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Private Client 2020

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Contributing editors:

Jonathan Conder & Robin Vos
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info@glgroup.co.uk
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Group Publisher
Rory Smith

Publisher
Paul Regan

Senior Editors
Suzie Levy
Caroline Oakley
Rachel Williams

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Expert Chapters

Q&A Chapters

France

Tirard, Naudin, Société d'avocats

Maryse Naudin

1 Connection Factors

1.1 To what extent is domicile or habitual residence relevant in determining liability to taxation in your jurisdiction?

Domicile is not relevant in determining liability to taxation in France.

Please see question 1.4.

1.2 If domicile or habitual residence is relevant, how is it defined for taxation purposes?

The British concept of "domicile" is not used by the French tax code. However, the French courts usually find that the law of the deceased's last domicile governs succession. Under the French Civil Code, domicile is the place where a person has his habitual residence. The place of origin has no influence on the determination of habitual residence.

The habitual residence is defined as the primary place of residence which means the place where the individual spends most of his time during the civil year.

1.3 To what extent is residence relevant in determining liability to taxation in your jurisdiction?

Residence is essential in determining liability for taxation in France.

As a principle, individuals who are residents of France are liable to French income tax in France in respect of their worldwide income and to a wealth tax which applies (as from 1st January 2018) to real estate properties and rights, directly or indirectly owned (*Impôt sur la Fortune Immobilière* "IFI"), irrespective of where they are located.

As explained above, individuals are subject to French inheritance tax or gift tax on the worldwide assets transferred when the deceased (or donor) is a tax resident of France or when the heir (or donee) is a French tax resident.

Finally, when the settlor or at least one of the beneficiaries is a French tax resident, trustees are subject to reporting obligations *vis-à-vis* the French tax authorities.

1.4 If residence is relevant, how is it defined for taxation purposes?

The concept of "residence" determines the French tax authorities' right to tax. It is defined in the same way for all tax purposes (Article 4B of the French Tax Code). There are four alternative tests for determining whether an individual is treated as resident for tax purposes:

- he has his home ("*foyer*") in France;
- his primary place of residence is in France;
- he performs an activity in France; or
- he has the centre of his economic interests in France.

1.5 To what extent is nationality relevant in determining liability to taxation in your jurisdiction?

Nationality is not relevant in determining liability to taxation in France.

1.6 If nationality is relevant, how is it defined for taxation purposes?

This is not applicable (see question 1.5).

1.7 What other connecting factors (if any) are relevant in determining a person's liability to tax in your jurisdiction?

The qualification of an asset as being a French asset is also a very important factor.

Assets are considered as French assets if they are either assets which are located in France, or assets (French or foreign) which are deemed to be located in France for French tax purposes. For example, a foreign company owning (directly or indirectly) real estate located in France may be, under certain circumstances, considered as a French asset.

Income derived from French assets, as well as capital gains, are taxable in France when said assets are sold, even if realised by a non-French resident taxpayer.

As explained above (question 1.3), non-residents are subject to wealth tax (IFI) on their French real estate properties and rights, directly or indirectly owned.

The qualification of an asset as being a French asset allows France to levy inheritance tax and gift tax even if the deceased (donor) and the heir (donee) are not residents of France.

Finally, a French asset owned by a trust entails reporting obligations on the trustee *vis-à-vis* the French tax authorities.

2 General Taxation Regime

2.1 What gift, estate or wealth taxes apply that are relevant to persons becoming established in your jurisdiction?

Liability to French gift and inheritance taxes is determined by the donor's and donee's residence (or the deceased and heir's residence) as well as the location of the assets being transferred. As explained in question 3.1, foreign assets may be deemed to be located in France and therefore considered as "French assets".

France does not impose an estate tax upon the transferor's estate. Inheritance tax is imposed upon the recipient and the rates vary according to the relationship between the heir and the deceased. Surviving spouses and civil partners are fully exempt from inheritance tax (but not from gift tax). The rates vary from 5% to 45% above EUR 1,805,677 (for 2018) for direct family members (after deduction of an allowance of EUR 100,000 for descendants for each 15-year period). They increase to 60% in the absence of a family relationship. Inheritance tax is due on any transfer of property upon death, whether it results from the application of intestate succession rules, the provisions of a will, or forced heirship. It is calculated on the net value of the property distributed to each heir.

Gift tax, which is imposed upon the donee, is due when all of the following conditions are fulfilled: a transfer is made without valuable consideration and with the intention of benefitting the person receiving the transfer (*animus donandi*); and the donor is immediately divested of the donated property and the gift is accepted by the donee, regardless of the nature of the gift. Gift tax is calculated at the same graduated rates that apply to inheritance tax.

When the donor (or deceased) is a resident of France or when the donee (or heir) has been so for at least six out of the preceding 10 years, all movable and real estate property (wherever situated) transferred without valuable consideration is liable to tax in France.

When the donor (or deceased) and the donee (or heir) are both resident outside of France, only movable and real property situated in France (or deemed to be French assets) are liable to French gift or inheritance taxes in these circumstances.

Tax treaties may modify the above rules (see section 6 below).

