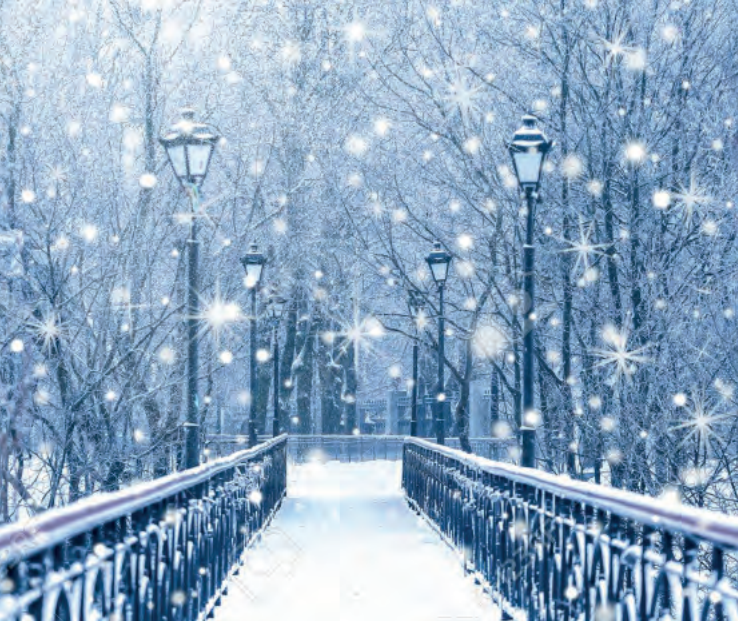


FBT
AVOCATS

FBT NewsLex

N° 20 - DECEMBER 2019

CONTACT

Marco Villa

mvilla@fbt.ch
T. +41 (0)22 849 60 40
www.fbt.ch

PERIODIC REVIEW OF INFORMATION ON LEGAL AND TAX MATTERS

TABLE OF CONTENTS

SWISS-FRENCH ADMINISTRATIVE ASSISTANCE IN TAX MATTERS: BEWARE OF UNPLEASANT SURPRISES IN THE EVENT OF MAINTAINING ECONOMIC TIES WITH FRANCE AFTER ESTABLISHING TAX DOMICILE IN SWITZERLAND!

According to the Federal Tribunal, a request for administrative assistance can aid the requesting State in obtaining information with a view to resolving a conflict of residence. This approach, confirmed by recent jurisprudence, constitutes a serious and growing threat of additional taxation, indeed of double taxation, for foreigners resident in Switzerland, in particular for French expatriates.

A ruling handed down last 23 August by the Federal Tribunal marked a new setback for a family in the framework of litigation against Swiss judicial and tax authorities.

In May 2017, a request for administrative assistance regarding the tax status and taxation of a French couple was sent to Switzerland by the General Directorate of Public Finances (Direction générale des finances publiques – DGFP).

Resident in France for tax purposes until 2013, the couple informed the appropriate French authorities of the transfer of their tax residence to Switzerland in course of 2014. Entertaining *a posteriori* doubts regarding this new tax residency since indications suggested the continuation of tax obligations in

France, the DGFP (the relevant French authority) requested the help of the Swiss authorities in order to clarify the lax liability of the persons in question in an international context.

In this context, the main questions asked by the French tax authorities were, *in extenso*, as follows.

A) Are the two persons known to the Swiss tax administration? Have they been considered tax residents by the Swiss tax administration since 2014? Have they had a permanent home at the indicated address in Switzerland since 2014?
B) Have the two persons been filing tax returns in Switzerland on a real basis of taxation since 2014? If yes, please indicate the nature and the amount of income declared by the two (earnings, investment income, worldwide income…) as well as the rate of taxation applied and the amount of taxes paid.
C) Please indicate the detail, nature, content and value (or the date and purchase price) of real estate holdings in Switzerland of the two persons in question as of 1 January 2014, 2015 and 2016. Please also indicate the amount of wealth tax paid in Switzerland on these holdings.

