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To be entitled to benefits under income tax treaties, companies must satisfy eligibility requirements. This article includes flowcharts to help practitioners navigate the eligibility requirements of the 2009 protocol to the France-U.S. income tax treaty[1] applicable to French companies.[2]

Income tax treaties may exempt business income from source country income taxes and eliminate or reduce domestic withholding taxes on payments between residents of countries that are parties to an income tax treaty. To be entitled to benefits under U.S. income tax treaties, a company must not only be a resident of the tax treaty partner's country, but generally must also satisfy at least one of the tests in the treaty's limitation on benefits provision, if applicable.

The flowcharts in this article focus on the eligibility of French companies claiming benefits on income that would otherwise be subject to U.S. taxation. This article does not address the eligibility for treaty benefits of entities that are partnerships or are otherwise transparent for U.S. or French tax purposes. Also, the flowcharts do not address ''triangular cases.''[3] This article is based on the treaty, the 2009 protocol to the treaty, and the U.S. Treasury technical explanation to the 2009 protocol.

This article is the seventh in a series of articles[4] that provide flowcharts to assist practitioners in determining

[1]Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, France-U.S., Aug. 31, 1994, S. Treaty Doc. No. 103-32 (as amended by protocols signed on December 8, 2004, and January 13, 2009, respectively).

[2]This represents our second article on the France-U.S. income tax treaty that includes flowcharts regarding eligibility requirements applicable to French companies. The flowcharts in this article specifically address amendments to the treaty made by a protocol signed on January 13, 2009, that entered into force on December 23, 2009.

[3]*See* France-U.S. income tax treaty, art. 30, para. 5.

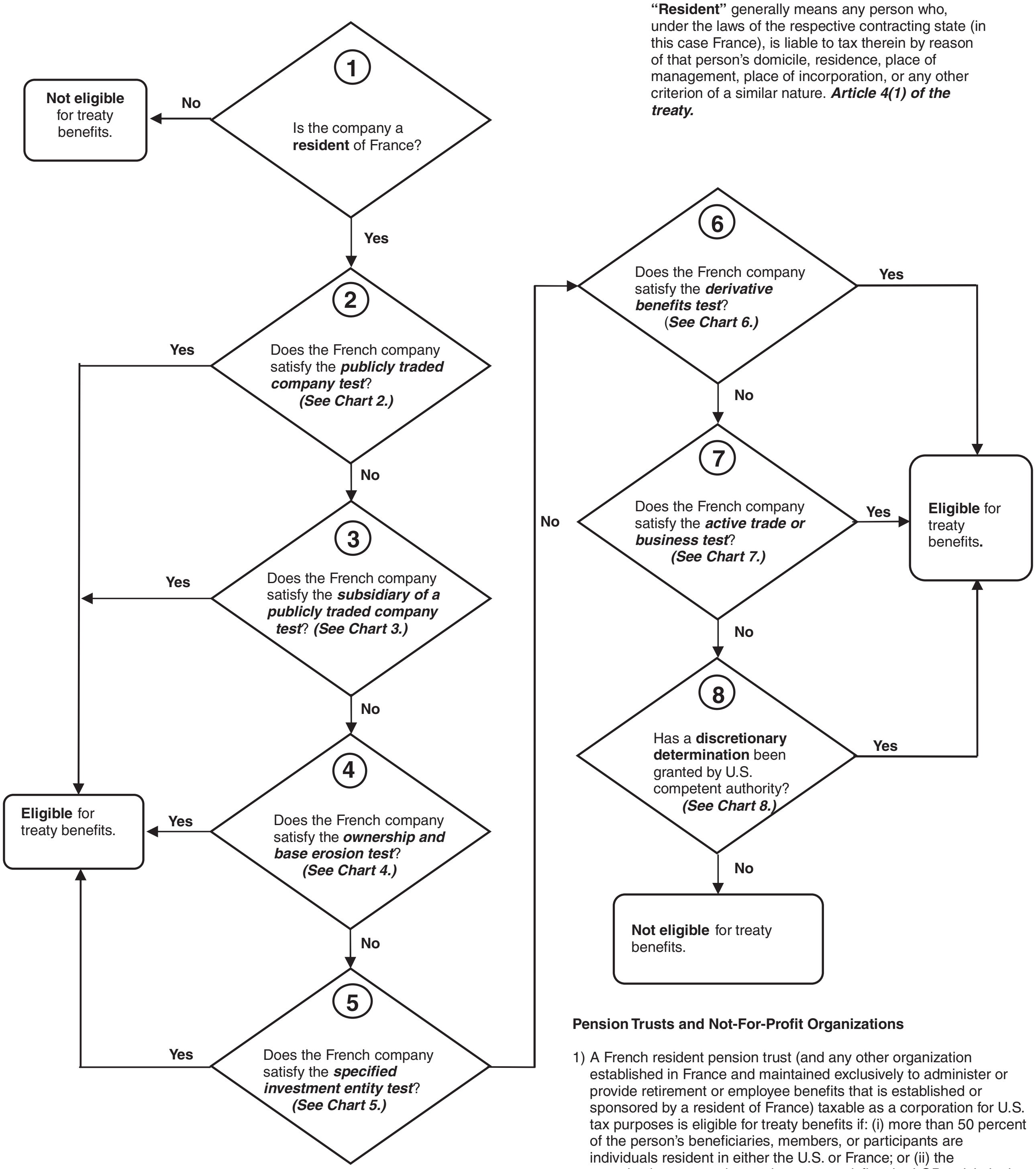
[4]*See* John Venuti, Jason Connery, Douglas Poms, and Jennifer Blasdel, ''Eligibility for Treaty Benefits Under the Netherlands-U.S. Income Tax Treaty,'' *Tax Notes Int'l,* Nov. 23, 2009, p. 601, *Doc 2009-24084*, or *2009 WTD 223-11*; Venuti, Connery, Poms, and Alexey Manasuev, ''Eligibility for Treaty Benefits Under the Canada-U.S. Income Tax Treaty,'' *Tax Notes Int'l*, June 15, 2009, p. 967, *Doc 2009-11815*, or *2009 WTD 113-15*; Venuti, Ron Dabrowski, Poms, and Manasuev, ''Eligibility for Treaty Benefits Under U.K.-U.S. Income Tax Treaty,'' *Tax Notes Int'l*, Mar. 23, 2009, p. 1095, *Doc 2009-4590*, or *2009 WTD 56-9*; Venuti, Connery, Poms, and Manasuev, ''Eligibility for Treaty Benefits Under the Luxembourg-U.S. Income Tax Treaty,'' *Tax Notes Int'l*, July 21, 2008, p. 285, *Doc 2008-14359*, or *2008 WTD 142-8*; Venuti, Dabrowski, Poms, and Manasuev, ''Eligibility for Treaty Benefits Under the France-U.S. Income Tax Treaty,'' *Tax Notes Int'l*, Feb. 11, 2008, p. 523, *Doc 2008-773*, or *2008 WTD 33-10*; and Venuti and Manasuev, ''Eligibility for Zero Withholding on Dividends in the New Germany-U.S. Protocol,'' *Tax Notes Int'l*, Jan. 14, 2008, p. 181, *Doc 2007-27516*, or *2008 WTD 12-10*.

