

# The Real Estate Newsletter

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#### Using partnerships in real estate

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## EDITORIAL

Using partnerships (*sociétés de personnes*) when planning to buy or own real-estate assets is now such a common and highly developed practice we could be trumped into thinking it is as easy as pie or that no difference would exist between owning a real-estate asset directly or by means of this legal structure.

Unfortunately the reality is quite different and we felt it would be useful to devote this real estate newsletter to try and explain the use of partnerships in real estate.

We will first examine the question of whether a partnership represents an effective bastion against the latest tax reforms, particularly in terms of managing deficits, distribution of profits and local taxes. Then we will highlight the specific points to bear in mind when carrying out restructuring of this type of company, whether in relation to changing tax regimes, reclassification of shares or even mergers. We will also address the international aspect and more particularly the question of whether partnerships still have resident status under international tax agreements aiming to avoid double taxation. We will then examine the specific situation of property construction and sale companies (*sociétés civiles de construction-vente*), structures which are very popular with real-estate developers, following a recent ruling by the State Council (*Conseil d'Etat*) on 28 November 2012 clarifying the tax implications when the exclusivity of their corporate purpose is not complied with. We will then go on to briefly examine the fiscally "transparent" public limited company (*société anonyme translucide*) referred to in article 239 bis AB of the Tax Code, which remains fairly unknown as a tax structure but will certainly be a great success.

The question of whether to sell the real-estate assets or shares in the real-estate company (*civil partnership immobilière*) will also be addressed, mainly from a capital-gain vantage point, but also in relation to pre-emption rights. This question has been of particular importance since the law of 13 July 2006 making a national housing commitment, amended by the law of 25 March 2009. Although in principle the urban right of pre-emption does not apply to the sale of most shares in a real estate company, when its assets comprise a single piece of real estate, whether built or not, whose sale would be subject to a right of pre-emption (except for real estate companies formed exclusively between relatives up to the fourth degree inclusive), we will prove that this works differently in practice in the case of the "reinforced" right of pre-emption.

We will also address the question of the validity of mortgage guarantees granted by partnerships particularly in the case of financing of the acquisition of their shares, in light of the two rulings by the Court of Cassation, under which the commercial chamber followed by the civil chamber ruled that to be valid a security granted by a civil partnership (*société civile*) must not only be unanimously agreed by the partners, but also not be contrary to its interests. Finally, we will compare the pros and cons of real estate companies and general partnerships (*sociétés en nom collectif*). Turning to recent developments, we will focus in particular on the new legal problem of constituting sui generis rights in rem following the ruling by the Court of Cassation on 31 October 2012. And lastly we will bring to the attention of those readers affected by the declaration campaign concerning reform of real-estate values of professional non-industrial buildings, the latest relevant information from the land registry on filling out the 6660 REV tax declaration.

# Characteristics of the restructuring of partnerships predominantly involved in real estate (*partnerships à prépondérance immobilière*)



By **Richard Foissac**, partner specializing in taxation. He deals in particular with acquisitions and restructuring of listed and unlisted real estate groups and provides advisory services in the context of their transactions. Professor in tax law at Paris I University and Nice Sophia-Antipolis University. richard.foissac@cms-bfl.com

**R**estructuring of partnerships predominantly involved in real estate (SPI) presents specific characteristics in relation to SPI's tax regimes. The first thing to remember in this respect is that SPI shares owned by legal entities, even when they constitute investment holdings, are, like shares in predominantly financial partnerships (*sociétés à prépondérance financière* or SPFs), excluded from the long-term regime for capital gains and losses from sales and provisions for depreciation. We should mention that the second 2012 Finance Law (amended) only changed this situation (repeal of the short-term regime) for capital losses from sales and provisions for depreciation of shares in SPFs, and only for the fraction of their amount corresponding to dividends distributed over the five financial years prior to the year in which the capital loss or provision for depreciation was made, and which benefited from the tax regime of their parent companies. In other words, for its legal-entity **shareholder, a loss on an SPI's shares still constitutes a short-term loss.** On the other hand, SPI status poses the enduring problem of compliance with the conditions of article 221 bis of the Tax Code when

**changing the company's tax regime. We know that this article allows avoidance taxation of unrealized capital gains reported as an asset provided these capital gains remain taxable under the new tax regime.**

**Although the SPI's corporate tax liability poses no problems in respect of this condition, the same cannot be said of the reverse operation (changing from corporate tax to income tax) since in that case the tax authorities' position remains that conditional limitation cannot apply when the profits subject to tax deferral and realized capital gains will potentially not be taxed under the conditions stipulated for professional activities (agricultural profits, non-commercial profits, industrial and commercial profits) subject to an effective tax**

regime<sup>1</sup>.