See question 2.3 for developments with regards to wealth tax. It is important to note that new French residents benefit from an exemption of wealth tax on real estate properties situated abroad during their first five years of residence (see question 3.1 below).

2.2 How and to what extent are persons who become established in your jurisdiction liable to income and capital gains tax?

Ordinary income

As a general rule, individuals who are residents of France are liable to French income tax in France in respect of their worldwide income (including ordinary income and capital gains).

As a general rule, income tax is progressive, with a marginal rate of 45% (for the fraction of taxable income over EUR 153,783 for 2018). In addition to income tax, additional so-called social contributions are due in respect of savings income and income from capital assets at an effective flat rate of 17.2% (for 2018).

Unless a tax treaty states otherwise, non-resident persons are subject to French income tax on their French source income (including rental income and business income) and capital gains realised on French assets (see question 1.7). However, a minimum tax rate of 20% for the fraction of French-source income under EUR 27,519 and 30% above applies to non-residents.

Non-resident individuals affiliated to a social security scheme in the EU are subject to a 7.5% social contributions on their French real estate income. All other non-resident individuals as well as French resident individuals are subject to social contributions at the standard rate of 17.2%, which come in addition to the income tax.

A supplementary contribution also applies to an individuals' high annual income, at a rate of 3% for the fraction of income between EUR 250,001 and EUR 500,000 for single taxpayers (between EUR 500,001 and EUR 1,000,000 for couples subject to joint taxation), and 4% for the fraction of income over EUR 500,001 for single taxpayers (over EUR 1,000,000 for couples subject to joint taxation). This contribution is assessed on the individuals' reference tax income ("*revenu fiscal de référence*"), corresponding to the net annual amount of all income and capital gains, including capital gains on the sale of real estate and exceptional income. This contribution applies to both French residents and non-residents whose French reference tax income exceeds the above thresholds.

As from 1st January 2019, income tax is withheld by the employer and/or by the French tax authorities in respect of Industrial and Commercial Profits, Non-Commercial Profits and revenues deriving from rental and agricultural activities.

Unless a tax treaty states otherwise, French source dividends and royalties received by non-French tax residents are subject to withholding taxes.

Capital gains tax

Although France does not levy a separate general capital gains tax as such (as, for example, in the UK), some specific gains of a capital nature are subject to income tax. As a general rule, only capital gains realised at the time of a sale or exchange for valuable consideration are taxable. Unrealised capital gains can, however, be taxable under the so-called "exit tax". We are convinced that the so-called "exit tax" does not comply with the constitutional and European fundamental principles.

The taxable base and applicable tax rates depend on the nature of the asset which is sold and whether the gains are made by individuals who are resident in France or not.

As a general rule, French-resident individuals are taxed on realised capital gains upon the sale of real estate property (regardless of where the property is located) at the global rate of 36.2% for 2018 (19% plus social contributions at the rate of 17.2%).

Capital gains on the sale of the main residence are, however, tax-exempt and capital gains on the sale of other real properties can be reduced by yearly allowances applying from the sixth year of ownership.

The yearly allowance is 6% from the sixth year of ownership up to the 21st year and 4% for the 22nd. As a consequence, after 22 years, holding capital gains on property are fully exempt from capital gains income tax. However, capital gains are only exempt from social contributions after 30 years of ownership.

An additional tax applied since 1st January 2013 is assessed on capital gains exceeding EUR 50,000 realised upon the sale of real property by both French residents and non-residents. This tax applies to the whole amount of the capital gain at a flat rate varying from 2% to 6% (for capital gains exceeding EUR 260,000).

The sale of the shares of a company owning real estate located in France as its main assets (qualified as a "*société à prépondérance immobilière*") is subject to a different tax regime depending on whether the company sold is a pass through entity (i.e. a "*société civile immobilière*", for example) or a company subject to corporate tax. Assuming the French resident sells the shares of a pass through entity, capital gains are taxable at the global rate of 37.2%. The same rebates as those applying to real estate properties apply. Assuming the French resident sells shares of a company subject to corporate tax ("*société à responsabilité limitée*"; "*société anonyme simplifiée*", or "*société anonyme*") the rules applicable to the sale of shares of a company running business assets apply (see below).

Since 1st January 2018, capital gains on shares and securities of "business companies including companies subject to corporation tax" are, as a general rule, subject to a flat tax rate of 30% (including 12.8% income tax and 17.2% social contributions). When taxpayers' capital gains are taxed under the flat tax rate, no allowance can be applied.

However, taxpayers are still allowed to elect for the application of the income tax progressive rates (with a marginal rate of 45%) plus 17.2% social contributions. In that case, for the purpose of determining the taxable net gain, such gains will benefit from annual allowances at the following rates: 50% if the shares are held for a period from two to eight years; and 65% if the shares are held for at least eight years.

Non-resident individuals' capital gains on the sale of real estate are only taxable in France when the property transferred is situated in France. They are determined on the same basis as for a French resident. The taxable capital gain is the difference between the sale price and the purchase price plus purchase costs and is subject to a withholding tax of 19% (since 1st January 2015). Individuals that are affiliated to a social security scheme in the EU are subject to social contributions at a rate of 7.5% on the sale of French real estate. All other individuals (i.e. French resident individuals and individuals that are not affiliated to a social security scheme in the EU) selling French real estate are subject to social contributions at the flat rate of 17.2%.

