation corresponding with the activity carried out abroad) in the amount of 50% of his/her total compensation, whether in France or abroad.

- Or for an exemption of the impatriation premium with no ceiling, provided that the exemption on the compensation corresponding with the activity carried out abroad is limited to 20%. This second option is advantageous for employees receiving a high impatriation premium.

- **Exemption of the revenues from foreign sources**

Article 81 C II establishes a French-style "*remittance basis*" by anticipating that half of the amount of the impatriate's "passive" revenues from foreign sources will be exempt for the five calendar years following the year of his/her establishment in France. This applies to the following earnings:

- Revenues from transferable capital, copyrights and fees for which the obligor is established in a State that has signed a tax convention with France and that includes an administrative assistance clause for the purpose of combating tax fraud or evasion.
- Capital gains from the disposal of transferable securities and shares, when their Custodian is established in a country covered by a convention (see above). One half of the amount of capital losses will also be taken into account.

BELGIUM

INVESTING IN BELGIUM

Located in the heart of Europe, Belgium is one of the top world destinations for foreign investments.

To stimulate economic growth, the Belgian government has implemented a series of incentives designed for companies whishing to establish on the Belgian territory.

One of the first problems encountered by a foreign investor whishing to start commercial operations in Belgium is to choose the type of entity to operate.

Create an enterprise in Belgium:
Any investor whishing to incorporate an enterprise in Belgium shall choose the appropriate legal entity. The main incorporation types are Public Companies (Sociétés Anonymes – SA), Private Companies (Société Privées à Responsabilité Limitée - SPRL) and Cooperative Companies (Sociétés Coopératives – SC).

a) Public Company (S.A.) :

The SA incorporation type is, in general, chosen by big companies. However, some Small and Medium size Enterprises (SME) also choose this form.

A minimum of two shareholders is necessary to incorporate a S.A.
The capital shall be at least 61.500 €. The S.A. is administered by at least three administrators designated by the general meeting of the shareholders.

The main advantage of the S.A. is the limited responsibility of the shareholders up to their contribution to the company.

b) Private Company (SPRL & SPRLU):

The SPRL is particularly interesting for the small private enterprises. The law sets simple and flexible functioning rules.

The SPRL is incorporated by at least two associates and the SPRLU by at least one. The minimum capital to be subscribed is only of 18.550 €. Each emitted share shall be paid up to at least 20% at the incorporation time with a minimum of 6.200 €.

The SPRL is run by one or several managers (private individual or corporations, resident or non resident, Belgian or foreign nationals).

c) Cooperative Company (SCRL) :

The SCRL is a very flexible incorporation form, intended to enterprises with a limited number of shareholders having variable contributions to the enterprise.

To create such entity, a minimum of three associates is necessary.
The minimum capital is 18.550 €. Each contribution shall represent at least a quarter of the subscribed capital with a minimum of 6.200 €.

The enterprise is run by several managers.

I. Set up a representative office in Belgium:

The representative office will be your relay in Belgium.

As long as this office limits its activity to preparatory and auxiliary operations which are not constitutive of a permanent establishment (for instance information services, public relationships), and as long as the representative people in Belgium do not have power, the representative office shall not be considered a branch under the commercial law, the accounting rules or the personal income tax regime.
There is no need to hold accountancy in Belgium, no need to register to the cross bank for enterprises, and no need to submit a tax declaration for non resident in Belgium.

II. Set up a branch:

Even the branch is not separate legal entity from its parent company; it shares the same functioning rules than companies which are fully incorporated under Belgian law. It shall be subject to Belgian VAT (Value Added Taxes), it has the obligation to

hold accountancy in accordance with Belgian accounting rules and to publish the yearly results, it shall be subject to income taxes, it recruits personnel etc.

Among other fiscal advantages, the creation of a branch does not require a minimum capital or the intervention of a notary public.

III. Set up a subsidiary:

The subsidiary is a separate legal entity from the parent company which shall be set up under one of the incorporation types (S.A., SPRL…).

With commercial consideration, the main advantage of the subsidiary is to be considered more like a Belgian or a European company than a foreign company. Clients and partners feel more secure about the sustainability of the company on the market.

IV. Tax incentives:

The following tax measures have been implemented by the Belgian government in order to facilitate and encourage the implantation of foreign companies in Belgium.

