



The "Dutreil" pact in a French-Swiss context: a precautionary measure to effectively reduce the French tax cost of a company transfer

The fact that a company and its shareholders are located in Switzerland sometimes makes people forget that inheritance and gift tax are payable in France, even though the deceased (or the donor) is not domiciled there, but one of his/her heirs (or a donee) is.

It is true that the 'extensive' scope of French tax law on gratuitous transfers is limited by certain double taxation agreements ("DTAs") – such as the DTA between France and Italy, for example – but the DTA between Switzerland and France was terminated with effect from 1st January 2015.

Failure to prepare for the transfer of a company to your children can have serious tax consequences – i.e., up to 45% in inheritance tax!

In this respect, the "Dutreil" scheme provided for in Article 787 B of the French General Tax Code appears "salutary" in that it reduces the tax burden inherent in the transfer of a company by inheritance or gift by up to 75% (and sometimes more).



By Jean-Luc Bochatay
Partner, FBT Avocats SA



And Jérôme Bissardon
Partner, FBT Avocats SA

1. Conditions of application of the "Dutreil" scheme

Company owners will be required to sign a gratuitous "Dutreil" pact for themselves and their successors either alone or with several partners (representing at least 17% of the financial rights and 34% of the voting rights for unlisted companies and 10% and 20% for listed companies), for a minimum period of two years, thereby benefiting from a 75% rebate on the value of shares in eligible companies (industrial, commercial, craft, agricultural, liberal) likely to be transferred by succession or gift.

The beneficiaries of the transfer will undertake to hold the shares individually for a period of four years from the expiry of the pact, which must be in force at the time of the transfer. In addition, during the term of the pact and for a period of three years following the transfer, one of the signatories of the pact or one of the beneficiaries must hold an eligible management

position in the company (e.g., chairmanship of the board of directors) or carry out his/her main activity, as the case may be.

2. Economics of the "Dutreil" scheme

In the event of death, the "Dutreil" scheme will limit the maximum tax cost to **11.25%** of the market value of the company in the case of a transfer between a parent and a child (compared to a maximum of 45% without the scheme).

A donation during the lifetime of the company director, as full owner, with the "Dutreil" scheme, will halve the taxes when the donor is under seventy years of age, i.e., a maximum tax cost of **5.63%**.

Finally, in the case of a gift of bare ownership only - the donor retaining the usufruct - **combining a dismemberment with the "Dutreil" scheme will reduce the tax bill even more drastically!**

3. Application of the "Dutreil" scheme in a French-Swiss context:

- In the event of the transfer of a French company by a company director resident in Switzerland.

The scheme is, in fact, not reserved solely for French tax residents.

- In the event of the transfer of a Swiss company or a company located in another country by a company director resident in Switzerland, one or more of whose heirs, legatees or donees are resident in France.

This is the classic case of a child who settles permanently in France, sets up his/her home there and develops his/her career; it is also the case of a child who has always lived in France and whose parents have transferred their residence to Switzerland. The situations are many and varied.

Fortunately, the "Dutreil" scheme is applicable to the shares of companies established in Switzerland; however, it should be emphasised that the formal conditions laid down by the French legislator are sometimes complex to satisfy in the case of companies established outside France, and not rarely require a comparative analysis to ensure that the mechanisms provided for by the legislation of the country in which the company is located comply with those governing the "Dutreil" scheme.

For example, in the case of a Swiss public limited company, it is necessary to check whether the chairman's mandate is comparable to that of the chairman of a public limited company under French law, which involves analysing and comparing the operating rules of the board of directors of a Swiss company and a French company.

- In the event of the transfer of a Swiss company by a company director domiciled in France.

Even if the company is established in Switzerland, the gratuitous transfer of all or part of its shares shall be taxable in France; setting up a "Dutreil" pact will be just as effective in reducing or even eliminating the tax cost in France.

The same will apply in the event of a gratuitous transfer of shares in a French or Swiss holding company interposed between the company director and a Swiss operating subsidiary. In this

situation, a "Dutheil" pact should be drawn up for the shares in the Swiss subsidiary, subject to all other conditions being met. The partial exemption will then be applied in proportion to the market value of the shares in this subsidiary.

Depending on the circumstances, it might be possible to apply the "Dutheil" scheme directly to the shares of the holding company, which would reduce gift tax even further; however, this would require the holding company - which can be either French or Swiss - to carry out, on a preponderant basis, the actual activity of a "facilitating holding company".

In conclusion, anticipating the tax impact in France of a gift or inheritance is not just a concern for French residents in a "hexagonal" environment, but is just as relevant for those who live in Switzerland and whose personal, family or asset situation is a connecting factor for taxation in France.

Even if no gift is envisaged in the short or medium term, entering into a "Dutheil pact" will be a very useful precaution and will make it possible to opportunely reduce (and sometimes even eliminate!) inheritance tax in the event of premature death. This measure is an effective and legally secure way of protecting heirs.

Biographies

Jean-Luc Bochatay is co-founder and Chairman of the law firm FBT Avocats SA with offices in Geneva and Paris. He has broad experience in tax, finance and corporate commercial issues regarding Swiss and foreign corporations and their shareholders.

He regularly advises individuals and corporate clients on complex domestic and cross-border matters. He has extensive experience in handling and coordinating multi-jurisdictional projects. He is considered as a leading expert in Swiss-French regulatory and tax matters.

Jérôme Bissardon is a Partner at FBT Avocats SA and a member of its Tax and Corporate Groups.

He specializes in personal and patrimonial taxation and advises company directors and individuals on the tax optimization of their professional and private assets both in France and abroad with a view to their transfer (sale, donation, inheritance), or in a long-term return or investment logic.

He has acquired solid experience of the "Dutheil" transmission pact in a French or French-Swiss environment, assisting company directors in the free transfer of shares or units of operating companies or animating holding companies, for the application of the transfer duty exemption on three quarters of the value.