

International **Comparative** Legal Guides



Real Estate **2021**

A practical cross-border insight into real estate law

16th Edition

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1 Real Estate Law

1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.

In France, real estate is governed by several laws and regulations which are codified differently depending on their aims and objectives: the “*Code de l’urbanisme*” (“Planning Code”) provides rules harmonising the use of French territory which is considered the common space of the nation.

- The “*Code de la construction et de l’habitation*” (“Construction and Housing Code”) consolidates construction, development and social housing rules.
- The “*Code civil*” (“Civil Code”) contains rules, among others, relating to the definition of ownership, transfer of ownership for consideration, by gift or by death as well as rules governing the use and lease of real estate properties.
- The “*Code de commerce*” (“Trade Code”) and the “*Code rural*” (“Rural Code”) include specific rules applying to real estate used for commercial and/or agricultural purposes.

1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?

Because France is a civil law country which does not recognise the concept of legal ownership *versus* beneficial ownership and has never ratified the Hague Convention on the recognition of trusts, a trust cannot directly own a real property located in France.

Nevertheless, it does not mean that a trust cannot be used to indirectly hold a French real property.

1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.

Strictly speaking, international laws are not relevant in France in matters of real estate law (in particular, in matters relating to planning, construction and housing rules).

2 Ownership

2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?

No legal restriction specifically applies to the ownership of real estate by particular classes of persons.

3 Real Estate Rights

3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?

Several rights over land are recognised in France, some of which are purely contractual between parties.

First of all, the full ownership (“*pleine propriété*”) of French real estate can be shared between usufruct (“*usufruit*”) and bare-ownership (“*nue-propriété*”). Several joint-owners may hold the usufruct, the bare-ownership and/or the full ownership of the same French real estate (“*indivision*”).

On the other hand, mortgages (“*hypothèques*”) (legal or contractual), and lender’s pledges (“*privilège du prêteur de deniers*”) can be registered on a French property.

Real estate rights are also given to the user of the property, whether it is used for free (“*mise à disposition gratuite*”) or rented out. Rights are, however, substantially different depending on the leasehold: “*bail d’habitation*” (housing lease); “*bail commercial*” (commercial lease); “*bail professionnel*” (professional lease); “*bail rural*” (rural lease) “*bail à construction*” (construction lease); “*bail emphytéotique*” (long-term lease); and “*concession*” (concession).

Finally, easements (“*servitudes*”) granted by the law or ancestral customs may apply to French real estate.

3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?

There are some cases where the right to a real estate diverges from the right to a building constructed thereon, such as the “*droit de superficie*” (land tenure) and the “*division de la propriété en volume*” (division of the property into several units).

3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?

As explained in the answer to question 1.2 above, there is no split between legal title and beneficial title in France. Consequently, a trust cannot be registered with the “*Cadastre de France*” (land register) as the owner of a French property. There is no proposal to change this.

4 System of Registration

4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?

All land, as well as all rights relating to French real estate (except lease agreements not exceeding 12 years) should be registered with the “*Cadastre de France*” in order to be enforceable against third parties.

4.2 Is there a state guarantee of title? What does it guarantee?

Strictly speaking, there is no state guarantee of title.

4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?

All rights listed in the answer to question 3.1 above are compulsorily registrable, except lease agreements not exceeding 12 years.

4.4 What rights in land are not required to be registered?

Lease agreements which do not exceed 12 years are not required to be registered.

4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.

There is no probationary period.

4.6 On a land sale, when is title (or ownership) transferred to the buyer?

Between parties, the ownership is transferred under the terms of the sale agreement. As a general rule, however, it is enforceable against third parties after the registration of the sale with the “*Cadastre de France*”.

4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?

The first registered buyer prevails over the others. Assuming different purchasers register on the same day, the first signed

agreement prevails. The rank of priority relating to liens on the property, such as “*privilège du prêteur de deniers*” (lender’s pledges) is also determined depending on the date of completion of the purchase agreement.

5 The Registry / Registries

5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.

The “*Cadastre de France*” is a framework of maps and administrative files registering all real estate properties located in each French town. The register was created at the beginning of the 19th century. For historical reasons, the region of Alsace-Moselle benefits from special treatment.

5.2 How do the owners of registered real estate prove their title?

Proof of real estate ownership is governed by the principle of freedom of evidence. The burden of proof is on the plaintiff in the claim action.

With respect to the modes of proof, the presentation of a title of ownership entails a presumption of property which can be reversed by the contrary proof.

For the courts, the proof can also be brought back by the legal presumption indicated in article 552 of the French Civil Code under which property of the ground carries the property of the top and the bottom.

It can also be constituted by indices such as the cadastre or the payment of property taxes.

Ownership by virtue of possession (“*Usucapion*”) is also the most widely used means of reporting evidence of real estate ownership. Proof of *usucapion* may be established by any means.

5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?