However, the fact that an SPI is no longer liable for corporate tax does not result in taxation of unrealized capital gains on real-estate assets if on that date these capital gains are allocated, as defined by article 219 a sexies O bis of the Tax Code, "*by the company to its own industrial, commercial or agricultural operations or to exercising a non-commercial profession.*" In the case of mergers of SPIs, a distinction is made

based on whether or not the merging companies are subject to corporate tax.

If they are, the merger can be placed under the preferential regime defined in articles 210 A et seq of the Tax Code, as would normally be the case. We should note in this respect that the tax authorities confirmed in advanced ruling no. 2011/29, recorded in the BOFIP database (BOI-IS-FUS-10-20-20 no. 60, 12-09-2012), that the option for corporate tax exercised by a company prior to its absorption carried out under the preferential mergers regime is not likely to be ruled out on the grounds of tax law for the simple reason that it enables application of the aforementioned preferential regime. When this is not the case, the absorption of the

***"The option for corporate tax exercised by a company prior to its absorption carried out under the preferential mergers regime is not likely to be ruled out on the grounds of tax law for the simple reason that it enables application of the aforementioned preferential regime."***

partnership triggers the measures applicable in relation to its winding-up. Taxation of the partners in the absorbed company is therefore calculated firstly based on the results of the financial year ended prior to the merger, plus unrealized capital gains recorded as assets, and secondly the capital gains or losses from cancellation of the shares. When making this calculation, however, the shareholder may apply Quémener case law.

<sup>1</sup>- Instruction dated 31 December 1991, 4 A-1-92 no. 26; D. adm. 4 A-633 no. 55, 9 March 2001; BOI-BIC-CESS-30-20 no. 280 and 290)

# Partnerships – effective bastions against tax reforms?

**The partnership tax regime presents certain advantages which have long been known in the real-estate sector. At a time when we are seeing a steady flow of tax reforms, it is worth wondering whether these advantages will endure.**

In accordance with article 8 of the Tax Code, the taxable income of a partnership is determined at its level, but only the partners are liable for the tax due in respect of their activities. In practice, in the case of a partner subject to corporate tax, its taxable income is increased (or reduced) by the taxable profits (or losses) of the partnership. Three years ago, this regime was the subject of substantial planned reforms, designed to bring it more in line with so-called “transparency” systems put in place abroad (income from the subsidiary is deemed to have been generated directly by the partner). For various reasons, this project has been put on the back burner and is no longer on the agenda. In light of above, is the partnerships regime still attractive?

In our view, absolutely. Firstly, the cap on the allocation of deficits, introduced in 2011 and tightened by the 2013 Finance Law (FL 2013), increases the appeal of the possible (an unlimited) offsetting of the respective profits and losses of the partnership and its partners. This offsetting may also prove valuable in the event of restructuring or a change in the activity of the partnerships, in which case the transfer or maintenance of deficits is subordinate, for a company subject to corporate tax, to the stricter conditions introduced by the second 2012 Finance Law (amended). Secondly, the distributions carried out by partnerships not subject to corporate tax do not constitute investment income and so are not subject to the 3% contribution on dividends introduced by this same law. Thirdly, unlike the situation applicable under the tax integration regime, there is no consolidation between the partnership and its partner(s) when assessing the thresholds at which

***“The partnerships regime definitely remains attractive in the current legal framework.”***

certain additional costs become applicable: turnover threshold (250 million euros) for the 5% additional contribution to corporate tax; threshold of net financial charges (3 million euros) for the flat-rate reintegration introduced by FL 2013 (“closing the loophole”, art. 212 bis of the Tax Code); threshold of non-deductible interest (150,000 euros) for application of under-capitalization rules (art. 212 II of the Tax Code); etc. In relation to financial charges, we should also recall that under certain conditions the tax authorities accept the absence of funds deposited in the current accounts of partners in partnerships, which makes it possible to avoid liability for non-deductible interest, where applicable. The absence of consolidation when assessing thresholds also

has advantages beyond the corporate tax. For instance, using a partnership has benefits in respect of the regional economic tax (*contribution économique territoriale* or CET). Remember that since 2010, real-estate companies are subject to the CET provided rents from bare leasing of professional buildings exceeding 100,000 euros. Although in terms of calculating taxable real-estate value, there is no overall advantage to using a real-estate company not subject to corporate tax, except maybe in the case of buildings for industrial use, it **can have a real impact in terms companies’ value-added tax (CVAE)**, since the applicable CVAE rate will be based solely on the turnover of the partnership.