a company's eligibility for tax treaty benefits under the LOB provisions of specific U.S. income tax treaties, and, when applicable, in determining eligibility for a 0 percent withholding tax rate on cross-border intercompany dividend payments to the company.

This article contains nine flowcharts. The first eight flowcharts analyze the LOB provision of the treaty as applied to French companies. The ninth flowchart analyzes the requirements a French company must satisfy to qualify for a 0 percent withholding tax rate on cross-border intercompany dividend payments to the company under article 10(3) of the treaty. Although the flowcharts provide a comprehensive review of applicable provisions under the treaty, taxpayers and their tax advisers should carefully evaluate each case and determine whether the requirements of the treaty are met based on all facts and circumstances. ◆

Chart 1. Eligibility for Treaty Benefits Under Article 30 (LOB) of the France-U.S. Tax Treaty

"Resident" generally means any person who, under the laws of the respective contracting state (in this case France), is liable to tax therein by reason of that person's domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature. ***Article 4(1) of the treaty.***



Pension Trusts and Not-For-Profit Organizations

1) A French resident pension trust (and any other organization established in France and maintained exclusively to administer or provide retirement or employee benefits that is established or sponsored by a resident of France) taxable as a corporation for U.S. tax purposes is eligible for treaty benefits if: (i) more than 50 percent of the person's beneficiaries, members, or participants are individuals resident in either the U.S. or France; or (ii) the organization sponsoring such person satisfies the LOB article in the treaty. ***Article 30(2)(d) of the treaty.***

2) A French resident not-for-profit organization other than a pension trust (or similar entity) taxable as a corporation for U.S. tax purposes is eligible for treaty benefits. ***Article 30(2)(d) of the treaty.***

Chart 2. Publicly Traded Company Test Under Article 30(2)(c)(I) (LOB) of the France-U.S. Tax Treaty

"Principal class of shares" means the ordinary or common shares of the company, provided that such class of shares represents the majority of the voting power and value of the company. If no single class of ordinary or common shares represents the majority of the aggregate voting power and value of the company, the **principal class of shares** is that class or those classes that in the aggregate represent a majority of the aggregate voting power and value of the company. ***Article 30(7)(a) of the treaty.***

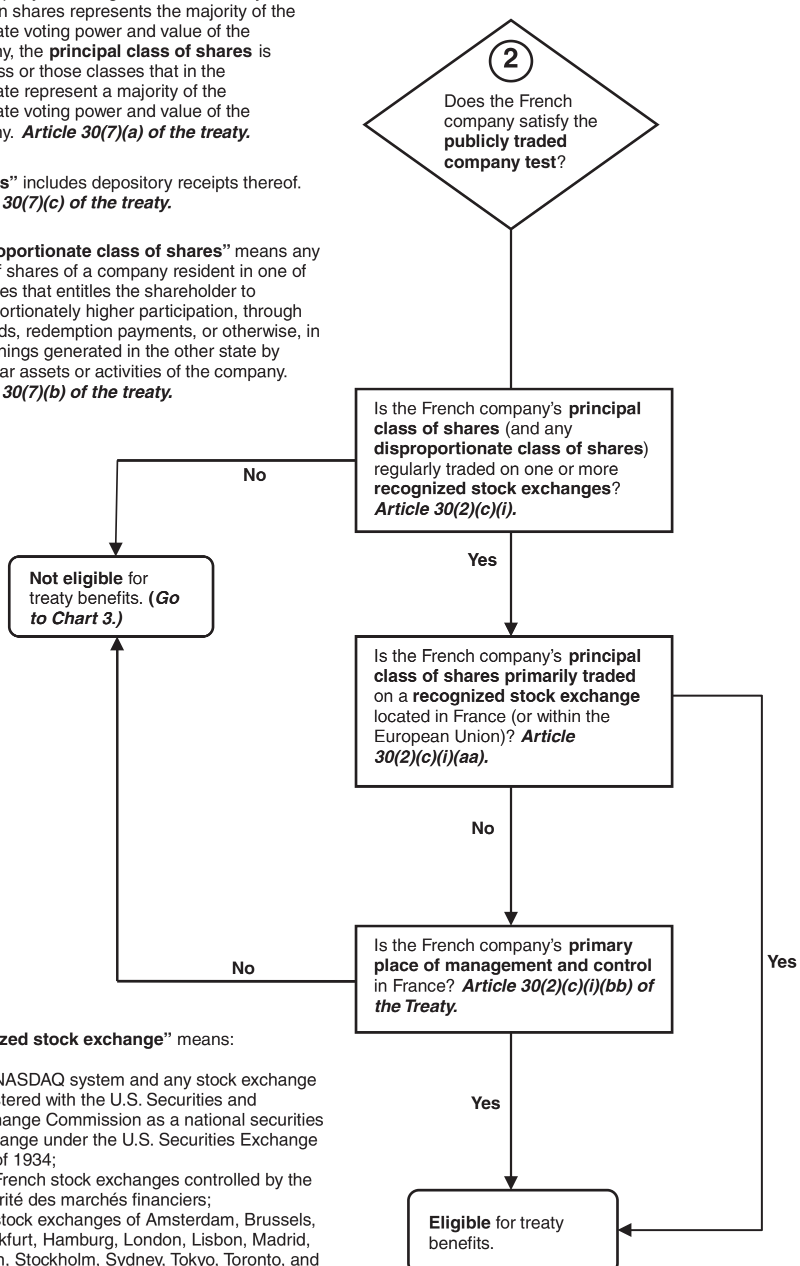
"Shares" includes depository receipts thereof. ***Article 30(7)(c) of the treaty.***

