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PERIODIC REVIEW OF INFORMATION ON LEGAL AND TAX MATTERS

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FROM LICENSED ASSET MANAGERS TO ACCREDITED COLLECTIVE ASSET MANAGERS: WHAT CHANGES ARE IN STORE FOR INSTITUTIONAL ASSET MANAGERS OF OCCUPATIONAL PENSION PLANS?

Since the entry into force on 1 January 2014 of Article 48f of the Ordinance on Old Age Pensions, Disability and Survivorship (OPP 2), management of Swiss institutional occupational pension plan assets may be entrusted only to third parties subject to prudential oversight or to an accreditation from the Occupational Pension Supervisory Commission. This instance issues accreditations valid for three years (renewable) to independent asset managers who fulfill the conditions of the directive «Habilitation des gérants de fortune actifs dans la prévoyance professionnelle» (Directive D-01/2014 – Accreditation of Asset Managers Working in the Area of Occupational Pensions). At present, these accredited asset managers are nonetheless not subject to any prudential oversight.

This system will change with the entry into force of the *Loi sur les établissements financiers* (LEFin – Financial Establishments Act «FinIA») on 1 January 2020. Thenceforth, managers of assets of institutions of occupational retirement plans will have to obtain an accreditation from the FINMA in their capacity as managers of collective assets, insofar as they are managing assets over the legal limits (i.e. they are managing assets over CHF 100 million and, in the compulsory field, 20% of the assets of a single institution; rules called *de minimis*). The managers of institutional pension assets who do not exceed the minimal limits will be subject to a less stringent asset manager licence. Moreover, as financial service providers, all asset managers will be subject to the rules of conduct of the *Loi sur les services financiers* (LSFin – Financial Services Act «FinSA»). Below, we discuss the main changes to come.

FINIA: LICENSE AND OVERSIGHT

The conditions to which collective asset managers are to be subjected are provided for in the FinIA and its enabling ordinance, broadly inspired by the conditions for authorisation currently applicable to managers of collective investment schemes under the Collective Investment Schemes Act.

The conditions for authorization of managers of collective assets are generally already partially fulfilled by accredited asset managers, for they are to be found, in essence, in Directive D-01/2014 regarding accreditation. Accredited managers are required to observe the guarantee of proper business conduct as well as the obligation to be organized on a scale commensurate with the volume of activity and the extent of the risks, all while maintaining adequate financial conditions. However, Directive D-01/2014 defines these conditions with less precision than the new rules. For example, the solid financial conditions required today have taken the form of required minimal capital of CHF 200,000 distinct from adequate own funds corresponding to a quarter of fixed costs, which must be permanently maintained. The requirements regarding organizational set up provided for in the FinIA exceed those regarding accreditation.

The real novelty resides in the prudential oversight of occupational pension asset managers. They will now be subject to FINMA oversight, passing from the status of non-regulated financial intermediaries to that of financial institutions subject to FINMA authorisation and oversight. The corollary of this oversight is the obligation to appoint an accredited audit company to carry out a prudential as well as a statutory audit. The newly regulated entities will thus incur additional costs.

FINSA: CATEGORIZATION OF CLIENTS AND RULES OF CONDUCT

The FinSA applies to managers of collective assets as financial service providers. The new law establishes: 1. the duty to inform; 2. the duty to verify the suitability and the appropriatness of the financial service provided; 3. the duty of documentation and accountability; and 4. the duty of transparency and due diligence in dealing with clients. The scope of application of these rules will vary according to the category of clients concerned, for the FinSA

distinguishes three categories of clients, i.e. institutional, professional and private clients. Pension institutions belong to the professional clients category but can request to be considered institutional clients (opting-out) or, conversely, as private clients (opting-in).

As a professional client, the pension institution has the possibility of waiving the requirement that the financial service provider fulfill in its favor the duty to inform, the duty of documentation and accountability. This waiver must nonetheless be explicitly declared. This explicit waiver is not required in case of the opting-out of the pension institution in order to be considered an institutional client. In this last case, the financial service provider will be automatically dispensed from applying the above cited rules; on the other hand, in case of opting-in of the pension institution in order to be considered a private client, all the protective rules of the law remain applicable. In practice, the institutional pension asset manager will generally wish to deal only with clients benefiting from the same status.

Finally, one might note that the FinSA also regulates the matter of retrocessions. If these are authorized by the FinSA, they will continue to require to be restored to the pension institutions in compliance with the regulations in matters of occupational pension.