By **Laurent Chatel**, partner specializing in taxation. He heads the local tax department of CMS Bureau Francis Lefebvre. Within the framework of real estate transactions he checks the land and property values retained as a basis for local taxation, audits those values within the framework of deals for the sale of real estate stocks and negotiates with the tax authorities the terms of liability under local tax within the framework of major refurbishment operations.  
laurent.chatel@cms-bfl.com



and **Frédéric Gerner**, associate specializing in taxation. He provides both advisory and litigation services in relation to direct taxes, particularly those linked to intragroup restructuring and real estate.  
frederic.gerner@cms-bfl.com

# Property construction and sale companies – clarification of activities compatible with their specific tax regime



By **Agnès Rivière-Durieux**, associate specializing in income tax and corporate tax related in particular to real estate. [agnes.riviere-durieux@cms-bfl.com](mailto:agnes.riviere-durieux@cms-bfl.com)

**W**ith a special status granted by articles L. 211-1 to L. 211-4 of the Construction and Housing Code, property construction and sale companies (SCCVs – civil companies whose corporate purpose is to construct and sell one or more buildings) enjoy a tax regime derogating from common law, which has greatly contributed to their popularity among real-estate developers. Although construction with a view to selling is considered a civil activity from a legal standpoint, article 35 1° bis of the Tax Code defines it as commercial when it comes to taxes. In accordance with the principle set out in article 206 2 of the Tax Code, if a civil partnership carries out the activities mentioned in articles 34 and 35 it becomes liable for corporate tax. And it is by way of derogation from this principle that article 239 ter stipulates that SCCV are not liable for corporate tax but subject to the tax regime of partnerships.

This derogation is not subject to the condition that the construction-sale activity be the company's sole corporate purpose. Tax authorities have always been of the view that, from a tax perspective, no distinction needs to be made between activities that are carried out exclusively or jointly and activities that are purely civil, such as letting buildings. However, civil partnerships which, in addition to constructing and

selling buildings, exercise another activity which is classified for tax purposes under the industrial and commercial profits category, must be subject to corporate tax (BOI-BICCHAMP- 70-20-100-20120912).

It is accepted by case law,

however, that carrying out activities that are commercial for tax purposes does not prevent application of the provisions of article 239 ter, when they facilitate the sale of the constructed buildings (sale of fixtures and fittings for communal areas of an elderly care home CE 27/02/1989 no. 57066, SCI La Résidence du Bocage) or directly contributing to achieving the corporate purpose (resale of land in return for the relinquishment of an easement CE 28/01/1983 no. 28193).

By stating that the regime in article 239 ter is

reserved for civil partnerships that only carry out construction and sale activities, the grounds of judgments could be taken to mean that article 239 ter of the Tax Code stipulated the condition that **companies' purpose should be exclusive** (CE 5/04/1978 no. 1211; CE 27/09/1991 no. 110130). Although this exclusivity principle is apparently intended solely to apply to activities which are commercial from a tax perspective, the State Council nevertheless applied it to a property construction and sale company which went on to let the constructed buildings. Instead of judging that a civil activity should deprive the company of its tax status, it reasoned that since the letting was ancillary and occurred prior to the sale, it simply constituted one of the means by which the company was able to complete the sale of its buildings and so did not deprive it of the benefit of its derogatory tax regime (CE 6/11/1998 no. 171927, SCI Paradis Prat).

In the same vein, an administrative appeal court judged that an SCCV whose letting activity was not ancillary should be subject to corporate tax on all its profits (CAA Bordeaux no. 08BX00965). It is this ruling which has recently been overturned by the State Council (28/11/2012 no. 332110 SCI Virapin Apou), which ruled that the derogatory tax regime ceases to apply to civil partnerships which, in addition to construction-sale operations, carry out other types of operations which, if carried out independently, would result in those companies being subject to corporate tax, pursuant to the combined provisions of articles 206, 34 and 35 of the Tax Code.

It thereby clarified the situation, by ruling:

- that the construction-sale corporate purpose is not exclusive;
- that a civil letting activity, even if not ancillary, does not deprive the company of the regime stipulated in article 239 ter of the Tax Code.

***“A civil letting activity, even if not ancillary, does not deprive the company of the regime stipulated in article 239 ter of the Tax Code.”***

# Individuals involved in construction and sale – reconciling limited liability and offsetting of losses against tax!

**S**tarting up a construction-sale activity in a majority partnership with other physical persons does not guarantee a loss-free project. So, will you choose a capital company, which would limit your legal liability but be subject to corporate tax, preventing you from deducting tax losses? Or will you opt for a property construction and sale company allowing you to offset losses against tax, but giving you unlimited legal liability?

## You don't have to choose anymore!

Replicating the American "Subchapter S Corporations" regime, article 239 bis AB of the Tax Code now allows you for five years to have a property construction and sale company tax regime applied to an unlisted public limited company (*société anonyme*), whether it is joint stock or limited liability. Your company may be newly created or have existed for less than five years. In the latter case, its withdrawal from the corporate tax regime will have no consequences, unless it has posted previous tax losses (these will be written off) or exercises a civil activity, whose assets include unrealised capital gains (which will be taxed at the time of this change of status).