As a general rule, the same treatment also applies to the sale of shares in a company (French or foreign, which own real estate located in France as a main asset, regardless of the tax regime applicable to the sold company (as opposed to the tax regime applicable to French residents)).

A non-resident individual's capital gains from the sale of securities or shares of companies which do not qualify as "*société à prépondérance immobilière*" (real estate companies) are only taxed if his participation, together with the participations of his or her spouse, ascendants (that is, those from whom a person is descended, for example parents and grandparents) and descendants, exceeds 25% of the shareholding in a resident company subject to corporate income tax at any time during the five previous years. Since 1st January 2018, the tax rate is 12.8% for non-resident individuals. Social contributions are not due on capital gains from the sale of securities or shares of companies which do not qualify as real estate companies realised by a non-resident individual.

Tax treaties may provide for exemptions.

2.3 What other direct taxes (if any) apply to persons who become established in your jurisdiction?

Wealth taxes (*Impôt de Solidarité sur la Fortune* [ISF] and *Impôt sur la fortune immobilière* [IFI])

The wealth tax which has been due since 1981 (*Impôt de Solidarité sur la Fortune* [ISF]) on movable and immovable wealth owned by French resident and non-resident individuals was repealed in 2017.

However a new wealth tax (*Impôt sur la fortune immobilière* [IFI]) was introduced on 1st January 2018, which applies to real estate properties and rights, directly or indirectly owned by resident and non-resident individuals.

The IFI rules relating to the deduction of the loans financing the acquisition are substantially different from whose which applied for ISF purposes. The concept of "*société à prépondérance immobilière*" does not exist any longer for IFI purposes. However, some exemptions apply under certain conditions when real estate properties are used for business purposes.

The total amount of income tax, IFI and some specific local taxes cannot exceed 75% of the reference tax income ("*revenu fiscal de référence*") of the taxpayer. However, this limit does not apply to non-residents. We consider this measure to be discriminatory.

Resident taxpayers are liable to IFI on their worldwide real estate properties and rights they directly or indirectly own whereas non-resident taxpayers are only liable to IFI on real estate and rights located in France which they directly or indirectly own.

IFI is payable only by individuals whose private real estate wealth, after deduction of debts, exceeds a certain limit on 1st January each year (EUR 1,300,000 for 2018).

The IFI payable for 2019 is determined by applying to the individuals' taxable assets over EUR 800,000 the following sliding scale:

- Up to EUR 800,000: 0%.
- EUR 800,000 to EUR 1,300,000: 0.5%.
- EUR 1,300,001 to EUR 2,570,000: 0.7%.
- EUR 2,570,001 to EUR 5,000,000: 1%.
- EUR 5,000,001 to EUR 10,000,000: 1.25%.
- More than EUR 10,000,000: 1.5%.

2.4 What indirect taxes (sales taxes/VAT and customs & excise duties) apply to persons becoming established in your jurisdiction?

French legislation has applied the VAT Sixth Community Directive since 1st January 1979. Article 256, I of the FTC provides that the sale of goods, delivery of assets and the supply of services for payment by a taxpayer are subject to VAT. This extremely broad definition contains a certain number of exceptions which are set out in the FTC. However, some exempt transactions may be rendered taxable if the appropriate elections are made.

The standard rate is 20%. An intermediary VAT rate of 10% applies to certain goods and services (agriculturally-based products, non-reimbursable medications, etc.), a reduced VAT rate of 5.5% applies to basic necessities such as food products, etc. A super reduced rate of 2.1% applies to certain drugs. Nevertheless, a number of specific rates should be added to this list (newspapers, for example) as well as the various specific rates applicable in Corsica and the overseas territories.

2.5 Are there any anti-avoidance taxation provisions that apply to the offshore arrangements of persons who have become established in your jurisdiction?

There are numerous anti-avoidance taxation provisions in France. First, the concept of abnormal acts of management and the abuse of law theory (see question 3.6) empower the tax authorities to reassess transactions which are deemed to be artificial or to have no purpose other than to reduce taxation. There are also specific anti-avoidance provisions that apply directly to offshore arrangements.

The CFC legislation provides that resident individuals who directly or indirectly own more than 10% in a foreign entity established in a low tax jurisdiction are taxable on a *pro rata* share of the income realised by the foreign entity, whether or not distributed. The income realised by the foreign entity is determined either on a real basis or on a notional basis, depending on whether the entity is established in a so-called non-cooperative jurisdiction, and is taxed in the hands of its French resident shareholder based on 125% of the amount of income calculated. If the entity is located in a non-cooperative state, the 10% participation requirement is deemed to be met.

2.6 Is there any general anti-avoidance or anti-abuse rule to counteract tax advantages?

As a general rule, under the abuse of law theory, fictitious acts or acts which seek the benefit of the literal application of laws, that are contrary to the objectives intended by Parliament, and that are exclusively tax-driven, are not binding on the tax authorities.

