

## Comparative company law



26<sup>th</sup> of September 2017 – 3<sup>rd</sup> of October 2017

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# Plan

- **General view of comparative company law (A.)**
- **Practical aspects of setting up a subsidiary in France and Germany (B.)**

## **A. General view of comparative company law**

- **Classification of companies (I.)**
- **Setting up a company with share capital (II.)**
- **Management bodies (III.)**
- **Transfer of shares (IV.)**
- **Taxation (V.)**
- **General tendencies in company law (VI.)**

# I. Classification of companies

- **General classification**
  - Partnerships
    - Typically unlimited liability of the partners
    - Importance of the partners
  - The companies with share capital
    - Shares can be traded more or less freely
    - Typically restriction of the associate's liability
  - Hybrid forms

# I. Classification of companies

- **Partnerships**
  - « Civil partnership »
    - France: *Société civile*
    - Netherlands: *Maatschap*
    - Germany: *Gesellschaft bürgerlichen Rechts*
    - Austria: *Gesellschaft nach bürgerlichem Recht (GesnbR)*
    - Italy: *Società semplice*

# I. Classification of companies

- **Partnerships**
  - « General partnership »
    - France: *Société en nom collectif*
    - UK: *General partnership* (but without legal personality!)
    - USA: *General partnership*
    - Canada: *General partnership*
    - Netherlands: *Vennootschap onder Firma (VOF)*
    - Germany: *Offene Handelsgesellschaft*
    - Austria: *Offene Gesellschaft (OG)*
    - Switzerland: *Kollektivgesellschaft*
    - Spain: *Sociedad colectiva (y Cia)*
    - Italy: *Società in nome collettivo*

# I. Classification of companies

- **Partnerships**
  - « Limited partnership »
    - France: *Société en commandite simple*
    - UK: *Limited partnership*
    - USA: *Limited Partnership*
    - Canada: *Limited Partnership*
    - Netherlands: *Commanditaire Vennootschap*
    - Germany: *Kommanditgesellschaft*
    - Austria: *Kommanditgesellschaft*
    - Switzerland: *Kommanditgesellschaft*
    - Spain: *Sociedad comanditaria simple*
    - Italy: *Società in accomandita semplice*

# I. Classification of companies

- **Companies with share capital**

- « Corporation »

- France: *Société anonyme*
- UK: *Public limited company with share capital (Plc)*
- USA: *Corporation (Corp., Inc., Ltd, Co.)*
- Canada: *Corporation (Corp., Limited, Ltd., Incorporated, Inc.)*
  - Between the classic “corporation” and a Limited liability company
- Netherlands: *Naamloze Vennootschap (NV)*
- Germany: *Aktiengesellschaft (AG)*
- Austria: *Aktiengesellschaft (AG)*
- Switzerland: *Aktiengesellschaft (AG)*
- Spain: *Sociedad anónima (S.A.)*
- Italy: *Società per azioni (Spa)*
- Japan: *Kabushiki Kaisha (KK)*



# I. Classification of companies

- **Companies with share capital**
  - « Limited liability company »
    - France: *Société à responsabilité limitée (SARL)*
    - UK: *Private company limited by shares (Ltd)*
    - USA: *Limited liability company (LLC)*
    - Netherlands: *Besloten Vennootschap (met beperkte aansprakelijkheid) (BV)*
    - Germany: *Gesellschaft mit beschränkter Haftung (GmbH)*
    - Austria: *Gesellschaft mit beschränkter Haftung (GmbH)*
    - Switzerland: *Gesellschaft mit beschränkter Haftung (GmbH)*
    - Spain: *Sociedad de responsabilidad limitada (SL)*
    - Italy: *Società a responsabilità limitata (Srl)*

# I. Classification of companies

- **Hybrid forms**

- « Company partially limited by shares »

- France: *Société en commandite par actions (SCA)*
- Germany: *Kommanditgesellschaft auf Aktien*
- Switzerland: *Kommanditaktiengesellschaft*
- Italy: *Società in accomandita per azioni*