Its corporate activity must be principally commercial (in general terms, this regime allows the main activity to be either industrial, craft, agricultural or independent), to the exclusion of any other wealth management, asset management or real-estate activity. However another ancillary activity, for example, bare leasing, will be authorised. Partners in property construction and sale companies (companies whose corporate purpose excludes any other commercial activity) who may have heard about tax disputes arising, for example, from the sale of unbuilt land (CAA Lyon, 10 November 2004, no. 97-2327), or construction-sale of equipped or furnished buildings (State Council, 27 February 1989, no. 57066), will appreciate the trouble-free operation of companies under article 239 bis AB, since carrying out these types of

activities will only reinforce the commercial nature of their main activity from a tax perspective.

At least 50% of the capital and voting rights must be owned by physical persons, of whom those possessing at least 34%, or members of their taxable household, are directors. Venture capital structures in France or other European Union Member States may also be partners, however, although their rights will not be taken into account when assessing these two percentages.

These companies must employ at least 50 people and achieve annual turnover, or record a balance sheet total, of less than 10 million euros. Although they are not subject to corporate tax, their partners may continue to benefit from regimes giving exemption from income tax for investments in companies subject to corporate tax (FCPRs, SUIRs, FCPIs, FIPs and SCRs) and reduced income tax for investments in SMEs. At the end of the five-year period, without any consequences in terms of income tax (provided the formalities in article 202 ter of the Tax Code are observed), this company may either retain its transparent tax status by transforming itself into a civil partnership (in the case of non-commercial activity) or a general partnership (in the case of a commercial activity), or otherwise become automatically subject to corporate tax...



By **François Lacroix**, partner specializing in taxation. He specifically focuses on the sectors of real-estate tax, public services, companies and not-for-profit public or private legal entities.  
francois.lacroix@cms-bfl.com

# To sell the shares or to sell the building? That is the question



By **Christophe Frionnet**, partner specializing in taxation. He particularly advises companies on their whole range of operations. Professor in real-estate taxation at Paris University (Paris I). christophe.frionnet@cms-bfl.com



and **Stéphanie Némarg**, associate. She focuses on all areas of corporate taxation, particularly in relation to real estate. stephanie.nemarg@cms-bfl.com

**W**hen an individual sells a building directly or via the intermediary of a predominantly real-estate company which is not subject to corporate tax (i.e. an SCI or an SNC), the tax regime in relation to capital gains is identical. But does that mean that the two options are equivalent?

In terms of income tax (apart from main residences), the sale of a building or of that category of shares is subject in any case to a rate of 19% (excluding social security deductions), calculated on a reduced basis depending on the duration of ownership (a reduction of 2% after the fifth year, 4% after the 17th and 8% after the 24th, falling to total exemption after 30 years of ownership).

In addition to this taxation there will now be a further **tax on individuals' real-estate capital gains** in excess of 50,000 euros, at a rate of between 1% and 6% of the taxable capital gains. It should be noted in this respect that capital gains on building land, which are also subject to income tax at a rate of 19%, are excluded from this additional tax, with the sale of built land now being taxed at a higher rate than building land. It should also be noted that using a fiscally transparent structure to sell built land or building land will not eradicate this difference in tax treatment. This could lead us to hastily conclude that there is no difference between selling the shares in the fiscally transparent company or the company selling its building, however this is not the case. The comparison needs to look further than the tax rates and regime. It should also take into account the methods for determining the bases for taxation.

This is because the length of time shares have been held and the length of time the building has been owned are not necessarily the same for individuals and any disparity between these dates may have a significant effect on the percentage reduction which will

apply. Furthermore, for the purposes of calculating capital gains, the acquisition price of the shares may differ from the acquisition price of the building, which changes the taxation basis. For example, a civil partnership may be formed with minimum capital and then take out a loan to acquire a real-estate asset. In this case, although the sale price of the shares and that of the building may be identical (on the date the loan is fully repaid), the capital gains realized by the sale of the shares will be more than from the sale of the building. Similarly, in the case of the sale of shares in a fiscally

transparent company, taxpayers may have to correct the fiscal acquisition price in the event of distortion between the economic costs/profits of their investment and the losses/income taken into account for tax purposes (mechanism established by "Quémener" and "Baradé" case law).

In the event that the fiscally transparent company is owned by a company subject to corporate tax, the last two examples of distortion mentioned above may also arise, even if the applicable effective tax rate remains the same (common law corporate

tax).

Another area to consider is registration fees. The sale of shares in an SPI is taxed at a rate of 5% while the sale of a building is subject to duties of between 6% and 7%. It should also be noted, however, that if the company has liabilities not attributable to the acquisition of the building, for calculation of the capital gains, the sale price of the shares will be increased by these liabilities and so will be equal to the sale price of the building. So the answer to the common question "sell my shares or sell the building?" has to be that there is no standard answer...

