

Evolution de la fiscalité des entreprises en Allemagne et restructurations franco-allemandes

Jeudi 23 mai 2013

François Hellio, Alain Herrmann, Alexandra Rohmert, CMS Bureau Francis Lefebvre

Gerd Leutner, Jesko Nobile, CMS Hasche Sigle

Sommaire

I/ Recent Tax Developments in Germany

II/ Actualités en fusions-acquisitions franco-allemandes

III/ Fusions transfrontalières franco-allemandes

I/ Recent Tax Developments in Germany

François Hellio, Avocat, associé de CMS Bureau Francis Lefebvre

Jesko Nobile, Rechtsanwalt/Steuerberater, Partner CMS Hasche Sigle

I/ Overview / Agenda

- *Flashback*: German / French Convergence Initiative (2012)
- "Modernisation" of German Tax Group Requirements
- Taxation of Dividend Distributions (Dividends from Portfolio Investm.)
- Pending Tax Legislation:
 - Amendment of the German "Foreign Investments Tax Act"
 - Tax Treatment of Hybrid Finance Instruments
 - "RETT-Blocker"
- Other Interesting Developments:
 - Update: Qualified substance requirements for foreign parent companies
 - Withholding Taxes on fees for construction work
 - Federal Tax Court: National "Treaty Overrides" constitutional?
 - Federal Tax Court: Treaty-protection of a French SICAV

I/ 1. *Flashback*: German/French Convergence Initiative 2012 (1/2)

- February 2012: "Green Paper" for a cooperation between Germany and France with regard to business taxation
- Proposed changes of *German* tax rules included, *inter alia*:
 - Tax Groups: Alignment of the Germany's rules for tax groups (especially: abolishment of profit and loss pooling agreements)
 - Minimum shareholding requirement for tax exempt dividend distributions
 - Increase of the carryback for tax losses from EUR 511.500 to EUR 1 million (and eventually abolishment of option right for a loss carryback and/or a loss carry forward)
 - Full German taxation of income derived by non-resident partners from a German partnership (German treaty override)

I/ 1. *Flashback*: German/French Convergence Initiative 2012 (2/2)

- "12-Points Paper" of the German Coalition Parties, proposing, *inter alia*, the following changes:
 - Modernisation of German rules and requirements for tax groups
 - Tightening of Taxation of latent capital gains in case of a restriction of taxation right (National Grid Indus case)
 - Taxation of income of non-German partners in German partnerships
 - Limitation of deductibility of financing expenses in LBO-structures and debt-push-down
 - Limitation of participation exemption for dividends of hybrid foreign entities (if payment is tax deductible on the level of the foreign entity)
 - Restriction of loss-utilisation in case of mergers of profitable companies into loss-making entities.

I/ 2. "Modernisation" of German Tax Group Requirements (1/4)

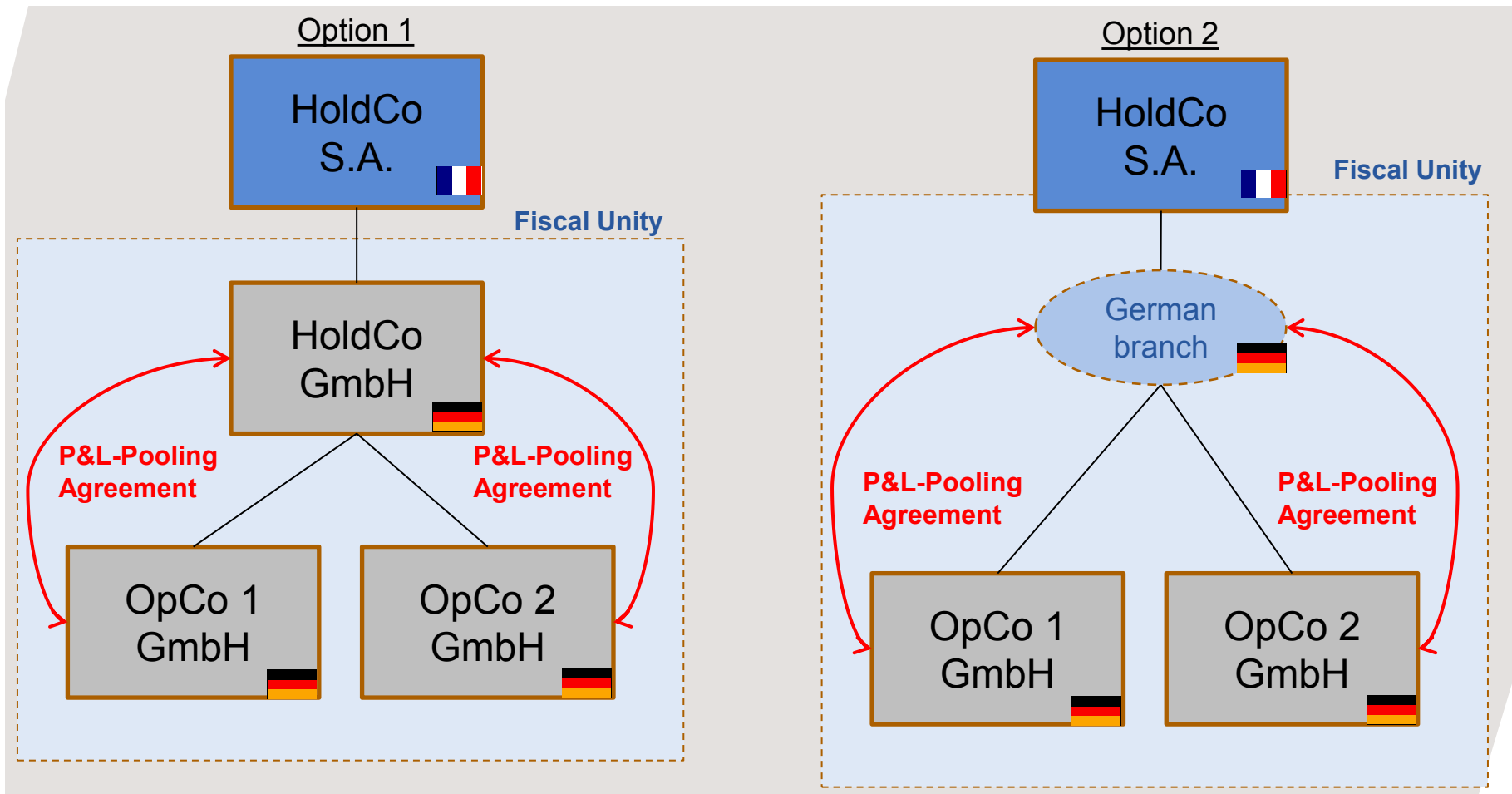
– "Previous" German requirements for tax groups:

- Subsidiary (corporation) with seat and place of effective management in Germany
- Parent Company must be fully taxable in Germany and hold more than 50% of the shares in the Subsidiary
- Conclusion and performance of a profit and loss pooling agreement for a minimum period of five years (several formalities to be met)

– Alternatively:

- Non-German parent company having a registered branch (*Zweigniederlassung*) in Germany
- Allocation of shares in German subsidiaries to such registered branch
- Conclusion of a profit and loss pooling agreement between the registered branch and the subsidiary

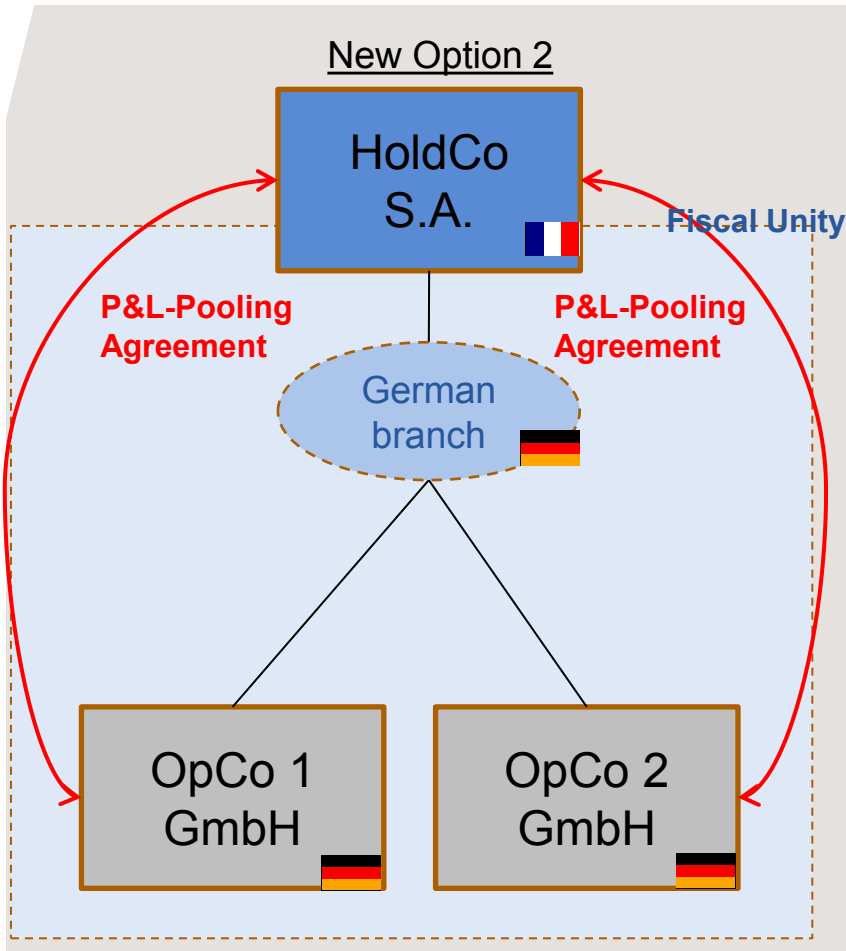
I/ 2. "Modernisation" of German Tax Group Requirements (2/4)



I/ 2. "Modernisation" of German Tax Group Requirements (3/4)

- "New" German requirements for German tax groups:
 - Subsidiary (corporation) with seat **in an EU / EEC member state and** place of effective management in Germany
 - Parent Company holding more than 50% of the shares in the Subsidiary
 - Conclusion and performance of a profit and loss pooling agreement for a minimum period of five years (several partly new formalities to be met)
 - Allocation of shares in the subsidiaries **to a German permanent establishment**
 - Germany must have a full taxation right for profits from the subsidiaries (both, pursuant to the domestic law and the applicable DTT)
- **Additional restrictions for losses used in two different jurisdictions by dual-resident companies (parent or subsidiary)**

I/ 2. "Modernisation" of German Tax Group Requirements (4/4)



– Consequences:

- A German fiscal unity can directly be established between a French parent company and German subsidiaries (or *vice versa*)
- P&L pooling agreements must be concluded and performed which must contain a certain wording (full reference to Sec. 302 of the German Stock Corporation Act)
- Losses can only be used in Germany if they were not used in France.

I/ 3. Taxation of Dividend Distributions (Portfolio Dividends) (1/2)

- "Previous" German tax rules for taxation of portfolio dividends:
 - Dividends distributed by a German corporation are subject to 26,375% German withholding tax, unless a valid tax exemption certificate has been granted
 - Such dividends are 95% tax exempt on the level of a German corporation receiving such dividend
 - No minimum shareholding for German CIT purposes
 - 15% minimum shareholding for German Trade Tax (tax professionnelle) purposes
 - WHT is credited against the German Corporate Income Tax (or refunded)
 - No such WHT refund possible for non-German parent companies, unless requirements under the Parent-Subsidiary-Directive / DTT are met
 - i.e. 10 % minimum shareholding required for such refund
 - ECJ (20.10.2011 – case C-284/09): Breach of freedom of establishment

I/ 3. Taxation of Dividend Distributions (Portfolio Dividends) (2/2)