As from 1st January 2020, a new abuse of law procedure is introduced (provided for by new article L. 64 A of the French tax procedure code), under which the French tax authorities will be allowed to disregard any transaction implemented for "main tax purposes" – as opposed to "exclusive" tax purpose in the existing abuse of law procedure. This procedure would not carry automatically the 40 percent or 80 percent penalties, although the French tax authorities may still try to apply a 40 percent penalty for wilful default, or an 80 percent penalty for fraudulent acts.

Sham transactions, and real transactions of which the only motivation is to avoid or reduce the tax which would otherwise be due, are caught.

Nevertheless, when two legal solutions are possible, every taxpayer has the right to choose the less heavily taxed option.

2.7 Are there any arrangements in place in your jurisdiction for the disclosure of aggressive tax planning schemes?

The Directive on Administrative Cooperation in the field of taxation (DAC 6), transposed under articles 1649 AD to 1649 AH of the French tax code imposes mandatory disclosure requirements on EU-based intermediaries and their clients. The disclosure concerns cross-border tax planning arrangements that have certain characteristics.

Tax planning arrangements for which the first step has been implemented between 25th June 2018 and 1st July 2020 will have to be reported on 31st August 2020 at the latest.

As from 1st July 2020, the disclosure will have to be made within 30 days of either:

- the day after the tax arrangement has been made available;
- the day after the tax arrangement is ready for use; or
- the day the first step of the arrangement has been made.

3 Pre-entry Tax Planning

3.1 In your jurisdiction, what pre-entry estate, gift and/or wealth tax planning can be undertaken?

Since French gift and inheritance taxes are due at very high rates when either the transferor or the transferee is resident in France, when a gift is contemplated it should, in most circumstances, be completed before any of the individuals involved becomes a resident of France. On the other hand, it is also important to reorganise the ownership structure before the taxpayer becomes a French tax resident; this is because some assets may remain qualified as French assets for estate and gift tax purposes after the taxpayer transfers once again his/her tax residence abroad. Likewise, a transfer into a trust should also be completed before the settlor becomes resident in France. This will allow a lower inheritance tax rate to be due upon his death (see question 8.2).

IFI (or before 1st January 2018, ISF) cannot be avoided any longer by transferring assets into a trust (see question 8.2) when the taxpayer has been a French tax resident for more than five years. However, new French tax residents benefit from an IFI (or before 1st January 2018, ISF) exemption granted on real estate assets (or all kind of assets before 1st January 2018) which do not qualify as French assets for five years. Therefore, before arriving in France, one may contemplate placing assets in a foreign company and/or setting up a trust in order to benefit from an exemption for five years.

3.2 In your jurisdiction, what pre-entry income and capital gains tax planning can be undertaken?

Due to the very high income and capital gains tax rates it might be appropriate to accelerate the realisation of foreign-source income or to realise latent capital gains by selling and repurchasing capital assets with built-in appreciation before becoming a French resident. Contributing assets into a holding company in a suitable jurisdiction may be an efficient tax planning technique to obtain a tax-free set-up. As mentioned in question 3.1, it also allows one to, under certain conditions, avoid the qualification of French assets assuming that the taxpayer decides to transfer his/her tax residence outside of France after a certain period. The use of a holding company set up in an appropriate jurisdiction can be a very efficient solution. Before arriving in France, one can also place assets that will otherwise generate taxable income into an insurance policy which complies with French requirements. Setting up irrevocable and discretionary trusts should also be considered.

3.3 In your jurisdiction, can pre-entry planning be undertaken for any other taxes?

There are no other significant taxes which require pre-entry planning.

4 Taxation Issues on Inward Investment

4.1 What liabilities are there to tax on the acquisition, holding or disposal of, or receipt of income from investments in your jurisdiction?

A French resident is taxable on the worldwide income he/she received during the civil year, irrespective of whether or not the income is remitted in France. Remittance of assets or funds into France does not attract direct taxes *per se*.

4.2 What taxes are there on the importation of assets into your jurisdiction, including excise taxes?

Importation of assets into France gives rise to VAT (see question 2.4). The current standard rate is 20%. Certain goods may also be subject to customs duties or excise duties when they are imported from outside the European Union.

4.3 Are there any particular tax issues in relation to the purchase of residential properties?

France places no restrictions on non-French residents acquiring French real estate property. From a tax standpoint, it is essential to understand that using a legal entity, whether it is French (such as a "*société civile immobilière*") or foreign (such as a Luxembourg "*société de participation financière*") and whether it is held absolutely or in trust, to hold a French property does not always avoid French taxes. This is because French tax law applies a concept known as a "*société à prépondérance immobilière*" (real estate investment company) under which French and foreign companies which mainly own a real estate property in France are treated in a similar way as the property itself. Some tax treaties may, however, alter the application of these rules.

Purchase tax

Whether the buyer is a French resident or not, the purchase of a residential property located in France is subject to transfer duties amounting to approximately 5.09% on the transfer price and related expenses. In addition, notary's fees are payable, bringing the total rate to approximately 7%. The purchase of the shares of a company (whether French or foreign) owning French real property directly or indirectly with a value representing more than 50% of the total French assets of the company is also subject to transfer duties at the rate of 5%.