In its ruling of 9 January 2018, the Federal Tax Administration (AFC) acquiesced fully to the request from Paris, accepting to communicate the address of the couple, the rate at which they were taxed, their tax bills and that, according to the property registers, the couple had no real estate holdings in Switzerland during the period concerned by the request for information.

On appeal, the Federal Administrative Tribunal ruled essentially as follows on 30 August 2018.

According to French law, a person is considered a tax resident in France if the person has her/his home or primary residence in France, if the person carries on a professional activity there, or if the center of that person's economic interests is in France. In the case under review, several circumstances suggest that the tax residence of said couple is still in France, for they bought an apartment in Paris on 3 April 2014, they have income from a lucrative activity based in France, and they have held shares in two French companies. Accordingly, the first federal judges had concluded that the requesting French authority had provided sufficient evidence to suppose the existence of a tax liability in France, hence the judges had confirmed the transmission of the requested information, with the exception of information relative to the exact tax scheme under which the couple was taxed.

Extending yet further its jurisprudence of last February (discussed in our previous NewsLex (N° 19 - July 2019, p. 6), the Federal Tribunal considered, in its August 2019 ruling, handed down on the appeal of the 30 August 2018 ruling, that, since the tax scheme under which the persons are taxed is substantive information, the requesting authority should be informed that the couple was subject to lump-sum taxation even though said authority – as in the case under review – had not explicitly requested it, thus confirming entirely the initial ruling of the AFC.

PERSPECTIVES

This new ruling by the Federal Tribunal confirms that the tax scheme under which a person is taxed should be considered likely to be pertinent information within the context of a request for administrative assistance. It carries consequences for many taxpayers subject to lump-sum taxation in Switzerland for they risk being considered French taxpayers under Article 4B of the French general tax code (in particular those who might have the center of their economic interests in France). In view of the growing number of administrative assistance requests in tax matters, the risks for lump-sum taxpayers of taking a wait and see approach when they have particular links to France that might become known will only increase, for Bercy is turning an attentive eye to these wealthy taxpayers who have left France to take up residence in Switzerland.

Contacts : Michel Abt and Romain Baume

EARNINGS EQUALITY: MAJOR SWISS BUSINESSES MUST CARRY OUT AN INITIAL ANALYSIS REGARDING EARNINGS EQUALITY BY THE END OF JUNE 2021

On 21 August 2019, the Federal Council set ***1 July 2020*** *as the date for the revision of the Law on Equality* (Loi sur l'égalité – LEg), *which is intended to improve the implementation of earnings equality, to enter into force. At the same time, it adopted the Ordinance on the Verification of the Analysis of Earnings Equality* (Ordonnance sur la vérification de l'analyse de l'égalité des salaires) *(henceforth «the Ordinance»), which will also enter into force on 1 July 2020.*

One may recall that the new section of the LEg was adopted on 14 December 2018 following the heated debates regarding this reform in the Parliament.

Businesses with more than 100 employees (not including apprentices) shall henceforth:

- Carry out an internal analysis of earnings equality, which is to be repeated every four years, unless it is demonstrated that earnings equality has been reached (Article 13a, LEg). The first analysis must be finished by **30 June 2021 at the latest.**
- Have this analysis verified by an independent body whose qualification criteria are given in Articles 2 to 5 of the Ordinance (Article 13d, LEg). If the employer engages the services of an auditing firm certified under the law of 16 December 2005 on monitoring of audit and oversight, the employer shall communicate all pertinent information and documents that said firm might need to carry out the verification; the firm shall verify that the analysis was carried out correctly in conformity with the appropriate requirements and shall draft a report within one year after completion of the analysis (Article 13e, LEg), i.e. by **30 June 2022 at the latest** for the first analysis.
- Inform the employees in writing of the results of the analysis, at the latest one year after it has been verified (Article 13g, LEg), i.e. by **30 June 2023 at the latest** for the first analysis. Companies whose shares are listed on a stock exchange must also publish the results of the analysis in the annex of their annual reports (Article 13h, LEg).