PERSPECTIVES

The desire to subject institutional asset managers of occupational pension plans to the oversight of a prudential authority is not new. With the entry into force of the FinSA, this oversight becomes a reality and should be welcomed in that it reinforces the protection of professional pension plan assets. More exacting conditions for authorization and prudential oversight reassure the pension institutions regarding the quality of the asset managers that they mandate. For their part, the asset managers of occupational pension plan will then be able to claim prudential oversight, whereas today only the Occupational Pension Supervisory Commission accreditation is available to them.

Accredited asset managers will have until 30 June 2020 to report their existence to the FINMA and until 30 December 2022 to meet the FinIA requirements, bringing themselves into compliance with the law, and to put on file their request for authorisation as collective asset managers. The time has thus come for these actors to consider the type of regime they will work under, their organizational set up and the related costs.

Occupational pension fund managers will have until the 31 December 2020 to comply with the requirements of the FinSA, which will involve, in particular, a review of their internal documentation.

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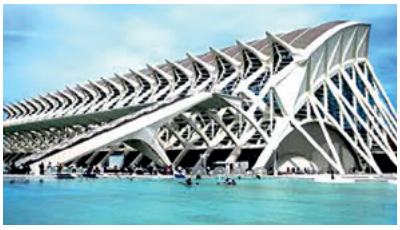
Throughout the past few years, the Federal Tribunal had had to rule on numerous cases related to the dismissal of senior employees. These rulings have made it possible to identify clear principles regarding the rights of these employees often designated « seniors », in particular the obligations of their employers when they are no longer satisfied with their employees' work and wish to end the employment relationship.

The jurisprudence of the Federal Tribunal regarding senior employees comes within the legal framework of the prohibition of abusive dismissals. By virtue of Art. 336, CO, certain reasons for dismissal – for example sickness of the employee or claims by the employee arising from the employment contract – may result in compensation for the employee insofar as (s)he has contested the dismissal in writing before the end of the contract (Art. 336b, al. 1, CO). Consistently in its jurisprudence, the Federal Tribunal has ruled that the motives for abusive dismissal provided for in the law are not exhaustive, with the result that other facts and situations may give rise to compensation for abusive dismissal (ATF 132 III 115 = JdT 2006 I 152).



First, the category of employee to which the jurisprudence in question applies must be determined. In this regard, two factors are determinant: the person's age and the length of employment. Cases submitted to the federal judges concerned in particular: employees 55 years old with 24 or 27 years of employment at the firm (TF, *arrêt* 4A_419/2007, 29 January 2008); 63 years old with 25 years of employment (TF, *arrêt* 4A_60/2009, 3 April 2009); 59 years old, with more than 10 years of employment (TF, *arrêt* 4A_384/2014, 12 November 2014); 64 years old with more than 12 years of employment (TF, *arrêt* 4A_558/2012, 18 February 2013); 64 years old with 44 years of employment (ATF 132 III 115 = JdT 2006 1 152); 55 years old with 24 years of employment (TF, *arrêt* 4A_419/2007, 29 January 2008); and 59 years old with 11 years of employment (TF, *arrêt* 4A_384/2014, 12 November 2014 = JdT 2015 II 117).

Drawing on these elements, the legal doctrine has maintained that the employers' obligations deriving from the above-mentioned jurisprudence apply to employees at least 50 years old and having a minimum of 10 years of seniority with the firm or the group at the time of dismissal.[1]

The employer has an added duty of protection toward employees in this category. This duty is based primarily on Art. 328 CO, which provides the principles of protection of the employee's person. To fulfill these obligations, the employer is required to demonstrate particular consideration toward the employee concerned, which in practice means, in particular, giving warnings before dismissal, notifying the employee that her/his work is unsatisfactory in such a way as to allow the possibility of improving her/his on-the-job performance. It is also incumbent on the employer to search for solutions allowing the continuation of employment.

PERSPECTIVES

In view of the preceding, we recommend that employers carefully examine alternatives to dismissal of employees at least 50 years old and having been employed at least 10 years with the firm. To avoid a too great risk that the dismissal might be characterized as abusive, it is necessary to make known to the employee that the work does not meet expectations and at the same time explain how the work may be improved. To do this, one way that seems appropriate is notably an evaluation discussion that can be documented by a letter indicating the deficiencies and expectations, as well as a period for accomplishing the improvement along with the means to do so.