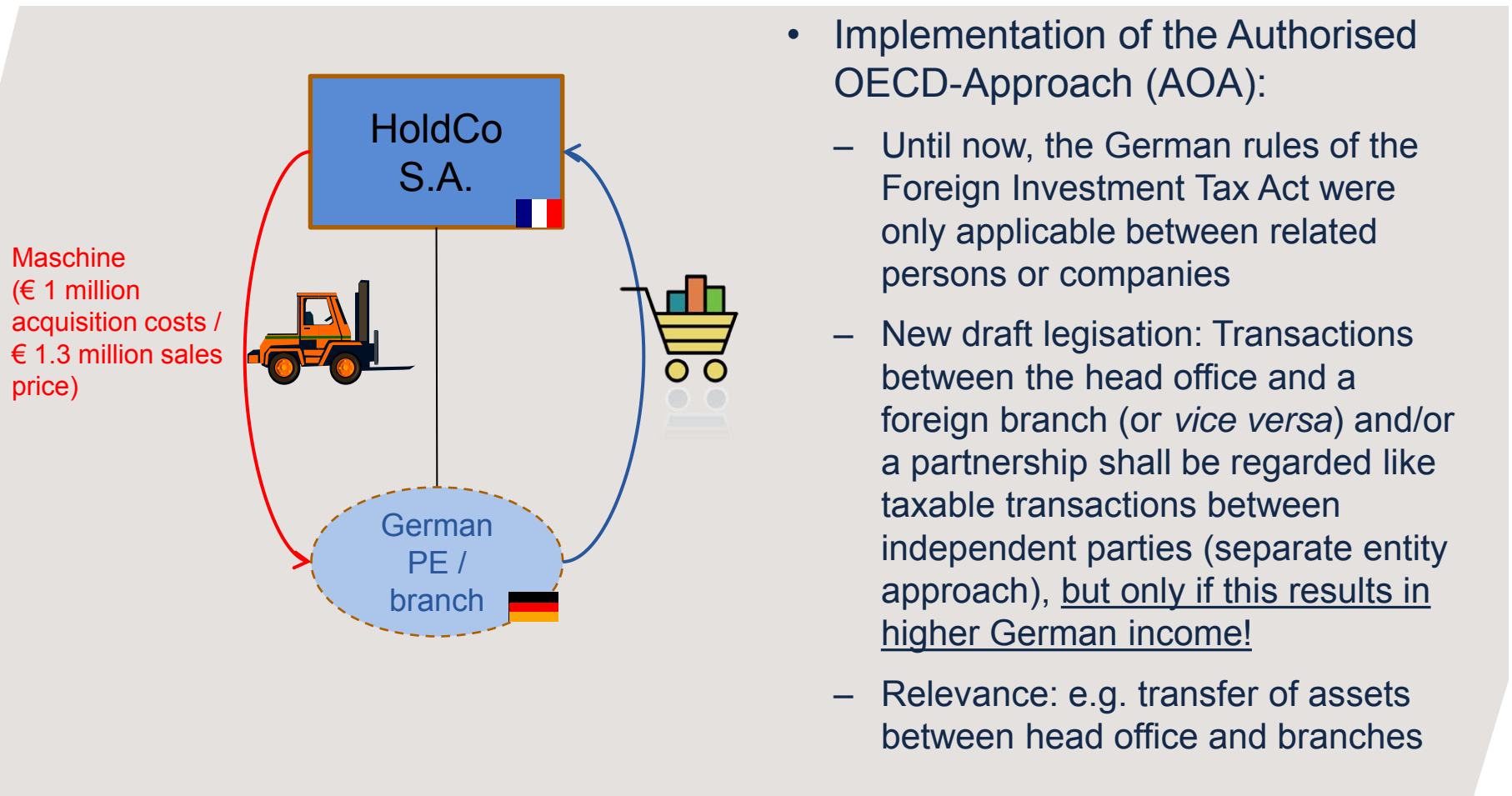
- "New" German tax rules for taxation of portfolio dividends:
 - Portfolio-dividends are only exempt from German Corporate Income Tax (on the level of the shareholder) in case of a minimum shareholding of 10%.
 - In case of a shareholding of less than 10 % as of the beginning of the calendar year when dividends are distributed, income from such dividends is fully liable to German Corporate Income Tax
 - New rules are applicable for dividend distributions made after 28.02.2013
 - **For dividends from portfolio investments (i.e. less than 10% shareholding) distributed before 28.02.2013, a WHT refund can be applied by non-German recipients (corporations) at the Federal Central Tax Office (BZSt).**
 - No comparable 10% minimum shareholding requirements for German tax exemption for profits from sales

I/ 4. Pending Legislation – Annual Tax Act 2013

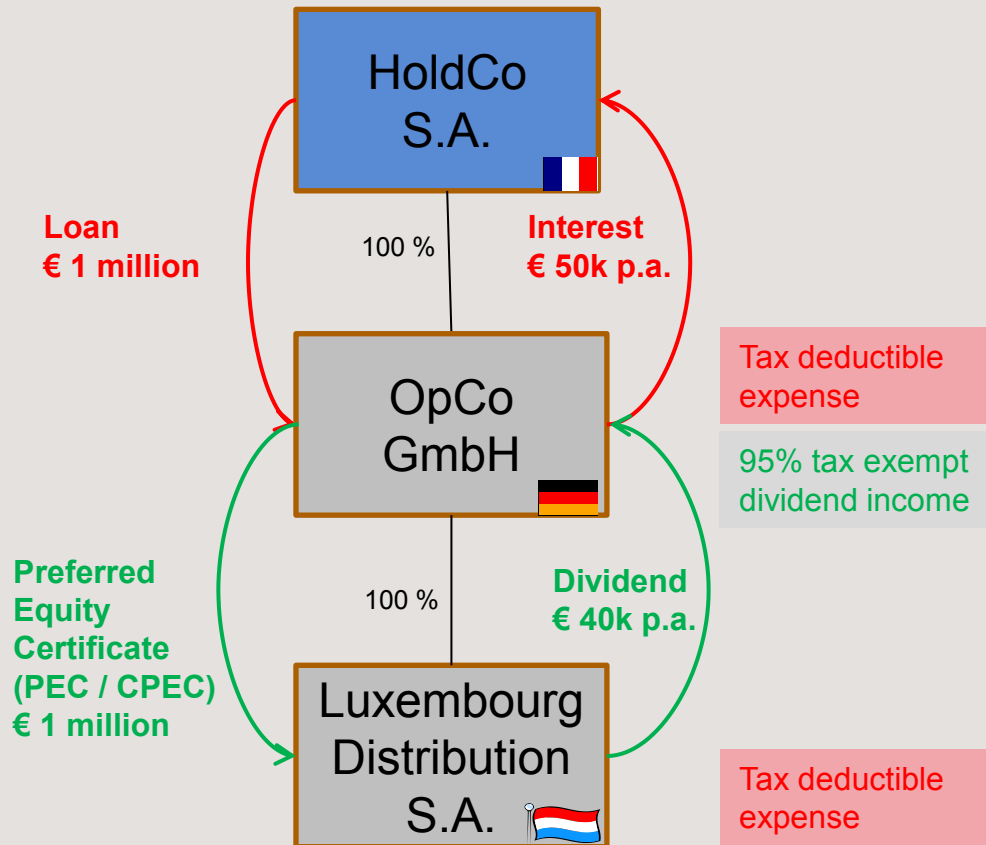
– Draft Annual Tax Act 2013: Amendment of Foreign Investment Tax Act:

- Implementation of the Authorised OECD-Approach (AOA)
- Participation exemption not applicable for hybrid financing instruments
- Anti-RETT-Blocker Rules
- Clarification of treaty-override rule for the qualification of income of a non-German partner in a German partnership from other business relationships (Sec. 50d (10) Income Tax Act). Timing:
 - Timing:
 - Conciliation committee: 12.12.2012 ("consented" draft rejected by parliament)
 - Annual Tax Act 2013 "light" 22.03.2013 rejected by Upper house (*Bundesrat*)
 - Conciliation committee: 23.04.2013 (decision postponed); next meeting: 05.06.2013

I/ 4. Pending Legislation - Foreign Investment Tax Act



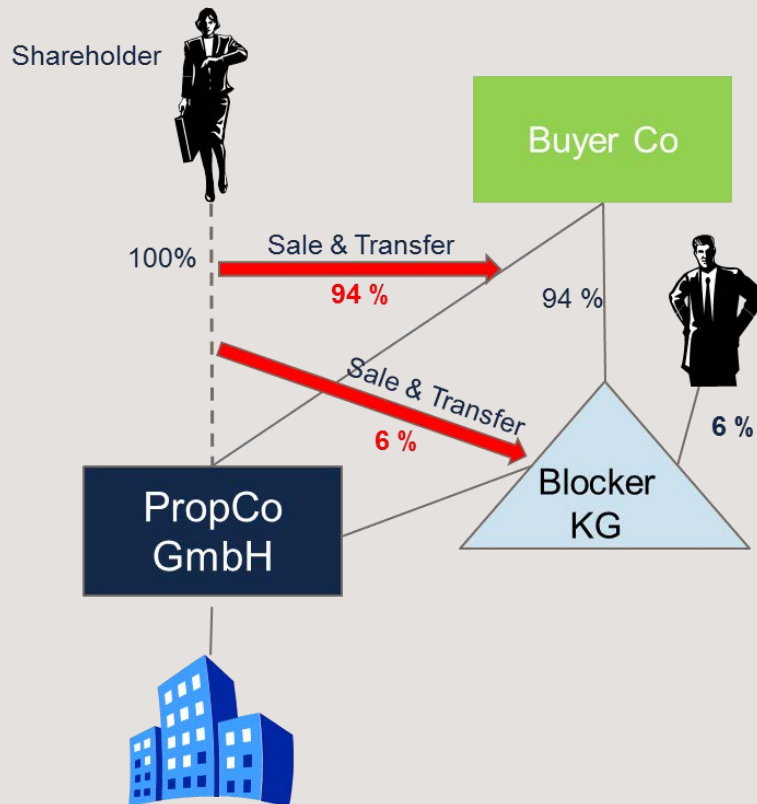
I/ 4. Pending Legislation - Hybrid Finance Instruments



- Restriction of German participation exemption for hybrid finance instruments:
 - In accordance with the recommendation of the Council of the European Union, the participation exemption for dividends shall only be applicable if and to the extent that the income of the distributing company has not been reduced by such payment

I/ 4. Pending Legislation - Anti-RETT-Blocker-Rules

Typical RETT-Blocker-Structure:



– Anti-RETT-Blocker-Rules

- So far, German Real Estate Transfer Tax can be avoided (in a share deal) if no shareholder directly or indirectly holds 95% or more in the property company; indirect participations are only taken into account if the shareholder holds at least 95% of the shares in the intermediate company.
- **New Legislation: Economic approach:** "Economic" shareholding of each shareholder must mathematically be determined on each shareholder level

I/ 5. Update Qualified Substance Requirements for Holdings

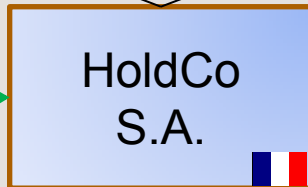


100 %



50 %

50 %

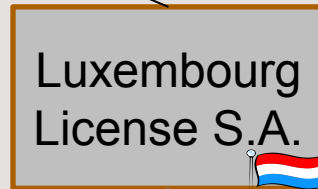


Dividend

Deduction of German WHT (26,375%)?

100 %

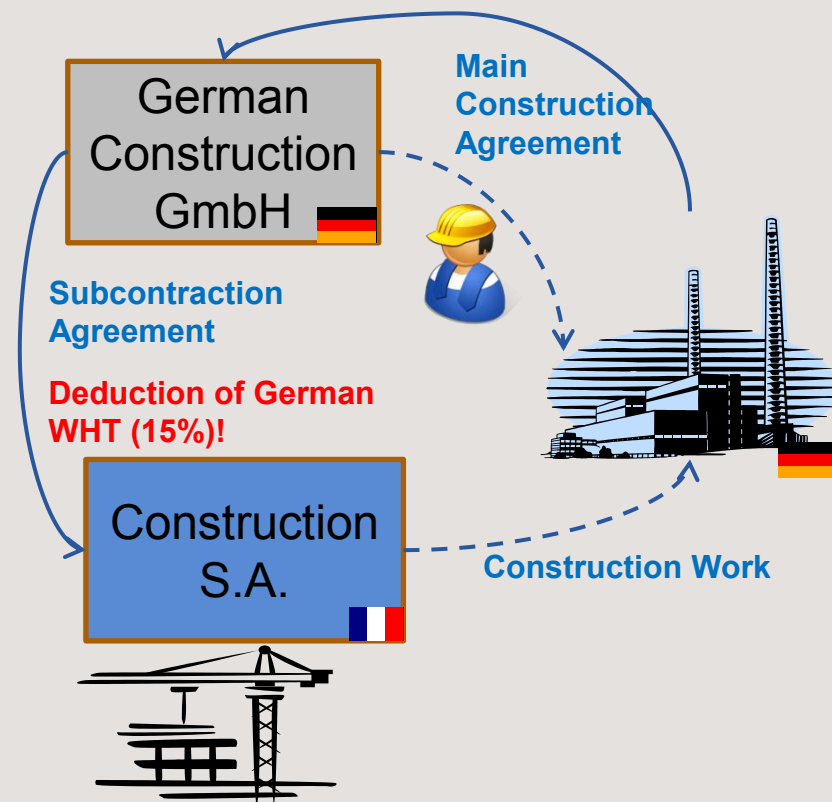
100 %



Trademark

- German Anti-Treaty-Shopping-rules
- WHT exemption / refund under a double tax treaty or the European parent-subsidiary directive requires evidence of certain substance of the shareholder in the resident state (Sec. 50d (3) ITA)
 - Office / Employees / business equip.
 - Economic reasons for the intermediate company
 - Real own business activities (10%)
- Evidence must be provided by completion of extensive questionnaires

I/ 5. Withholding Tax Obligations for Construction Work

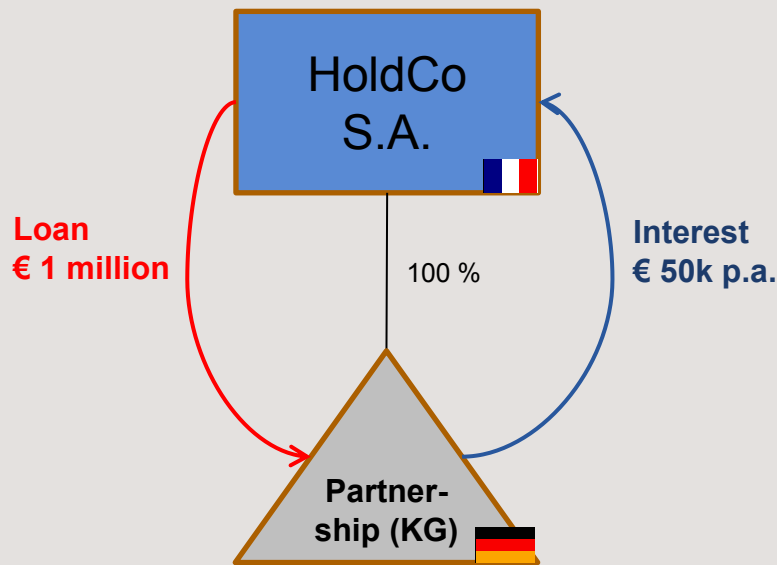


- Sect. 48a, 48b Income Tax Act: Payments made by a VAT-able person for construction work in Germany are subject to 15% WHT unless an exemption certificate from German tax authorities can be presented.
- Rule applies to German and non-German construction companies.
- Compliance with European law?