The transfer of French real estate should be registered with the register either by a French *notaire* in the case of a private sale or by a French judge in the case of auction.

The information on ownership of registered real estate cannot be accessed electronically.

5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?

No compensation can be claimed from the registry if a mistake has been made. However, in theory, the *notaire* may be held responsible.

5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?

One may obtain information relating to the transfer of French real estate by gift, by death and by sale. The date and price of

transfer, as well as the identity of each new owner is provided. All mortgages and liens put on the property are also detailed, including their amounts, dates, beneficiaries and the levees' date.

This information can be obtained by way of a request to a French administration called "*Service de la Publicité Foncière*" using a form n°3233-SD.

6 Real Estate Market

6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.

Several parties may be involved in a real estate transaction in France. The real estate brokers are the first to appear on the scene. They allow potential purchasers and sellers to meet. They also provide all information on the property to the buyer. As opposed to the situation in the UK, no general survey on the property is, as a general rule, carried out in France. It is the responsibility of the buyer to find out information regarding the property. Only a few compulsory survey certificates are issued before the acquisition.

Avocats may be involved in the process of purchasing a property in France, as well as the purchase of shares of a company which owns, directly or indirectly, French real estate properties. They represent their own clients during the negotiation period and the preparation of the legal documentation.

The French *notaires* are "*officiers ministériels*" (ministerial officers) who benefit from a monopoly of executing and registering (with the "*cadastre*") all transfers of French properties. The sale of shares of companies (French or foreign) owning directly or indirectly French real estate having a market value exceeding that of their French movable assets, signed outside France, should also be reiterated with a French *notaire*. Other sales of shares are not in the scope of the *notaires'* monopoly.

Real estate technicians can be appointed by the potential purchaser in order to carry out the non-compulsory survey and due diligence work on the property.

A *représentant fiscal* (tax representative) must also be appointed by the seller if he is a resident in a state which is not a member of the EEA and which has not signed an international administrative agreement with France (i.e. EU countries, Norway and Iceland). The *représentant fiscal* is in charge of paying the withholding tax due (see question 9.5). Only the buyer if he is French resident, a French bank or an accredited person can be appointed as *représentant fiscal*.

Finally, sales of properties by auction may be executed and registered to the "*cadastre*" by a French judge.

6.2 How and on what basis are these persons remunerated?

Fees of real estate brokers (between 1% and 5% depending on the nature and amount of the sale price) as well as those of *avocats* (depending on their diligence) are negotiable.

Notaires receive compulsory fees determined by the law depending on the market value of the property sold. A degressive rate scale applies with a marginal rate of 0.814%. When two *notaires* are involved in the transaction, one representing the seller, the other representing the purchaser (this is our recommendation in order to avoid a conflict of interest), compulsory fees are shared between both *notaires*. Fees due to the *notaires* upon the reiteration of the sale of shares of a company owning a French real estate property signed abroad should, however, be negotiated.

6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?

Exceptionally low loan interest rates have continued to sustain a high and growing demand for real estate in France in 2018 and 2019.

For the first time, in 2019, the commercial real estate investments in France reached more than €40 billion (+19% compared to 2018) and Paris became the first European market for non-resident investors before London. The main investment vehicle, SPCIs, have reached an historical volume of investment of €9.2 billion. The loan to value ratio of an SPCI is limited by law to 40%.

In addition, the aggregate amount of loans borrowed to finance residential real estate has reached a new high of €1.079 billion at the end of 2019.

Another consequence of the low loan interest rates is that real estate prices continued to rise in 2019 (+3% in France).

However, the COVID-19 crisis has stopped this expansion. Regarding commercial real estate, the investments fell to €4.4 billion for the 2020 second trimester (-44% compared to the 2019 second trimester).

As of today, the evolution is uncertain, and it should be very different from one sector to another, and largely depends on the future restrictions in response to the COVID-19 pandemic.

6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.

In 2019, a new record of 1,063,000 real estate transactions was set. Every asset class benefited from the growth dynamic. The investment in offices almost reached €35 billion. Real estate prices rose by 3% in France, 5.7% in Paris for flats and 3% for offices.

The biggest transaction was the acquisition of the 28 assets of Terreis for €1.8 billion. The second largest was the acquisition by Primonial and Samsung SRA of the Paris Bercy building "La lumière" for €1.2 billion.

6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.

There was no slowdown in particular market subsectors in 2019. If the transactions volume has highly risen in 2019 in the Paris area, the number of transactions has decreased by 10%.

In addition, in 2020, due to the COVID-19 crisis, all subsectors have been affected, especially hospitality real estate (-78% for the nine first months) and offices (-30%).

7 Liabilities of Buyers and Sellers in Real Estate Transactions

7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?

As explained above, the French *notaires'* monopoly means that parties rely on them to execute the minimum formalities for the sale and purchase of real estate.