→ Combination of a Limited Partnership and a corporation

- The German *GmbH & Co. KG*

- Limited partnership
- Company with limited liability (e.g. *GmbH*) as General partner
- Usually, the members of this *GmbH* are the Limited partners

# I. Classification of companies

- **Comparison**
  - Similar classification criteria
  - For most companies, similar structures can be found in many countries
  - In countries having the same official language, a similar terminology is used

# I. Classification of companies

- **Comparison**
  - Influence between the different legal families
    - E.g. significant influence of the German on the Austrian and Swiss company law
  - However, there are important differences between the national structures
    - E.g. legal personality of the General partnership in the USA but not in the UK
    - Important structural differences between *Limited liability* company, GmbH, SARL etc.

## II. Setting up a company with share capital

- **Two main possibilities**
  - Setting up of a completely new company
    - Respect of all the formalities required
    - Possible in all legal systems
  - Purchase of a pre-registered company (“shell company”)
    - Germany
    - United Kingdom

## II. Setting up a company with share capital

- **Requirements**
  - Registration
    - Compulsory in all systems
    - General elements:
      - Signature of the statutes by at least one founder
      - Nomination of the management body
    - Degree of formalism varies from country to country
      - USA: Online-declaration can be sufficient (at least in certain States)
      - Germany, Switzerland: Notary's authentication
      - France, Germany, Switzerland: Detailed examination of the statutes' content

## II. Setting up a company with share capital

- **Requirements**
  - Paying in of shareholder's contribution before / after the setting up
    - Before: France, Switzerland
      - No free disposal over the bank account
    - After: Germany
      - Opening of the bank account and paying in of the contribution shall imperatively be executed after the authentication of the statutes (articles of association)

## II. Setting up a company with share capital

- **Minimum capital**
  - Corporations:
    - USA: No minimum capital
    - France: EUR 37.000
    - Italy: EUR 50.000
    - Germany: EUR 50.000 (25% have to be paid in)
    - Switzerland: CHF 100.000 (20% but at least CHF 50.000 have to be paid in)
  - Limited liability companies:
    - USA, UK, France, Netherlands: No minimum capital
    - Switzerland: EUR 20.000
    - Germany: EUR 25.000



## III. Management bodies

- **General bodies**
  - Assembly of associates
  - Officer or officers body
  - Board of directors (one-tier board system) or board of directors and supervisory board (two-tier board system)

## III. Management bodies

- **Two different board systems**
  - One-tier board system
    - One board of directors with both executive and non-executive members (e.g. *conseil d'administration*)
      - Executive members take the decisions of the everyday-life of the company
      - Non-executive members are independent persons appointed to control the executive members
  - Two-tier board system
    - One board of directors with only executive members (e.g. *Vorstand / directoire*)
    - One supervisory board without representative power (e.g. *Aufsichtsrat / conseil de surveillance*)

## III. Management bodies

- **One-tier board system:**
  - Common law family
    - USA
    - UK
  
- **Two-tier board system:**
  - German law family
    - Germany
    - Austria
    - Switzerland
  
- **Choice between the two systems:**
  - Romanic law family
    - France
    - Belgium
    - Italy
  
  - European company (*SE*)

## IV. Transfer of shares

- **Corporations**
  - Principle: Free transfer of shares
  - Restrictions can be set forth in the statutes
    - Need of approval (often via qualified majority) by the shareholder's meeting
    - Need of approval by the company (represented by the management)
  - For stock corporations, the possibilities of restriction are often limited by law
    - E.g. maximum threshold of X percent owned by one shareholder

## IV. Transfer of shares

- **Limited liability companies**
  - Principle of free transfer of shares except if provided otherwise:
    - UK
    - Canada (except for certain provinces)
    - Germany
    - Austria
  - Approval of a majority or the totality of the shareholders necessary:
    - France (majority of the shareholders representing at least half of the shares)
    - Switzerland (2/3 majority)
  - N.B.: A specific procedure is often required for the opposability of the transfer (e.g. France)

