Read this post online

A few things to consider before incorporating a company under French law

The creation of a company, which is far from insignificant, requires considering various issues before the incorporation so that the project can be carried out successfully and achieved in the most relevant way possible.

As legal advisor, one of the first questions that the lawyer must ask his/her client is the overall purpose of the entrepreneurial project. It is essential to clearly identify the objectives pursued by the client: Limitation of the entrepreneur's liability, desire to form a partnership, separation of the entrepreneur's personal and professional assets, etc., in order to confirm that the incorporation of a company is indeed relevant.

It is then necessary to decide on the main characteristics of the future company, starting with the legal form. In this respect, it should be recalled that there are many differences between the various legal structures and that such differences constitute as many parameters to be taken into account in the choice of the company's legal form. For example, the desire to limit the liability of the shareholders necessarily excludes the creation of a general partnership (*société en nom collectif* or SNC) where members have unlimited liability and leads to choose instead a type of company where such liability is limited, such as the simplified joint-stock company (*société par actions simplifiée* or SAS) or the limited liability company (*société à responsabilité limitée* or SARL). Similarly, for tax reasons, it may be more appropriate to choose a structure that is subject to the set of rules governing corporations or, conversely, a structure that is not subject to this set of rules.

In addition to the legal form, it is of course advisable to consider the nature of the company: Civil or commercial, the regulated or unregulated nature and the scope of the corporate purpose of the future structure. Particular attention must be paid to the wording of the corporate purpose. This wording must be sufficiently explicit insofar as it makes it possible to determine the scope of the powers of the directors/corporate officers, and even the circumstances where the company could be held criminally liable, which will not happen wherever the contentious action/measure exceeds said purpose.

The status of the company's managers/corporate officers must also be thoroughly considered. Indeed, the possibility of concluding an employment contract, the taxation of the remuneration, the social security regime or the terms and conditions for removal vary significantly depending on the type of company. For example, in a *société par actions simplifiée*, the social security regime applicable to the president is that applicable to

employees, whereas the majority-owner manager of a *société à responsabilité limitée* will be affiliated with the social security fund for self-employed persons.

The determination of the amount of the share capital and the nature of the contributions should also be discussed. Experience demonstrates that a very low share capital may force the shareholder(s) to restore the shareholders' equity to an appropriate level during its first years of existence when it falls below half of the share capital. As for the contributions, they are multifaceted: Contributions in cash, i.e., a sum of money, contributions in kind (for example of a business, a building, shares, etc.), and contributions in services or technical knowledge (*apports en industrie*) in certain types of companies (in particular in *sociétés par actions simplifiées* and *sociétés à responsabilité limitée*).

The entrepreneur should also check the formalities associated with transfers of shares, such as sales or gifts, held in the contemplated legal form. As such, regarding the approval of new shareholders, applicable legal provisions vary from one corporate form to another: While in a *société par actions simplifiées*, known for its great organizational flexibility, this question is addressed in the by-laws, obtaining the approval of the current shareholders is a legal obligation whenever a third-party wishes to acquire a stake in a *société à responsabilité limitée*.

Finally, other aspects that may seem, at first glance, more trivial should not in fact be overlooked. This is the case for the choice of the registered office and the corporate name. In fact, the name must not infringe on the rights held by one or more third parties, such as a trademark, a trade name, a domain name, etc. For this reason, it is strongly recommended to check if the contemplated corporate name does not conflict with any other earlier intellectual property rights, for example via the website of the French Patent and Trademark Office (*Institut National de la Propriété Industrielle* or INPI).

The above list of issues is far from being exhaustive and merely provides a brief overview of the multiple parameters that may come into play when determining the most appropriate legal structure for the incorporation of a company under French law.