Contacts : Michael Biot and Gilles Dubuis

[1] Rémy Wyler, « La protection du travailleur âgé au bénéfice d'une grande ancienneté », Regards de marathoniens sur le droit suisse (Geneva : Mélanges, 2015), p. 187 ff.

THE CLOSURE OF THE INSTRUCTIONAL PHASE IN CIVIL PROCEDURE

In ruling 4A_73/2014 of 19 June 2014, published at ATF 140 III 312, the Federal Tribunal examined the question of knowing at what point the instructional phase of a civil case may be considered closed.

This problem is of crucial practical importance for the parties. Art. 229, § 1, CPC, provides that new facts and evidence may be admitted to the main arguments only under restrictive conditions : they are subsequent to either an exchange of written submissions or the last instruction hearing (letter a) or they existed before but could not be submitted despite reasonable diligence(letter b).

In the ruling in question, the plaintiff had filed a memorandum after a second exchange of written submissions, but before the instruction hearing. According to Art. 226, § 2, CPC, during the instruction hearing, the court informally determine the object of litigation, complete the established facts, seek an agreement between the parties and prepare the main hearing(s). However, this written submission had been set aside, the court considering it overdue given that the parties had already previously had two occasions to present their facts and evidence.

This begged the question whether these new elements were admissible without restriction or if they were subject to the conditions set in Art. 229, § 1, CPC.

Before the Federal Tribunal, the plaintiff claimed that it was possible, during an instruction hearing following a double exchange of written submissions, to invoke new facts without restriction. He based this interpretation on Art. 229, § 1a, CPC, which in particular stipulated that the instructional phase is closed after the last instruction hearing.

In its ruling, the Federal Tribunal, on the one hand, proceeded to analyze the legal doctrine, which is not unanimous on the question, and, on the other hand, noted that the meaning that the legislature had intended to give to « following the last instruction hearing » in Art. 229, §1a, CPC, was uncertain.

The federal judges considered that if it was possible to submit new facts when the instruction hearing followed upon a double exchange of written submissions, and the « éventuelle » maxim (general principle of civil procedure according to which the parties must allege the facts and present their evidence once at a specific point in the procedure) would be left to the discretion of the court, with the result that the parties would not be able to determine at what point the instructional phase ends.

From this, the Federal Tribunal determined that the fact that the parties proceeded to a second exchange of written submissions, even if the instructional arguments were under way, ended the instructional phase, and new facts and evidence would be subject to the conditions Art. 229. § 1, CPC.

PERSPECTIVES

In its result, this jurisprudence implies that the parties have only two opportunities to present facts and evidence at the beginning of the procedure, unless the conditions of Art. 229, § 1, CPC are met. Thus, the parties, in all cases, will be able to complete the presentation of the facts formulated in their request or response by a rejoinder or a second response that will intervene either in the form of a second exchange of written submissions, if it is ordered (Art. 225, CPC), or orally during an instructional arguments hearing or the main proceedings, if the former are not held (Art. 229, § 2, CPC).

The solution chosen by the Federal Tribunal offers the advantage of reliability for the parties who can thus know precisely just when the alleged facts in the trial are established. On the other hand, the parties will have to be attentive at the beginning of the trial to its different phases in order to know just when they can allege facts or present new evidence.

Contacts : Michael Biot and Gilles Dubuis

SWISS-FRENCH TAX COOPERATION: RELEVANCE OF THE TAXATION SYSTEM (LUMP SUM TAXATION)?

The Federal Tribunal was called upon recently, within the context of of a request for international legal assistance, to rule on the relevance of informing French tax authorities of the regime under which a person is taxed. The High Court considered that since the request in question had as its objective to establish the tax domicile of the person, the regime under which the taxpayer is taxed likely constituted relevant information and should be given to the French authorities.

The ruling of the Federal Tribunal (TF) handed down on 1 February 2019, within the context of a request for international administrative assistance, came in response to the question of the legality of communicating to French tax authorities information regarding the system under which a taxpayer's taxes were assessed. In order to justify its approach, the TF had to answer the question of whether the way a taxpayer's taxes are assessed was included in the notion of «highly relevant information» as defined in Art. 28, § 1, of the Swiss-French convention to eliminate double income and wealth taxation and to prevent tax fraud and evasion.