The *notaire* should verify that:

- the real estate property is duly owned by the seller. For example, the apparent owner of the property could only own the usufruct and the bare-owners may not have been involved in the negotiation process;
- the mortgages registered on the property being sold do not exceed the sale price of the property; and
- all compulsory certificates relating to the absence of legionella, woodworm, lead poisoning and asbestos, as well as the conformity of gas and electrical fittings, etc., have been provided by the seller.

The *notaire* should also exercise all formalities relating to pre-emption rights that might apply as a result of the law to the town or other public authorities (e.g.: “*droit de préemption urbain*”, “*droit de préemption de la SAFER*”).

It may be appropriate to rely on the *notaires* for low-value transactions relating to French real estate; however, we recommend being assisted by a French *avocat* for larger scale transactions.

The *notaire* does not represent either the seller or the buyer, one of his main tasks being to make sure that taxes are paid.

Assuming the shares of the company owning the real estate are sold, due diligence should be performed by parties in order to verify the situation of the French real estate and the financial situation of the company sold. These verifications are performed in practice by French *avocats*.

A *représentant fiscal* (tax representative) may also have to be appointed (see question 6.1).

7.2 Is the seller under a duty of disclosure? What matters must be disclosed?

The seller has, as a general rule, very few duties of disclosure, and the *notaire* will not necessarily protect the purchaser. As explained before, it is the responsibility of the purchaser to investigate the property to his satisfaction. This is always reiterated in the standard sales agreement proposed by the French *notaires*. This is why it is recommended for both the seller and the buyer to engage their own *avocat* to ensure that everything is carried out to their satisfaction.

7.3 Can the seller be liable to the buyer for misrepresentation?

In France it is rare that a seller is held liable for misrepresentation relating to the acquisition of real estate. The buyer would need to demonstrate that the essential reason he/she was interested in purchasing the property was misrepresented in order to invalidate the acquisition, according to the new article 1112-1 of the Civil Code. Assuming the agreement was valid, it is voidable by application of the new article 1187 of the Civil Code if at least one condition precedent provided in the agreement was not met before the completion date.

It should be noted that in France, as a general rule, a private pre-purchase agreement is signed between parties, providing several conditions precedent which should be met prior to the signing of the purchase agreement before the *notaire*. After the signing of this agreement, it becomes very difficult to challenge the validity of the purchase, except in the case of fraud.

However, the seller's liability is easier to challenge in cases of the sale of shares of a company owning French real estate when the share purchase agreement provides representations on the seller which have not been met. The share purchase agreement can either be null and not valid according to article 1112-1 of the Civil Code in case of misrepresentation, or voidable by application of article 1187 of the Civil Code (see above).

7.4 Do sellers usually give any form of title “guarantee” or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?

The contractual warranties appearing in the “standard” private pre-purchase agreement of French real estate are, as a general rule, very limited and should be checked before the signing of the agreement in front of the *notaire*. They may concern, for example, the nature of the building (land to build), the possibility of obtaining a construction permit or purchasing a vacant building when it is still occupied. It should also allow the new purchaser to substitute the seller in order to benefit from any building guarantees previously granted. However, warranties are never a substitute for the buyer carrying out his own due diligence.

7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.

The seller retains three main liabilities in respect of the property post sale:

- the guarantee for hidden defects (article 1641 of the French Civil Code);
- the guarantee for non-conformity (articles 1616 to 1623 of the French Civil Code); and
- the guarantee of quiet possession free from any claims by third parties (article 1626 of the French Civil Code).

The guarantee for hidden defects applies when the defect was hidden and not visible, when it rendered the product unfit for use and when it could not have been discovered by a reasonably thorough inspection before the sale. A replacement, a partial or total refund or the cancellation of the whole contract can be obtained.

The guarantee for non-conformity in the sale of real estate property requires the delivery of a property whose area corresponds to that possibly indicated in the deed of sale. If the area does not correspond, the seller can suffer a diminution of the price received from the buyer. Moreover, in the case of the sale of a flat, the *Loi Carrez* provides that a seller must guarantee the surface area of the flat sold. If the actual surface area is less than 1/20th of that declared by the seller, he must, if requested by the buyer, reduce the price *pro rata* by the shortfall in the area.

Finally, the seller must guarantee the buyer against any cause of eviction (i.e. a non-declared mortgage on the property sold, the extension of the lease granted to the tenant by the seller without giving notice to the buyer).

7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?

In the case of the purchase of French real estate, the buyer is only liable for expenses mentioned in the agreement. Assuming the shares of the company owning the French real estate are sold, the purchaser is liable for known and unknown debts of the company. In order to prevent or limit the liable risk of the buyer, a liability guarantee clause along with an escrow clause should be provided in the share purchase agreement.

8 Finance and Banking

8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?