"Disproportionate class of shares" means any class of shares of a company resident in one of the states that entitles the shareholder to disproportionately higher participation, through dividends, redemption payments, or otherwise, in the earnings generated in the other state by particular assets or activities of the company. ***Article 30(7)(b) of the treaty.***

A class of shares comprising the **principal class of shares** is considered to be **regularly traded** if: (i) trades in the class of shares are made in more than de minimis quantities on at least 60 days during the taxable year; and (ii) the aggregate number of shares in the class traded during the year is at least 10 percent of the average number of shares outstanding during the year. ***U.S. Treasury technical explanation to the 2009 protocol to the treaty.***

Trading on one or more **recognized stock exchanges** may be aggregated for purposes of meeting the **regularly traded** standard. Authorized but unissued shares are not considered for purposes of the **regularly traded** standard. ***U.S. Treasury technical explanation to the 2009 protocol to the treaty.***

Stock of a French company is **"primarily traded"** if the number of shares in the company's **principal class of shares** that are traded during the taxable year on all recognized stock exchanges in France (or on a **recognized stock exchange** located within the EU) exceeds the number of shares in the company's **principal class of shares** that are traded during the year on established securities markets in any other single foreign country. ***U.S. Treasury technical explanation to the 2009 protocol to the treaty.***



A French company's **primary place of management and control** is in France only if executive officers and senior management employees exercise day-to-day responsibility for more of the strategic, financial, and operational policy decision-making for the company (including its direct and indirect subsidiaries) in France than in any other state, and the staffs conduct more of the day-to-day activities necessary for preparing and making those decisions in France than in any other state. Thus, the test looks to the overall activities of the relevant persons to see where those activities are conducted. In most cases, it will be a necessary, but not a sufficient, condition that the headquarters of the company (that is, the place at which the chief executive officer and other top executives normally are based) be located in France. ***Article 30(7)(e) of the treaty; U.S. Treasury technical explanation to the 2009 protocol to the treaty.***

For guidance regarding the persons who are considered "executive officers and senior management employees," see ***U.S. Treasury technical explanation to the 2009 protocol to the treaty.***

"Recognized stock exchange" means:

- **(i)** the NASDAQ system and any stock exchange registered with the U.S. Securities and Exchange Commission as a national securities exchange under the U.S. Securities Exchange Act of 1934;
- **(ii)** the French stock exchanges controlled by the Autorité des marchés financiers;
- **(iii)** the stock exchanges of Amsterdam, Brussels, Frankfurt, Hamburg, London, Lisbon, Madrid, Milan, Stockholm, Sydney, Tokyo, Toronto, and the Swiss stock exchange; and
- **(iv)** any other stock exchange agreed on by the competent authorities. ***Article 30(7)(d) of the treaty.***

Chart 3. Subsidiary of a Publicly Traded Company Test Under Article 30(2)(c)(I) (LOB) of the France-U.S. Tax Treaty