1. The notional interest deduction

The notional interest deduction, also called "deduction for capital at risk", allows Belgian or foreign enterprises to reduce their tax base. Therefore, enterprises create tax savings when they invest in equity capital.

The system has also the advantage to cancel the 0,5% of registering fees on contribution capital.

Belgian branches of a foreign parent company can also benefit of a notional interest deduction.

2. Fiscal ruling

Every tax payer can apply, under certain conditions, to an « *advantage ruling* » in accordance with which, the Federal Financial Public Service will define the applicable tax regime to a specific situation.

Thanks to this system, the potential investor obtains a legal certainty regarding tax processing of its investment in Belgium.

The procedure has been eased in order to be faster and more effective.

V. Financial aid :

According to the location of the investment (Flanders, Wallonia, or Brussels), Belgian and foreign enterprises can benefit from public financial aid.

For instance, the "Participation Fund", a federal public institution, can facilitate the financing of SMEs which have insufficient financial guarantees to get bank loans. The Fund guarantees the capital, the interests and the accessory fees of the credit in front of the granting financial institutions.

Regional subsidies can also be granted for research and development purposes.

ITALY

INVEST IN ITALY

In general, every company interested by the foreign market will get ahead progressively. When planning to market its goods and services, the company will first get familiar with the foreign country using the channel of local commercial agents. Then, a little more structured, the company gives the marketing to a national distributor. Finally, when the market or the essence of the activity makes it necessary, the company chooses to establish.

Means for establishment in European countries with a Roman-Germanic legal tradition are specific to each single country even though the legal regimes remain close to each other.

Establishing in Italy

First, companies incorporated under foreign laws (non-member countries of the European Union) can operate on the Italian territory. This assumption is, nonetheless, subject to a reciprocity condition.

They will be subject to Italian law if they have, in Italy, their effective head office or their main object.

1. Representative offices and branches

A company, legally incorporated in a foreign country can open a representative office in Italy. Commercial activity is restricted for the representative office, however, it can collect and transfer information about the market on behalf of the foreign company (rent and personnel are at the charge of the foreign company).

To operate in Italy, the foreign company can choose to open a branch (secondary establishment) according to some formalities. The activity shall be in conformity with Italian social, taxation, accounting, and company's object regulations.

Formalities to open those structures are quite simple. However, branches and representative offices do not have the juridical personality. The representation office is an observatory to know the market better when the branch is more structured.

2. *The Joint Stock Company : a traditional actor of the Italian market*

The choice between a partnership and a joint stock company is important like in other country of the European Union. Limited partnerships for instance have been quite successful until the nineties.

For practical reasons, this article mainly focuses on two types of joint stock companies provided for by Italian law: the « società a responsabilità limitata » (S.r.l.) and the « società per azioni » (S.p.A).

On this matter, the legal framework has been deeply reformed in 2003. Rules regarding the S.r.l. are now clearly dissociated from the rules of the S.p.A. and both types of companies gained in terms of statutory independence and functioning simplification. On the contrary to some other European countries, incorporation still requires a notarial deed.

Generally, the S.r.l. is the typical model adopted by SMEs, even those of large-scale. The S.r.l. is more and more chosen by large companies and foreign companies because of its functioning flexibility. The S.p.A. incorporation type is compulsory for certain type of regulated activities.

a) The S.r.l. : the model chosen by most of the enterprises in Italy

The S.r.l. is a joint stock company characterized by a strong "*intuitus personae*" of the associates. The functioning rules are, for the major part, freely determined by the statutes.

The minimum capital is €10.000,000. The S.r.l. can be owned by a sole proprietor. To the traditional in cash or in kind contributions, the legislator has added an "industrial" contribution (under certain conditions). The administration of the company can be done by a single manager, the board of directors, or a pluripersonnel organ which is not collegial. Nomination of a statutory auditor is compulsory beyond certain capital / turnover / number of employees' thresholds. Due to the law of August the 6th 2008, N° 133, subject to the fulfillment of some conditions, registrations of share assignments do not require notary intervention any more.

b) The S.p.A.: the model for big enterprises

The minimum capital for an S.p.A. is €120.000,000. It can be incorporated by several associates or be owned by a sole proprietor.

The law provides three types of corporate governances for the S.p.A. The basic legal type, "*latin*", with an administrative organ (single or collegial) and a compulsory

supervisory organ (statutory auditors), the "*dualist*" type, based on the German experience, and the "*monist*" type of English inspiration.