In the course of its analysis, the TF recalled that Art. 4, § 6b, of the convention does not consider a resident of a contracting state any physical person who is taxable in this state solely through lump-sum taxation based on the rental value of any residence(s) owned on the territory of this state.

The High Court concluded that, in view of the importance of how taxation is assessed in the determination of the tax domicile, to wit and especially that persons taxed on expenditure (or lump-sum taxation) are not considered residents of the state in question, information regarding the regime under which taxes are assessed is highly relevant and should be provided to the French authorities if the purpose of the request is to determine the person's tax domicile.

It follows that any request from the French tax authorities concerning the tax domicile of a Swiss taxpayer can in the future involve the communication to them of the way the taxation is assessed in Switzerland. This communication can be of particular importance for persons taxed on a lump-sum basis instead of on the ordinary basis.

PERSPECTIVES

The confirmation by the TF, within the context of a request for international administrative assistance, that the basis for taxation should be considered highly relevant information is not without consequences for many persons in Switzerland subject to lump-sum taxation. These taxpayers should know the implications of the communication of this status to the French authorities so that they can anticipate its effects on their tax domicile, especially in view of the risk of being considered French taxpayers under Art. 4B of the General Tax Code (in particular those who might have their economic interests centered in France). Moreover, the increase of requests for international administrative assistance heightens the risks of taking a wait-and-see approach for those subject to lump-sum taxation who might be vulnerable to having their particular attachments to France identified.

Contacts : Michel Abt and Thomas Romailler

FINTECH – EXTENSION OF THE SANDBOX'S FIELD OF APPLICABILITY

On 1 April 2019, new provisions modifying the 2017 sandbox regime entered into force via an amendment of the Ordinance on Banks (OB).

The innovation space (sandbox) allows a business enterprise to accept an unlimited number of deposits from the public up to a ceiling of 1 million Swiss francs, without requiring a bank license, provided that the depositors are informed that the enterprise is not subject to supervision by FINMA and that the deposits are not guaranteed.

This exemption regime, which can benefit diverse types of business models, has allowed *inter alia* crowdfunding plateforms to carry on activities without being subject to banking constraints. Crowdlending operators nonetheless remained subject to significant restrictions.

On the one hand, the platform could neither invest nor remunerate the deposits, which meant that it was obliged keep the funds intact until such a time as they would be returned to the borrower. On the other hand, the borrower was compelled to use the funds to finance his artisanal or industrial activity carried on as a primary occupation, which excluded financing for other purposes.

The amendment that entered into force on 1 April of this year removed this restriction both for crowdlending platform and for the borrower. The result is that the enterprise can now be the contracting counterparty of funding providers, insofar as it is authorized to remunerateand invest the deposits of funding providers. It is not, however, authorized to carry on net interest income operations, which remain confined to the banks. According to the FINMA, these operations are characterized by *« generating profits resulting from the difference between the interests paid on the liability side of the balance sheet* [acceptance of deposits] *and the ones collected on the asset side of the balance sheet, generally thanks to granting credits and loans »* (draft partial revision of FINMA Circular 08/03). In other words, the crowdlending platform is obliged to ensure that the interests paid on the deposits correspond to those collected on the loans granted. It can, however, receive for its services a commission corresponding to a percentage of the amount of assets collected.

Further, the funds collected by the platform can be used to finance projects that are not necessarily intended for the development of the main artisanal or industrial activity of the borrower. This regulatory relaxing opens broader perspectives regarding projects to be financed, including enterprises wishing to experiment with other business models, not connected to their main activity. It should be noted that if the funds collected by the platform are intended to finance a private undertaking, namely non-commercial, the platform acting as intermediary is then subject to the Consumer Credit Act as a crowdlending broker.

PERSPECTIVES

The adaptation of the Swiss regulatory framework to development of business models in the FinTech field continues apace. Even if at this stage, it is rather an evolution than a « revolution », the FinTech businessess and more broadly the blockchain technology, will continue to test the limits of the Swiss legal framework and, in this way, contribute to its modernization. The Federal Council has clearly shown its intention to create a high quality framework conditions for the development of innovative businesses. It is in this spirit that, on 22 March of this year, it opened a consultation aiming at the adaptation of federal law to the developments of blockchain and distributed ledger technology. It also indicated at that time that it will continue, in particular, to track the evolution linked to sandbox and will proceed with its adaptation regarding potential new blockchain business models if necessary. The series of legislative and regulatory reforms has been launched and is not about to stop.