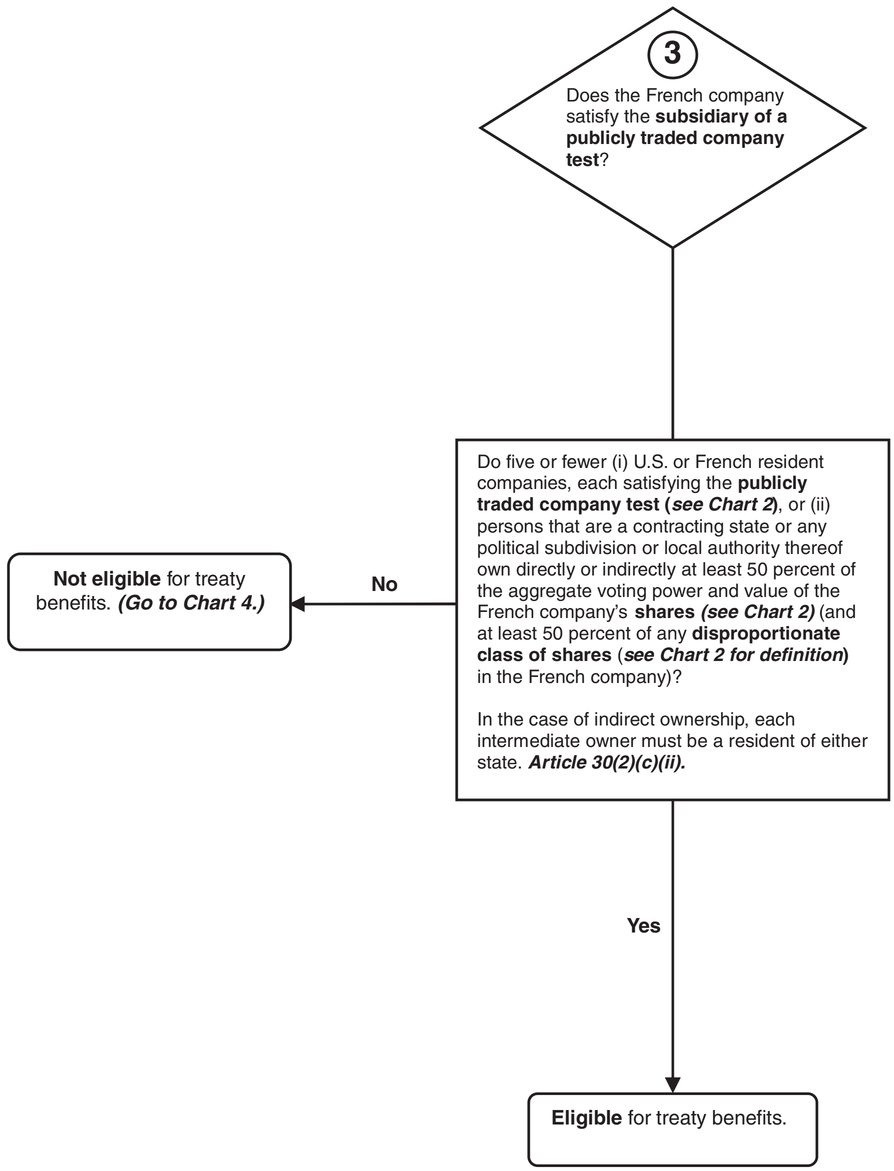


Chart 4. Ownership and Base Erosion Test Under Article 30(2)(c)(I) (LOB) of the France-U.S. Tax Treaty

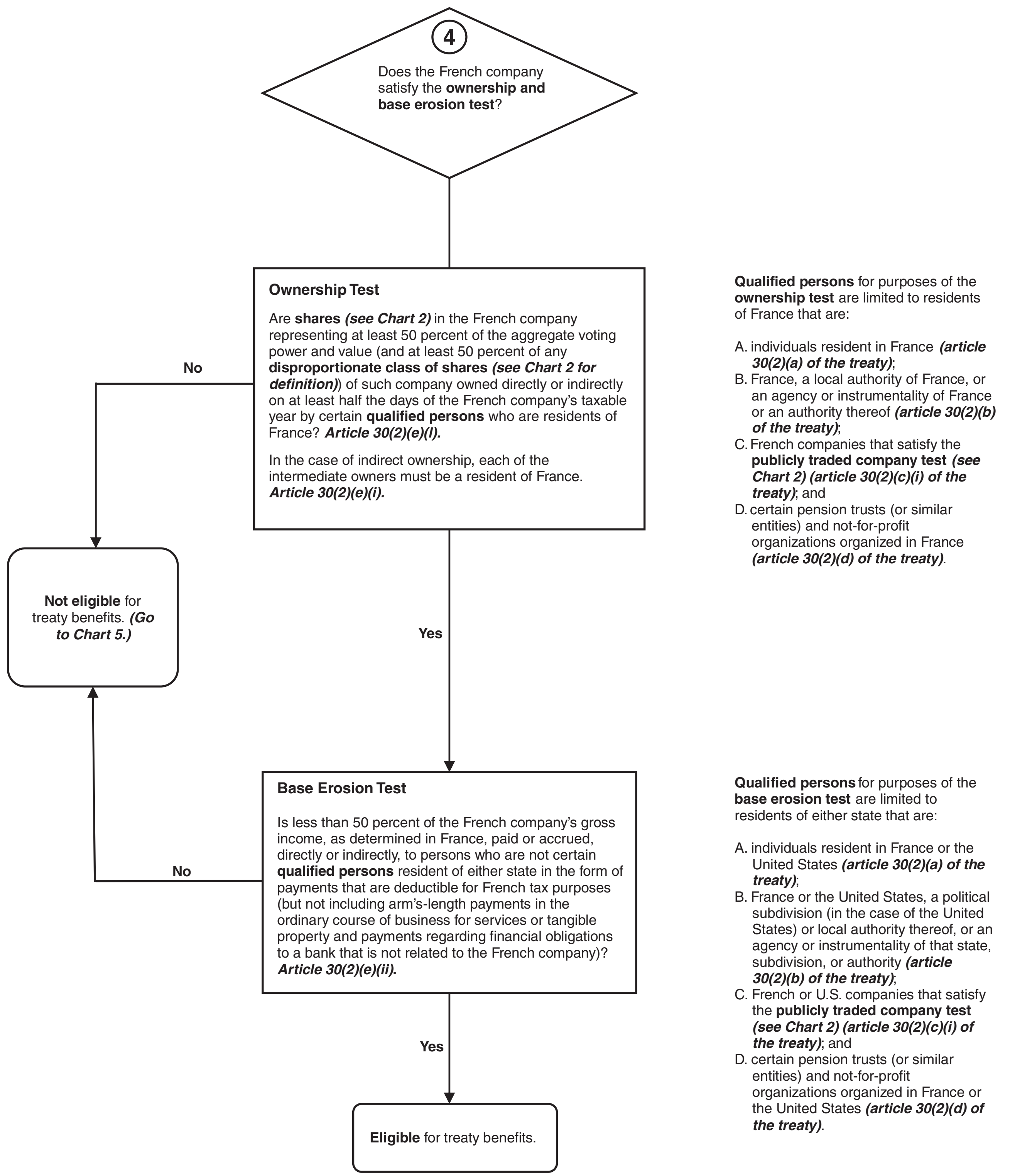


Chart 5. Specified Investment Entity Test Under Article 30(2)(c)(I) (LOB) of the France-U.S. Tax Treaty