Employers are free to choose the analytical method used in the analysis, provided that it is scientific and conforms to law (Article 13c, LEg). The federal government shall make the verification tool «Logib», which can be downloaded on-line for free, available to the companies concerned.

While non-observance of these new provisions does not give rise to any sanction, it goes without saying that such a violation can affect the reputation of the company concerned and its attractiveness in the marketplace.

The Parliament has limited the duration of validity of the obligation to analyze earning equality to 12 years, with the result that the amendment of the LEg as well as the enabling Ordinance will cease to apply as of **1 January 2032.**

PERSPECTIVES

We note that the reform follows upon the failure of voluntary measures by the Federal Council, which reached the conclusion that supplementary governmental measures were called for. The initial draft proposed by the federal executive was more far-reaching and would have applied to companies with more than 50 employees. In the end, the revision of the law on equality is a «light» version of this draft, applicable to only 0.9% of companies, but which employ 46% of Swiss workers. Employers concerned by this legislation would be well advised to engage the services of a lawyer specialized in labor law in order obtain appropriate legal counsel for the implementation of these requirements and, if necessary, resolving any problems discovered within the company upon completion of an audit.

Contacts : Michael Biot and Sophie Moreillon

FROM THE NOTION OF DISTRIBUTION OF COLLECTIVE INVESTMENT SCHEMES TO THAT OF AN OFFER OF FINANCIAL INSTRUMENTS: CHANGES EXPECTED ON 1 JANUARY 2020 IN SWITZERLAND

The Financial Institutions Act (FinIA) and the Financial Services Act (FinSA), as well as their implementing ordinances, will enter into force on 1 January 2020 after a very long gestation period. The changes wrought by the new legal texts in the regulatory landscape are major. Among them is the suppression of the notion of «distribution», as well as the disappearance of the specific regulated activity of distribution of collective investment schemes and the end of the distributor's license.

Currently, Swiss law regulates the distribution of collective investment schemes, unlike all other financial products. Distribution is understood as a proposal (i.e. the concrete offer to conclude a contract) or advertisement for investment funds not exclusively reserved to regulated qualified investors as defined by the Collective Investment Schemes Act (CISA). In contrast, the following are not considered acts of distribution: the provision of information within the framework of a written discretionary management agreement or at the request of the investor, or the publication of prices. Any person that intends to distribute collective investment schemes must be authorized by the FINMA. All distributors are subject to rules of conduct and must conclude written distribution contracts with the promoters whose funds they are distributing.

The Financial Services Act, which uniformly governs the provision of financial services, does not include the CISA's notion of «distribution», which is eliminated. However, it introduces the concept of **«offer»**, i.e. an activity defined as «any proposal to acquire a financial instrument that includes sufficiently detailed information on conditions of the offer and the financial instrument concerned». The Financial Services Ordinance (FinSO) specifies that the offer *«shall regularly aim to attract attention to a specific financial instrument and to sell it»*. Since advertising does not correspond to the definition of an offer, it is treated separately by the FinSA. Finally, simply making available factual information does not constitute an offer, although it can, depending on the case, come under the definition of «distribution» under the current regime. It thus appears that the notion of «offer» is **narrower** than that of «distribution», when it is limited to the proposal – but excludes advertising and, generally, provision of factual information. It is nonetheless

broader than that of « distribution » in that it targets all financial instruments, contrary to distribution, which concerns only collective investment schemes.

Whether the rules of conduct applicable to the financial services provider are also applicable to the offer of financial instruments has been subject to controversy. The systematics of the law seemed to answer the question in the negative. In fact, the FinSA's clear text enumerates exhaustively « financial services », which includes, in particular, the **purchase** or the **sale** of financial instruments, **investment management** and **advisory,** leaving the offer outside the restrictive definition of financial services. As a concrete acquisition proposal, an offer is not to be confounded with the concept of advisory, which must include a personalized recommendation for the purpose of the acquisition of a financial instrument ; it is also distinct from the acquisition of financial instruments, which constitutes a transaction. And, if the offer is not a financial service, it is not subject to the rules of conduct applicable to financial service providers, and all distributors of financial instruments then are outside the scope of FinSA.