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THE DISCREET CHARMS OF A NATIONALITY

In the era of « globalization » and « geographic mobility », fashionable terms if ever there were any, nationality has returned to the front and center of the legal stage, without, for all that, our necessarily taking its full measure.

The criterion of nationality is present in varying degrees in all international instruments and enjoys a privileged position in private international law.

Let us then be careful not to abandon one or acquire another without first evaluating the effects.

A few rare states have long attached the ownership of a nationality to the effects of taxation, sometimes experienced as a sort of hobble difficult to escape from.

Certain political figures from other countries raise the specter of the creation of an equivalent regime, a sort of « perpetual right to tax », with the purpose of countering the effects of departure abroad of tax revenues from the native land.

And one then sees emerge a new idea, in response to this, which is to abandon one's nationality to free oneself preventively – and definitively – from a potential tax attachment tied to holding the nationality of a country in which one has no longer lived, sometimes for a very long time.

It seems to us that abandoning one's nationality falls into the category of what is commonly called « acts of a serious nature », not only from the symbolic perspective – whose evaluation, highly personal, belongs to each individual – but also with regard to the effects of such a renunciation on the law applicable to this person in her/his daily life.

In the area of family law alone – one of the dimensions of « daily life » – some examples will illustrate our point.

Parallel to the abdicative formalities, another tendency has developed, to wit multi-nationality, allowing those who have the opportunity to add a new nationality to their original nationality. In general, being the national of several countries allows an expansion of the choice of possibilities regarding the law applicable to oneself or the judicial authority which will be competent. However, having certain nationalities can also grant certain « nationality privileges » with the potential of blocking the option of another legal regime. We might note here the example of Swiss inheritance law, which lends itself beautifully to this, at least in the current state of its positive law.

I – RENUNCIATION

As an illustration of the effects induced by the renunciation of nationality, we might first look at inheritance law : since the entry into force – on 17 August 2015 – of European Regulation N° 650/2012 of 4 July 2012, the Succession Regulation (also called simply

« the Regulation »), all the states bound by this text (25 to date, to wit all the member states of the European Union except the United Kingdom, Ireland and Denmark) recognize the possibility for a person to designate its national law as applicable to the settlement of her/his estate. This holds even if this law is not the law of a member state. If a personhas several nationalities, (s)he can freely choose among her/his nationalities, without there being a hierarchy among them.

With regard to the effect of a renunciation of one's nationality, one can easily understand that once the nationality has been renounced, it becomes impossible in the future to designate its law to settle one's estate. It can be emphasized that the Regulation, striving for the predictability of the applicable law and the permanence of the choice, has introduced conditions favorable to the choice of law : Article 22 of the Regulation stipulates : « A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death. »

Thus, a choice validly made before renunciation of should remain effective, in spite of the subsequent loss of the designated nationality (but the flexibility of this law must be conciliated with the domestic law of the states concerned, states which might not be parties to the Succession Regulation – see below for the example of Switzerland). On the other hand, if this choice has not been expressed in time, this option is definitively excluded in the future.

Regarding matrimonial regimes : the 18 states[1] bound by European Regulation 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (Matrimonial Regimes Regulation), have, since 29 January 2019, applied the provision of this text to determine the law applicable to the matrimonial regime of a couple.

The criterion of nationality comes into play at two levels :

In the absence of a choice-of-law agreement by the future spouses, and in case the spouses haven't ever had a common habitual residence after the conclusion of the marriage, the law of the spouses' common nationality at the time of the conclusion of the marriage will be applicable (Art. 26).

The choice by the spouses or future spouses of the applicable law merits its particular attention. Article 22 of the Matrimonial Regimes Regulation allows the future spouses to designate (for the purpose of marriage) or the spouses to modify (after the conclusion of the marriage, thus for the purpose of changing the law applicable until then) the law applicable to their regime. However, the spouses may designate only one of the following laws :

1 – the law of the state in which at least one of the spouses or future spouses has her/his habitual residence at the time of the conclusion of the agreement ; or

2 – the law of a state whose nationality is held by one of the spouses or future spouses at the time of the conclusion of the agreement.

There again, renunciation of nationality will exclude a future option.

The nationality of a person is an important link in private international law, be it for knowing what law is applicable (or perhaps can be chosen) or for what court is competent to handle litigation (or can be designated by the parties).