## V. Taxation

- **UK**
  - Corporate tax rate varies according to the size and the results of the company
  - 30% for most important companies
- **USA**
  - Corporation tax due at a federal level and at the level of each State
  - American companies don't pay taxes for national profits but only for foreign profits
- **France**
  - Corporation tax of 33.3% and trade tax (*CET*) partially calculated on the basis of fixed assets (*immobilisation*)
- **Germany**
  - Corporation tax of 15% and trade tax (*Gewerbesteuer*) of 7-17% (depending on the geographic situation)
- **Switzerland**
  - Federal tax of 8.5% and cantonal tax of 8-25% depending on the canton
  - Very attractive because specific rules exempt companies of these taxes under certain conditions (e.g. holding companies) or reduce them

## VI. General tendencies in company law

- **Deregulation**
  - USA: Run after the Delaware company law
  
- **Simplification**
  - Creation of simplified structures
    - France: *Société par actions simplifiée (SAS)* since 1994
    - Germany: Creation of an “Entrepreneurial company” (*Unternehmergeellschaft haftungsbeschränkt*) for start-up companies
  
  - Possibility of one-man-companies
    - France: *Entreprise unipersonnelle à responsabilité limitée (EURL)*
    - Switzerland: Possibility of one-man-AGs and one-man-GmbHs since 2008

## VI. General tendencies in company law

- **Simplification**
  - Reduction of the minimum capital
    - Italy: Reduction for the *Società per azioni (Spa)* from EUR 120.000 to EUR 50.000 in 2014
  - EU: Proposal of Directive on a single-member private limited liability company (*SUP – Societas unius personae*)



## VI. General tendencies in company law

- **Measures to improve gender balance on boards**
  - Current proposal for an EU directive (COM (2012) 614 final) with a minimum target of 40% for the under-represented sex for non-executive board members of the largest European stock companies
  - National measures already implemented in many countries, e.g.
    - Italy: Quota of 33% of each gender on the board of corporations and state owned companies by 2015
    - France: Quota of 20% to be achieved by 2014 and 40% by 2017 applicable to non-executive directors in companies employing at least 500 workers and with revenues over EUR 50 millions

## **B. Practical aspects of setting up a subsidiary in France and Germany**

- **The SAS: The most appropriate solution for France (I.)**
- **The GmbH: The most appropriate solution for Germany (II.)**
- **The Franco-German relations (III.)**

# I. France: Setting up a SAS

- **Characteristics of the SAS**

- “Simplified corporation” (*Société par actions simplifiée*)
- Various advantages compared to the “classic” Corporation (SA) and Limited liability company (SARL)
- Introduced into French law in 1994 with major reform in 2008/2009
- Fast rising popularity

# I. France: Setting up a SAS

- **Advantages of the SAS**
  - Highly developed principle of freedom of contract
  - Only mandatory provisions:
    - Management by an officer (natural or legal person)
    - The company's capital has to be divided into shares
  - Configuration as a one-man-company is possible
  - Minimum capital: EUR 1.00

# I. France: Setting up a SAS

- **Advantages of the SAS**
  - Audit is mandatory only under certain circumstances:
    - Excess of certain thresholds
      - Balance sheet amount
      - Annual turnover
      - Number of employees
    - In a Group: When the SAS controls or is controlled by another company
  - Possibility of “*apports en industrie*” (work capacity as shareholder contribution with right to participate in profits)

# I. France: Setting up a SAS

- **Internal structure of a SAS**
  - Corporate governance:
    - Besides the Officer, other management bodies are possible:
      - General manager, Deputy general manager
      - Board of directors, Advisory board
    - Free distribution of management powers:
      - Legal transactions requiring approval
      - Possibility of transfer to third parties (e.g. Renault-Nissan)
      - Delegation of authority via power of attorney

# I. France: Setting up a SAS

- **Internal structure of a SAS**

- Shareholder's meeting:

- Possibility to make any restrictions in transferability of shares
  - Approval procedures, specific group of people
  - Prohibition of disposal (maximum 10 years)
  - Pre-emption rights
- Free distribution of membership rights
  - Shares with multiple voting rights
  - Shares with a right of veto
  - Preference shares without any right of vote
- Freedom in the process of decision making
  - Quorum and majority requirements
  - Conditions (meeting, written procedure etc.)