The dualist type prescribes a management board while the supervisory board is in charge of the management control. The monist system prescribes a board of directors in charge of the management which appoints a supervisory management committee made up of directors. The accounting supervision is given to the statutory auditors.

For some companies, the law prescribes that the accounting supervision is given to an external auditor or an auditing firm.

SPAIN

INVEST IN SPAIN

Spain has been a country traditionally receptor of foreign investment. Until Spain became a member of the EU there were important restrictions to foreign investments. There were fields of activity restricted for foreigners; applications had to be presented to the Authorities to get permissions, etc. Nowadays foreign investments are practically free and only subject to a declaration for statistic purposes.

Only investments coming from tax heavens, or, in general, jurisdictions that have not signed a treaty with Spain to avoid double taxation might not be advisable for tax purposes.

Again, any investment coming from a foreign jurisdiction will be protected in Spain as if it was a national investment, it will be secured and the right to repatriate benefits –subject only to the fulfilment of tax obligations –will be fully recognized.

SET UP YOUR BUSINESS IN SPAIN

Although it does not exactly result in setting up a business in Spain, but operating through appointed agents and distributors is the lightest structure that can be chosen to sell your products on the Spanish Market.

1- Agent - Special law deriving from the EU directive: the Law of 1992

You can appoint your agent is Spain as a first step. He will deal with potential clients and develop your products, but he will not buy your products. He will be an intermediary.

Important issues to be taken into account:

Independency of the agent: if the agent is not independent, he could be considered as your employee.

You shall be aware of the eventual indemnities in case of termination of the contract. The first thing to take into account is the notice. If you want to terminate the agreement, the notice given shall be of one month for every year of contract with a maximum of 6 months.

The indemnity cannot be superior to the average remuneration of the last 5 years of contract.

A clause of non competition can be agreed for a maximum period of two years after the termination of the agency contract except in cases where the duration of the contract has been inferior to two years.

It is very important to draft a written contract.

2 – Distributor - The Distributor buys your products and sells them to third parties

You shall be aware of the eventual indemnities in case of termination of the agreement.

A prior notice of termination shall be given between 3 and 6 months. If this notice period is not respected, you will be obliged to indemnify.

The indemnity will be calculated on the clients (consideration of whether the number has increased or their activity has increased). The indemnity might also be based on the investment the distributor has made to sell your product.

3 - Representative Office

It normally works for official purposes, but it does not have the capacity to trade.

4 - Branch Office

It is not advisable either, as the formalities to register it are far more complicated than in case of a subsidiary. In addition, the liability of the branch passes to the mother company and there are no tax advantages whatsoever.

5 - The incorporation of a subsidiary - The most probable the answer

The incorporation of your subsidiary can be made through two different structures or two different types of companies: limited liability (sociedad Limitada) and joint stock company (sociedad Anónima).

Main differences:

- Capital minimum in SL 3.010 Euros / SA 60.000 € (paying minimum the 25%)

Sl is easier to manage. If assets are incorporated to the capital it is not necessary to obtain an expertise as it is with the SA.

- No minimum number of partners (even only one partner).

- Transfer of participation. Bearer shares or nominative shares in case of SA. Limitations in case of SL.

You can choose your system of administration: Board of Directors, Unique managers etc. Foreign nationals can be members of the Board without restriction (all Board can be composed of foreign nationals) and they only have to obtain an identification number.

6 - A Joint venture with Spanish partners is perfectly possible

If you have a company 50% /50% in case of disagreement the activity of the company could be paralysed. Even it could be that one of the partners claims the judicial liquidation of the company. To avoid such problem, it is important to draft articles of association that will provide for an outcome under the form of a put and call or of an arbitration to solve the problem.

It is advisable in case of a joint venture to review deeply the termination clauses proposed by the other party.

You should also be cautious when deciding on the management of the company.

7 - Acquire a Spanish company

To acquire an activity, due diligence is advisable, in both tax issues and labour questions. When buying an activity, you also take over the obligations in relation with the employees, the debts etc. You can always require and obtain certifications of the tax and labour authorities.

Depending on the importance of the company, full diligence is required. It is commonly accepted that part of the price for the purchase guarantees the eventual liabilities (when drafting the purchase agreement).

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