In family and personal law, one finds once more the criterion of nationality governing questions regarding personal status (legal capacity, substantive conditions of a marriage for example), and also, although lesser, especially in case of divorce, alimony and parental responsibility.

Moreover and more generally, nationality can – if necessary – allow one to make use of « juris-

dictional privilege ». Such is, for example, the case of French nationality. In fact, Articles 14 and 15 of the French Civil Code, applicable as an alternative (to wit in the absence of any international convention regulating matters of competence in planned litigation, and if the competence of a French judge does not result in the application of ordinary domestic laws of territorial competence applied by extension to the international order), attribute competence to French courts when one of the parties has French nationality : a plaintiff of French nationality can bring legal action before a French court (Article 14) or the case can be heard by a French court if the defendant is of French nationality (Article 15).

Here follows an illustration regarding matrimonial regime and inheritance law.

George and Monica, a Franco-Italian couple, have been living in Italy since their marriage. At the time of their wedding, they chose Italian law and a regime of separate property. George, French, founded his business and prospered. He bought a splendid house in Tuscany, which is the couple's primary residence. Monica, Italian, does not carry out a professional activity and has no personal assets. They have no children.

George has two sisters as well as his parents. He has been totally estranged with them for many years, mostly because they did not approve of Monica.

George wants to assure that in the event of this death, all his property will go to Monica.

George, being French, has several possibilities.

– The adoption of the full community of property (communauté universelle) with full attribution under French law is one. Under the E.U. Matrimonial Regimes Regulation, the couple can change the law applicable to their matrimonial regime (currently under Italian law), designating French law (the law of George's nationality), choose the French regime of the full community of property and provide that in the event of the dissolution of the

community through death, the property of this community will be attributed fully to the surviving spouse. Under French law, this would be a « matrimonial advantage » and not a matter of inheritance. In the event that George dies before Monica, the attribution of the common property to Monica and the resulting assetless estate means that the other members of George's family will have no right over any of George's initial holdings. To avoid any conflict between the French matrimonial regime and Italian inheritance law, George will take the precaution of designating French inheritance law by last will and testament, thus imparting an overall coherence to his estate planning.

– Drawing up a will : In the event that George does not wish to adopt a full community of property regime yet wishes to leave his entire holdings exclusively to his wife, French inheritance law makes this possible. In fact, neither the father and mother nor the siblings are rightful heirs under French law. Thus, George can legally establish his wife as his sole heir without fear of his will being contested. He can establish a last will and testament under which he can designate French law, the law of his nationality, as the law applicable to his estate, then he can name his wife as his sole heir.

In what way would the solution be different if George had renounced his French nationality (which supposed that he had first acquired another, most likely Italian), without having first established the above acts ?

– Regarding the matrimonial regime : submitting it to French law will no longer be possible (unless at least one of the spouses has a habitual residence in France, which is not planned). George and Monica will be able to change matrimonial regimes, but within the limits allowed by Italian law. The Italian conventional regime regarding the community of property is more restrictive than that under French law, with certain categories of property having a decidedly personal character being excluded. Moreover, Italian law does not admit of a clause of full attribution, nor even of unequal sharing The community must be divided half and half (Article 194 of the Italian Civil Code), the share of the first deceased entering into the assets of the estate.

– Regarding George's estate, as he is unable to designate French law, it is Italian inheritance law, to wit that of the last habitual residence, that applies : besides the fact that the rightful heirs and the sharing through the legal distribution of the estate differ between the two legal systems (the sisters would be rightful heirs to the estate under Italian law whereas the presence of the spouse would exclude them under French law), it should especially be noted that the ascendants are rightful heirs under Italian law,

whereas they have not been so in French since 2006. In this context, it is no longer possible to assure George that his wife will be his sole heir.

Establishing one's surviving spouse as sole legatee makes it possible to exclude the sisters but in no way the mother and father. It will, of course, be possible for the ascendants to waive their right to their share once the estate is arising, but, since Italian domestic law prohibits inheritance pacts, this waiver can not be negotiated as long as George is alive.

II – ADDITION

In certain circumstances, such as moving permanently to a country or marriage between two persons of different nationalities, there can be the possibility of adding a new nationality to the original.

Generally, the second nationality opens up the field of possible options, in matters of court jurisdiction as well as in applicable law. We have seen that recent European regulations give great attention to the criterion of nationality.