I/ 5. Case Law: German "Treaty Overrides" constitutional? (1/3)

- Example: Germany's current rules for partnerships:
 - Income from contracts between one partner and the partnership (e.g. for services, leasing of assets or loans) are re-classified into business income from the partnership (so-called: *Sonderverguetungen*) for German tax purposes and taxed as income from the partnership
 - Traditionally, these rules were also applied by the German tax authorities in cross-border situations, i.e. if a non-German partner received such additional income from separate contracts with a German partnership and qualified such income as taxable income from a German PE (for DTT-purposes)
 - German Federal Tax Court ruled (in several decisions) that such requalification does not apply for DTT-purposes
 - i.e. interest from loans granted by the partner is subject to the DTT-rules for interests and therefore taxable only in the state of residence.

I/ 5. Case Law: German "Treaty Overrides" constitutional? (2/3)



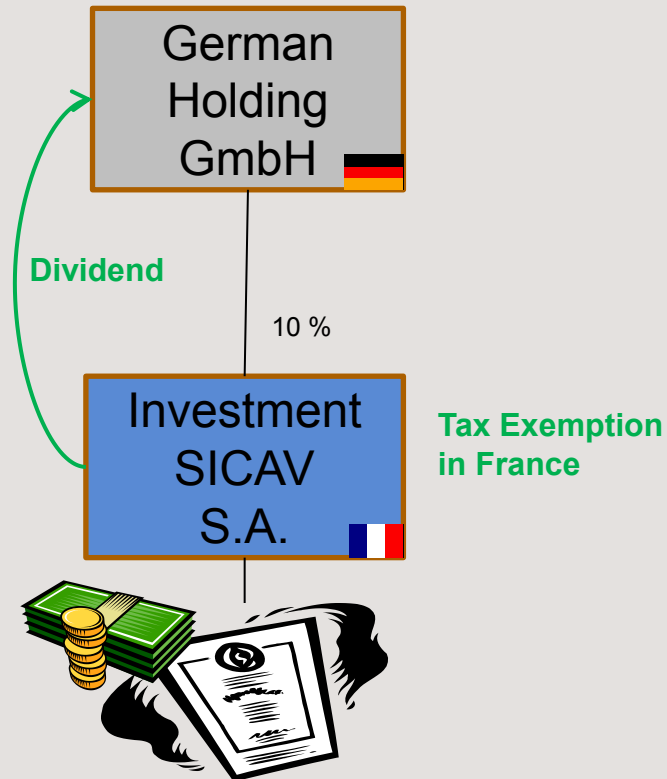
– Example:

- A French S.A. holds 100% of the shares in a German KG (limited liability partnership).
- S.A. has granted a shareholder loan in an amount of € 1 million; interest: € 50k p.a.
- Pursuant to the German domestic tax rules, the interest payments are re-classified into income from the partnership.
- French-German DTT: Art. 4 (business income) or Art. 10 (interest income) applicable?
- Sec. 50d (10) Income Tax Act!?

I/ 5. Case Law: German "Treaty Overrides" constitutional? (3/3)

- In reaction to this case law, a "treaty override" rule was enacted end of 2008 (Sec. 50d (1) Income Tax Act), stipulating that the German qualification rules shall also apply in cross-border-cases, unless the relevant DTT provides for a specific rule.
 - *Note: The German Federal Tax Court (08.09.2010, I R 74/09) held that this rule is not applicable as the loan cannot be allocated to a German PE.*
- In addition to this rule, many similar treaty override rules exist.
- The German Federal Tax Court has submitted a request to the German Constitutional Court (with regard to another treaty override rule) whether such "treaty overrides" are consistent with the German constitution (10.01.2012 – I R 66/09; 2 BvL 1/12)
- **Practical consequences: Appeals against German tax assessment notices should be filed, if a "treaty override"-rule is applied!**

I/ 5. Case Law: Treaty Protection of a French SICAV



- Federal Tax Court (06.06.2012, case I R 52/11):
 - Can a French SICAV benefit from the Treaty Protection (participation exemption) under the German French Double Tax Treaty?
 - Decision:
 - A tax exempt French SICAV is in principle tax resident in France for DTT-purposes
 - But it needs to be checked whether a SICAV qualifies as corporate entity from a German tax perspective.

II/ Actualités en fusions-acquisitions franco-allemandes

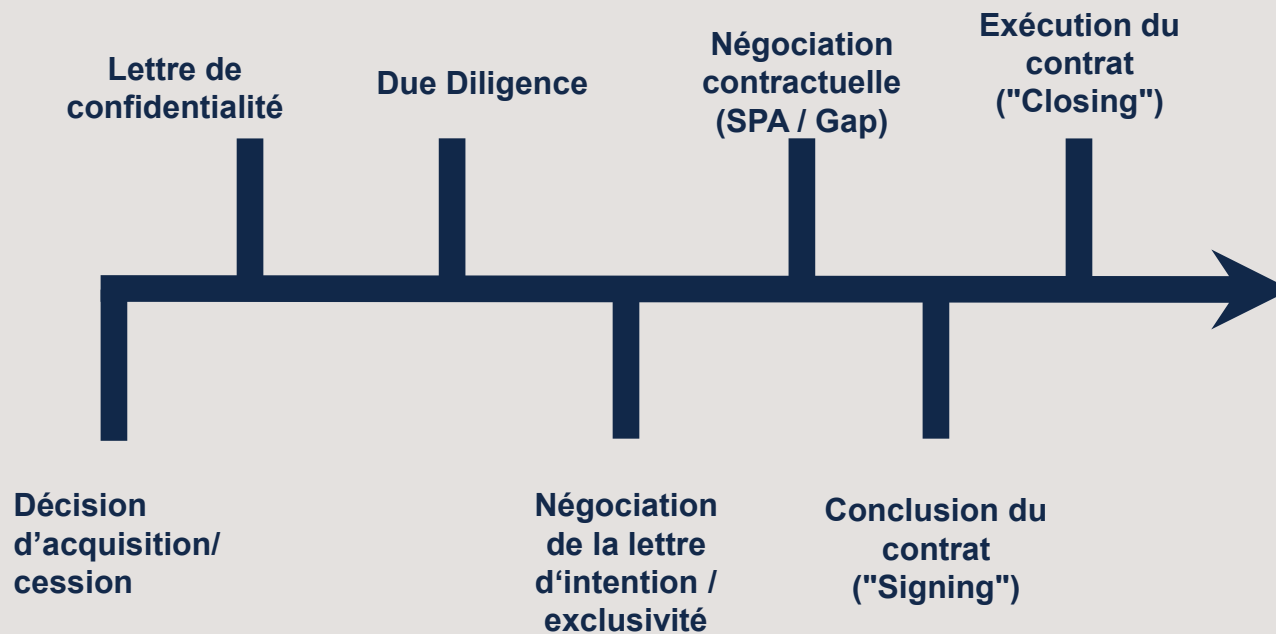
Gerd Leutner, Rechtsanwalt, associé de CMS Hasche Sigle

Avec la participation de d'Alexandra Rohmert et d'Alain Herrmann avocats,
CMS Bureau Francis Lefebvre

III/ 1. Etude CMS sur les fusions-acquisitions (M&A)

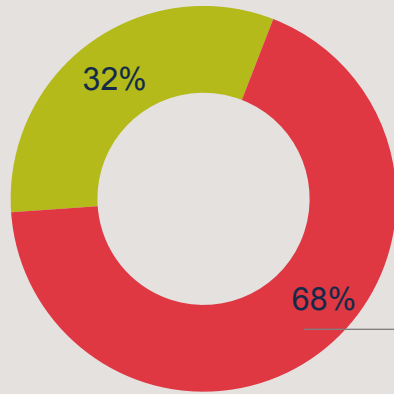
- Aperçu des règles juridiques applicables en matières de fusions et de contrats d'acquisition (Contrats M&A)
- Données basées sur des transactions, pour lesquelles CMS a conseillé l'acquéreur ou le vendeur
 - Une implantation locale et une pénétration du marché permettent un aperçu complet du marché européen des M&A
- 5ème édition pour la période de 2007 à 2012
- L'analyse porte sur 1.700 contrats M&A, dont 342 pour la seule année 2012

II/ 2. Déroulement d'une opération de M&A



II/ 3. Mécanismes d'ajustement des prix (1/4) Ajustement du prix d'achat 2012

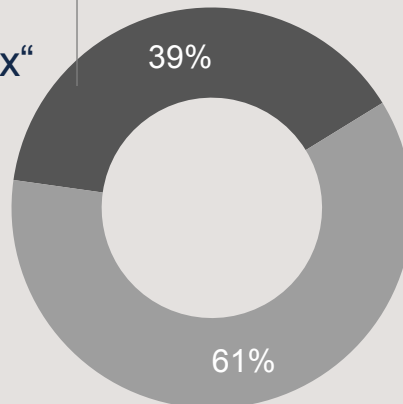
» Pays Germanophones



100 % = toutes les transactions analysées

■ Oui
■ Non

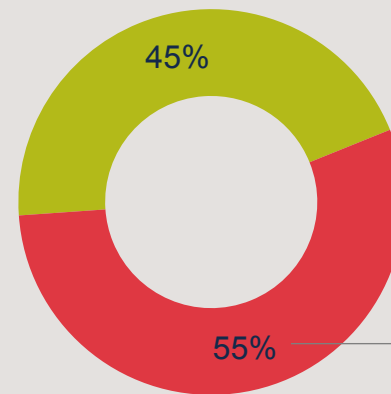
» „Locked-box“



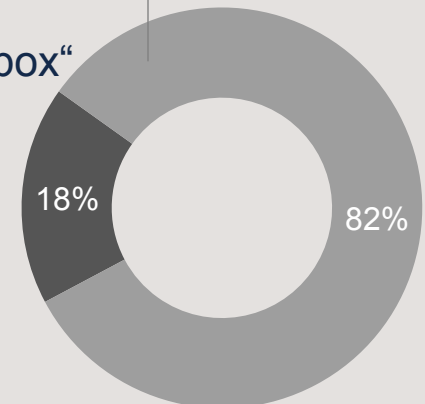
100 % = des transactions sans mécanisme d'ajustement du prix d'achat

■ Oui
■ Non

» France



» „Locked-box“

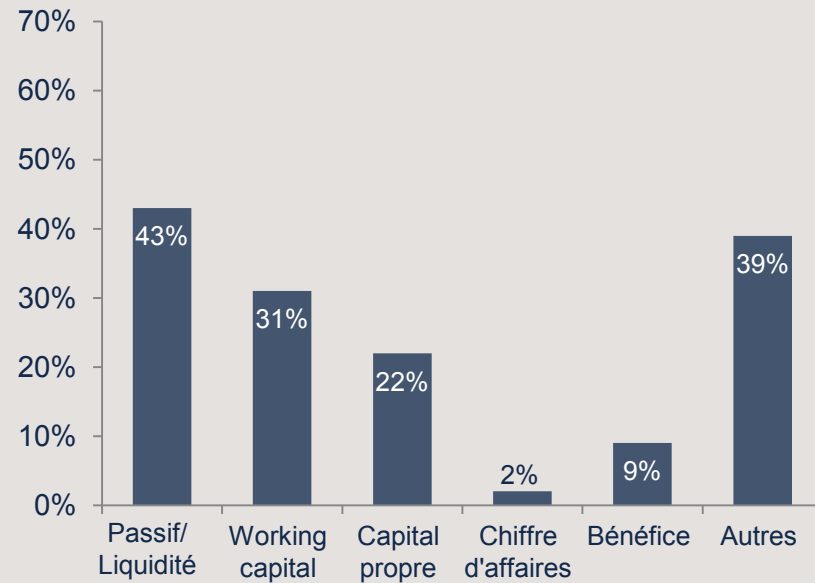


II/ 3. Mécanismes d'ajustement des prix (2/4)