***"The comparison needs to look further than the tax rates and regime. It should also take into account the methods for determining the bases for taxation."***

# Civil partnerships guaranteeing third parties – beware of the mine field!

It is common for civil partnerships to grant security rights over properties to guarantee undertakings made by third parties, particularly by operating companies from within the same group. This is because the creditors of the third party debtor, particularly lending banks, see a mortgage on corporate property as a more effective guarantee than a personal security or a pledge of company shares. However, the validity of guarantees granted by a civil partnership has generated abundant case law over many years, an analysis of which, in conjunction with recent developments, calls for extreme caution. Unlike joint-stock companies (*sociétés par actions*), which are bound even by deeds not covered by their corporate purpose, partnerships, and in particular civil partnerships, are governed by a principle of specificity: the company is only bound by deeds signed by its director which are directly related to the corporate purpose. It is rare, however, for the granting of guarantees to third-parties, including companies within the same group, to be explicitly included in the corporate purpose of a company other than a credit institution. Nevertheless, to ensure

## creditors' protection under the

law, the Court of Cassation had gradually established three alternative criteria determining the validity of guarantees granted by a civil partnership:

- granting of guarantees to third parties is directly included in the corporate purpose of the civil partnership;
- granting of guarantees is not included in the corporate purpose but has been unanimously authorised by the partners;
- granting of guarantees is not included in the corporate purpose but a common interest exists between the guarantor company and the guaranteed third party.

However, it was corporate interest – combined with the common interest between the guarantor company and the guaranteed debtor – that the Court of Cassation focused on more recently to assess the validity of guarantees granted by civil

partnerships. In two rulings dated 8 November 2011 and 12 September 2012, the commercial chamber followed by the civil chamber ruled that to be valid a security granted by a civil partnership must not only be unanimously agreed by the partners, but also not be contrary to its interests. The Court of Cassation appears to view the definition of what is contrary to the corporate interest as anything that threatens the **"existence of the company"**, since in its ruling dated 12 September 2012, the civil chamber overturned the appeal judgment for not having failed to examine *"whether the guarantee granted by the SCI was contrary to its corporate*

***"More recently, the Court of Cassation focused on corporate interest to assess the validity of guarantees granted by civil partnerships."***

*interest on the grounds that the value of its only property asset was less than the amount of its commitment and in the event the guarantee was triggered, its entire assets would need to be liquidated, which would be likely to compromise its very existence."*

Case law established by the Court of Cassation represents a source of insecurity for creditors since the concept of corporate interest is difficult to define. The Court of Cassation appears to base its reasoning on an objective criterion: the security granted is contrary to the corporate interest when it could lead to liquidation of its entire assets. However, a company could have a direct interest in the guaranteed operation justifying the risk taken, even when, it could risk losing its sole asset as a result of the security right. As case law from the Court of Cassation stands, creditors benefiting from a guarantee granted by a civil partnership cannot therefore be satisfied with the unanimous authorisation of partners, but must examine the balance of the risk taken by the company in relation to the value of its asset(s) and relations between the guaranteed third party and the guarantor company, in order to ensure the validity of the security right granted to them.



By **Christophe Blondeau**, partner specializing in corporate law. He deals with issues related to transactions in particular in the real-estate sector. [christophe.blondeau@cms-bfl.com](mailto:christophe.blondeau@cms-bfl.com)



and **Cécile Sommelet**, associate specializing in corporate law. She specifically focuses on restructuring and mergers and acquisitions in the real estate sector. [cecile.sommelet@cms-bfl.com](mailto:cecile.sommelet@cms-bfl.com)

# Civil partnerships versus commercial partnerships – pros and cons



By **Christophe Lefaillet**, partner specializing in tax law (registration duty and Wealth Tax) and corporate law. He specifically focuses on merger and acquisition transactions in the real estate sector. christophe.lefaillet@cms-bfl.com



and **Isabelle Prodhomme**, corporate M&A associate. She deals with issues related to merger transactions and restructuring, in particular in the real-estate sector. isabelle.prodhomme@cms-bfl.com

**T**he two main types of partnerships, i.e. companies focusing on the personality of the constituent partners rather than capital companies are general partnerships (*société en nom collectif* or SNC) and limited partnerships (*société en commandite simple* or SCS). The SCS is very rarely chosen due to the coexistence of two categories of partners with differing rights and obligations, making it very complicated to run.

There are many similarities between an SNC and a civil partnership:

- no minimum company capital is required to form it;

- **partners' contributions can be made in cash,** kind or labour;

- the director(s) may be physical persons or legal entities, whether partners or not;

- the freedom granted to partners in drafting the articles of association allows relatively flexible operation; appointing an auditor is not mandatory (for the SNC, below a certain threshold defined in article R. 211-5 of the

Commercial Code); they are not obliged to submit annual accounts except for SNCs when all the partners are companies (art. L. 232-21 Commercial Code);

- as a general rule, they are subject to the same tax regime of fiscal transparency with the possibility of opting for the capital companies regime, although this option is irrevocable.