One must however keep in mind that these regulations involve only the European Union member states who are parties to them. Third states to these regulations are in no way bound by their provisions.

Regarding inheritance law, the example of current Swiss private international law gives an interesting illustration of the opposition among the present rules.

Here is a French national who has been living in Switzerland for years. To complete his integration, he requests and receives Swiss nationality, while keeping his French nationality. He wishes to plan for the consequences of his death and inquires about the law that can or must be applied to his estate.

From the angle of French international private law, the E.U. Succession Regulation will be applied (and this would be the same in the 25 E.U. member states bound by this regulation). Theoretically, what will be applied will be the law of the country of habitual residence of the deceased (in this case, Switzerland), unless the deceased had designated the law of his original nationality as applicable to settle his estate. The Successions Regulation stipulates that when the person has more than one nationality, (s)he can designate the one of her/his choice. In application of this law, it is thus possible to validly designate French law.

Will this choice be recognized today in Switzerland ?

The matter is regulated by Article 90 of the Federal Law on Private International Law (LDIP). In the first paragraph, the law states : « The estate of a person who had his last domicile in Switzerland shall be settled by Swiss law. » This principle corresponds to that of the Succession Regulation's last habitual residence even though the notions of « domicile » and « habitual residence » are not identical.

Moreover, for far longer than the European Union, Switzerland has given the possibility of designating its national law as applicable to one's estate. In fact, the second paragraph of Article 90, LDIP, provides « a foreigner can nonetheless subject her/his estate by last will and testament inheritance agreement to one of her/his national states. » One finds here the ability to establish a « professio juris » and the free choice in case of more than one nationality. But the text adds to this statement of principle an important exception. The paragraph continues : « This choice is null and void if, at the time of death, the person no longer has this nationality or had acquired Swiss nationality. » If the person has acquired Swiss nationality, (s)he would no longer be a « foreigner » empowered to choose one of her/his national laws. Switzerland thus created a « privilege of nationality » according to which Swiss nationality would prevail and has imposed on the Swiss authorities the enforcement of Swiss law insofar as the deceased had her/his last domicile there. It cannot be otherwise except in the event that the person in question

had her/his last domicile outside the country. This is the exception to the principle provided for in Article 91, LDIP : « The estate of a person who had her/his last domicile abroad shall be settled in accordance with the law that the rules of private international law designate in the state in which the deceased was domiciled. »

Regarding our French national, who had acquired Swiss nationality, the designation of French law – valid and effective under French law – will be ineffective in Switzerland as long as the person is living there. It will be unable to be effective in Switzerland except in the event that the person no longer had her/his domicile there at the time of death.

We should note moreover that, contrary to the Successions Regulation, current Swiss law recognizes the designation of another national law only if the person has kept that nationality until death.

Well aware of these divergences, and taking advantage of the opportunity to harmonize the legislation of the 25 member states parties to Successions Regulation, Switzerland began in 2015 an in-depth reflection on the opportunity to modify the LDIP as it applies to inheritance, in order to offer its citizens more legal security and forseeability in the disposal of their property after their death.

The instances consulted in 2018 regarding the draft law which has thus been produced, applauded the proposed harmonization (at the same as they noted certain difficulties and expressed the wish to see the text evolve further), which implies that legislative process will continue and result in an effective change of the current rules, in the not too distant future.

The fact remains that the example of Switzerland is one among many others, and it is far from sure that this willingness to narrow the gap separating it from European law is similarly felt in states less close to the Old World.

Moreover, harmonization is not synonymous with identical rules, such that a close analysis will always be necessary.

PERSPECTIVES

In an era of galloping globalization, growing geographic mobility and ties with one's native country, one's fatherland, probably less close than in the past, the criterion of nationality remains everywhere essential in numerous areas of law, and is to be found in most international instruments.

The traditional longevity in principle of this criterion surely explains the prominent place accorded it in both domestic and international law.

Thus, the decision to renounce a nationality or, on the contrary, to acquire another, should not be made without taking the full measure of its consequences.

An overall analysis of the context and rights at stake, the right timeline and anticipation are essential.

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TAX REGULARIZATION IN FRANCE: OPENING A WINDOW DEDICATED TO BUSINESS ENTERPRISES, BUT ALSO TO THEIR SHAREHOLDERS AND MANAGERS

In France, regularizations to bring one in compliance with the tax laws are always possible for individuals, in spite of the closing of the famous «STDR Cell». A new window has just been opened to business enterprises, including family-owned.