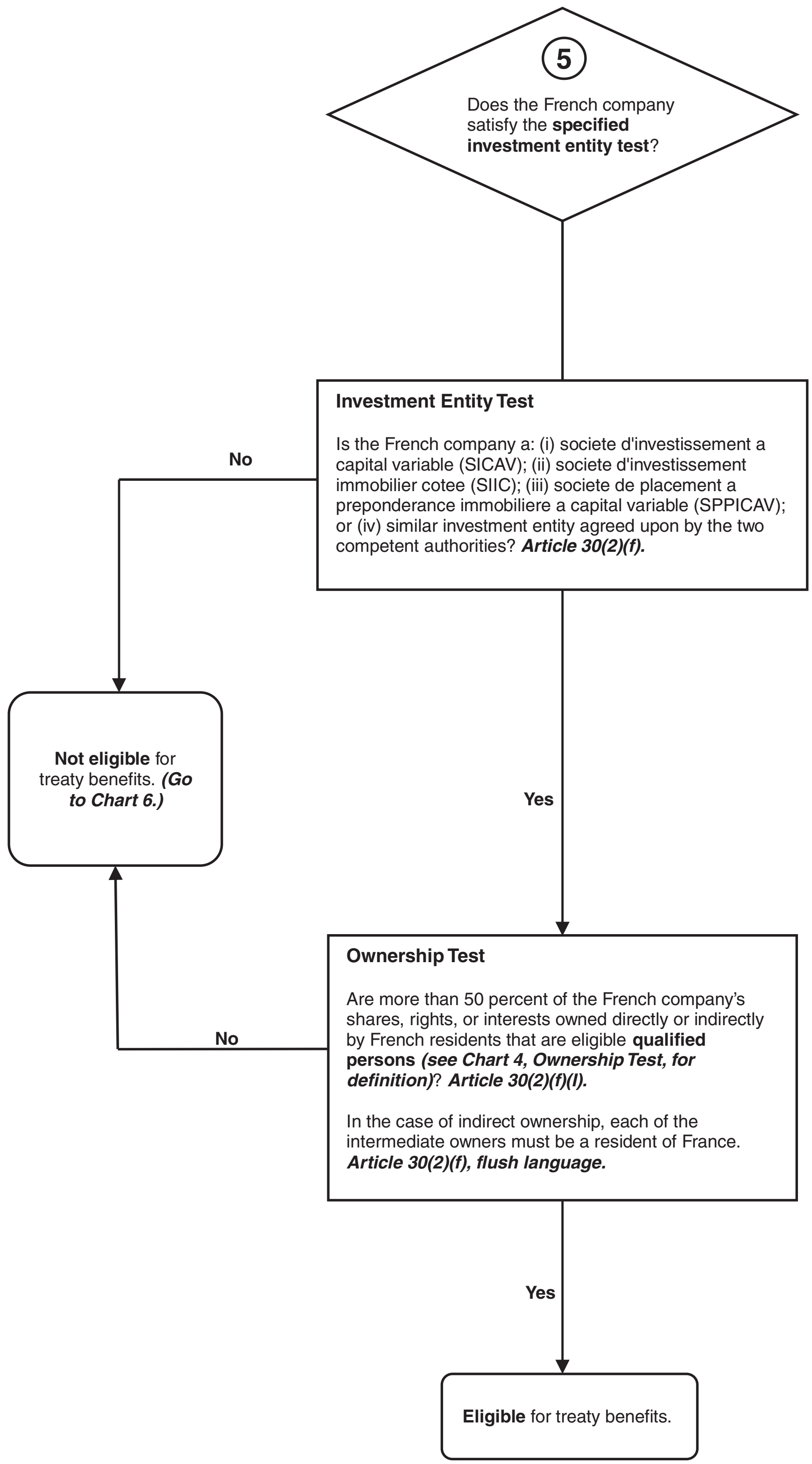


Chart 6. Derivative Benefits Test Under Article 30(2)(c)(I) (LOB) of the France-U.S. Tax Treaty

NOTE: The derivative benefits test potentially applies to all benefits under the treaty, although the test is applied to individual items of income. ***U.S. Treasury technical explanation to the 2009 protocol to the treaty.***

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Does the French company satisfy the **derivative benefits test**?

Ownership Test

Are **shares** ***(see Chart 2)*** representing at least 95 percent of the aggregate voting power and value (and at least 50 percent of any **disproportionate class of shares** ***(see Chart 2 for definition)***) of the French company owned, directly or indirectly, by seven or fewer persons who are **equivalent beneficiaries**? ***Article 30(3)(a).***

No

Not eligible for treaty benefits. ***(Go to Chart 7.)***

Yes

Base Erosion Test

Is less than 50 percent of the French company's gross income, as determined in France, for the taxable year paid or accrued, directly or indirectly, to persons who are not **equivalent beneficiaries**, in the form of payments that are deductible for French tax purposes (but not including arm's-length payments in the ordinary course of business for services or tangible property and payments regarding financial obligations to a bank that is not related to the French company)? ***Article 30(3)(b).***

No

Yes

Eligible for treaty benefits.

