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The French «Société Par Actions Simplifiée – SAS», All Purpose Vehicle!

- **ABSTRACT:** *The Société à Responsabilité Limitée or the limited liability company (SARL) and the Société Anonyme or the public limited company (SA) were perceived as relatively rigid or inadequate company types. Besides the reform of these traditional types of company forms, in 1994, a new company type was created as a flexible vehicle for businesses: the Société par Actions Simplifiée – the SAS (simplified joint stock company). Further changes in 1999 and 2008 made businesses even more adaptable. In 2019, more than 65% of newly created legal entities were established as a SAS; SARL around 30%, and SA less than 2%. SAS has a single member variant, the SASU (U for unipersonnel – one person). The French experience showed that the simplified joint stock company responded to a real economic and organisational need. The new company form based on limited liability has become widely accepted and useful. The simplified joint stock company was introduced by Poland as a new company form in 2019. Other states may also consider the French experience based on the comparative advantages of this peculiar business organisation.*
- **KEYWORDS:** French company law, company law reform, flexibility of company forms, simplified joint stock company, comparative advantages of the simplified joint stock company.

Unlike common law jurisdictions, French company law was, until recently, very rigid and inadequate for modern business trends.

Two main types of vehicles were predominant until the 2000s: the SARL (Société à Responsabilité Limitée or the limited liability company) and the SA (Société Anonyme – or the public limited company). Created in 1925, the SARL² was designed to meet the needs of small traditional businesses. Since its legislation, it has only been revised minimally. The *intuitus personae* is at the foundation of the

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2 Commercial Code art. L. 223-1 and seq.



SARL; for instance, the assignment of shares to third parties requires prior consent from the other partners. More than 1.4 million SARL are still in operation in France. This structure is currently popular and adapted to small entities. As a backbone of the development of capitalism at the end of the 19th century, the French SA was established in 1867 and totally reformed in 1966. An SA can make public offerings and be listed or remain private.³ Until 2015, a minimum of seven shareholders were required by the commercial code at the foundation of the SA. This rule, based on historical considerations, was obsolete and has halted the creation of new SA. Until the reform of 2015, this partly explained the success of the SAS, which can be formed with only two founders (and one for the sole-member form – the SASU). Additionally, the SA is designed for large businesses and its governance structure is complicated and demanding.⁴

The relative inadequacy of French law to modern business needs resulted in quite significant consequences: (a) for the first time, in the early the 2000s, France ranked poorly in the World Bank *Doing Business* ranking. This popular ranking assesses world economies based on diverse criteria, one of which is the ease of establishing a new company. (b) Major companies made the choice to relocate their head office in other European Union (EU) countries said to be more business friendly. The choice to establish businesses in countries such as Ireland, the United Kingdom (UK), or the Netherlands (NL) was not based solely on fiscal reasons. For instance, in the late 90's, the mother company of Airbus (named EADS at this time, Airbus Group today) chose the form of a *Naamloze Vennootschap* based in NL because, at the time, Dutch law was more flexible than French. (c) Last but not least, this period has seen a significant increase in shareholder agreements. The reason is simple: what was otherwise impossible to provide in the articles of association of the company due to the legislation rigidity, became feasible within the framework of “private” agreements.

Urged by lawyers and legal practitioners, the French Parliament gave birth to a new type of company, the *Société par Actions Simplifiée* – SAS (Simplified Joint Stock Company) in three steps: (a) First, in an act promulgated on 3 January 1994,⁵ the newly created SAS was only accessible to groups of a significant size. All shareholders must have been legal entities with a minimum capital of 1,5 million Francs (currently 230 000 €); this vehicle was mostly used as a holding company or a joint venture for large groups. (b) The second act was voted in on 12 July 1999;⁶ the SAS opened to individuals and became a very successful vehicle for small- and medium-sized businesses. (c) Last,

3 Monsérié-Bon and Grosclaude, 2016.

4 There are two main forms of governance organisations in the French SA. The most popular is the one with a Board of Directors and a Chief Executive Officer (CEO) (Com. code art. L. 225-17 and seq); another model is the one with a directory and supervisory committee. The latter has been inspired by German business law (Com. code art. L. 225-57 and seq).

5 Loi n° 94-1 du 3 janvier 1994 ;

6 Loi n° 99-587 du 12 juillet 1999 ;

a third act dated 4 August 2008⁷ has made the SAS more attractive by waving minimum capital requirements and opening to sole-membership.

