# TRILATERAL IFA CONGRESS

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**Tax Treatment of Hybrid Instruments**

French Presentation

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# OECD BEPS

**French Government Policy**
**Non-deductibility of interest**

•Pro-active French Government to implement BEPS
•Legislation approved end of December 2013
•Article 212, I-b of the French General Tax Code
•It goes beyond hybrid instruments
•Interest paid by a **French borrower to an affiliate lender** is deductible only to the extent the lender's tax liability in respect thereof is **not lower than 25% of the corresponding French corporate tax liability, i.e., around 8.33%, or 8.6%, or 9.5%** (according to the FTA)
•No safe harbour clause, potentially unconstitutional

# OECD BEPS

**French Government Policy**
**Non-deductibility of interest**

- Regs issued by the FTA provide that the relevant tax comparison is based on the treatment of the interest **on a stand alone basis** and not the overall P&L of the lender **(e.g., any back-to-back financing of the lender is disregarded)**

- If lender is a tax transparent entity or a UCIT (within EU or in a jurisdiction with an administrative assistance clause with France), the affiliation condition must be met also at the level of the partners/shareholders of such transparent entity/UCIT (**double affiliation rule**); if the double affiliation is met, no interest would be deductible if any of the affiliates is not subject to the minimum taxation

# Parent Subsidiary Directive changes French implementation

**No Participation exemption for deductible distributions**

•Legislation applicable from 1st January, 2015
•Article 145, 6-b of the French General Tax Code
•The 95% exemption is not available for the French recipient to the extent the distribution (from EU and non–EU sources) is deductible for the distributing entity

# ATA Directive

**Potential French implementation**

- The current French legislation on hybrid instruments (non-deductibility of interest) applies only to affiliate lenders; the ATA Directive would apply to affiliates and non-affiliate lenders

# Practical Implications
# French hybrid instruments (1)

- **« Popular » French instruments issued by French issuers**
- **TSS (Super Subordinated Securities)**
  - Very junior ranking (senior only to shares)
  - Undated
  - Remuneration may be indexed on the profitablity of the issuer
  - Generally viewed as deductible (subject to anti-abuse rules)
  - **Example:** used by French financial institutions for regulatory purposes (AT1)
  - Tax treatment should not be impacted if subscribed by th market (i.e., non-affiliates), but ATA Directive may have a impact

# Practical Implications
# French hybrid instruments (2)

- **ORA (Mandatory Convertible Bonds)**
  - Potentially same features as TSS plus conversion into shares
  - Generally viewed as deductible subject to certain abusive arrangements (e.g., cancellation of shares replaced by ORA)
  - **Example:** between a French Sub and a US Parent
  - Impacted by anti-abuse legislation