Inheritance/gift tax

As a general rule, whether a French real property is owned directly or via one or more companies, inheritance/gift taxes are payable in France even if the ultimate owner is non-resident. Some tax treaties may, however, alter the application of these rules.

Capital gains tax

A non-resident individual's capital gains on the sale of real estate are taxable in France when the property is located in France. As a general rule, when the gain is taxable, a withholding tax is levied in France at a rate of 19% for the income tax and at 17.2% for the social contributions (7.5% for non-resident individuals affiliated to a social security scheme in the EU). An additional tax varying from 2% to 6% also applies when the taxable capital gain on French real estate and shares of companies owning directly or indirectly real properties exceeds EUR 50,000. In addition, the supplementary contribution levied on individuals' high annual income, at a rate of 3% or 4% may also apply. As a consequence, the marginal rate of taxation may reach 46.2%. Some tax treaties may, however, alter the application of these rules.

Wealth Tax on real estate properties and rights, directly or indirectly owned by resident and non-resident individuals (IFI)

The concept of "*société à prépondérance immobilière*" (real estate company) that existed with former wealth tax (ISF) does not apply anymore for IFI purposes. As from 1st January 2018, any real estate properties indirectly owned through one (or various) companies are, as a general rule, subject to IFI. However, IFI is not due on real estate property used to run the business of a company held for less than 10% of its share capital by the taxpayer.

As a consequence, non-resident individuals owning French real property by means of several intermediate companies (French or foreign) remain subject to IFI in France.

The 3% annual tax

Although legal entities are not subject to wealth tax, all legal entities (i.e. both French and foreign) which directly or indirectly own real property in France are subject to an annual tax of 3% levied on the market value of the property. If there is a chain of ownership, the tax is only avoided if each company involved in the structure benefits from an exemption. If several companies in the chain do not benefit from an exemption, the 3% tax is only payable by the legal entity which is the nearest to the property which is not exempt. Under most circumstances, in order to avoid the 3% tax the ultimate beneficial owner should disclose his identity.

5 Taxation of Corporate Vehicles

5.1 What is the test for a corporation to be taxable in your jurisdiction?

Corporations are subject to French corporate tax on the profits of any business carried out in France, irrespective of whether or not they are registered in France.

5.2 What are the main tax liabilities payable by a corporation which is subject to tax in your jurisdiction?

In addition to corporate tax, corporations are notably subject to the territorial economic contribution (CET).

The standard rate of corporate tax will progressively reduce from 31% to 25% as follows:

- 31% for fiscal year 2019;
- 28% for fiscal year 2020;
- 26.5% for fiscal year 2021; and
- 25% for fiscal year 2022.

5.3 How are branches of foreign corporations taxed in your jurisdiction?

French branches of foreign corporations are subject to corporation tax. They are also subject to a 30% branch tax. This tax is not due by French branches of EU corporations or when it is waived or reduced by a tax treaty.

6 Tax Treaties

6.1 Has your jurisdiction entered into income tax and capital gains tax treaties and, if so, what is their impact?

France has entered into income tax and capital gains tax treaties with more than 130 countries. Although as a general rule their main objective is to avoid double taxation, the more recent treaties also aim to prevent tax evasion through the exchange of information and to provide for mutual assistance in the collection of taxes.

6.2 Do the income tax and capital gains tax treaties generally follow the OECD or another model?

The vast majority of the tax treaties follow the OECD model.

6.3 Has your jurisdiction entered into estate and gift tax treaties and, if so, what is their impact?

France has signed 40 estate tax treaties which seek to prevent double taxation, but only 12 of which also concern gift tax.

When a tax treaty applies, it defines each state's entitlement to tax by reference to the deceased's residence as well as providing the means for avoiding double taxation.

One of the general principles of the estate and gift tax treaties is that the country in which the donor or decedent was domiciled may tax the estate or gifts of that individual on a worldwide basis but must allow a tax credit corresponding to the tax paid in the other country with respect to certain types of property located in such other country.

There are, however, a number of exceptions to the premise that the country of domicile will be the main taxing country. One of the main exceptions relates to real property which may be taxed in the country where it is located. It should be noted that this is a primary taxing right, but not always an exclusive one.

6.4 Do the estate or gift tax treaties generally follow the OECD or another model?

These treaties generally follow the OECD model, with a few exceptions in respect of the older treaties.

7 Succession Planning

7.1 What are the relevant private international law (conflict of law) rules on succession and wills, including tests of essential validity and formal validity in your jurisdiction?

As from 17th August 2015, a new EU Regulation considerably modifies the rules on the jurisdiction and applicable law governing matters of succession in France.

Under the Regulation, the law applicable to the succession as a whole (immovable and movable succession) shall be the law of the country in which the deceased had his habitual residence at the time of death (irrespective of whether they are Member States of the EU or not) and no longer the French law as regards all immovable property located in France.

The Regulation allows a person to choose the law of the country whose nationality he possesses at the time of making the choice, or at the time of death, as the law to govern his succession.

There are two main forms of wills under French law:

- Holographic will: this must be handwritten by the testator but does not need to be witnessed. This is the most common type of will.
- Authentic will: this must be made in the presence of a notary ("*notaire*") and two witnesses.