As of 1st January 2018, a real estate wealth tax (“IFI”) applies on real estate properties or rights held by resident or non-resident individuals of France. For the computations of the taxable basis of this tax, several limitations have been introduced in respect of the deductibility of loans. The main limitations are the following:

- Loans granted by family members to finance a French real estate property would only be taken into consideration for IFI purposes (see section 9 below) if the terms and conditions of the loan agreement are at arm’s length.
- For taxpayers, having a real estate wealth exceeding €5 million, the deductibility of the loans for IFI purposes cannot exceed 60% of the value of the real estate. Only 50% of the amount exceeding this limit is taken into consideration for the determination of the IFI taxable basis.
- Loan agreements providing for a “bullet repayment” at maturity (“Balloon Loans”) have to be amortised over the duration of the loan (or 1/20 per year elapsed in the absence of a maturity date) for IFI purposes. The principal of the loan which should have been theoretically amortised is not deductible for the purpose of determining the net value of the taxable properties.

8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?

The traditional methods by which real estate lenders seek to protect themselves are the inscription of the “*privilege du prêteur de deniers*” (lenders’ pledges), registration of the mortgage within the “*registre cadastral*” and by means of a pledge on the shares of the company owning the French real estate.

8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?

Conventional mortgages as well as “*privilege du prêteur de deniers*” (lenders’ pledges) should only be registered in the “*registre cadastral*” (see above) by French *notaires*. There is no need to involve court proceedings. One should also be aware that the French tax authorities are permitted to put a legal mortgage on French real estate properties if they have reason to believe that their owners would not be able to pay their taxes.

8.4 What minimum formalities are required for real estate lending?

As already explained, the registration of a conventional mortgage should be executed by a French *notaire*. It is the same for the registration of “*privilege du prêteur de deniers*” (lenders’ pledges).

Pledges over shares should only be registered with the “*registre du commerce et des sociétés*” (Companies and Trade Registry). The cost associated with this is very limited in comparison to the fee for the registration of the mortgage.

8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

The real estate lender is protected against claims against the borrower or the real estate asset by other creditors by registering a “*privilege du prêteur de deniers*” (lenders’ pledges) and/or a mortgage of first rank which will allow him to be paid before any other creditors, including the French tax authorities.

8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?

The only circumstance where a security taken by a lender can be avoided or rendered unenforceable is in case of fraud when the lender helped the owner to organise his/her insolvency.

8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?

There is no action a borrower can take except, of course, to demonstrate that the debts owed have been duly refunded to the lender.

8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?

As a general rule, in case of insolvency or corporate rehabilitation of the borrower, the real estate lender who has registered a “*privilege du prêteur de deniers*” (lenders’ pledges) or a mortgage on the real estate of first rank will be protected by the fact that he will be entitled to be paid on the sale of the real estate bought by the borrower before any other creditors.

8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?

The most common form of security over shares is the so-called “*nantissement de parts sociales*” (share pledge).

The share pledge is granted over the shares of types of companies other than joint stock companies such as “*société à responsabilité limitée*” or “*sociétés civiles immobilières*”. This pledge covers the actual share which means that new additional shares are not automatically included in the scope of the pledge.

As a general rule, a share pledge is enforced by its registration with a commercial court registry. It is also recommended to register the share pledge with a French *notaire* in order to set the rank of the pledge.

The lender has the right to appropriate shares in case of insolvency or reorganisation procedure of the borrower. However, the strength of his right will depend on the rank of inscription of the share pledge.

9 Tax

9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

As a general remark, the “*Code général des impôts*” (French tax code) provides special treatment which is applied to real estate located in France and companies owning such real estate which is very different from the tax regime applicable to other assets or companies. The concept of “*Société à prépondérance immobilière*” (“SPI”) (a real estate company) has been introduced for French tax purposes only, which allows France to apply a specific regime on qualified companies. The concept of SPI has a different meaning depending on each tax involved. However, the common characteristic of the different definitions (either those of the internal law or tax treaties) is that in order to be considered as an SPI, the company (French or foreign) which owns, directly or indirectly, French real estate must have a market value which exceeds that of their movable assets.

Transfer of real estate is subject to transfer duties at the rate of 5.81%, calculated on the purchase price of the property, and at the rate of 5% on the sale price of shares of an SPI.

Traditionally, transfer duties are due by the purchaser even if it may be provided otherwise in the sale agreement. Both the seller and purchaser are liable for their payment *vis-à-vis* the French tax authorities.

9.2 When is the transfer tax paid?

The *notaire* levies transfer duties at the time as the property sale agreement is signed. Transfer duties on sale of an SPI's shares should be paid within 30 days of signing the sale agreement.

9.3 Are transfers of real estate by individuals subject to income tax?

Transfers of real estate are subject to income tax at a flat rate of 19% and social security contributions at the rate of 17.2% for 2020. An additional tax at progressive rates varying from 2% to 6% also applies on capital gains exceeding €50,000. Finally, the exceptional contribution on high income may also apply at a rate of 3% or 4% depending on the annual income and capital gains received by a taxpayer during a said year. The marginal rate of taxation for 2020 reaches 46.2%.