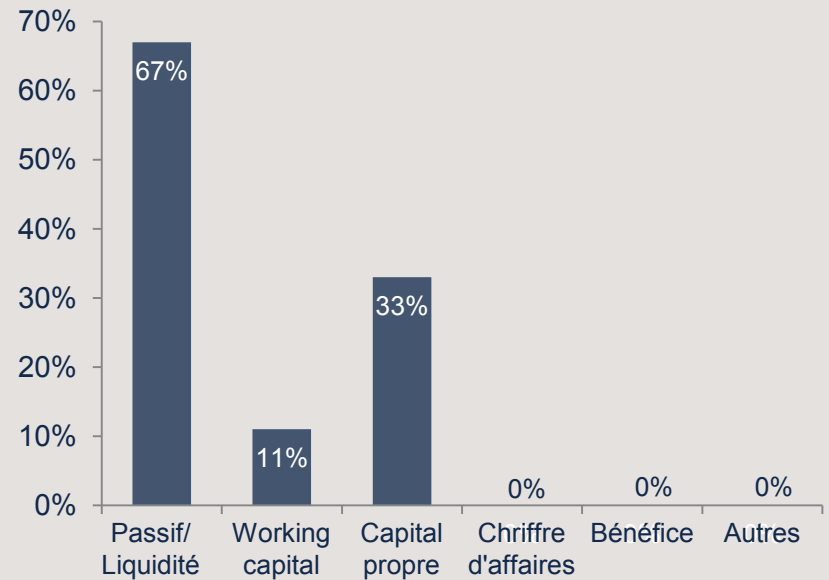
Ajustement du prix d'achat : les méthodes d'ajustement

2012

» Pays germanophones



» France

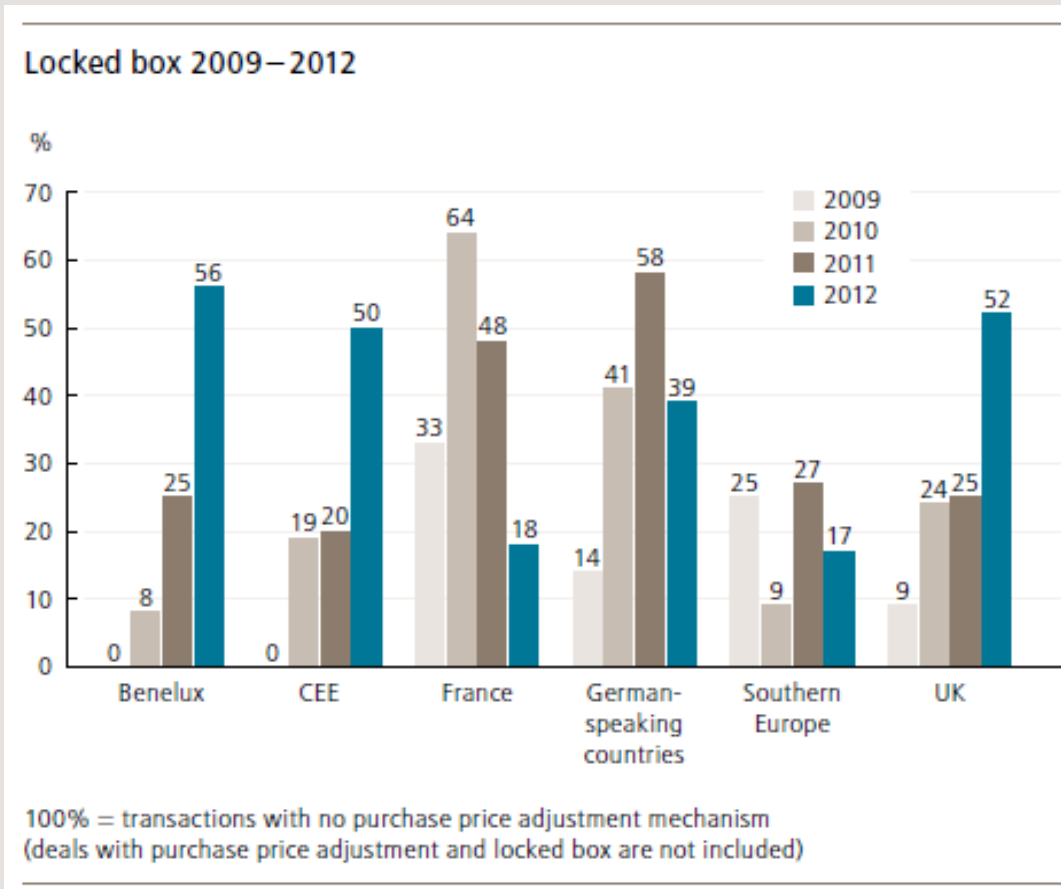


100 % = alle untersuchten Transaktionen mit Kaufpreisanpassungsmechanismus - Mehrfachnennungen möglich

Rechtsanwälte Steuerberater

II/ 3. Mécanismes d'ajustement des prix (3/4)

Diminution du recours aux locked box en France et en Allemagne en 2012

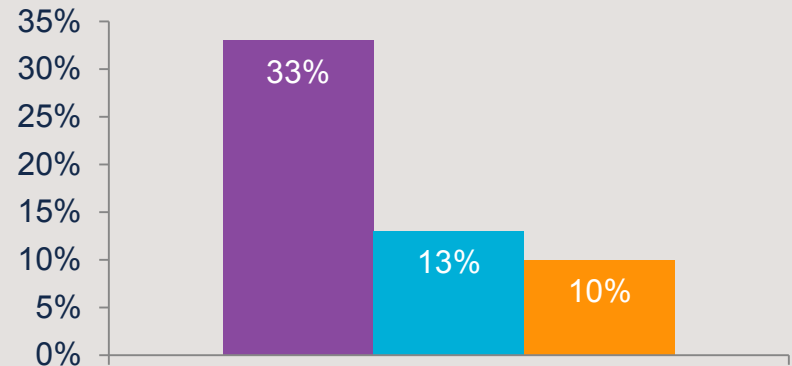
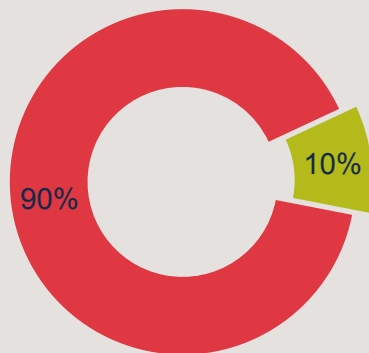


II/ 3. Mécanismes d'ajustement des prix (4/4)

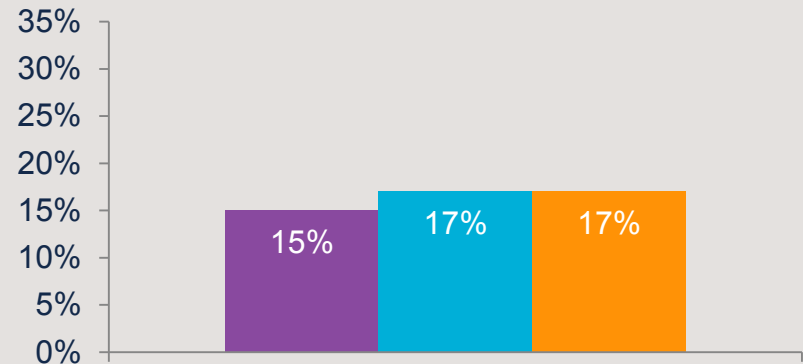
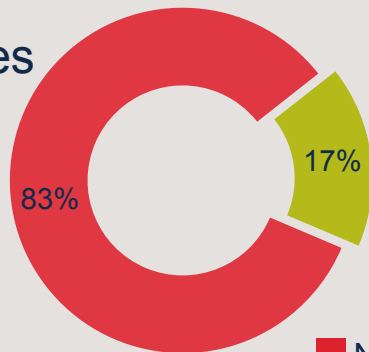
Clause dite de "Earn-out" en 2012

Comparaison: clause dite de "Earn-out"

» France



» Pays germanophones

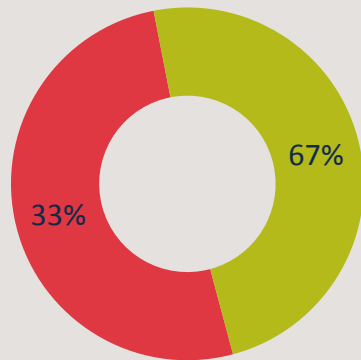


100 % = toutes les transactions analysées

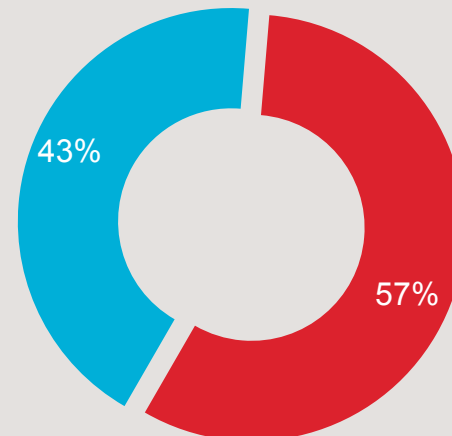
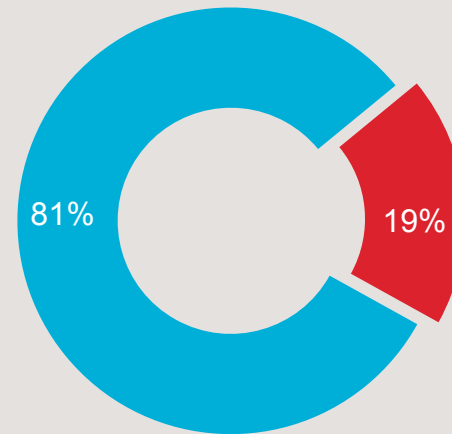
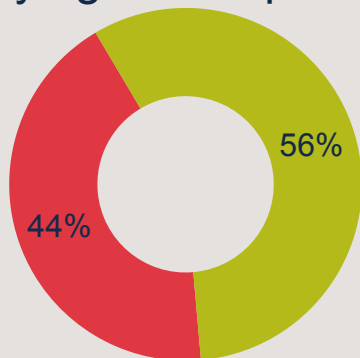
■ Non ■ Oui

II/ 4. Les garanties de passif favorables aux vendeurs (1/7) La garantie "Basket" en 2012

» France



» Pays germanophones



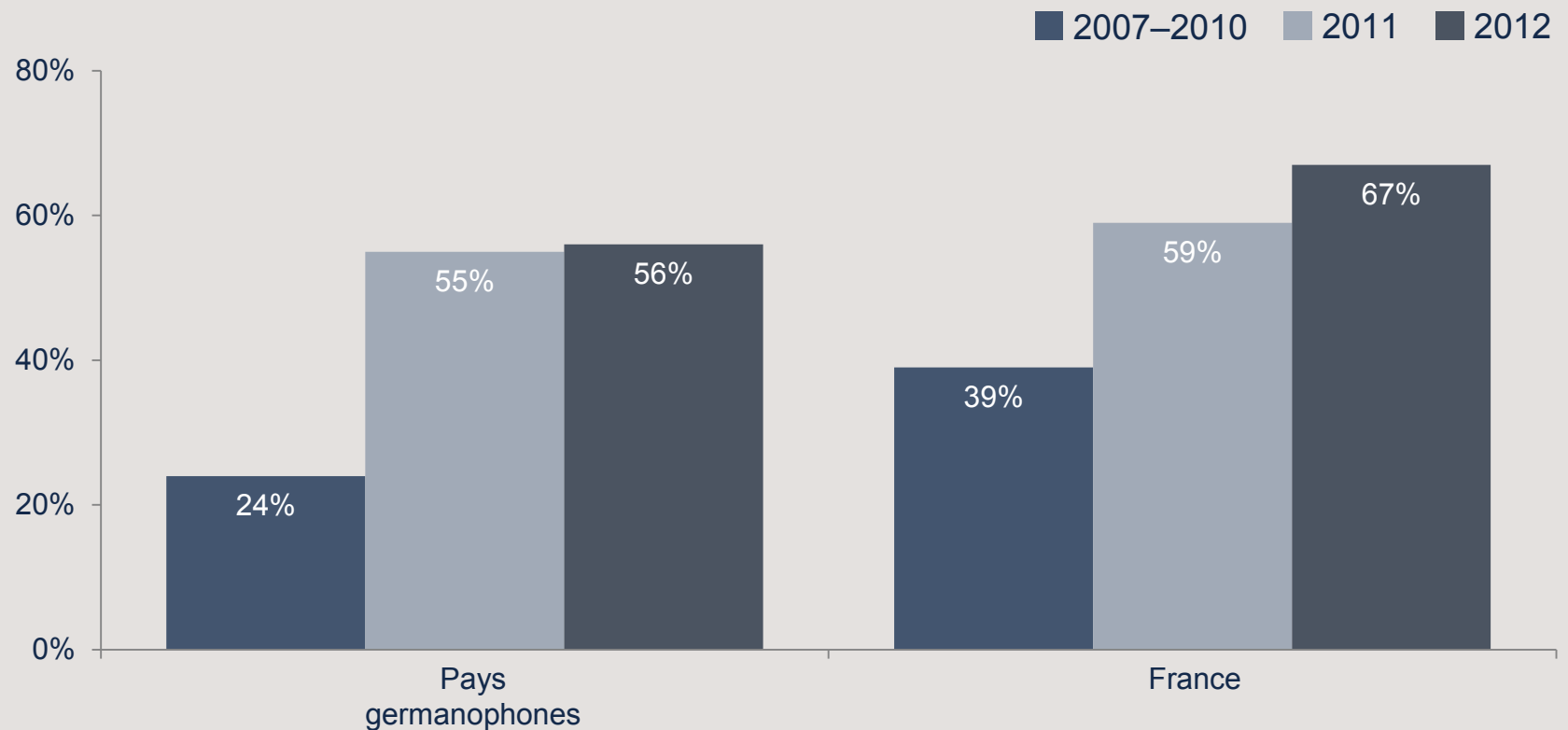
■ Excess Only

■ First Dollar

100 % = toutes les transactions analysées

■ Non ■ Oui

II/ 4. Les garanties de passif favorables aux vendeurs (2/7) La garantie "Basket" en 2012