Since then, the SAS has always maintained its popularity; in 2019, it represented more than 65% of the newly created legal entities in France.⁸ The SAS is compatible with all types of activities and all business sizes, with only one restriction: the exclusion from public offerings and, thus, stock listing. There is almost nothing one cannot operate within the framework of an SAS. Therefore, the “old” SARL is at risk.

1. SAS at-a-glance

The main features of this type of company are the following: (a) SAS is a form of commercial company. Therefore, regardless of the activity offered, this entity is always regarded as commercial. SAS has no limitation when it comes to the type and size of the activity. It can fit both very small enterprises and large firms. As for the type of economic activity, the spectrum of the SAS is one of the broadest: all commerce, industry, craft industry, liberal professions, both domestic and international. (b) SAS remains a private company that is prohibited from making a public offering. Thus, it cannot be listed on a stock exchange. Depending on the clauses provided in the articles of association, the SAS can be open to third parties or completely private.⁹ (c) SAS can be set up by individuals and/or legal entities, profitable or not-for-profit. Thanks to its flexibility, this structure is popular as a parent/holding company or to frame an international joint venture. When it comes to the minimum number of shareholders, the French commercial code provides the simplest solution: one. The SASU (U for *unipersonnel* – sole proprietor) represents one-third of the total companies created in France each year; it is used both by sole entrepreneurs to protect their personal assets and groups to launch fully-owned subsidiaries. (d) Indeed, SAS is a limited liability company, in which shareholders do not risk their own patrimony (unless they are the guarantor for the legal entity). Minimum contributions are not required, and the SAS can be constituted with a minimal investment of only 1 €. ¹⁰ (e) The procedure of incorporation in France is quick, cheap, and simple; almost all formalities can be completed online.¹¹ Apart from the amount of capital¹² and the law firm honorarium, the current fees for the creation of an SAS do not exceed 300 €.

7 Loi n° 2008-776 du 4 août 2008 ;

8 In comparison, the SARL has represented around 30 % and the SA less than 2 %.

9 See point 4 *infra*.

10 Before 2008, the capital requirement was 37 000 €.

11 The government of France is currently (2021) establishing a one-stop-shop to complete all the business procedures for start-up, amendments, dissolution... concerning all enterprises, both sole-ownership and companies. *Loi PACTE* dated 22 May 2019.

12 Com. code art. L. 225-3 provides that the only 50% of the capital must be paid at the time of start-up. The balance must be paid within five years.

2. Articles of association vs. mandatory provisions

The distinctive feature of the SAS in comparison to all other business vehicles is that it has very few mandatory provisions. Therefore, there is adequate flexibility for the articles of association to rule governance, collective decisions, and relationships between shareholders.

When one opens the French commercial code, there is a striking number of provisions devoted to each company: (a) SARL – 44 articles, of which most are mandatory; (b) SA – more than 250 provisions, mostly mandatory; (c) SAS – 22, of which most are not mandatory and simply validate the articles of association.¹³

This latitude in drafting articles of association is highly appreciated by lawyers and *in-house* counsel, who can customise the organisation of the SAS to meet the real needs of their clients. In practice, whereas almost all SA and SARL are copy-pasted and look very similar, most of the SAS are unique, especially when it comes to governance structure.

In return for this freedom, and unlike other types of companies, the Commercial code does not provide any default rules, which means that the articles of association have to be drafted in a very detailed manner to anticipate all situations.

To illustrate this drawback, let us compare the issue of the Director's dismissal in the SARL and in the SAS. In SARL, article L. 223-25 Com. code provides that the dismissal of the Director (*gérant* in French) requires a collective decision taken by the majority of shareholders. This text adds that the Director is entitled to damages if the dismissal decision does not rest on fair grounds. The articles of association may remain silent, and in this case, the legal provision applies. When it comes to the SAS, the articles of association may decide freely if the President is or is not dismissible and, if so, under which conditions (grounds, procedure...); however, if the articles do not foresee this situation, no default rule is taken from the SA legislation. The SARL rules do not automatically apply. In the case of a dispute, a court will be powerless.

Another example is the requirement of a quorum for collective decisions. Here again, the company charter is free to set (or not) a quorum for collective decisions. Sometimes, the founders or their counsel set forth a quorum upon first convening (one half of the shares, for example) and do not provide any alternatives if this quorum is not met. In this particular case, the default rules contained in the commercial code for the SA will not apply and the SAS will be in a difficult situation, whereby no decisions can be made.