Exemptions apply depending on the duration of the ownership of the property, under which a total exemption of income tax (at the rate of 19%), additional tax, and exceptional contribution on high income is granted after 22 years of ownership. A total exemption from the social contribution (at the rate of 17.2% for 2019) also applies after 30 years of ownership.

The same regime applies for residents and non-residents of France. However, tax resident individuals of the European Economic Area (European Union, Iceland, Norway, Liechtenstein and Switzerland) may benefit from a reduced rate of social contributions of 7.5% provided that they can demonstrate their affiliation to the social security regime of their country.

9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

VAT may only apply (at a rate of 20%) on transfers of land to be built upon, on buildings under completion, and on new

buildings completed in the previous five years. All other sales of real estate and SPI shares are subject to transfer duties, as explained in the answer to question 9.1.

9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?

Assuming the seller of the real estate is a company subject to French corporate tax, capital gains are subject to French corporation tax at a rate of 28% (or 31% for the portion exceeding €500,000, if the turnover of the company is superior to €250 million) in 2020.

A 30% flat tax applies on the distribution of dividends to French resident individuals. Except when a tax treaty provides a lower rate, a 12.8% withholding tax would apply on distribution of dividends benefiting non-French resident individuals.

Assuming the seller is a foreign company subject to corporate tax, a 28% withholding tax applies (for 2020) on capital gains realised upon the sale of French real estate, unless tax treaties provide otherwise.

Depending on the seller's country of residence, the taxable basis of the withholding tax may vary:

- If the seller is a company resident in a Member State of the EEA, the 28% withholding tax is levied on the difference between the sale price and net book value of the real estate property.
- If the seller is a company resident in a state which is not a member of the EEA, the 28% withholding tax is levied on the difference between the sale price and the purchase price of the real estate, or a lesser amount corresponding to 2% of the purchase value of the real estate per year of ownership of the sold real estate property. We are convinced that this rule restricts the free movement of capital.

The withholding tax levied is a prepayment of corporate tax which is computed at the end of the fiscal year during which the real estate is sold. This may therefore give rise to corporate income tax (CIT) refunds if the 28% withholding tax exceeds the amount of CIT eventually due.

Assuming the seller is a not resident of a European Union country or Norway or Iceland, a *représentant fiscal* (tax representative) must be appointed (see question 6.1).

9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

Transfers of shares of an SPI (when considered tax transparent) by an individual (resident or non-resident of France) are subject to the same regime as described in the answer to question 9.3. However, the taxable capital gain is obtained by finding the difference between the sale price and the purchase price of the sold SPI shares. The same exemptions for the duration of the ownership also apply (see the answer to question 9.3). A flat rate of tax of 30% applies to the sale by French resident individuals of shares of an SPI subject to corporate tax.

Non-French residents are subject to the same regime as those applicable in cases of sale of shares of an SPI considered as fiscally transparent. Finally, the special tax on real estate capital gains (ranging from 2% to 6%; see the answer to question 9.3) also applies in all cases.

The transfer of shares of an SPI (regardless their fiscal statute) by a French company subject to corporate tax, is taxed at a standard rate of 28% (or 31% for the portion exceeding €500,000).

Foreign companies are subject to a withholding tax at a standard CIT rate (28% and 31% for the portion exceeding €500,000) in case of sale of SPI shares.

Assuming the seller is resident in a non-cooperative state or territory, the withholding tax is increased to 75% on the capital gain amount. We are convinced that this rule restricts the free movement of capital.

9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?

As explained above, the transfer of real estate is secured in France. However, it is important in our opinion to execute survey diligence before purchasing even if it is, not yet, a common practice. Assuming the purchase of an SPI's shares is contemplated, it is important to conduct due diligence not only on the real estate but also on the tax and financial situation of the SPI.

10 Leases of Business Premises

10.1 Please briefly describe the main laws that regulate leases of business premises.

The statute of "*baux commerciaux*" (leases of business) provided by articles L.145-1 to R.145-37 of the "*Code de Commerce*" (trade code), is deemed to protect the tenant's rights. It provides a minimum duration and allows the tenant the right to renew the agreement at its term. It also makes it possible to limit the increase in rental fees when the agreement is renewed.

The statute of "*bail professionnel*" (professional lease) provided by article 57A of the law 86-1290 on 23rd December 1987 and article 1713 of the Civil Code is applicable to professional activities other than businesses. As a consequence, professional premises cannot be used by a tenant running business activities.

10.2 What types of business lease exist?

As explained above, two main types of business lease exist:

- The "*bail professionnel*", which applies to professionals running a civil activity (e.g.: lawyers, doctors, etc.). The professional lease is concluded for a minimum period of six years. It can be renewed for a six-year duration. Each party can refuse the renewal of the agreement by notifying the other party six months before its termination date and the tenant can terminate the lease with six months' notice.
- The "*bail commercial*" which applies to business activities creating a "*fonds de commerce*" is described below.