"Equivalent beneficiary" means**:**

A resident of a member state of the EU or of a party to the North American Free Trade Agreement, but only if that resident:

(i)(aa) would be entitled to *all* the benefits of a comprehensive income tax treaty between any EU member state or any party to NAFTA and the United States under provisions analogous to the rules for certain **qualified persons** ***(see Chart 4, base erosion test, for definition)*** provided that if such treaty does not contain a comprehensive LOB article, the person would be entitled to the benefits of the treaty by reason of status as a **qualified person** ***(see Chart 4, base erosion test, for definition)*** if such person were a resident of one of the states under article 4 (resident) of the treaty; **and**

(bb) with respect to insurance premiums and income referred to in article 10 (dividends), 11 (interest), or 12 (royalties) of the treaty, would be entitled under such treaty to an exemption from excise tax on such premiums or a rate of tax regarding the particular item of income for which benefits are being claimed under the treaty that is at least as low as the rate applicable under the treaty; **or**

(ii) is a resident of either the United States or France that is a **qualified person** ***(see Chart 4, base erosion test, for definition)*** entitled to the benefits of the treaty by reason of such status. ***Article 30(7)(f) of the treaty.***

NOTE: For purposes of applying paragraph 3 of article 10 (dividends) of the treaty to determine whether a person owning shares, directly or indirectly, in the company claiming the benefits of the treaty is an **equivalent beneficiary**, such person will be deemed to hold the same voting power in the company paying the dividends as the company claiming the benefits holds in such company. ***Article 30(7)(f), flush language, of the treaty.***

NOTE: Under article 30(7)(f), a company that satisfies the **subsidiary of a publicly traded company test** ***(see Chart 3)*** or the **ownership and base erosion test** ***(see Chart 4)*** is *not* an **equivalent beneficiary.**

Chart 7. Active Trade or Business Test Under Article 30(2)(c)(I) (LOB) of the France-U.S. Tax Treaty

(Only applies if an item of income is derived in connection with or incidental to an active trade or business in France)

The phrase **"active conduct of a trade or business"** is not defined in the treaty. The **U.S. Treasury explanation to the 2009 protocol to the treaty** explains that the United States will refer to the regulations promulgated under section 367(a) to define the term "trade or business."

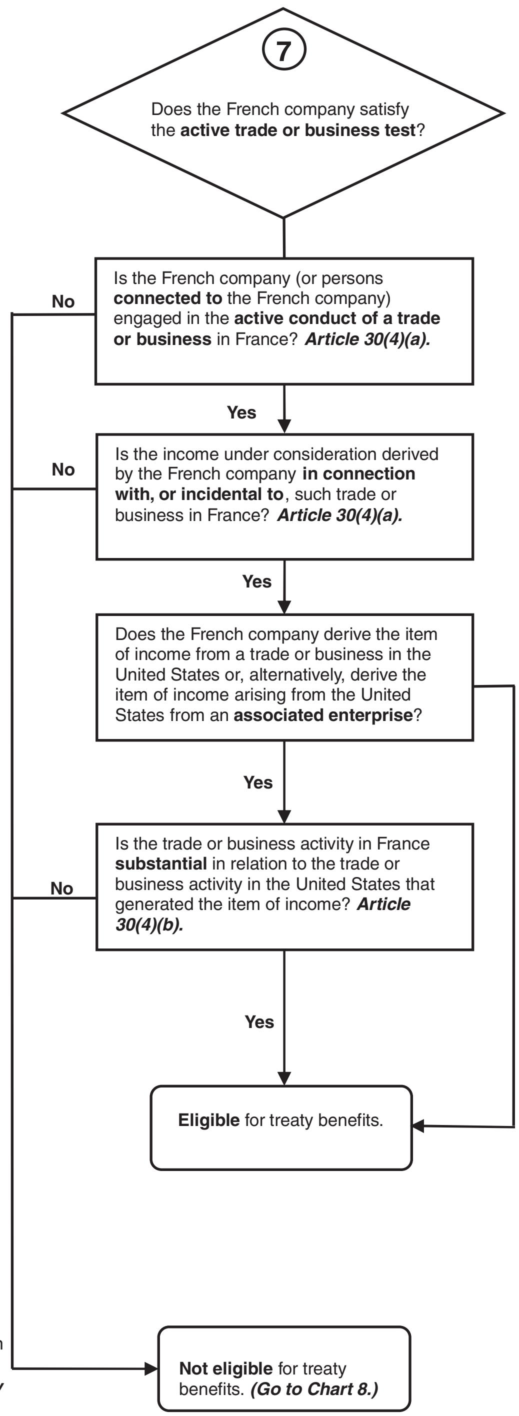
The **active conduct of a trade or business** does not include the business of making or managing investments for one's own account, unless these activities are banking, insurance, or securities activities carried on by a bank, insurance company, or registered securities dealer. ***Article 30(4)(a) of the treaty.***

Income is considered derived **in connection with** a trade or business if the income-producing activity in the source state (for example, the United States) is a line of business that "forms a part of" or is "complementary" to the trade or business conducted in France by the income recipient. ***U.S. Treasury technical explanation to the 2009 protocol to the treaty.***

A business activity generally is considered to "form a part of" a business activity conducted in the source state if the two activities involve the design, manufacture, or sale of the same products or type of products, or the provision of similar services. The line of business in the state of residence may be upstream, downstream, or parallel to the activity conducted in the source state. Thus, the line of business may provide inputs for a manufacturing process that occurs in the source state, may sell the output of that manufacturing process, or may sell the same sorts of products that are being sold by the trade or business carried on in the source state. ***U.S. Treasury technical explanation to the 2009 protocol to the treaty.***