On the other hand, providing the corporate purpose is not exclusively civil (in practice, only two types of activity are civil in real estate: the purchase of land in order to resell it after construction and leasing of buildings – all other activities relating to buildings are commercial), opting for an SNC presents an advantage since a civil partnership exercising commercial activities is necessarily subject to corporate tax. This obviously precludes its taxable profits, when negative, from being taken into account by partners for tax purposes. SNCs meanwhile

remain fiscally transparent, despite their formal commercial nature, and are therefore able to exercise civil and commercial activities.

The main disadvantage of the SNC is linked to the status of partners, who are categorised as traders and are therefore personally liable for corporate debts, not only without limitation (as with a civil partnership) but also jointly. Partners may not sell their shares in the company, not even to another partner, unless they have obtained the unanimous agreement of the other partners, without the articles of association being able to derogate from this strict provision stipulated by article L. 221-13 of the Commercial Code. If the requested

agreement is not obtained, the partner may only

require the company or the other partners to buy back the shares if there is a relevant clause in the articles of association, although questions persist as to the validity of such a clause, despite a ruling recognising its validity (CA Aix-en-Provence, 25 May 2007).

Conversely, if the requested agreement is not obtained, a partner in a civil company may require the company or the other partners to buy

back the shares based on an expert opinion in the event of disagreement over the price (article 1843-4 of the Civil Code). Similarly, the articles of association may set the conditions under which a partner may withdraw from the company.

The death of a partner constitutes grounds for winding up an SNC, unless otherwise stipulated in the articles of association, although a civil **partnership continues with the deceased's heirs or legatees**, again unless otherwise stipulated in the articles of association.

Opting for an SNC, as opposed to an SCI, may therefore prove beneficial from a tax perspective, but the status of partner in an SNC entails certain disadvantages, especially if the partners are physical persons.

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# Partnerships and international operations – beware of the pitfalls!

It is fairly common in France to use partnerships for real-estate investments. Their use presents certain difficulties in an international context however.

### Application of tax conventions

According to article 4 §1 of the OECD Model Tax Convention, *"the term 'resident of a Contracting State' means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature."*

The question to consider, therefore, is whether French partnerships are liable for tax in France, even when the tax will be paid by their partners. Case law is now well established. The State Council agrees to recognise that French partnerships are resident for the purposes of international tax agreements.

In the Quality Invest judgment of 11 July 2011, for instance, it was ruled that a French SCI could *"be considered to be a resident of France"* for the purposes of the agreement between France and Norway.

Nevertheless, some countries may take a different approach and consider French partnerships not to be French residents for the purposes of the agreement.

It would be prudent in this case to obtain a residency certificate from the French tax authorities.

Difficulties may also arise in relation to application of preferential rates of withholding tax, for example when receiving dividends from a foreign source.

The OECD Model Convention stipulates that the reduced rate of 5% shall only apply if the *"beneficial owner is a company (other than a partnership)"*. **This requirement is found in various forms in a number of tax agreements: sometimes the beneficiary company must be subject to corporate tax (e.g. Spain and Italy); sometimes the beneficiary company must be a capital company (e.g. Germany).** In either case, a French partnership is in principle not entitled to the reduced rate of withholding tax on dividends.

### Lack of eligibility for European directives

When fiscally translucent, French partnerships do not benefit from the provisions of the main European directives. The directive concerning dividends in relation to parent companies and their subsidiaries applies to countries listed in the annex. For France, this mainly means capital companies and companies subject to corporate tax. The same goes for the directive concerning cross-border interest and royalty payments between associated companies.

### Parent company-subsidiary regime inapplicable when using the intermediary of a partnership

The parent company-subsidiary regime does not apply in France when a partnership is used as an intermediary. The traditional position of the State Council (ruling dated 19 October 1983 on EIGs) has recently been confirmed by the Versailles administrative court of appeal in Franco-American framework (Artemis SA judgment, 16 July 2012). In this case, a French company held a stake in an American partnership, which itself held a stake of more than 10% in an American company by the name of Roland. The court ruled that the fact that the American company was a partnership prevented Artemis SA from benefiting from the parent companies regime since (i) Artemis SA did not directly receive dividends from the capital company Roland and (ii) the partnership did not constitute a subsidiary eligible for the parent company-subsidiary regime.

***"The use of partnerships in an international context raises numerous tax difficulties."***



By **Julien Saïac**, international partner specializing in taxation. He deals more specifically with issues related to international restructuring and real-estate investment.  
[julien.saiac@cms-bfl.com](mailto:julien.saiac@cms-bfl.com)

# Urban right of pre-emption and selling shares in a real estate company – when should you submit a declaration of intention to alienate?