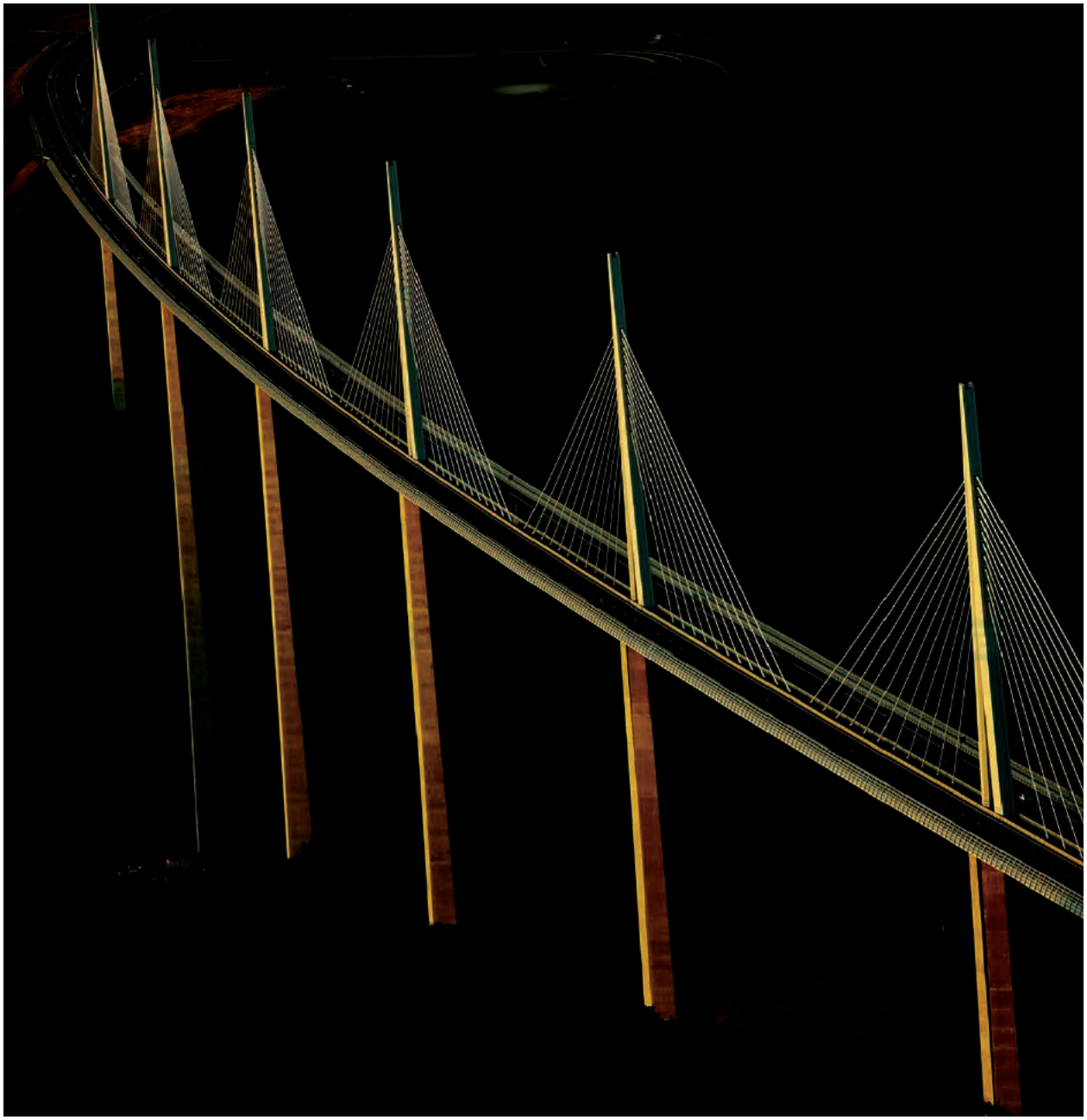
Considering that the objective of the legislator was to subject distributors to the FinSA, the Federal Department of Finance (FDF) has specified, in the final version of the FinSO, that the acquisition and disposal of financial instruments should be understood as ***« all activity directly aimed at a particular client with the specific purpose of buying or selling a financial instrument ».*** The FinSO thus incorporates this activity that is prior to the acquisition and sale of financial instruments into the catalog of financial services. The FDF specifies in its *Commentaire* of FinSO that the activities targeted are, in particular *« the activities regarding a particular clientele that, prior to the formal acquisition or disposal of financial instruments, is identifiable and aims specifically to buy or sell a financial instrument, but for whom there is not yet advice regarding a transaction »*. In other words, one must understand that activities inciting to the acquisition or sale of financial instruments are part of the activities of acquisition or sale. It is nonethe-