10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?

As explained in the answer to question 10.2, only the aspects relating to the "*baux commerciaux*" will be discussed in these answers. It applies to real estate where the "*fonds de commerce*" is run. The "*fonds de commerce*" is characterised by the existence of a real and independent clientele owned by the tenant. The business activity should be run by a tenant registered within the "*registre du commerce et des sociétés*" (business registry).

(a) Term

The term of the "*bail commercial*" should be concluded for at least nine years. However, the tenant can terminate the agreement at the end of each three-year period with a minimum of six months' notice.

(b) Rent increases

The rental fees are freely determined between both parties upon the signature of the original "*bail commercial*". As a general rule, rental fees can be indexed but no increases may apply before a period of at least three years following the date of first use or of the renewal of the lease agreement. In addition, the increase is limited in order to protect the tenant.

(c) Tenant's right to sell or sub-lease

When business premises are let with a lease to operate a certain type of business, the tenant has the right to sell his right to the lease ("*droit au bail*"). Depending on the provision of the "*bail commercial*" the landlord should either agree or participate in the sale of the "*droit au bail*". The sub-lease should be provided by the "*bail commercial*" and the landlord should either authorise or participate in the sub-lease agreement's signature.

(d) Insurance

Real estate is, as a general rule, insured by the landlord against damage to the building and insured by the tenant against damage to the premises and equipment.

(e)(i) Change of control of the tenant

As a general rule, the change of control of the tenant does not interfere with the "*bail commercial*", except of course if it specifically stipulates otherwise.

(e)(ii) Transfer of lease as a result of a corporate restructuring

The "*droit au bail*" owned by a merged tenant is automatically transferred to the absorber.

(f) Repairs

Important renovation work, such as structural and internal work is the responsibility of the landlord, while other repairs are the responsibility of the tenant.

10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?

(a) Taxation of rental income

When the landlord is an individual, French income tax is due on rental income on a cash basis. The determination of the tax basis is different if the building is rented out as furnished or unfurnished. Residents and non-residents are subject to income tax at progressive rates with a marginal rate of 45%. Non-residents are, however, subject to a minimum taxation amounting to 20%. Social contributions are also due at a rate of 17.2% for 2019 (except for certain residents of the EEA, see question 9.3). Finally, the contribution on high income amounting to 3% or 4% may also apply.

Companies are subject to corporation tax on accrued rental income. The determination of the tax basis is the same as for operational companies. The depreciation of the building is deductible. The standard rate for 2019 of corporate tax is 28% (or 31% for the portion of the income exceeding €500,000).

(b) VAT

VAT is due when industrial and/or commercial buildings are rented out as furnished. The landlord of an industrial and/or commercial building rented out as unfurnished may elect for VAT under certain circumstances. This election allows the VAT to be deducted on construction cost, expenses relating to renting out the property and avoiding the "*taxe sur les salaires*" (tax on wages). VAT is never due on residential buildings rented out unfurnished.

(c) IFI

A wealth tax on real estate properties or rights called "*Impôt sur la Fortune Immobilière*" is due by resident taxpayers on the worldwide real estate properties owned directly

or indirectly, and by non-resident taxpayers only on their real estate properties located in France, owned directly or indirectly through French or foreign companies or trusts. Among a few other exemptions, participation in a French or foreign operating company owning real estate which does not exceed 10%, is exempted from IFI provided that certain conditions are met. As already explained, some limitation of deduction of debts also applies.

(d) **French gift and inheritance tax**

French gift tax and inheritance tax are due on worldwide assets by resident taxpayers and only on French assets by non-resident taxpayers. Shares of French or foreign companies qualifying as a “*société à prépondérance immobilière*” (see question 9.1) and French real estate owned directly or indirectly by a French or foreign company (or a trust) more than 50% of which is owned by the same family are, among others, considered French assets.

The rate at which French gift tax and inheritance tax are due depends on the relationship between the donor (deceased) and the donees (heirs). A full exemption of inheritance tax applies between spouses. A similar progressive rates scale applies (from 0 to 45%) to donations between spouses and to donations and successions between parents and descendants. A flat tax of 60% applies between unrelated persons. The same regime applies when assets are owned through a trust.

(e) **Annual 3% tax**

An annual 3% tax is due by French or foreign companies owning directly or indirectly real estate properties located in France. Companies disclosing the identity of their owners, as a general rule, benefit from an exemption. The tax is due once by the entity of a structure of ownership that does not abide by this rule or that is resident in a state which is not a member of the EU or which has not signed an international administrative agreement with France. Other interposed entities are jointly liable.

If the entity is not resident in a EU country, Iceland or Norway, the French tax authorities may require the appointment of a *représentant fiscal* (tax representative) to assist the taxpayer. He will not be jointly liable for the payment of the tax.