By **Céline Cloché-Dubois**, associate specializing in urban planning and environmental law. She provides both advisory and litigation services to corporations and public entities. [celine.cloche-dubois@cms-bfl.com](mailto:celine.cloche-dubois@cms-bfl.com)

**“Not all sales of SCI shares are subject to the prior lifting of the urban right of pre-emption.”**

Since the law of 13 July 2006 making a national housing commitment, the sale of shares in a real estate company (SCI) may, under certain conditions, be dependent on the prior lifting of the urban right of pre-emption. These conditions were amended by the law of 25 March 2009. Therefore when selling shares in an SCI it should always be considered whether a declaration of intent to alienate (*DIA – déclaration d'intention d'aliéner*) needs to be sent to the municipality. Communes which have a local development plan, land use regulations or a municipal map may establish a right of urban pre-emption (DPU – *droit de préemption urbain*) in their area<sup>1</sup>.

**In principle, the DPU does not apply to “the sale of the majority of shares in a real estate company, when its assets comprise a single piece of real estate, whether built on or not, whose sale would be subject to a right of pre-emption. This paragraph does not apply to real estate companies formed exclusively between relatives and in-laws up to the fourth degree inclusive”<sup>2</sup>.**

However, this same article stipulates: “Nevertheless, in a reasoned deliberation, the municipality may decide to apply this right of pre-emption to alienations and sales mentioned in this article in all or certain parts of the territory subject to this law.” Municipalities may therefore make the sale of SCI shares subject to the “reinforced” right of pre-emption<sup>3</sup>.

Several conditions must be met.

Firstly, a condition relating to the will of the municipality. Making such transactions subject to the right of pre-emption effectively requires the deliberative meeting to pass a motion instituting the “reinforced” right of pre-emption in all or part of the municipal territory, it being emphasised that the municipality may modify the territorial scope of the right of pre-emption or repeal it at any time. This deliberation must be displayed and published in the town hall and mentioned in two newspapers distributed in the relevant département.

Secondly, conditions relating to the transaction.

Even if the first condition is met, not all sales of SCI shares are subject to the prior lifting of the urban right of pre-emption, since article L. 211-4 of the

Urban Planning Code restricts the transactions to which it applies.

Firstly, only transactions involving the majority of the **SCI's shares are affected**<sup>4</sup>. The sale of less than 50% of the shares in an SCI is automatically excluded from the scope of the DPU.

It should be emphasised that this criterion should be analysed uniquely from the perspective of the number of shares sold and not with respect to whether or not the acquiring partner will come to hold a majority stake.

Secondly, a condition is imposed by the Urban Planning Code in relation to the configuration of the **company's assets. This stipulates that the DPU only applies if the SCI only possesses a single piece of real estate, whether built on or not.** Therefore, if an SCI owns several buildings or, on the contrary, a single co-owned plot, the DPU will not apply.

Thirdly and finally, article L. 211-4 of the Urban Planning Code makes a distinction between the type of owners of SCI shares and excludes family real estate companies from the scope of the “reinforced” DPU, in other words those owned exclusively by relatives and in-laws down to the fourth degree inclusive. A building owned by a family SCI is therefore not subject to the DPU.

If all of the above conditions are met, the vendor or their notary must send a DIA to the municipality prior to the sale of shares in the SCI. The municipality then has two months to exercise its right of pre-emption.

1-Article L. 211-1 of the Urban Planning Code  
2-Article L. 211-4 d) of the Urban Planning Code  
3-Article L. 211-4 of the Urban Planning Code  
4-Article R. 211-2 of the Urban Planning Code

# Division of ownership – special in rem right of enjoyment

In a judgment dated 31 October 2012, the Court of Cassation stated that "*the owner may, subject to public regulations, grant an in rem right giving special enjoyment of his property throughout the beneficiary's entire existence*".

This statement necessarily raises questions regarding the notions of ownership, in rem rights, and the potential sui generis nature some of these may have.

Given the issues which may be at stake, should we be astonished or concerned reading it, or put it in perspective?

In 1932, in two notarized deeds, the Maison de Poésie foundation sold a private mansion to SACD society, while retaining a right, defined as "right of enjoyment and occupation" over part of the premises it then used. In the event of eviction of the occupant by the owner, the occupancy right would convert into an obligation on the owner to rehouse the occupant, in premises with an equivalent location and size. After 70 years of peaceful enjoyment, the SACD decided to evict the occupant. The Court of Cassation overturned the analysis by the Paris appeal court which, in accepting the application, judged that the right conferred equated to a right of use and habitation, whose term should be calculated according to that of a usufruct – i.e. 30 years in the case of allocation to a legal entity<sup>2</sup>.

The Court of Cassation ruled that nothing prohibits the constitution of sui generis rights in rem, that these can be constituted for the term stipulated in the agreement, and that, unlike the right of use and habitation, which is subject to the same regime as usufruct, such rights may exceed 30 years.