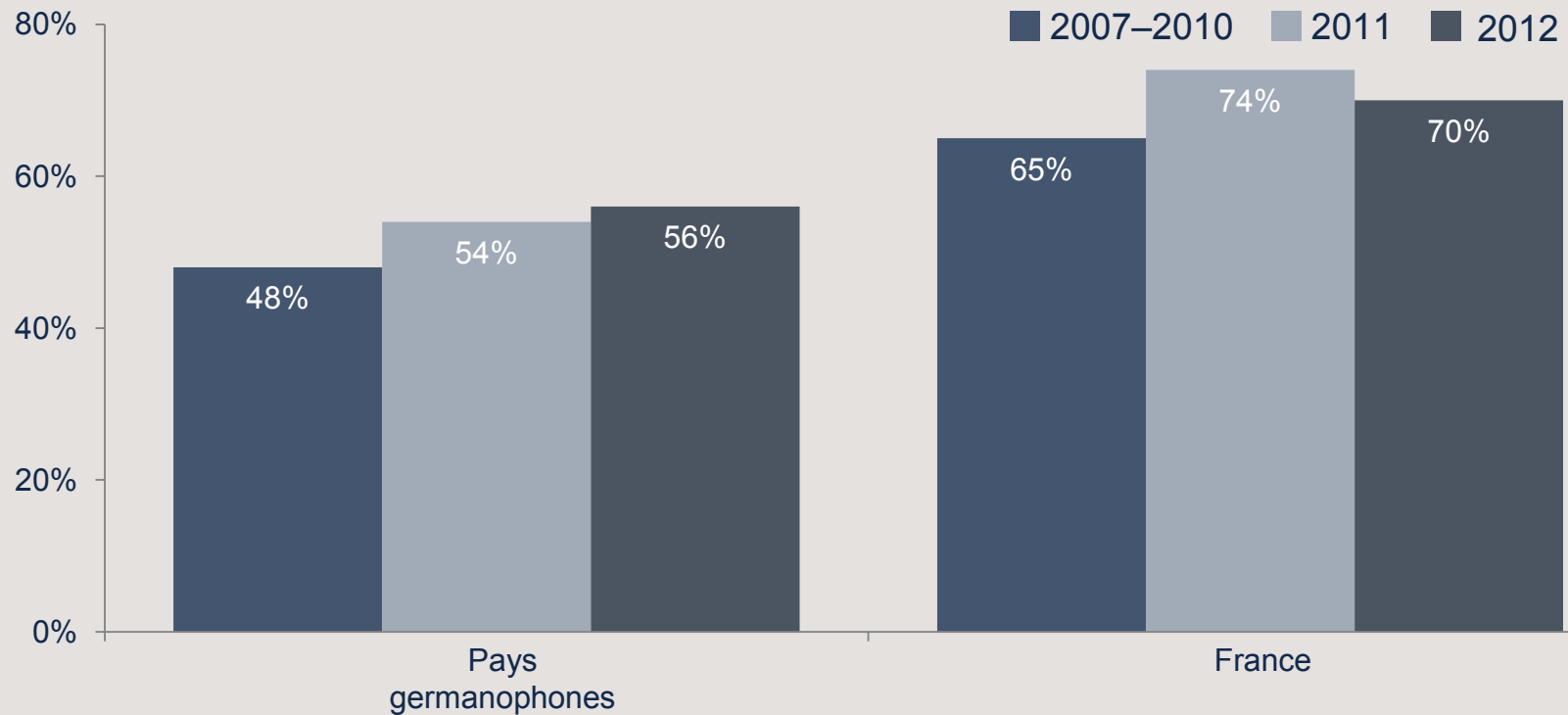


Evolution de la fiscalité des entreprises en Allemagne et restructurations franco-allemandes

100 % = toutes les transactions analysées

II/ 4. Les garanties de passif favorables aux vendeurs (3/7)

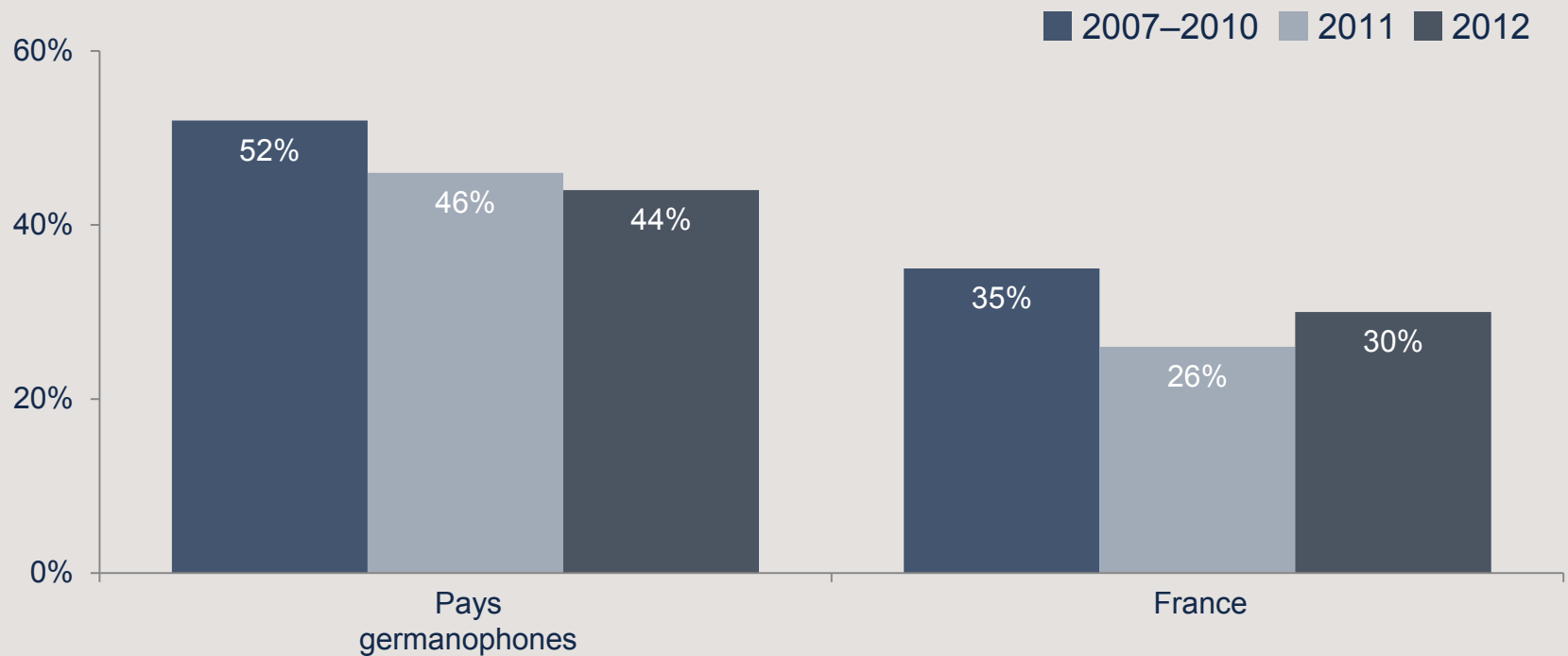
Des seuils globaux d'indemnisation jusqu'à 50 % du prix d'achat 2007-2012



100 % = toutes les transactions analysées

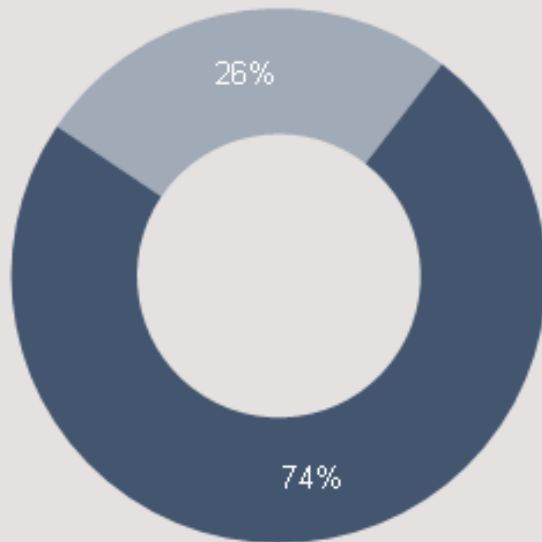
II/ 4. Les garanties de passif favorables aux vendeurs (4/7)

Des seuils globaux d'indemnisation de plus 50 % du prix d'achat
2007-2012



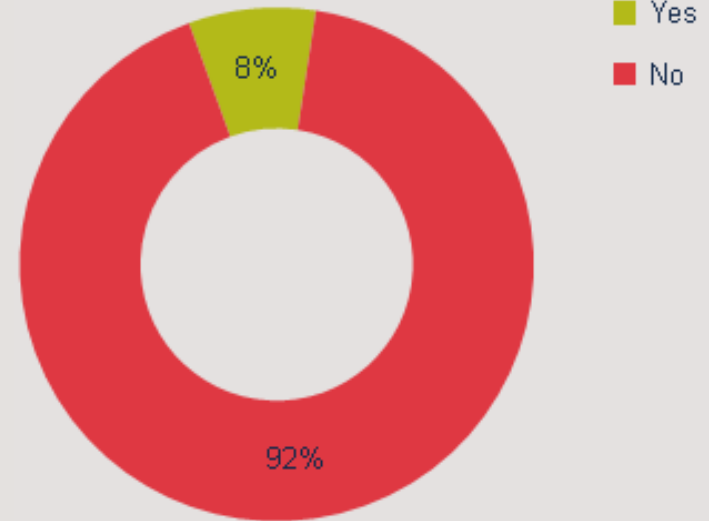
100 % = toutes les transactions analysées

II/ 4. Les garanties de passif favorables aux vendeurs (5/7) Assurances de garantie de passif



100% = deals in which W+I insurance was actively contemplated or actually used

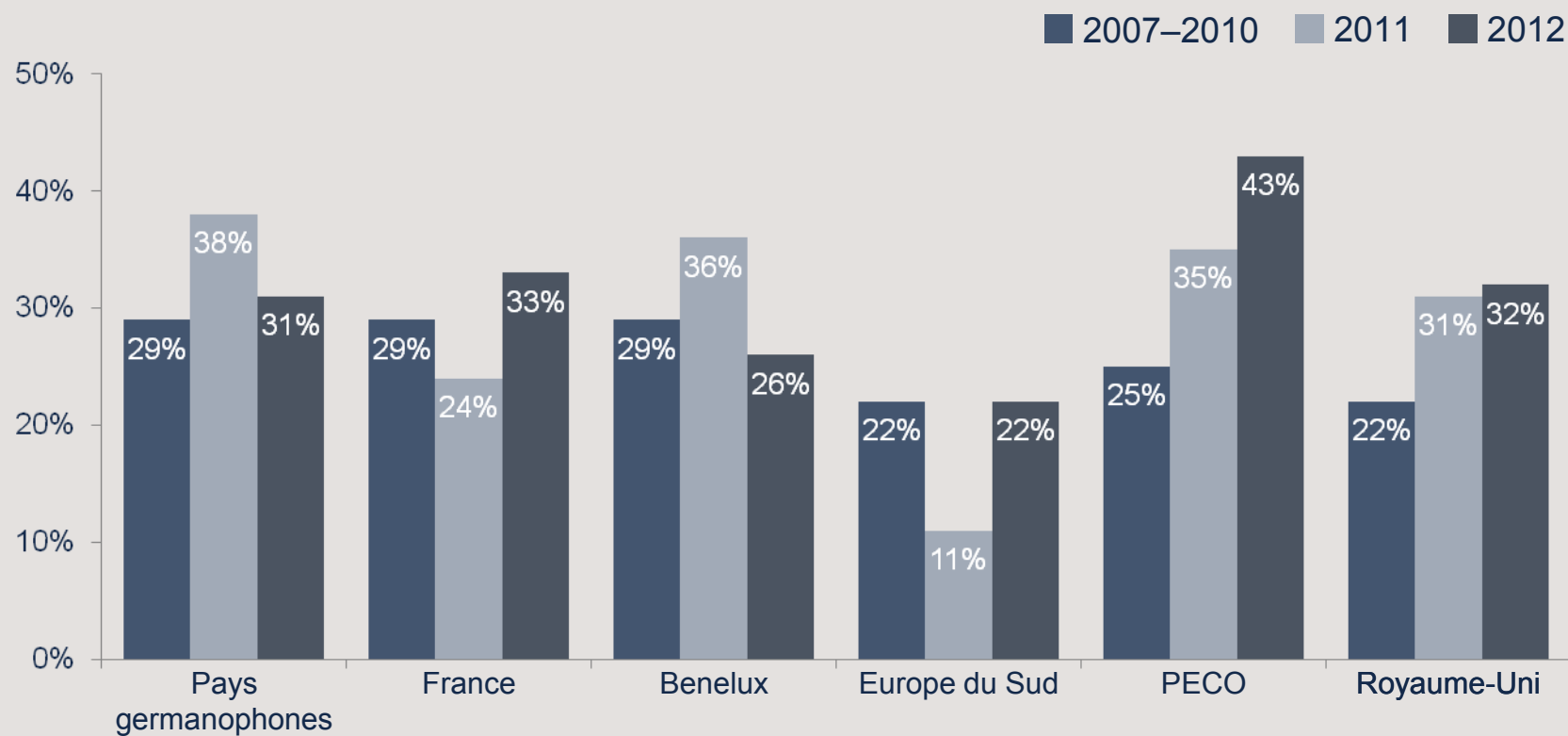
■ Sell side
■ Buy side



100% = all evaluated transactions

■ Yes
■ No

II/ 4. Les garanties de passif favorables aux vendeurs (6/7) Délai de prescription, Période de garantie de 18 à 24 mois