(f) **Reporting obligations**

In order to allow France to levy its taxes and duties, French or foreign companies, as well as trustees of trusts owning French assets, including real estate located in France, have a duty to report changes in ownership.

The identity of the ultimate owners of French or foreign companies, regardless of their activities, registered within the French company and commerce registry should be disclosed.

An 80% penalty is due on eluded income tax, wealth tax, IFI tax, and gift and inheritance tax when the trustees of a trust indirectly owning assets subject to those taxes fail to report the identity of the settlors and beneficiaries as well as all events affecting the trust.

10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?

As explained above, business leases are usually terminated by the tenant at the end of a three-year period (see questions 10.2 and 10.3). The landlord could also terminate a business lease at the end of a six-year period (“*bail professionnel*”) or of a nine-year period (“*bail commercial*”). The parties may always decide to

extend and renew the lease. The landlord should compensate the tenant if he terminates the lease before or at its expiry.

10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?

Landlords are no longer liable for their obligations once they have sold their real estate. However, the tenants remain responsible if they have sold their interest or sub-leased the real estate.

10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the “environmental footprint” of a building. Please briefly describe any “green obligations” commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).

The French Construction Code provides for numerous environmental requirements (“green obligations”) relating to leases, such as the requirement to include an energy diagnosis performance with all lease agreements, with the exception of agricultural and seasonal lease agreements (article L.1343-1).

As of 1st January 2011, all rental (and sale) adverts must also contain the energy performance grade (from A to G) of the building (article R.134-5-1).

Since 14th July 2013, leases relating to offices or commercial buildings with a surface area larger than 2,000 m² must contain a “green appendix” (“*Annexe environnementale*”, article L.125-9 of the French Environmental Code). This green appendix contains comprehensive information in respect of the energy equipment of the building (e.g. waste treatment, heating and lighting system, water consumption).

10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.

As of today, there are no such trends. However, due to the COVID-19 pandemic and the development of the home office, the situation may evolve in the near future.

11 Leases of Residential Premises

11.1 Please briefly describe the main laws that regulate leases of residential premises.

Land use regulation in France is complex. As explained in question 1.1, the current frame of the regulation is set out in the Construction Code, the Urban Planning Code, and the Environmental Code.

11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?

The laws do not differ if the premises are intended for multiple different residential occupiers. Some rules are, however, organised

for multiple different residential occupiers which should be agreed to and followed by new occupiers (i.e. “*Règlement de co-propriété*”). They should be attached to all purchase and lease agreements in the form of an appendix.

11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c) the tenant’s rights to remain in the premises at the end of the term; and (d) the tenant’s contribution/obligation to the property “costs” e.g. insurance and repair?

- (a) **Term**
The term of the “*bail d’habitation*” should be at least six years. However, the tenant can terminate the agreement at the end of each three-year period with a minimum of six months’ notice.
- (b) **Rent increases**
The rental fees are freely determined between both parties upon the signature of the original “*bail d’habitation*”. As a general rule, rental fees can be indexed but no increases may apply before a period of at least three years following the date of first use or of the renewal of the lease agreement. In addition, the increase is limited in order to protect the tenant.
- (c) **Tenant’s right to sell or sub-lease**
As a general rule, the tenant cannot sell its rights. The sub-lease should be provided by the “*bail d’habitation*” and the landlord should authorise signature of the sub-lease agreement.
- (d) **Insurance**
As a general rule, the landlord insures the property against damage to the building and the tenant insures against damage to the premises and equipment.
- (e) **Change of control of the landlord**
As a general rule, a change of control of the landlord does not interfere in the “*bail d’habitation*”.
- (f) **Repairs**
Important renovation work, such as structural and internal work, is the responsibility of the landlord, while other repairs are the responsibility of the tenant.

11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?

The protection of the tenants is a very serious issue in France, and therefore strictly regulated. A landlord wishing to terminate a residential lease should indemnify the tenants.

12 Public Law Permits and Obligations

12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.

As already explained, the “*Code de l’urbanisme*” (“Planning Code”) provides rules harmonising the use of the French territory. It governs the location, size and main characteristics of buildings. It also provides zoning rules.

The “*Code de la Construction et de l’habitation*” (“Construction and Housing Code”) gathers together construction, development and social housing rules. It provides compulsory specifications and proper use of buildings.

The “*Code de l’environnement*” (“Commercial Code”) provides, among others, rules, prohibitions, and requirements for building contractors and owners.

12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.

The local authorities, and under certain circumstances the State, may exercise their pre-emptive rights upon the sale of real estate properties as already mentioned above.

They can also force landowners to sell their land. The expropriation procedure is provided by an ordinance dated 4th November 2004. It should, however, only be applied for public utility purposes. Evicted landowners receive full compensation, determined either by a contractual agreement or settled by the judge.

12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?