As a general rule, French law permits a foreign person who is not domiciled in France to make a will under the law of any country, provided it is valid under the law of that country.

7.2 Are there particular rules that apply to real estate held in your jurisdiction or elsewhere?

Please see question 7.1.

7.3 What rules exist in your jurisdiction which restrict testamentary freedom?

Forced heirship rules

Under the French forced heirship rules, a certain portion of the estate (hereditary reserve) cannot be disposed of by lifetime gift or will other than to descendants and, under certain conditions, to the surviving spouse.

The remaining portion of the estate that can be freely disposed of depends on the number of children the deceased had:

- one child: half;
- two children: one-third; and
- three children or more: one-quarter.

If the deceased does not leave descendants, the surviving spouse is entitled to 25% of the estate, provided that no divorce proceeding is pending.

Other restrictions

Two other restrictions to the freedom of disposition on death may apply:

- the prohibition of covenants on future inheritance: any agreement that purports to allocate assets falling within a future estate to the future heirs is prohibited unless it is made according to the provisions of the CC; and
- the prohibition of "substitutions": any provision under which a donee or an heir is obliged to conserve property and transfer it to a third party is prohibited, except in the cases expressly allowed by the law.

8 Trusts and Foundations

8.1 Are trusts recognised/permitted in your jurisdiction?

The concept of trust is alien to the French Civil Code. French law has no doctrine of trusts. There is no distinction between legal and equitable ownership. Therefore, creating a trust under French law is impossible. The French "*fiducie*" adopted in February 2007, is a very different institution and cannot be seen as an alternative structure to the common law trust, either conceptually or functionally.

Although it is not possible to create a trust under French law, French courts recognise the effects in France of common-law trusts, provided they comply with the mandatory rules of French law (see question 8.3).

8.2 How are trusts/settlors/beneficiaries taxed in your jurisdiction?

Up until the adoption of the law of 29th July 2011 (the New Law), France had no tax legislation dealing with the tax treatment of trusts in respect of gift and inheritance taxes as well as wealth tax. As a consequence, irrevocable and discretionary trusts benefitted from a very favourable tax treatment in France.

However, to counter the exploitation of what were perceived as loopholes, the New Law introduced a comprehensive gift, inheritance and wealth tax regime for the taxation of trusts. The same tax treatment applies to all trusts regardless of their characteristics.

Income tax

The income tax treatment of trusts has been left unchanged by the New Law. French income tax is, as a general rule, imposed only when distributions of income are made to French resident beneficiaries; therefore income generally may be accumulated in a trust without French income tax also being due.

Distributions of income are considered as financial income from abroad for French tax purposes, regardless of whether income or capital gains were realised by the trust. As from 1st January 2018, the distributions are subject to a flat tax of 30% (12.80% corresponding to income tax and 17.20% for social contributions). However, beneficiaries are still entitled to elect for the application of the progressive scale rate with a marginal rate of 45% as well as social contributions (at the flat rate of 17.20%).

Inheritance or gift tax

Under French law, the transfer of assets into a trust does not give rise to transfer taxes.

Since 31st July 2011, inheritance or gift tax applies either:

- at the time the trust assets are transferred to the beneficiaries; or
- on the death of the settlor (if earlier).

The beneficiaries are liable for the payment of gift or inheritance tax, which is assessed on the value of the trust assets at the time of the taxable event. The tax rate is determined in accordance with the relationship between the settlor and the beneficiary, assuming the value of the trust assets is included in the inheritance tax return established by the settlor's heirs.

If it is not possible to ascertain the shares of the beneficiaries in the trust fund on the death of the settlor, the trustee should pay the inheritance tax at the rate of:

- 45%, if the class of beneficiaries only contains descendants of the settlor.
- 60%, if the class of beneficiaries contains non-descendants.

The 60% rate will always apply if the trust either:

- is governed by the law of other non-cooperative states or territories; or
- was settled by a French resident after 11th May 2011.

The trustee and the beneficiaries are jointly liable for the payment of tax.

Wealth tax on real estate properties and rights directly or indirectly held by resident or non-resident individuals (IFI)

As from 1st January 2018, the settlor (or the beneficiaries treated as "deemed settlors") must pay IFI on assets held in any kind of trust (including an irrevocable discretionary trust) if either:

- the settlor (or the beneficiary "deemed settlor") is a French resident; or
- the trust fund contains taxable French assets.

After the death of the settlor, the beneficiaries who become "deemed settlors" are subject to IFI.

Before the entry into force of IFI on 1st January 2018, settlors and beneficiary deemed settlors were liable to ISF under similar conditions.

A specific tax applicable to trusts is also being introduced, at the current rate of 1.5%. A catch-all provision provides that the trustee is liable for this tax jointly with the settlor and the beneficiaries if either the:

- Trust assets are not included in the settlor's or the beneficiaries' estates for wealth tax (ISF or IFI) purposes.
- Trust assets have not been disclosed to the tax authorities when the settlor is not liable to wealth tax (ISF or IFI).