# I. France: Setting up a SAS

- **The setting-up process**
  - Preparation of the statutes:
    - Identity of the shareholders and raising of capital
    - Name, head office, business purpose
    - Organisation of the management
    - Restrictions in transferability of shares
    - Quorum and majority requirements
    - Conditions for the process of decision making
    - Nomination of auditors



# I. France: Setting up a SAS

- **The setting-up process**
  - Conclusion of the necessary contracts:
    - Commercial lease agreement (*bail commercial*)
    - Opening of a French bank account and paying in at least 50% of the share capital
    - Signing of the statutes (no need for notarial authentication)
    - Conclusion of contracts of employment if needed

# I. France: Setting up a SAS

- **The setting-up process**
  - Formalities:
    - Publication in an official journal
    - Preparation of all the forms and declarations needed
    - Notification of creation to the *Centre des Formalités des Entreprises (CFE)*
    - Registration of the statutes at the tax authorities
    - Registration in the Register of Commerce; legal personality

## II. Germany: Setting up a *GmbH*

- **Characteristics of a *GmbH* :**
  - Company with share capital with limited liability
  - Minimum capital: EUR 25.000
  - Capital split up into shares (freely tradable)
  - Low degree of formalism and flexibility of the statutes

## II. Germany: Setting up a *GmbH*

- **The setting-up process :**
  - Notarial authentication of the statutes and the certificate of incorporation
  - Minimum capital: EUR 25.000
    - EUR 12.500 have to be paid in at the incorporation
    - the rest as required by the management
  - Opening of the bank account and conclusion of lease agreement only **AFTER** the notarial authentication

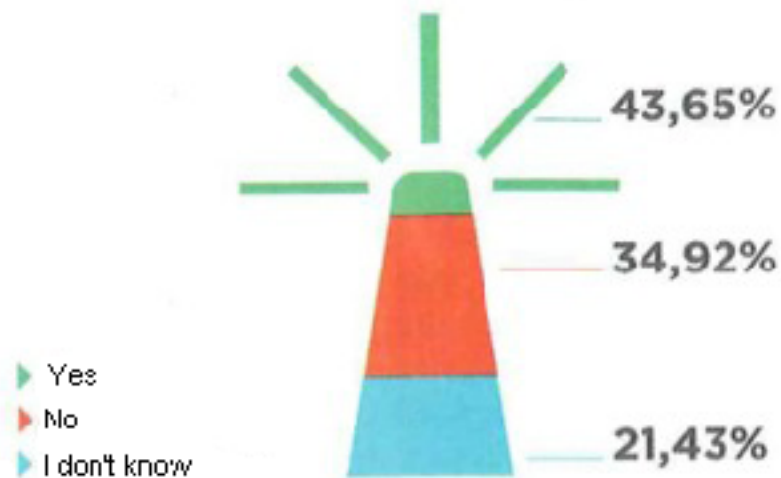
## II. Germany: Setting up a *GmbH*

- **The setting-up process :**
  - Documents to prepare for incorporation:
    - Notarial deed of the articles of association (naming the manager(s))
      - Representation by PoA
      - PoA certificated by a foreign notary (with apostille if necessary)
    - PoA of the single shareholder (by private deed)
    - Request for registration by the manager (certified by a notary)
  - Possibility of the purchase of a pre-registered company (“shell company”)
  - **Warning:** The founders personally are jointly and severally liable during the setting-up period (between the notarial authentication and the registration)