less to be emphasized that the definition of these activities is much narrower than that of distribution, which is to disappear from the regulations.

What, then, can be said about offer in the sense of the FinSA? The *Commentaire* revisits the context and the history of the definition of offer in the FinSA in order to explain that it is specified only in the context of the obligation to establish a prospectus and a key information document. While setting the provision into context makes it possible to better grasp its scope, the *Commentaire* introduces confusion, considering that an «offer» must be sufficiently concrete to be able to be accepted or refused by the person to whom it is finally addressed and *«only the negotiation oriented to the investment decision of an investor should be considered an offer.»*

Financial service thus seems to be distinguished from offer in that the former targets a specific client. The discussion is still open that may make it possible to distinguish the outlines of financial service consisting of the activity prior to the acquisition and disposal of financial instruments from the offer, a condition prior to the offer to the public entailing the duty to publish a prospectus.

The incorporation by the FDF into the FinSO of the activity inciting to the acquisition and disposal of financial instruments to specific clients obviously appears questionable from the point of view of its legality. The process that results in subjecting a similar activity (without its being identical) to distribution, which has been deliberately deleted from the texts, without naming this activity but in basing it in a regulated activity, seems to go beyond simple execution measures delegated by the FinSA. But, as it stands, the objective has been achieved. With the final FiNSO text, the activities of financial instrument distribution must be deemed financial services, which comports the obligation for Swiss and foreign service providers aiming for the Swiss market to observe the FinSA's rules of conduct. This involves the obligation to be entered in the register of advisors for the service providers concerned.



PERSPECTIVES

The disappearance of the notion of distribution is accompanied by that of the rules applicable to distributors. Whereas currently, without being subject to prudential oversight by the FINMA, all distributors are obliged to be authorized in order to exercise their activity, this obligation will end at the end of 2019. The legislator has chosen to end licensing distributors because financial instrument distributors, like other financial service providers, will be subject to the new FinSA rules and to the obligation to be entered in the register of advisors. Until the publication of the final text of FinSO, one might legitimately have asked if the law would allow making the distribution of financial instruments a regulated service. The intention of the legislator to subject the activity to rules of conduct and to list those who practice it in the register of advisors was supported by the FDF. The final text of FinSO thus accomplishes the objective.

Contacts : Frédérique Bensahel and Véronique Chatelain Gomez

DATA PROTECTION: COMPATIBILITY OF SWISS LAW AND EUROPEAN REGULATORY LAW

Current federal law on data protection (LPD) has been superseded by technological and social evolution. The Federal Council intends to adapt it to take this into account, while making the handling of data more transparent and reinforcing the right of all persons to have access to their own data.

A preliminary draft of the LPD revision was submitted for consultation, which was completed on 4 April 2017, and demonstrated the dichotomy between the grievances of those (primarily from economic milieus) who consider it too strict and those who desire better protection similar to the reforms undertaken by the European Union (EU).