The Court of Cassation has already recognised the validity of in rem rights not defined in law, as illustrated by the surface rights (req. 5 Nov. 1866, D. 1867 1 32) and the in rem right of enjoyment over communal areas of a co-owned

property (Civ. 3, 4 March 1992, n° 9013 145, Civ. 3, 2 Dec. 2009, no. 08-20 310). We are familiar with permanent surface rights, which create a division of two distinct properties, occupying a superimposed space and belonging to two different owners. Leasing of surfaces, meanwhile, makes this same division on a temporary basis.

The impact of this potential to constitute in rem rights not included in the numerus clausus sometimes used in this category remains to be seen. Is this the resurgence of the concepts of a "useful" domain and an "eminent" domain in relation to an in rem usage right, with an owner being permanently prevented from reconstituting all the rights attached to his building?

The wording of this principle foreshadows its application to a wide range of in rem rights over property.

Two key questions nevertheless arise: – what are the implications of an undetermined duration of this in rem right of enjoyment?

– under cover of the concept of "variety", could it be possible to constitute completely new in rem rights created by borrowing from existing in rem rights only those characteristics which suit the contracting parties – for instance, an in rem right with all the characteristics of an emphyteusis right except for freedom of use, which is deemed to be an essential and inherent aspect of that right?

Therefore the possibility of freely granting an in rem right conferring the benefit of special enjoyment, in relation to one or more uses of a property is yet to be fully explored. Neither did the ruling in question stipulate the regime applicable to this implied right.



By **Jean-Luc Tixier**, partner specializing in real-estate law and public law. He provides both advisory and litigation services to a great many commercial and industrial corporations, as well as property developers in matters of planning, construction, sales and rentals of buildings, long-term leaseholds and building leases. Professor at Paris University (Paris I). [jean-luc.tixier@cms-bfl.com](mailto:jean-luc.tixier@cms-bfl.com)

1-Civ. 3, 31 October 2012, appeal no. 11-16.304  
2- Paris, 10 February 2011, JurisData no. 2011-001678.

# How to fill out 6660 REV declarations concerning reform of property rental values?

By **Laurent Chatel**, partner specializing in taxation. He heads the local tax department of CMS Bureau Francis Lefebvre. laurent.chatel@cms-bfl.com

**W**ith companies currently finding themselves in the middle of the campaign concerning reform of real-estate values of professional non-industrial buildings, here is the latest relevant information from the Land Registry (Cadastré – GF 3 A) on filling out the 6660 REV tax declaration.

All owners of the buildings concerned should have received in mid-February either the paper declarations to fill in, or their access codes to the online declaration website depending on the number of plots in question. It should be noted that even for paper declarations, it is possible to submit a declaration online using the codes printed on the form.

The following information should be provided when filling out 6660 REV declarations:

- the choice of category of premises – only tick a single box. If there is more than one, choose the category corresponding to the largest surface area of the premises;
- floor area calculated between the walls should be broken down into five areas since covered and open-air car parks have been added;
- rent received as of 1 January 2013 should be stated excluding rental charges, but including variable rent and not taking rental holidays into account.

The information to be provided is therefore normally known to all owners, subject to knowledge of any layout changes made by tenants in the case of surface area. Based on the land registry sheet(s) for these buildings, it is therefore important to use the same measurements held by the land registry, to improve the company's knowledge of the relevant surface areas and to ensure that it correctly isolates the annual rent to be stated in the declaration.

The tax authorities will be reluctant to grant deadline extensions, although this decision is a political one.

At the end of this declaration campaign, the new land values that will be used as the basis for calculating the land tax (taxe foncière) and the corporate real-estate contribution (cotisation foncière des entreprises or CFE), will be based on the category selected, surface areas declared and application of the tariff to be decided by the land registry.

We should point out, finally, that the new tariff will be calculated on the basis of on the weighted average per square metre of rents declared by all owners during the declaration campaign for the economic sector in which the building is located.

## C/M/S/ Bureau Francis Lefebvre

1-3 villa Emile-Bergerat 92522  
Neuilly-sur-Seine Cedex  
Tél. 01 47 38 55 00

Retrouvez toutes les informations relatives à notre activité en Immobilier :



Si vous souhaitez contacter les auteurs de cette lettre, vous pouvez vous adresser à la rédaction qui transmettra aux personnes concernées. Vous pouvez également vous adresser à :

**Me Christophe Blondeau**, christophe.blondeau@cms-bfl.com

**Me Laurent Chatel**, laurent.chatel@cms-bfl.com

**Me Richard Foissac**, richard.foissac@cms-bfl.com

**Me Christophe Frionnet**, christophe.frionnet@cms-bfl.com

**Me François Lacroix**, francois.lacroix@cms-bfl.com

**Me Christophe Lefaillet**, christophe.lefaillet@cms-bfl.com

**Me Julien Saiac**, julien.saiac@cms-bfl.com

**Me Jean-Luc Tixier**, jean-luc.tixier@cms-bfl.com