France took some times to accept the setting up a regularization service for physical persons. But given its success, and in spite of the official closing of the STDR on 1 January 2018, individuals can still initiate a «detox» process. Now taking place in local centers, it is being carried out in even more favorable conditions and makes possible avoiding criminal prosecution.

The great novelty is that the circular published on 28 January 2019 opens a new regularization procedure intended for both foreign and domestic business enterprises as well as their managers and shareholders, also foreign and domestic. The circular clarifies its area of operation and the practical aspects of the functioning of this new service named «SMEC» (Service de Mise en Conformité des Entreprises – Service for Bringing Business Enterprises into Compliance).

The field of activity of this new service is open:

– on the one hand to all tax anomalies discovered by new owners of a business enterprise;
– on the other hand, to the problems listed below.

– **In international taxation:**
- ↘ undeclared activity in France, constituting a stable establishment;
- ↘ illicit or abusive schemes that have been the object of a publication on the official site of the tax administration, such as
  - tax convention abuse,
  - bypassing rules of territoriality in matters of gift taxes or inheritance,
  - hiding assets abroad,
  - and more generally, any international scheme involving French or foreign structures for holding financial or real estate assets;

– **in matters of taxation of managers:**
- ↘ problems linked to the tax regime of impatriates in case of their return to France;
- ↘ non-observance of the conditions of a «Dutreil Pact»;

– **and more generally:** all operations susceptible to be sanctioned by the penalty of 80%, designated as «hidden activity», «an abuse of law» or «fraudulent maneuvers».

Thus, the SMEC will receive submissions on all problems of international family taxation considered partially abusive, especially because operated through foreign entities (companies, foundations or trusts). It could in particular be a matter of hidden real estate holdings, set up for the benefit of resident or non-resident French taxpayers.

PERSPECTIVES

Whereas one might think that the time of tax regularization, initiated almost 10 years ago with the famous cell called «Woerth» would draw to a close with the shutting down of the STDR on 1 January 2018, such is not the case, and France has obviously «developed a taste» for regularization.

The first bank information communicated in the framework of the automatic exchange is beginning to be analyzed by the French tax services, and numerous indeed are the «informative» mailings addressed to the taxpayers reminding them of their tax obligations relative to holding foreign assets and inviting them to rapidly bring themselves into compliance, but without benefiting now from any reduction or particular rebate.

Such is not the case at the SMEC, where the conditions are clearly stated and turn out to be, for certain aspects, considerably more favorable than those previously granted by the STDR.

In fact, the procedure, which should always be spontaneous, to

wit carried out before any tax or legal procedure, makes it possible to obtain significant reductions of penalties and also – exceptionally – of default interest.

Another noteworthy element is that files on fraudulent maneuvers and abuses of rights are eligible for regularization and are even subject to surcharges reduced from 80% to 30% (default interest, for its part, being reduced by 40%).

To carry the philosophy of the affair to its logical conclusion, and thispoint is fundamental, it is explicitly stated that the spontaneous opening of a regularization file with the SMEC will exonerate the tax authorities of their new obligation to automatically bring the case before a judge of the criminal court. In other words, the transaction drawing the procedure to a close will remain exclusively in the hands of the tax authorities for purposes of tax collection.

From a practical point of view, the SMEC is only just beginning and has not yet reached its cruising speed, but it seems already open and pragmatic in the context of anonymous discussions preliminary to submitting a file. In particular, the SMEC has been able to declare itself empowered in matters of ISF regularization for a non resident taxpayerholding real estate assets in France through a trust and an off-shore company, thus enabling the regularization of all the interlocutors of the case through a single procedure : the company for the taxes on the companies and the 3% tax, the trustees for the declarations of trust beneficial owner for the ISF and the IFI.

The future will tell if the SMEC will know the same as success that of its predecessor, the STDR (with 51,000 cases and 32 billions recovered), but its broad field of intervention, international and domestic, corporate and family-based, dealt with outside the criminal justice system and with preferential conditions, can lead one to suppose so.

Contact : Alain Moreau

Overview Table of Proposed Modulations

Rate of Increase Under Common Law	Rate of Increase For Bringing into Compliance	Percentage of Reduction of Late Charges
80%	30%	40%
40%	15%	40%
10%	0%	50%

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