These two examples clearly show the benefits and consequences of applying such freedom, in which the drafters of the articles of association are experts who master this business vehicle and are aware of the absence of a default rule. Articles must be comprehensive.

¹³ Nevertheless, some sections of the SA legislation are applicable to the SAS, like the ones on capital, issuance of securities, etc.

3. SAS governance and collective decisions

In most of the companies in France, governance and collective decisions are regulated through civil or commercial codes, with limited room for articles of association. These pieces of legislation deal with the architecture of the governance (type of organs), the conditions for appointment and dismissal, the powers, the liability, financial compensation, collective decisions, competence of the shareholders' general meeting, as well as the conditions of a majority and/or quorum.

In contrast, the SAS offers almost unlimited freedom to founders. The only mandatory provisions pertain to (a) the obligation to appoint one “President” of the SAS, acting as a CEO;¹⁴ (b) the non-invocability to third parties of the provisions limiting the powers of the President; (c) the Directors' liability, both civil and criminal: grounds for liability, type of actions, possible plaintiffs, and statutes of limitation are non-negotiable; and (d) a list of necessary decisions to be taken by means of collective decision-making.

On all the other aspects, governance and collective decisions are a blank page for the founders, who can decide freely on the governance structure. At the very least, the company shall appoint one President, but there's a room for any collegial body. Two models are often found: a strategic collegial organ¹⁵ endowed with decision-making powers and/or a supervisory collegial organ aiming at controlling governance bodies (empowered with a right of information and sanction). In some middle-size SAS, the governing structure could be more complex, including various *ad hoc* committees in charge of remuneration, long-term strategy, and environmental policy.

In addition, the articles of association frequently make provision for a “General Director”, who may play the role of a Deputy President, based on the stipulations of the articles of association. This person can have exactly the same powers as the President, but surprisingly the commercial code prohibits the creation of a “Vice-President” position.

Deputy General Directors, in charge of a sector of the activity, may also assist the General Director: (a) decide freely on the President and members' governance organs status: conditions for appointment and dismissal; power limitation and financial compensation are decided by the articles of association; the President is not necessarily elected by the shareholders and could be appointed by a minority shareholder or, in extreme circumstances, by a third party; (b) without limitations, set the modalities of collective decisions: by means of teleconference or videoconference, in the presence of shareholders, with or without quorum requirements, etc. As for the conditions of majority, most of the SAS makes the distinction between annual general meetings,

14 Com. code art. L. 227-5.

15 For example, the aircraft manufacturer Airbus is incorporated as a SAS and has a Board of Directors, which has more powers than the traditional Board of Directors in a public limited company (French SA).

in which decisions are taken based on an absolute majority rule, and extraordinary general meetings, which are governed by a qualified majority rule.

Even though the imagination of the drafters is not unlimited, in practice, SAS governance models are very diverse and each entity can be tailored to the needs of its founders; thus, each appears unique in this regard.

4. Provisions on share transfers

Here again, freedom is the rule and mandatory provisions are the exception. Pursuant to articles L. 227-13 to 16, the articles of association may (a) submit the assignment of shares to the company's assent; (b) freeze any share transfers, thanks to the introduction of an inalienability clause; and (c) provide the possibility of shareholder exclusion.

The shares assignment approval (in French *clause d'agrément*) is simply an option in the hands of the founders. If they do not include such a provision in the articles, the SAS will be fully open; conversely, the founders may lock the SAS by requiring that all transfers receive prior approval. In practice, what is often observed is an in-between clause (i.e., submitting only certain transfers, say the ones to third parties, for shareholder approval). Since no default provisions apply,¹⁶ the drafters must foresee all the modalities of the clause. This includes: (a) the limits to which the transfer clause applies; a scope has to be defined for the type of transfer (share purchase only, donation, exchange, etc.), and the category of assignee concerned: third party, existing shareholders, familial circle, spouses, etc. (b) the procedure of the approval: means of information of the assignment project by the assignor, content of the information, recipient, time-frame for the decision, organ or person in-charge, application of the *silence equals consent* rule. (c) the solution in case the assignment is not cleared: shares purchaser and price issues.

The inalienability clause¹⁷ is a very atypical provision that can be introduced in the articles of association to offer more security to an investor. As a serious derogation to the principles of ownership rights set forth by the French constitution, inalienability is only possible for a maximum of 10 years. However, the articles of association can invoke various forms of this clause by targeting certain shares or certain shareholders, or by limiting its application to certain transfers (purchase f.i.). In practice, the inalienability clause is not commonly used.