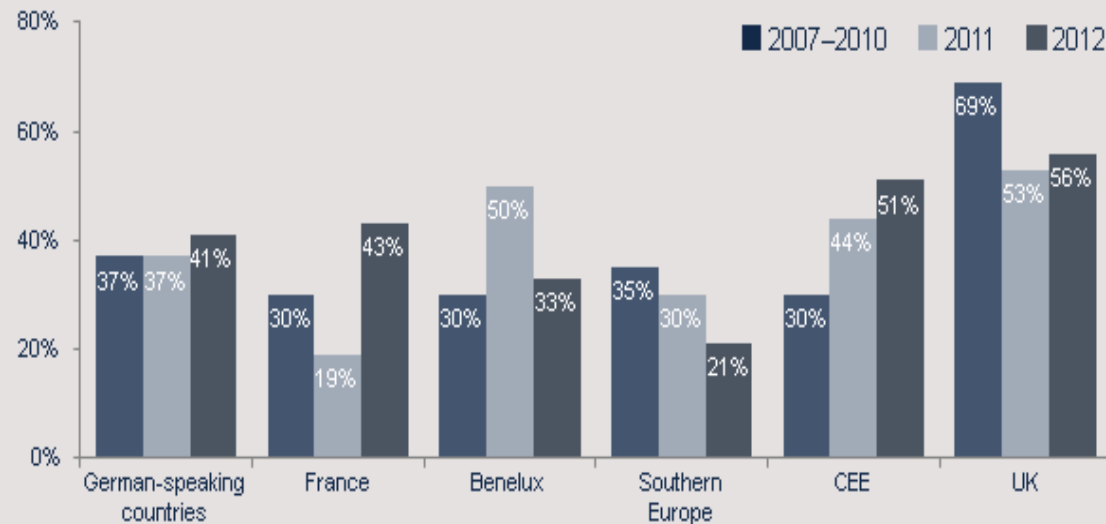


100 % = toutes les transactions analysées

II/ 4. Les garanties de passif favorables aux vendeurs (7/7) Traitement de la data room comme élément exonératoire

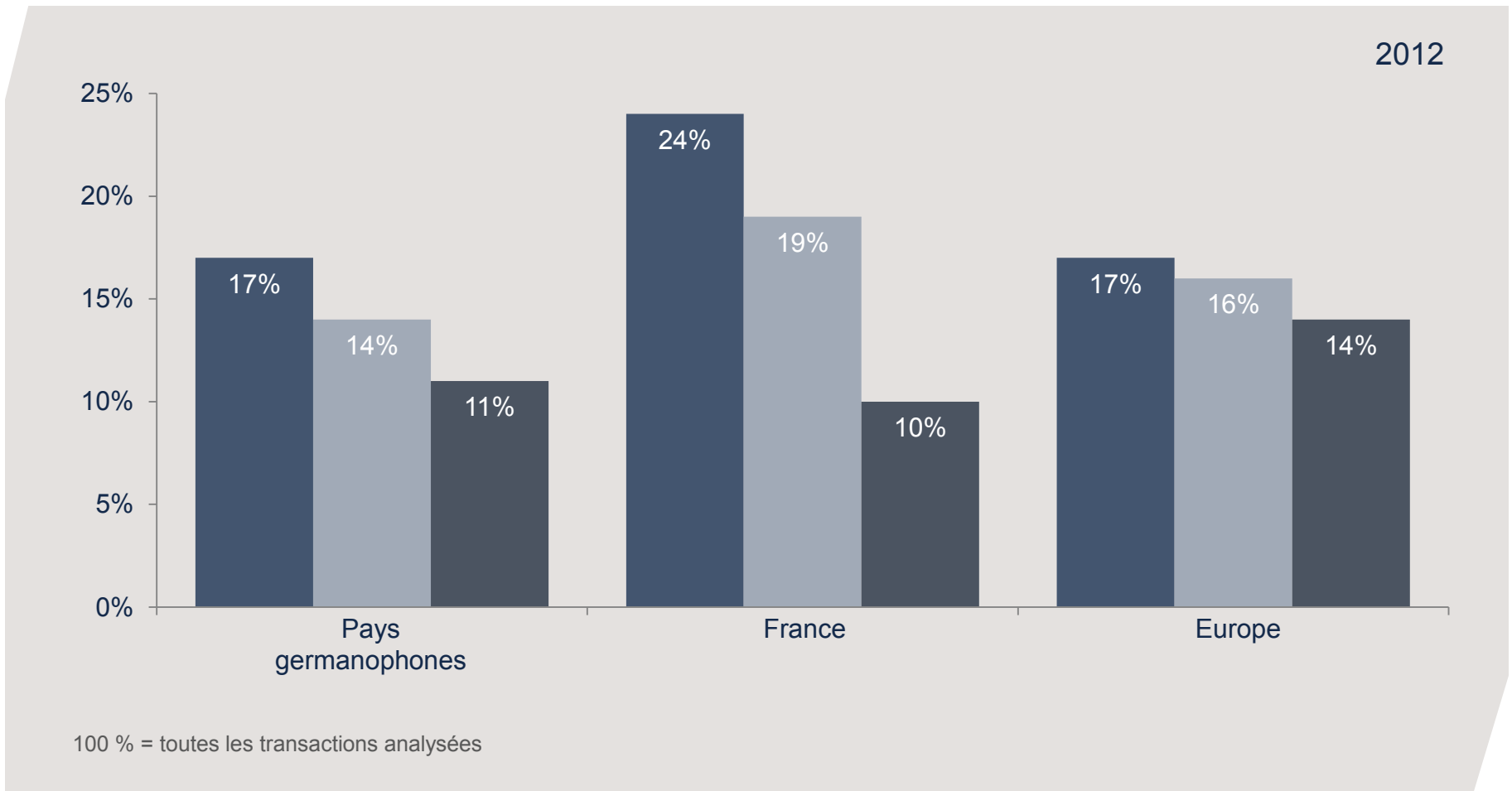
Exclusion of Warranty Claims 2007–2012

Time trend Europe: Disclosure documents (Data Room)

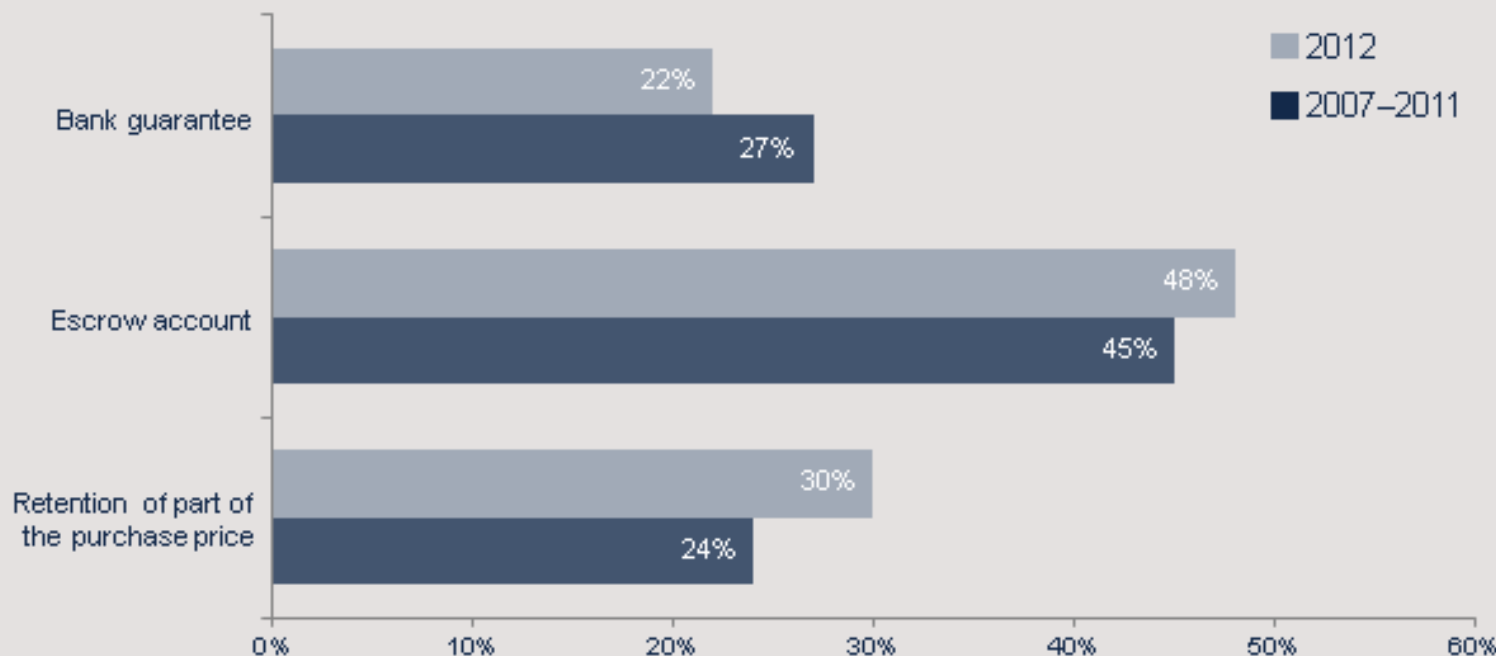


100% = all evaluated transactions—more than one nomination possible

II/ 4. Les garanties de passif: les acquéreurs résistent (1/4) Clauses dites de «material adverse change» (MAC)



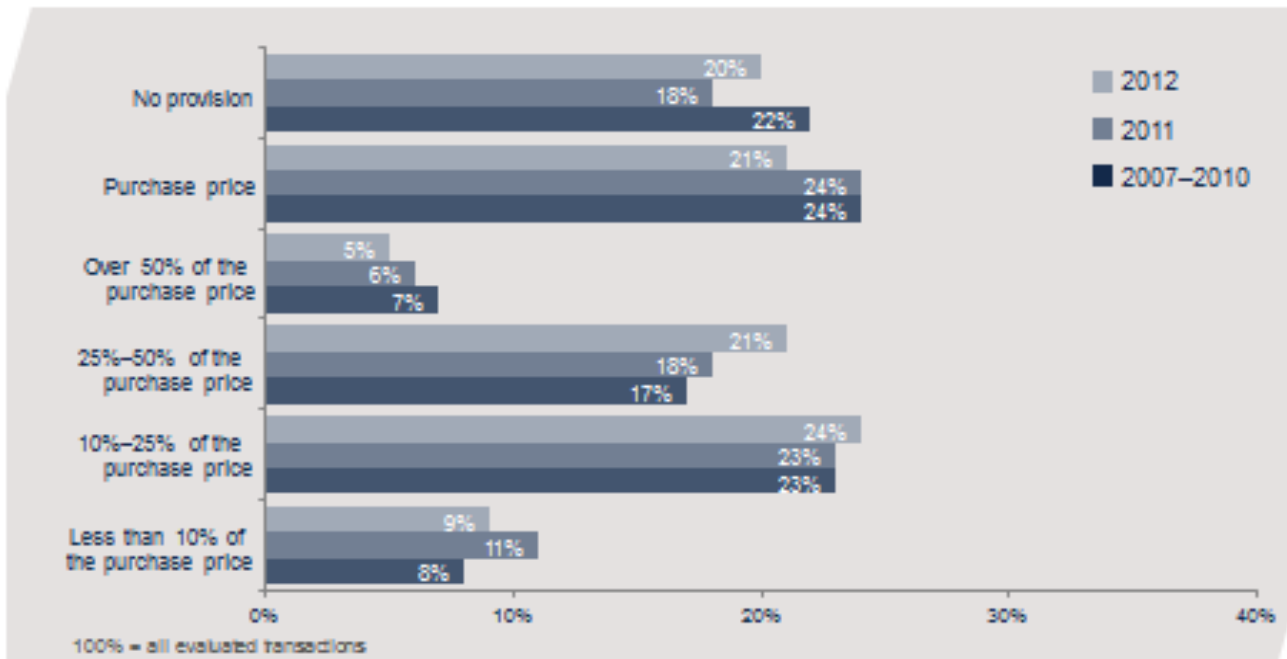
II/ 4. Les garanties de passif : les acquéreurs résistent (2/4) Garantie sur la garantie



100 % = transactions with safeguarding mechanism—more than one nomination possible