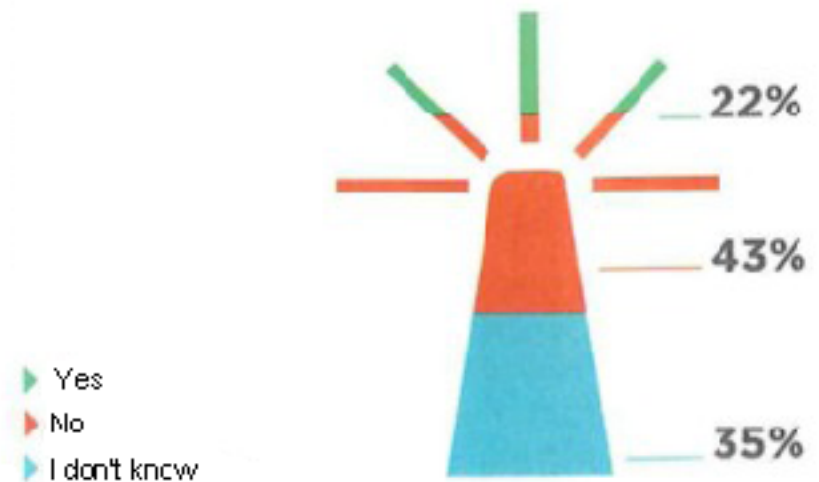
## III. The Franco-German relations

- France and Germany: A role model in the eye of the people?

Is Germany a role model?



Is France a role model?



Source: Survey of more than 25.000 people on the relations between France and Germany made by ARTE from 5 July to 8 November 2012 (Journal *ParisBerlin* February 2013)

## III. The Franco-German relations

- France or Germany: Who is more attractive?

Would you like to live in  
Germany?

▶ I don't know  
▶ No  
▶ Yes



Would you like to live in  
France?

▶ I don't know  
▶ No  
▶ Yes



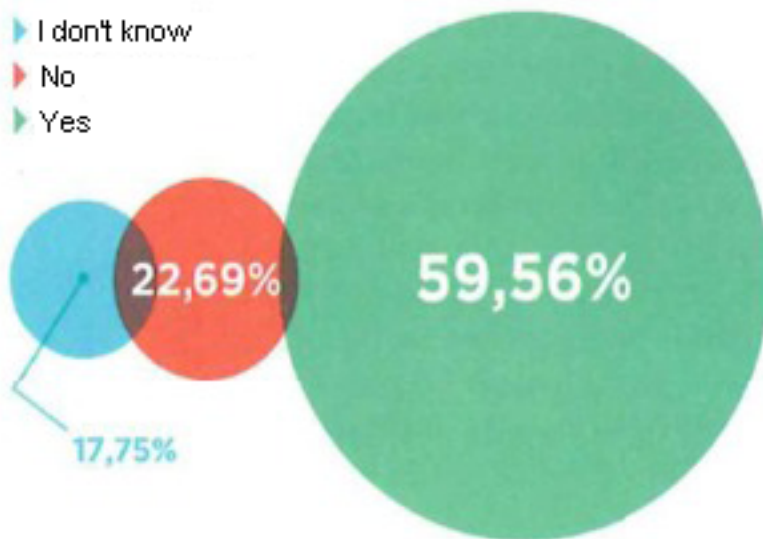
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## III. The Franco-German relations

- To work in France or in Germany?

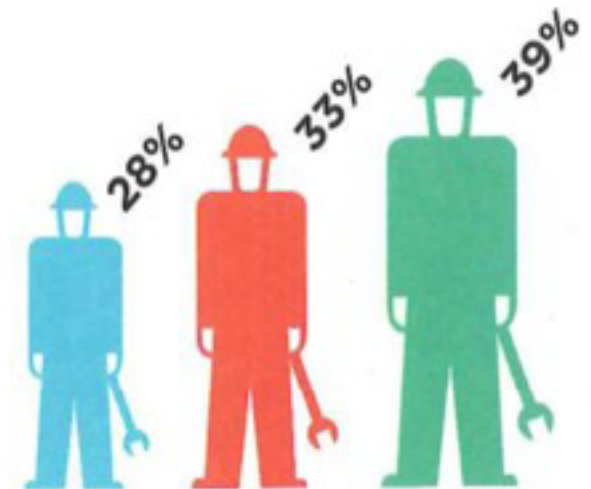
Would you like to work in Germany?