8.3 How are trusts affected by succession and forced heirship rules in your jurisdiction?

A certain portion of the estate called the "reserve" is reserved for certain heirs under the so-called forced heirship rules. Any reserved heir may request the application of these rules in the event that they are infringed by a will or by the provisions of a trust. It is important to note that this rule only concerns real estate property situated in France and movable property where the settlor is domiciled in France at the time of death. Since the heirs may waive the application of the forced heirship rule, the mere existence of the reserve cannot make the existence of a trust invalid *per se* unless the only purpose of the trust was to defraud reserved heirs. As a general rule, in the event that a trust does not comply with the reserve, the penalty is a reduction of the assets held in trust for non-reserved heirs.

8.4 Are private foundations recognised/permitted in your jurisdiction?

Foundations ("*fondations*") cannot be used in France for estate planning purposes and are controlled by a representative of the State. They only acquire legal personality and the right to receive gifts or legacies upon special authorisation, which can only be granted under very strict conditions and provided that the only purpose of the foundation is to promote public welfare.

However, a new type of foundation ("*fonds de dotation*"), inspired by Anglo-Saxon endowment funds, was introduced into French law in 2008 and amended in 2016. This type of foundation can benefit from an inheritance tax exemption on bequest or gifts, provided that certain conditions are met, and does not need to be controlled by a representative of the state or be granted special authorisation, contrary to the public utility foundation. The non-lucrative income part of such foundations is exempt of corporate income tax and VAT.

The above-mentioned foundations can only be set up for cultural, scientific or charitable purposes and cannot be considered as a substitute for trusts (except, to a limited extent, in the case of charitable trusts).

8.5 How are foundations/founders/beneficiaries taxed in your jurisdiction?

As a general rule, a favourable tax regime applies to public utility foundations. Article 206-5 of the French Tax Code (FTC) provides that public utility foundations benefit from a corporate tax exemption in respect of their income deriving from non-profit activities (see question 8.4).

Individuals making donations to public utility foundations and foundations under the aegis of a public utility foundation can deduct 66% of the contribution from their French income tax, up to 20% of the donor's taxable income.

As a general rule, the founders are not subject to specific taxation resulting from the creation of the foundation. Moreover, public utility foundations cannot be used for estate planning purposes.

8.6 How are foundations affected by succession and forced heirship rules in your jurisdiction?

Private foundations are not recognised. Gifts to foreign foundations are subject to the rules governing forced heirship (see question 8.3).

9 Matrimonial Issues

9.1 Are civil partnerships/same-sex marriages permitted/recognised in your jurisdiction?

A same-sex couple as well as two persons of the opposite sex can conclude a contract to organise their life in common (PACS). They are not treated as spouses for succession purposes but they are fully exempt from inheritance tax.

Since 17th May 2013, a marriage can be contracted by two persons of the same-sex pursuant to article 143 of the French Civil Code.

9.2 What matrimonial property regimes are permitted/recognised in your jurisdiction?

There are five matrimonial property regimes.

The spouses can draw up a marriage contract when they get married or during the marriage period. Such contract, which can only be drawn up before a French *notaire*, allows the spouses to decide on a matrimonial property scheme with personalised provisions.

If a couple marries without a contract, they automatically fall under the regime of *communauté réduite aux acquets* (community), governed by articles 1401–1408 of the CC, under which the movable and real property owned separately at the time of the marriage or subsequently acquired by gift or succession remain the sole property of their owner. Common property is thus limited, under this regime, to the assets acquired by the couple during the marriage, whether through their income-earning activities or the income from their sole property, but does not include increases in the capital value of sole property.

The spouses can also choose the regime of *séparation de biens pure et simple* (basic separation of property regime) under which no properties are jointly owned or the regime of *separation de biens avec participation aux acquêts* (separation of property regime) which combines separation and joint ownership where the property acquired after the marriage will be divided between the spouses upon a divorce.

The spouses can also choose the regime of *communauté universelle* (universal community of assets) under which all the assets owned by the spouses constitute a pool.

9.3 Are pre-/post-marital agreements/marriage contracts permitted/recognised in your jurisdiction?

Although it is not possible to establish a prenuptial agreement under French law *per se*, foreign prenuptial agreements might produce effects in France.

Married couples can draw up a contract before and during the marriage period under which the spouses decide on a matrimonial property scheme with personalised provisions (see question 9.2).

9.4 What are the main principles which will apply in your jurisdiction in relation to financial provision on divorce?

Maintenance obligation is unavailable under French law which means that covenants cannot dispose of it.

A "*prestation compensatoire*" (compensatory allowance) may be paid upon a divorce (irrespective of its cause) to a spouse who suffered a difference in living standards due to the divorce. The amount is determined either by the spouses when there is mutual consent or by a judge.

10 Immigration Issues

10.1 What restrictions or qualifications does your jurisdiction impose for entry into the country?

In principle, foreign nationals entering and staying in French territory must be in possession of a valid entry and stay visa, unless exempt from this requirement. Visa exemption depends on the individual's nationality, the possession of a residence permit for France or a Schengen State, the duration of the stay and where on French territory the individual intends to stay.

Citizens from the EU and the EEA can work in France without requiring a work permit. As a general rule, any non-EU national (over the age of 18) who wishes to stay in France for more than three months to work, study, or reside without employment must have a residence permit.