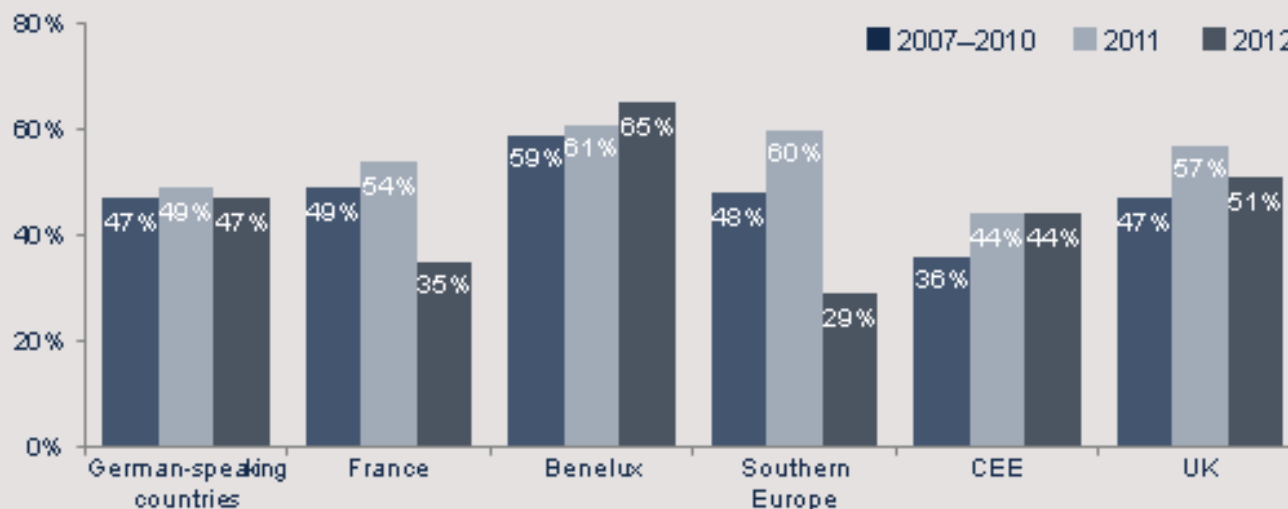
II/ 4. Les garanties de passif : les acquéreurs résistent (3/4) Opérations sans plafond de garantie

Liability Caps 2007–2012



II/ 4. Les garanties de passif : les acquéreurs résistent (4/4) Clauses de non-concurrence

Time trend Europe



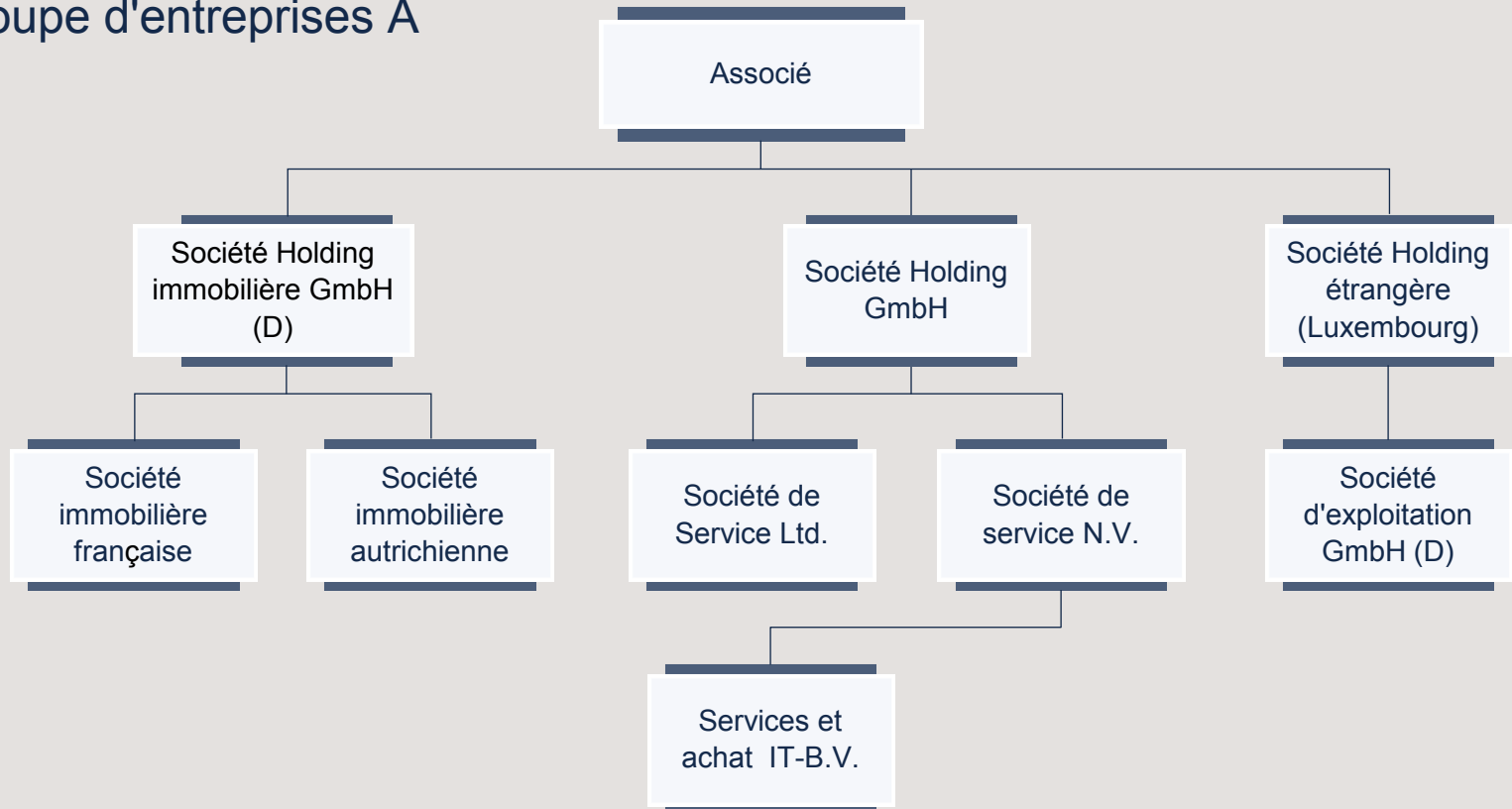
100% = allocated transactions

II/ Fusions transfrontalières franco-allemandes

Gerd Leutner, Rechtsanwalt, associé de CMS Hasche Sigle

III/ 1. Les motifs et le déroulement (1/8) Surmonter des structures complexes !

» Groupe d'entreprises A



III/ 1. Les motifs et le déroulement (2/8) Surmonter des structures complexes !

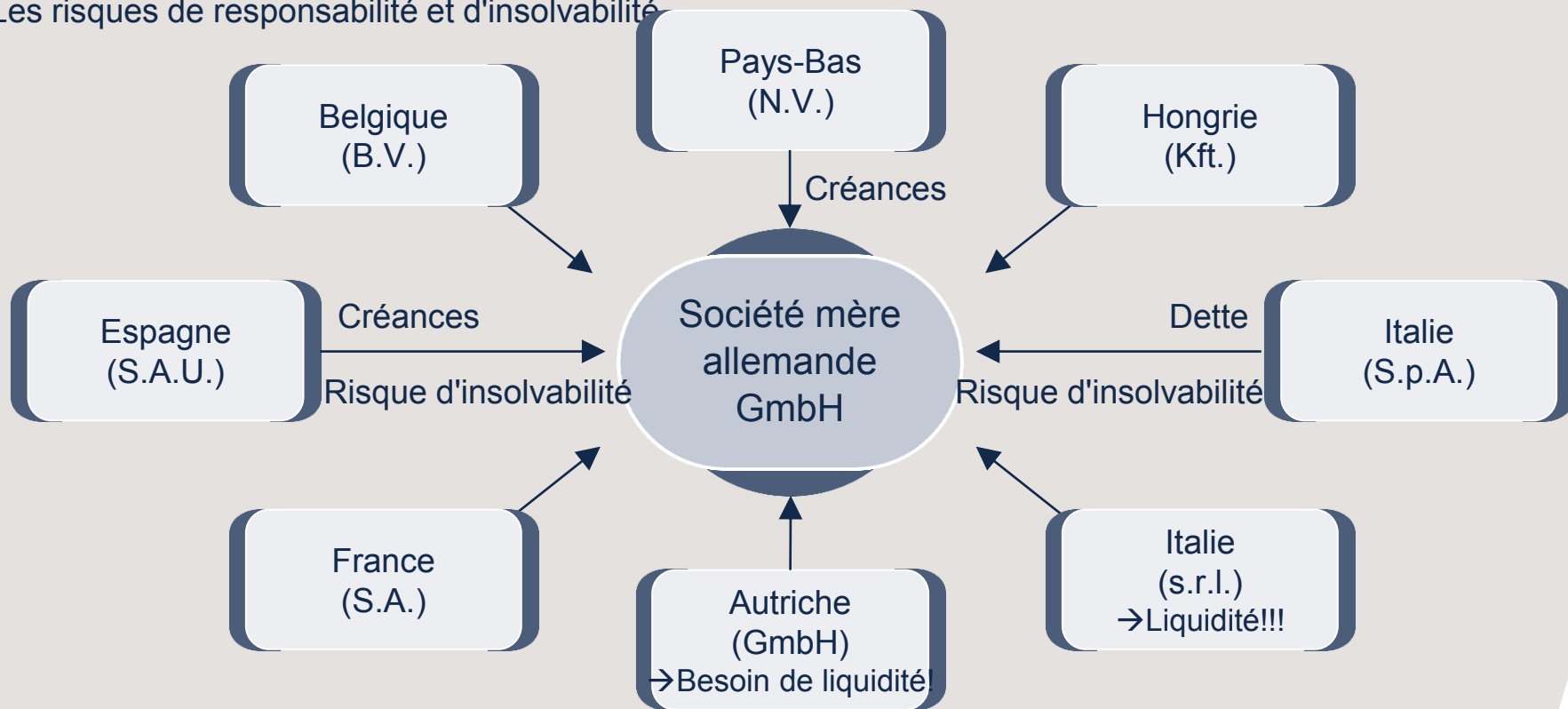
» Groupe d'entreprises A



III/ 1. Les motifs et le déroulement (3/8)

Extrême inégalité dans la répartition des liquidités, créances et de la dette intra-groupe

Les risques de responsabilité et d'insolvabilité



III/ 1. Les motifs et le déroulement (4/8)

d) Règlementation

e) « Squeeze out »

III/ 1. Les motifs et le déroulement (5/8)

Déroulement d'une fusion transfrontalière

Fusion transfrontalière, articles 122a et suivants UmwG
(loi allemande sur les transformations des sociétés)

Rédaction d'un projet commun de fusion transfrontalière

Rapport(s) de fusion

Audit de la fusion

Rapport d'audit

Publication du projet de fusion

Mise à disposition du rapport de fusion, du projet de fusion et des comptes annuels

Approbation par l'assemblée générale (résolution)

Certificat de légalité de la réalisation de la fusion dans le pays de la société absorbée

Immatriculation au registre du commerce de la société absorbante

III/ 1. Les motifs et le déroulement (6/8)

Allègements pour les fusions intra-groupe

- Pas d'augmentation du capital en cas de "up-stream-merger" ou en cas de renonciation par l'associé
- Pas d'audit de la fusion en cas de "up-stream-merger " ou en cas de renonciation par l'associé
- Résolution des associés n'est pas requise dans certains cas

Mais:

- Le rapport de fusion est toujours requis
(Différence avec la fusion de droit allemand)

III/ 1. Les motifs et le déroulement (7/8)

Les particularités nationales à concerter

- Intégration du Comité d'entreprise
- Enregistrement au registre du commerce de la société absorbée dans des délais spécifiques pour éviter des comptes intermédiaires
- Les délais de convocation de l'assemblée des associés et d'autres organes sociétaires à respecter
- Publication du projet de fusion

III/ 1. Les motifs et le déroulement (8/8)

Problèmes pratiques

- Projet de fusion en deux (voire trois) langues
(pas de version anglaise possible)
- Prééminence d'une version concernant l'ensemble du projet de fusion
- Les traductions sont-elles obligatoires?