▶ I don't know  
▶ No  
▶ Yes



Would you like to work in France?

▶ I don't know  
▶ No  
▶ Yes



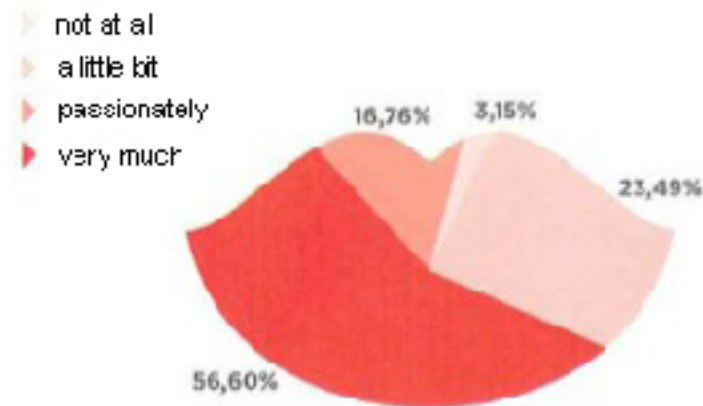
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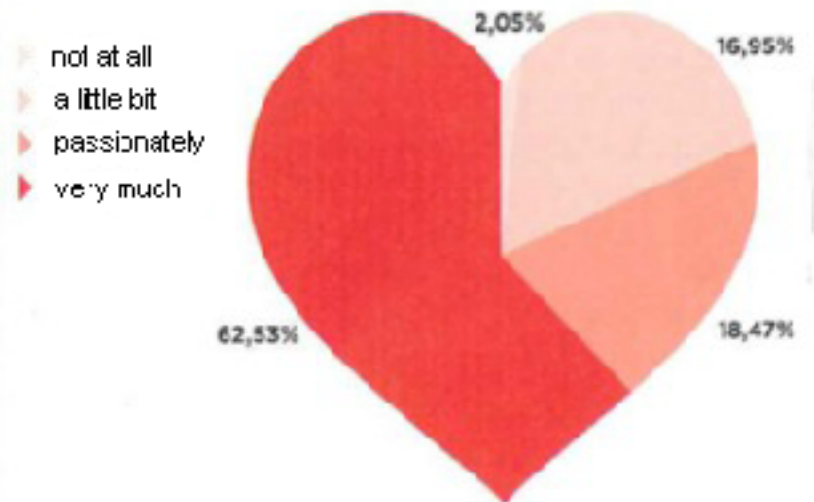
## III. The Franco-German relations

- Who is more popular?