On 15 September 2017, the Federal Council published its draft law, accompanied by a message and report on the consultation.

During its deliberations on the revision of the LPD, the Parliament decided to divide the total revision of the LPD into two parts and to deal initially with only the legislative changes necessary for the integration of the Schengen Agreement. The federal law implementing European Union Directive 2016/680 was adopted and entered into force on 1 March 2019. The complete revision of the law on data protection will not enter into force before the end of 2019.

The main changes sought by the proposed revision of the federal law on data protection (P-LPD) essentially replicate the principles of the current LPD while adapting them to European law *(Règlement général sur la protection des données n° 2016/679)* and include:

- Introduction of a new rule: the right to be forgotten through Article 5, al. 4, P-LPD, which provides that personal data be destroyed or rendered anonymous as soon as they are no longer necessary with regard to the purposes of the processing
- Encouragement of self-regulation through codes of conduct that aim to facilitate the activities of those responsible for data processing and to contribute to observance of the legislation (Article 10, P-LPD); these codes conduct are to be submitted to the federal official in charge of data protection and transparency (PFPDT) for approval (Article 10, al. 1 & 2, P-LPD)
- Creation of the obligation to keep a processing register (Article 11, P-LPD)
- Additional requirements related to the communication of personal data to parties outside the country, transmission of these data being permitted only if an appropriate level of data protection is guaranteed (Article 13, P-LPD)
- Establishment of a legal norm regarding the right to access data of a deceased person only if certain conditions are fulfilled (Article 16, P-LPD)
- Establishment of the obligation to report all violations of personal data security (Article 22, P-LPD)

- Reinforcement of the duty to provide information placed on the person responsible for the data processing and a sub-contractor during the collection of personal data, the goal of which is to enhance transparency (Article 17, P-LPD); persons whose data have been collected also have the right of access to that data, which is a subjective right inherent in the person (Article 23, P-LPD)
- Reinforcement of the statute, powers and tasks of the federal official (PFPDT); the draft provides, in particular, for a reinforcement of controls in the sense that the official, sua sponte or upon complaint, will be authorized to open an investigation into the federal body or a private individual if there is credible evidence that data processing could be contrary to the data protection provisions (Article 43 ss, P-LPD)
- Strengthening of criminal sanctions through fines of as much as CHF 250,000 (as opposed to the current maximum of CHF 10,000); sanctions are provided for in case of violation of due diligence, of the duty to observe discretion or of non-compliance with an order of the PFPDT (Articles 54 to 60, P-LPD)

PERSPECTIVES

The LPD revision will also entail a partial revision of other federal laws, such as the criminal code, the criminal procedure code, the law on international administrative assistance in criminal matters and the law on the exchange of Schengen information. On the other hand, the revision does not cover data protection of legal persons, which will especially facilitate exchanges of data with parties outside the country.

The right to data protection continues to have an increasingly important impact on business management, and it is recommended to pay careful attention to this aspect of changes to the LPD particularly and, if necessary, seek competent legal counsel from a specialist in the area.

Contacts: Michael Biot and Anaïs Jacot-Guillarmod

TRANSFER OF TAX RESIDENCE: FRANCE BLOWS HOT AND COLD

Whereas at the end of 2018 the French parliament voted several measures favorable to persons considering expatriation, a recent parliamentary report is making several proposals to the contrary, aiming at restricting departures.

At the end of 2018 – after the final vote on the 2019 finances law – persons considering expatriation from France could breathe a sigh of relief : there was an easing of the exit tax (reduced from 15 years to 2 or 5, with a concomitant easing of the guarantees to be provided) coupled with a conditional continuation of exoneration of the main residence in the event of post-departure sale.

But this has been short-lived : a parliamentary information report dated 17 September 2019 pertaining to « universal taxation » *[l'impôt universel]* is now raising new considerations in opposition to relocation for tax purposes.