The exclusion clause is probably the SAS' most frequently drafted provision. Unlike other forms of companies, the SAS founders may explicitly draft such a clause to compel a shareholder to sell his/her shares¹⁸. This clause is useful in solving

¹⁶ See point 2 *supra*.

¹⁷ Com. code art. L. 227-13.

¹⁸ It is still unclear if an exclusion clause may be introduced in the articles of association of other forms of companies.

intra-company conflicts, as well as to squeeze out shareholders who concurrently hold another position (employee or Director) that they have lost for some reason. The drafting of an exclusion clause requires special attention due to both the litigation risk and the requirements set forth by the French *Cour de cassation*. A valid exclusion clause shall comprise the following: (a) The grounds for exclusion, even if article L. 227-16 Com. code does not require any formal reasons for excluding a shareholder. Discretionary exclusion is difficult to conceive and would represent a significant litigation risk. (b) The exclusion procedure. On this particular aspect, the articles of association may designate any organ of the SAS or even a person to decide on the exclusion. French courts have ruled on two limits pertaining to the procedure: first, if the decision is made by way of vote, the shareholder whose exclusion is intended shall take part in this deliberation¹⁹. Second, pursuant to Article 6 of the European Convention on Human Rights²⁰, the procedure shall respect the rights of defence, which means that the shareholder has to be informed of the grievances and has the right to respond before the decision is made. (c) The clause shall foresee the question of the determination of the assignee of the shares of the excluded person, and obviously determine the price. (d) After the exclusion has been pronounced, the shareholder may be reluctant to transfer his/her shares to the designated assignee; the articles of association may provide the suspension of the shares' non-financial rights, that is, at principal, the voting right.

5. Financing opportunities

When it comes to financing instruments, the SAS offers many opportunities. Once again, the only limitation is the prohibition of making a public offering (I.P.O.) and, thus, quoting shares on a stock-exchange market.

SAS can issue ordinary shares, as well as preference shares.²¹ The latter are often issued to counterbalance the minority positions of venture capital investors. Preference shares may provide specific rights, such as multiple voting rights, veto rights, preferential right to subscribe, right to a definite number of seats on the board of the company, etc.

The SAS can also issue bonds (not for listing) and quasi-equity instruments, such as convertible bonds or subordinated securities. Quasi-equity instruments will be of high utility in the context of an economic crisis in relation to Covid-19. These financial instruments offer the advantage of reinforcing the company's proper funds and, therefore, do not weaken its balance sheet. In addition, most quasi-equity securities are compliant with EU competition rules, especially the prohibition of state aid.²²

19 Cass. com 23rd October 2007 (N° 06-16.537).

20 Right to a fair trial – Convention dated 4th Nov. 1950.

21 Com. code art. L. 228-11 and seq.

22 The government of France announced in September 2020 that its plan for economic recovery will resort to these type of quasi-equity instruments.

In addition, SAS may raise funds through crowdfunding platforms. Recent crowdfunding legislation in France is very welcoming and has set high caps for both equity crowdfunding and crowdlending.²³

6. Tax regime

French legal entities may be subject to two different tax regimes: income tax or corporate tax. By default, the SAS is subject to the corporate tax system, which is a flat tax system in which benefits are taxed at a single rate of 28%.²⁴ SMEs benefit from a reduced rate of 15% of their taxable profits up to 38 120 €.

Subject to size requirements, SAS may elect the income tax system for its first five years of operation. Income tax is a “flow-through” system, whereby benefits are not taxed at the level of the legal entity but in the hands of the shareholders and in proportion of their share in the capital. When a company generates a deficit, which is often the case at the early stage of operation, it may contribute to reducing the personal taxation of its shareholders.

7. Conclusion

The SAS has many advantages compared to other vehicles that experts had predicted 10 years ago would cause the gradual extinction of the *old* SARL. Contrary to all expectations, SARL still resists the assaults of the young and flexible SAS. Among the justifications for this relative resistance, the social regime of the Directors can be less costly in the SARL (even though less protective) and, from the legal perspective of personal civil liability, a SARL start-up can be less risky than a SAS.

²³ SAS can access crowdfunding platforms up to 8 M€ per year.

²⁴ This rate reached 33% before 2018. At the end of President Macron’s term in 2022, it will decrease to 25%, which is the average taxation rate in Organisation for Economic and Co-operative Development (OECD) countries.

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