For two activities to be considered to be "complementary," the activities need not relate to the same types of products or services. They should, however, be part of the same overall industry and be related in the sense that the success or failure of one activity will tend to result in the success or failure for the other. ***U.S. Treasury technical explanation to the 2009 protocol to the treaty.***

An item of income derived from the source state (for example, the United States) is "**incidental to**" the trade or business carried on in France if production of the item facilitates the conduct of the trade or business in France. ***U.S. Treasury technical explanation to the 2009 protocol to the treaty.***



A person is **"connected to"** another person if one possesses at least 50 percent of the beneficial interest in the other (or, in the case of a company, at least 50 percent of the aggregate vote and at least 50 percent of the aggregate value of the **shares** ***(see Chart 2)*** in the company or of the beneficial equity interest in the company) or another person possesses, directly or indirectly, at least 50 percent of the beneficial interest (or, in the case of a company, at least 50 percent of the aggregate voting power and at least 50 percent of the aggregate value of the **shares** ***(see Chart 2)*** in the company or of the beneficial equity interest in the company) in each person. A person is considered **connected to** another person if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same person or persons. ***Article 30(4)(c) of the treaty.***

A French company is **associated** with an **enterprise** of the United States if it participates directly or indirectly in the management, control, or capital of the U.S. enterprise or if any third person or persons participate directly or indirectly in the management, control, or capital of the French company and the U.S. enterprise. ***Article 9(1) of the treaty.***

Whether the French company's trade or business (or the trade or business of a person **connected to** the French company) is **substantial** in relation to the trade or business activity in the United States that generated the item of income is based on a facts and circumstances test. Factors to be taken into account include: (i) the comparative sizes of the trades or businesses in each state; (ii) the nature of the activities performed in each state; and (iii) the relative contributions made to that trade or business in each state. In making each determination or comparison, one must give due regard to the relative sizes of the U.S. and French economies. ***U.S. Treasury technical explanation to the 2009 protocol to the treaty.***

NOTE: The 2009 protocol does not retain the safe harbor ratios for determining whether the trade or business in France is **substantial** in relation to the trade or business activity in the United States that generated the item of income.

Chart 8. Discretionary Determination by the U.S. Competent Authority Under Article 30(6) (LOB) of the France-U.S. Tax Treaty

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Has a **discretionary determination** been granted by U.S. competent authority?

No

Not eligible for treaty benefits.

Yes

Eligible for treaty benefits.

A French resident company that is not entitled to some or all of the benefits of the treaty because of the application of the LOB article may be granted benefits of the treaty if the U.S. competent authority so determines. The U.S. competent authority will grant a discretionary determination if it determines the establishment, acquisition, or maintenance of such company and the conduct of its operations did not have as one of its principal purposes the obtaining of benefits under the treaty. The U.S. competent authority will consult with the French competent authority before denying a request for a discretionary determination. ***Article 30(6).***

The U.S. competent authority will not grant benefits solely because the French company was established prior to the effective date of the treaty (or a protocol amending the treaty). In that case a French company would still be required to establish to the satisfaction of the U.S. competent authority clear nontax business reasons for its formation in France, or that the allowance of benefits would not otherwise be contrary to the purposes of the treaty. Thus, persons that establish operations in France with a principal purpose of obtaining the benefits of the treaty ordinarily will not be granted discretionary determination relief. ***U.S. Treasury technical explanation to the 2009 protocol to the treaty.***