Land and building use are under the control of local administrative authorities. The “*Maire*” (Mayor) ensures the town planning and grants the “*permis de construire*” (“prior construction permits”). The “*Préfet de région*” (“regional prefect”) may also be involved in specific circumstances. Other administrative authorities may also be included in the process, for example, for historical monuments or for environment concerns.

12.4 What main permits or licences are required for building works and/or the use of real estate?

Various permits granted by the administrative authorities are required in France for building works as well as for the use of real estate.

Prior construction permits as well as specific authorisations should be obtained for constructions exceeding 20m². Any modification of the use of buildings should also be authorised.

12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?

Compulsory regulations which should be complied with in order to obtain building/use permits are, as a general rule, well-known by architects. As a consequence, preparing the request for a building permit is not particularly difficult. Nevertheless, any obtained administrative permit can be challenged by third parties if they are affected by the contemplated project. As a consequence, it can take time to obtain a favourable decision, which is finally given by an administrative judge.

12.6 What is the typical cost of building/use permits and the time involved in obtaining them?

As any administrative authorisations for building/use permits are free of charge, the cost of their request is, as a general rule, included in the architect’s fees. When the building permit is challenged before the administrative court, its cost may become more substantial depending on the importance of the project.

As a general rule, the time necessary to obtain the building permits is relatively short. A two-month period is required for

ordinary building permits, three months for construction-development permits and six months for high-rise or public access buildings. They can be challenged by third parties within two months following their display on the building site.

12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?

As already mentioned, several regulations apply allowing for the protection of historic monuments. However, they only apply on renovation work of the building which is considered either as historic or located in an historic area. However, there is no regulation limiting the transfer of the ownership of such buildings.

12.8 How can, e.g., a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?

Careful investors must exercise due diligence and request a pollution diagnosis from the vendor based on environmental documents.

Investors can also ask the “DREAL” (a French public body) for the relevant documentation or consult databases such as “BASOL” and “BASIAS” which notably identify sites and soils which are polluted or may potentially be polluted.

12.9 In what circumstances (if any) is environmental clean-up ever mandatory?

Environmental clean-up is mandatory in case of risk to human health, security and the environment. Public authorities can automatically proceed with the clean-up if a formal demand was unsuccessful. The person responsible for such pollution must bear the cost.

12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.

A diagnosis of energy performance (so-called “DPE”) must be attached to the deed transferring the real estate ownership or to the lease agreement (either residential or commercial).

13 Climate Change

13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).

France transposed the European Directive 2003/87/EC of 13th October 2003 establishing a scheme for greenhouse gas

emission allowance trading. The French environmental code therefore provides for a mandatory emissions trading scheme applicable to energy production activities, civil aviation activities, production of paper and carbon, the mineral industry and the production and processing of ferrous metals.

13.2 Are there any national greenhouse gas emissions reduction targets?

Law n° 2009-967 of 3rd August 2009 (the “Grenelle 1” Act) aims at reducing greenhouse gas emissions to a quarter of current levels by 2050.

The construction sector is responsible for 27% of greenhouse gas emissions in France. The “third sector” decree of 23rd July 2019 indicated the modalities of the third sectors’ obligation reduce its energy consumption (-40% by 2030).

13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?

The “Grenelle 1” Act encourages the construction of “low energy consumption” buildings (i.e. less than 50 KWh/m²/year) and requires a reduction of energy consumption by 38% by 2020 in the existing building stock. By 2020, all new buildings should produce more energy than they use. This measure is being confirmed by the new Environmental Legislation 2020 which specifies all the norms to reach such a goal. Due to the COVID-19 pandemic, this Legislation will not enter into force before summer 2021.

In addition, Law n° 2010-788 of 12th July 2010 (the “Grenelle 2” Act) completed and implemented the “Grenelle 1” Act, notably by introducing specific requirements such as the completion of an energy performance diagnosis as of 1st January 2017 for buildings which have heating or cooling systems, and the requirement to carry out works to increase the energy efficiency of buildings for commercial use before 1st January 2020.

14 COVID-19

14.1 What principal changes to the laws that govern real estate in your jurisdiction have been introduced, in reaction to the effect of the Coronavirus (COVID-19) pandemic?

Law 2020-290 of 23rd March 2020 instituted the state of public health emergency due to the COVID-19 pandemic. This law permitted the government to take specific measures. Regarding real estate, the government mainly granted the postponement of business rental payments, specific loans and warranties.

Several administrative and tax deadlines have also been reported, such as the deadline to instruct an urbanism authorisation or to pay CIT prepayments.



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Tirard, Naudin is a highly reputed boutique law firm co-founded in 1989 by Jean-Marc Tirard and Maryse Naudin, which specialises in all aspects of French taxation, including tax litigation, with a particular emphasis on international tax issues. The firm is managed by Ouri Belmin.

The firm's 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. The firm has considerable expertise in property tax issues and the creation of efficient structures for non-resident investors. It also has a long experience in transfer pricing issues for multinational groups.

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