### Do you like Germany?



### Do you like France?

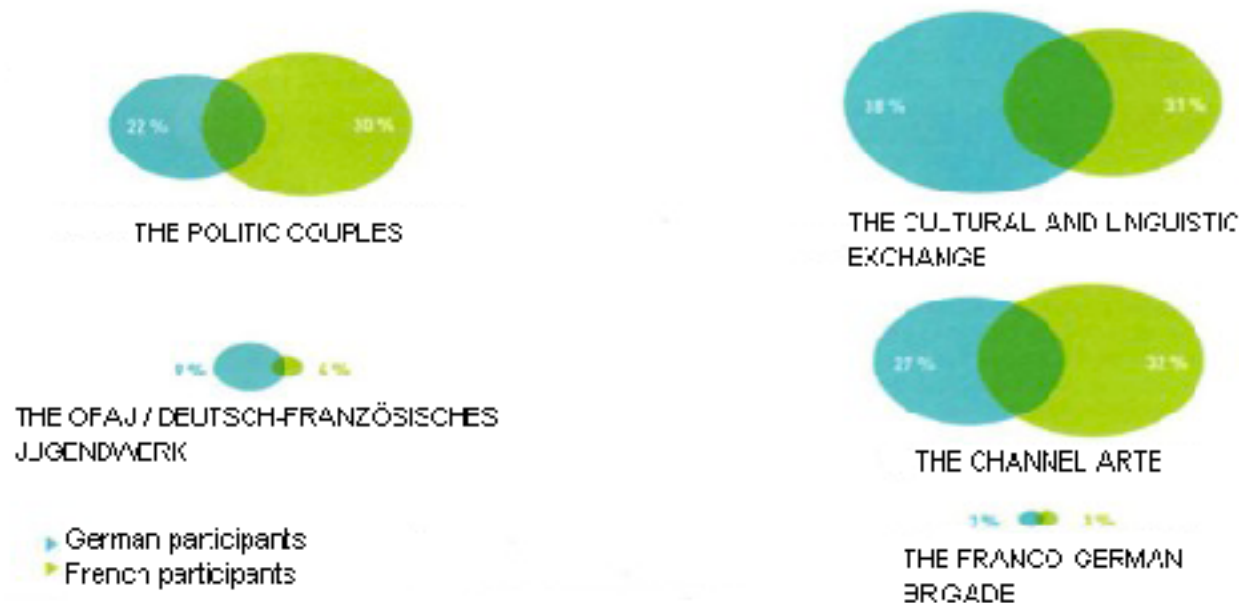


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## III. The Franco-German relations

- The Germans seen by the French and vice versa

**What does best symbolize the relations between France and Germany?**

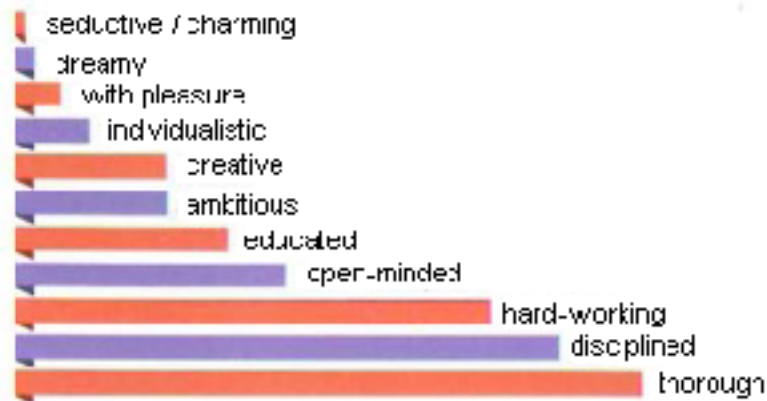


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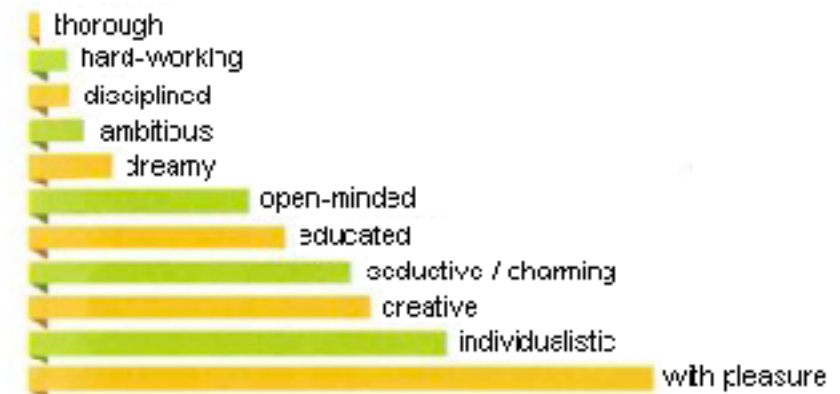
## III. The Franco-German relations

- The Germans seen by the French and vice versa

**Which are the three main qualities that you would assign to a German?**



**Which are the three main qualities that you would assign to a Frenchman?**



Source: Survey of more than 25.000 people on the relations between France and Germany made by ARTE from 5 July to 8 November 2012 (Journal *ParisBerlin* February 2013)

## Contact

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**Thank you for your attention !**