10.2 Does your jurisdiction have any investor and/or other special categories for entry?

France does not provide special categories of visa in order to attract investors or individuals with special skills.

10.3 What are the requirements in your jurisdiction in order to qualify for nationality?

French nationality is acquired by operation of law or by naturalisation. Anyone born anywhere of a French father or mother is French (*jus sanguinis*). Anyone born in France of unknown parents or to at least one foreign parent who is also born in France automatically acquires French nationality (double *jus soli*). Unlike the United States, one does not acquire French citizenship by virtue of birth in France only; residency must be proven. A child born in France from foreign parents may acquire French nationality under certain conditions. A person aged 18 and over may apply for French citizenship by naturalisation after five years' habitual and continuous residence in France. In addition it is required that the applicant has his or her primary source of income in France during the five-year period. The residence period may be waived or shortened under certain circumstances.

10.4 Are there any taxation implications in obtaining nationality in your jurisdiction?

There are no taxation implications in obtaining French nationality.

10.5 Are there any special tax/immigration/citizenship programmes designed to attract foreigners to become resident in your jurisdiction?

As explained above, new French residents benefit from a five-year wealth tax exemption (either ISF or IFI) in respect of their non-French assets (including the non-French assets held by a Trust). During this period, they would be subject to wealth tax (ISF or IFI) only if the market value of their French real estate assets exceeds the threshold of EUR 1,300,000.

11 Reporting Requirements/Privacy

11.1 What automatic exchange of information agreements has your jurisdiction entered into with other countries?

France signed a FATCA agreement with the USA on 14th October 2013 (modified by law n°2014-1098 of 29th September 2014) under which French financial institutions must report US citizens' bank accounts. This agreement is enforceable as from 29th September 2014.

France has signed the common reporting standards Multilateral Competent Authority Agreement (MCAA) which provides for an automatic exchange of information for tax purposes with the signatories' states (92 states on 26th November 2019). France has been engaged in automatic exchange of information with other countries since September 2017.

11.2 What reporting requirements are imposed by domestic law in your jurisdiction in respect of structures outside your jurisdiction with which a person in your jurisdiction is involved?

Since the adoption of the law of 29th July 2011, reporting requirements incumbents upon the trustee, are due in France when a Trust has one of the following connecting factors with France (as of 1st January):

- the settlors or at least one of the beneficiaries is a French-resident;
- an asset of the Trust is French situated; and
- the Trustee is a French-resident.

The information must be provided in French on prescribed forms. The penalty for non-declaration amounts to EUR 20,000 per missing declaration.

If the settlor or the "beneficiary deemed settlor" is liable to IFI in France and does not report the value of the trust assets for IFI purposes, a specific flat tax at the current rate of 1.5% of the market value of the trust's assets within the scope of IFI ("*sui generis* tax") should in principle be due by the Trustee on a yearly basis.

Please see question 4.3 as regards the annual 3% tax.

11.3 Are there any public registers of owners/beneficial owners/trustees/board members of, or of other persons with significant control or influence over companies, foundations or trusts established or resident in your jurisdiction?

All the information reported by the trustee of a trust which has a French connection is gathered in a register which can be consulted by listed public authorities such as the French tax authorities or the judicial authorities.

Maryse Naudin began her career in the tax department of one of the major accounting firms, where she was in charge of the real estate practice and the South East Asia clientele, prior to co-founding Tirard, Naudin. She now has more than 35 years' experience in advising and defending a varied clientele, from multinational corporations to high-net-worth individuals, in relation to cross-border tax issues. She has a particular expertise in advising foreign investors acquiring French real estate property as well as French clients with foreign interests. Ms. Naudin also has a wealth of expertise in matters relating to trust aspects in a civil law environment, European taxation and, in particular, tax litigation with respect to community freedoms. She is the co-founder and former secretary of the French branch of STEP, a member of the International Academy of Estate and Trust Law, and a former chairman of the "International Estate Planning" commission of the *Union Internationale des Avocats*. She is a member of the International Academy of Estate and Trust Law and a fellow of the American College of Trust and Estate Counsel.

Tirard, Naudin, Société d'avocats
9, rue Boissy d'Anglas
75008 Paris
France

Tel: +33 1 53 57 36 00
Email: lawfirm@tirard-naudin.com
URL: www.tirard-naudin.com

Tirard, Naudin is a highly reputed Paris-based boutique law firm co-founded in 1989 by Jean-Marc Tirard and Maryse Naudin, which specialises in international tax and estate planning (including trusts), tax representation and litigation in all aspects of French taxation with a particular emphasis on international tax issues. The firm's experience in the trust field is virtually unique in France. Its client base includes corporate clients, who come both for its special expertise in negotiating with the French tax authorities and for its experience of structuring international transactions. It also acts for high-net-worth private clients and their families who need help in resolving complex tax and inheritance issues. It has considerable expertise in property tax issues and the creation of efficient structures for non-resident investors. Tirard Naudin acts regularly as "lawyer's lawyers", providing specialist support for other firms and their clients. The firm's two founding partners are now assisted by Ouri Belmin who is in charge of Tirard, Naudin's team in Paris.

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