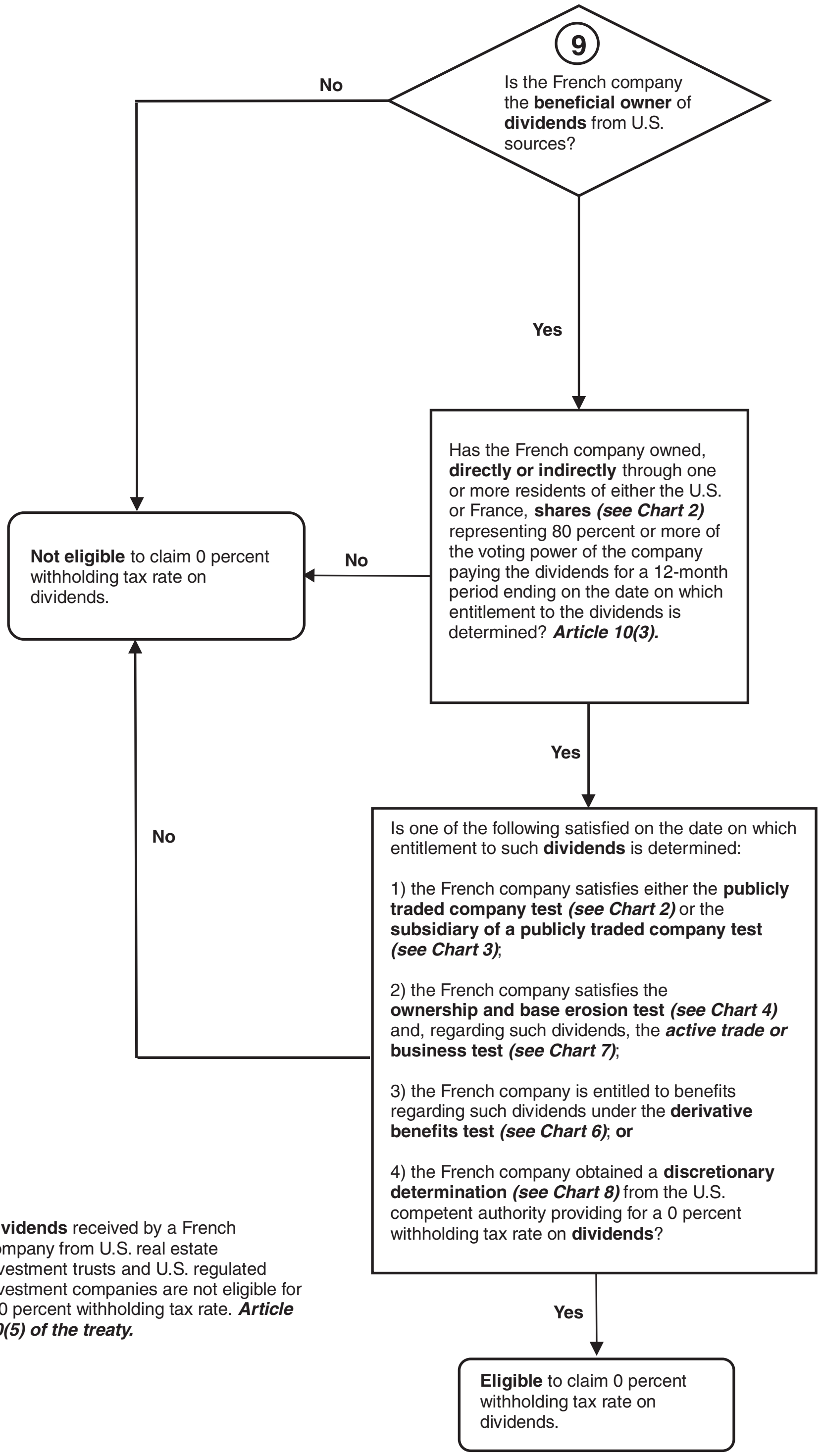
The U.S. competent authority's discretion is quite broad. It may grant all of the benefits of the treaty to the taxpayer making the request, or it may grant only certain benefits. For instance, it may grant benefits only regarding a particular item of income. Further, the U.S. competent authority may establish conditions, such as setting time limits on the duration of any relief granted. ***U.S. Treasury technical explanation to the 2009 protocol to the treaty.***

A French company is permitted to present its case to the U.S. competent authority for an advance determination based on a full disclosure of all pertinent information. In these circumstances, if the U.S. competent authority determines that benefits are to be allowed, such benefits will be allowed retroactively to the time of entry into force of the relevant provision of the treaty or the establishment of the structure in question, whichever is later. ***U.S. Treasury technical explanation to the 2009 protocol to the treaty.***

Requesting competent authority assistance — A taxpayer may request the assistance of the U.S. competent authority under Rev. Proc. 2006-54. The U.S. competent authority may determine in its own discretion that the taxpayer qualifies for certain benefits under the LOB article of the treaty.

There is a US $15,000 user fee for requesting a **discretionary determination** under the LOB article. If a request is submitted for more than one entity, a separate user fee is charged for each entity. ***Rev. Proc. 2006-54, section 14.2.***

Chart 9. Eligibility for 0 Percent Withholding Tax Rate on Dividends Under Article 10(3) of the France-U.S. Tax Treaty



Dividends received by a French company from U.S. real estate investment trusts and U.S. regulated investment companies are not eligible for a 0 percent withholding tax rate. ***Article 10(5) of the treaty.***

"Beneficial owner" is not defined in the treaty and, thus, is defined under the internal law of the country imposing the tax (here, the United States) unless the competent authorities agree to a common meaning. ***Article 3(2) of the treaty.*** The **beneficial owner** of a dividend is the person to which the dividend income is attributable for tax purposes under the laws of the United States. Thus, if the French company receives dividends as a nominee or agent on behalf of another person, the French company is not the **beneficial owner** of the dividend. ***U.S. Treasury technical explanation to the 2009 protocol to the treaty.***

The term **"dividends"** means income from **shares** ***(see Chart 2)***; "jouissance shares" or "jouissance rights"; mining shares, founders' shares, or other rights, not being debt claims; participating in profits; as well as income treated as a distribution by the taxation laws of the state of which the company making the distribution is a resident (here, the United States); and income from arrangements, including debt obligations, that carry the right to participate in, or are determined with reference to, profits of the issuer or one of its **associated enterprises** ***(see Chart 7 for definition)***, to the extent that such income is characterized as a dividend under the law of the contracting state in which the income arises (here, the United States). The term "**dividends**" does not include income referred to in article 16 (directors' fees). ***Article 10(6)(a) of the treaty.*** Article 10 (dividends) applies when a beneficial owner of dividends holds depository receipts evidencing ownership of the shares regarding which the dividends are paid, in lieu of the shares themselves. ***Article 10(6)(b) of the treaty.***

Dividends are defined "broadly and flexibly" by the United States and include:

(I) a constructive dividend that results from a non-arm's-length transaction between a corporation and a related party;

(ii) a payment to a French company denominated as interest that is made by a thinly capitalized corporation to the extent that the debt is recharacterized as equity under the laws of the United States;

(iii) amounts treated as a dividend upon the sale or redemption of shares or upon a transfer of shares in a reorganization ***(see, e.g., Rev. Rul. 92-85, 1992-2 C.B. 69)***; and

(iv) a distribution from a U.S. publicly traded limited partnership that is taxed as a corporation under U.S. law. ***U.S. Treasury technical explanation to the 2009 protocol to the treaty.***

However, a distribution by a U.S. limited liability company is not characterized as a dividend, provided the U.S. limited liability company is not treated as a corporation under U.S. law. ***U.S. Treasury technical explanation to the 2009 protocol to the treaty.***