The initial objective of this report was to reopen an old discussion in France, i.e. the taxing of non-residents in function of their nationality rather than on the basis of place of residence. This long-running saga, proposed initially by Dominique Strauss-Kahn in 2007, has regularly been revived in the ebb and flow of electoral campaigns and changes of government. This report once again highlights the numerous advantages that a « citizen » tax based on nationality might offer.

Under such a tax scheme, used primarily by the United States (but also by Eritrea and Myanmar), the annual departure of some 500 « major tax payers » in the direction of more tax-favorable countries would have no effect on public finance. Indeed, taxing the 2 million French citizens on the World register of French outside France could even be contemplated !

But such is not the conclusion of this report, and therein lies the major point of interest.

Instead of focusing on a demagogic measure practically impossible to implement in the mid-term (constraints of European law ; obligation to renegotiate over 120 tax treaties ; not to mention setting up a FATCA *à la française*), the report has 11 alternative proposals intended to combat tax exile.

While some may sound far-fetched (a reimbursement loan as a means of contributing to national solidarity for tax expatriates ; the creation of « formal » declaratory obligations to trace French citizens living abroad), others are worth developing.

One such, in particular, is the report's proposal N°3, which aims *« to adapt in France a mechanism of extended tax obligation for nationals moving to tax haven countries, for a period to be defined by the legislature, which could be between five and ten years.*

The principle of **« extended limited taxation »** allows for **an extension of tax obligations of the citizen when the citizen decides to change tax residence** taking up residence in a **tax haven country** (this notion, then, would require a clear definition, taxation at less than 50% of the French rate seeming to be suggested in the report's conclusions).

Several countries have already introduced this « extended limited taxation », thus providing inspiration for the French parliament. Germany comes to mind, as well as Finland, Sweden, Spain and Italy, each of which, with its own particularities, has created a right to follow-up taxation of its citizens.

We might consider the German system, which, since 1972, has allowed taxing a German citizen who has lived in Germany for at least five years in the course of the ten preceding expatriation. The taxation covers all income from German sources, as well as income whose origin is undertermined, for ten years. Only departures to low-tax countries – below one third of the equivalent Ger-

man tax level – are targeted by this measure.

The laws on follow-up taxation cover three years in Finland, four in Spain and five in Sweden.

PERSPECTIVES

Currently, France is between two major tendencies regarding transfer of tax residency. On the one hand, there is a willingness to maintain a certain economic attractiveness for capital and for high potential persons regarding the transfer of tax residency. A drastic easing of the exit tax is a clear message in this direction.

On the other hand, there is an obvious willingness to develop an ever stricter tax regime to combat tax exile and any form of international tax optimization. This position is right in line with European directive DAC6 in favor of greater tax transparency.

In this regard, it would not be surprising to soon find, behind a law on finances, one or several of the provisions targeted in last 17 September's parliamentary report. One might, in particular, imagine that the concept of « extended limited taxation », already known in several of France's European neighbors, will be included in the French General Tax Code (Code Général des Impôts).

We might note here that, regarding the 2020 draft finance law currently under discussion, it is already planned to amend the criteria for residence of managers of major French companies. Article 4 B of the General Tax Code – establishing the criteria for the tax residence in domestic law – would be modified so as to consider that corporate management (directors, chief executive officers et al.) of French groups would necessarily exercise their primary professional activity in France.

In the absence of a tax treaty, they would then be considered de facto resident in France for tax purposes, whatever the length of their stay in France and whatever the country where their family may be residing. A direct consequence of the « Carlos Ghosn » affair (apparently a non-resident in France for tax purposes while he was president of Renault), this legislative amendment could prefigure others in the near future.

Contact : Alain Moreau

FBT Avocats SA
Genève | Paris

www.fbt.ch

Rue du 31-Décembre 47
Case postale 6120
CH-1211 Genève 6
T. +41 22 849 60 40
F. +41 22 849 60 50

4, avenue Hoche
F-75008 Paris
T. +33 1 45 61 18 00
F. +33 1 45 61 73 99