III/ 2. La participation des salariés (1/2)

Aspects généraux

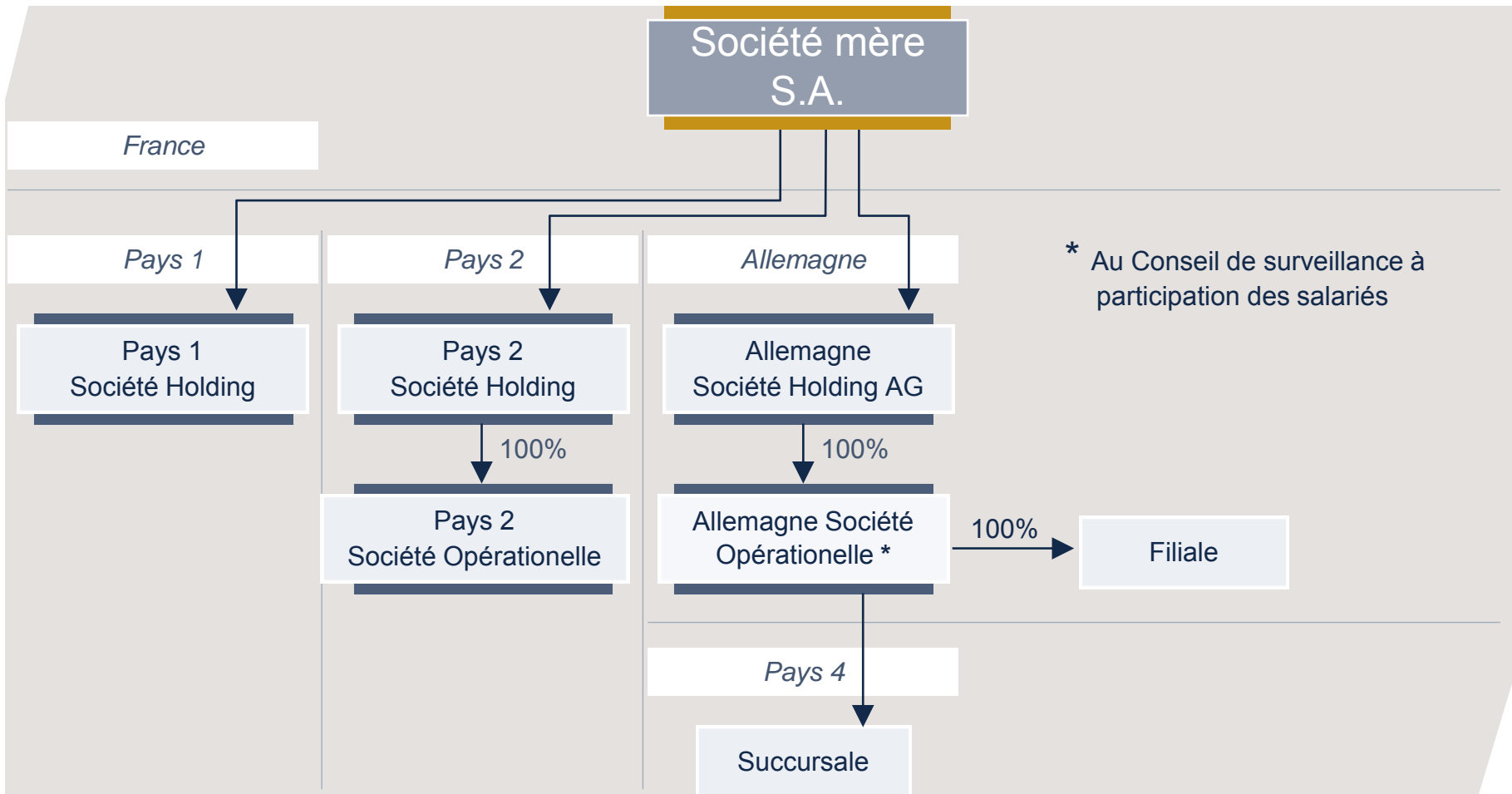
- Le droit d'information des représentants des salariés
- Participation au niveau de l'entreprise : procédure de participation des salariés en Allemagne
- Les aspects du droit du travail au regard du projet et du rapport de fusion
- Le droit d'information des salariés

III/ 2. La participation des salariés (2/2)

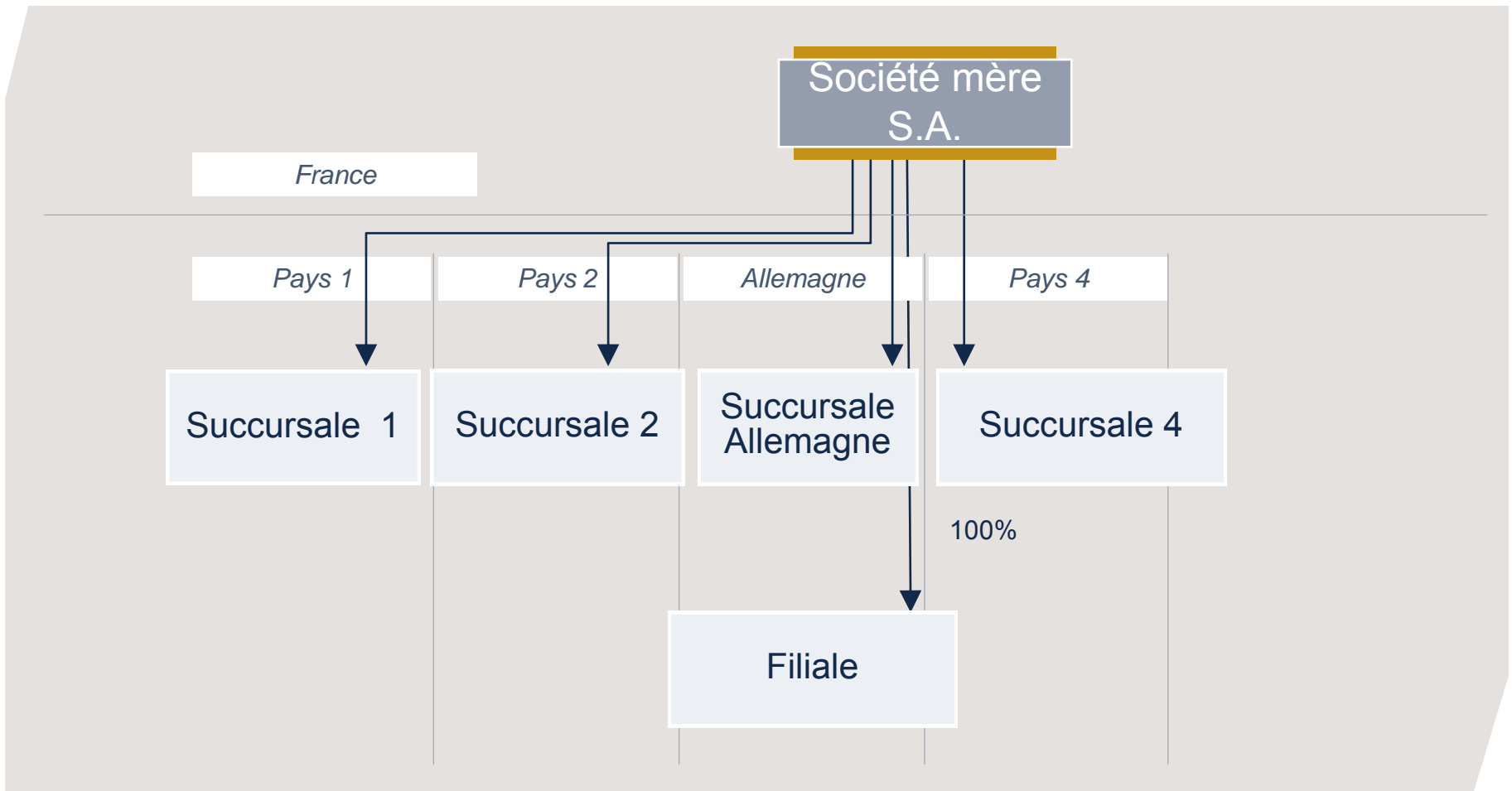
Mise en œuvre de la participation des salariés

Règlement négocié	Règlement standard
<p><u>Avantages</u></p> <ul style="list-style-type: none">• Possibilité de conception dans le cadre de la cogestion (par exemple, la taille de l'organe de cogestion)• Implication des salariés• En France : Éviter un empilement d'un comité d'entreprise, du comité de la société transfrontalière et d'un éventuel comité européen	<p><u>Avantages</u></p> <ul style="list-style-type: none">• Gain de temps (pas de période de 6 mois de négociation)• Réduction des coûts
<p><u>Inconvénients</u></p> <ul style="list-style-type: none">• Temps et coûts	<p><u>Inconvénients</u></p> <ul style="list-style-type: none">• Constitution du GSN peut être indispensable en vue de l'exécution de tâches prévues par la loi• En France : obligation de créer un comité de la société transfrontalière

III/ 3. Étude d'un cas pratique (1/6) Situation de départ



III/ 3. Étude d'un cas pratique (2/6) Structure envisagée



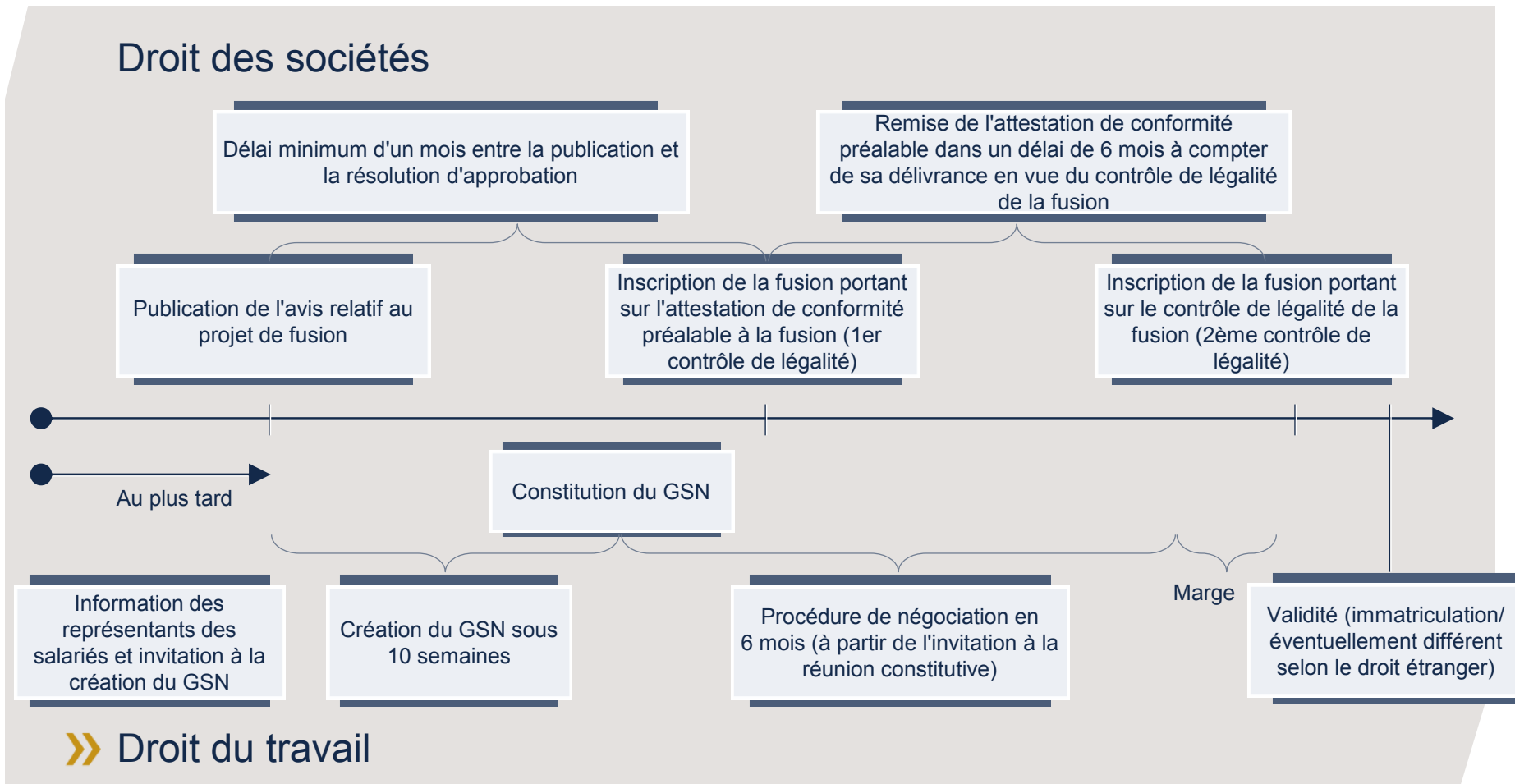
III/ 3. Étude d'un cas pratique (3/6)

Les défis

- Fusion par absorption d'une société allemande par une société française : Le droit français est en fin de compte déterminant, mais les particularités de droit allemand doivent être prises en compte!
- Calendrier:
 - Coordonner les délais en matière de droit des sociétés, de droit du travail et règlementaire.
- Chaîne de fusions transfrontalières
- Communication très en amont du plan définitif de fusion en vue de pouvoir constituer le groupe spécial de négociation (GSN)
- Nombre de GSN dans une chaîne de fusions transfrontalières?
- Contrats de transfert de pertes et bénéfices au niveau international

III/ 3. Étude d'un cas pratique (4/6)

Structure générale du processus de fusion



III/ 3. Étude d'un cas pratique (5/6) Solutions et conclusions (1)

- Contacts systématiques avec les registres de commerce sont absolument nécessaires en pratique.
- Une implication à temps des représentants des salariés est judicieuse et permet de créer un climat d'acceptation.
- Décision à temps: orientation du processus sur la cible (ici: approbation de l'assemblée générale de la société absorbante) ou traitement des éventuelles corrections, si le registre l'exige.
- Collecte à temps des informations pour la préparation de la création du GSN.
- Confirmation du modèle CMS d'un projet de fusion unique sur la base de la directive; adieu aux modèles nationaux.

III/ 3. Étude d'un cas pratique (6/6)

Solutions et conclusions (2)

- En réalité, il n'y a pas d'harmonisation complète des procédures par la directive européenne.
- Confirmation de la planification et de l'exécution avec un «comité de pilotage» avec les représentants de l'entreprise et les conseillers juridiques et fiscaux

III/ 4. Référence bibliographique

Vous trouverez une vue d'ensemble très instructive au travers de l'article de Tobias Teicke, **"Herausforderungen bei Planung und Umsetzung einer grenzüberschreitenden Verschmelzung"**, **Der Betrieb 2012, S. 2675**

III/ 5. Autres transformations transfrontalières

Transformation transfrontalière

Jurisprudence de la Cour de Justice de l'Union européenne (CJUE):

- Décision – Cartesio du 16.12.2008 (Affaire C-210/06)
- Décision Vale du 12.07.2012 (Affaire C-378/10)
- Jusqu'à présent aucune disposition législative de transposition n'est disponible!