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Summary of the effect on Jersey residents of the French Blacklisting

As at 5th, September 2013.

This is not an opinion or advice, it is a short summary for information, and no steps should be taken in reliance upon it without professional advice. All copyright and intellectual property reserved. It is singularly unwise to rely upon English interpretations of terminology and withholding tax procedures within the French context, as the French system functions very differently from what they term the anglo-saxon model, despite superficial internationalisation. In some areas, the French approach is surprisingly "uncartesian" and pragmatically and conceptually incoherent.

This is a summary of the practical effect for Jersey individuals, companies and trustees of the French unilateral blacklisting, if nothing changes, between now and 1st January, 2014. Please contact Peter Harris for further details and advice on this savage initiative. The unilateral blacklist should have been published in April 2013, not leaving those affected by it a mere three months to adjust. It is probably unlawful, but that is another issue. It certainly appears to be outside the Paris based OECD area of global approval. Again, that is another set of issues which no doubt the Island's representatives are addressing, along with speaking to the French Minister directly on the divergence of opinion as to how far French domestic practices as to "secret fiscal" can be enforced abroad, when they don't tick the right box on the OECD Template Request form.

Barring a retraction by the French, as from 1st January, 2014, Jersey, along with Bermuda, and the BVI will become an *Etat ou térritoire non coopératif* ("ETNC"); a Non cooperative territory.

The French *code général des impôts* ('CGI") discriminates against ETNCs at several layers of the CGI; ranging from changing the burden of proof as to non-avoidance, to application of penalizing and expropriative rates, of 75% increased to over 90%, when combined with the French social security contributions, now recoverable in the same manner as income tax or gains.

The general effect is that outgoing payments from France to Jersey individuals or corporates, including trustees, and investment funds will become subject to the increased rate of withholding

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tax, where that applies. It does not always. So the legal position on each type of payment needs to be checked. Until 2012, the increased and admittedly penal ETNC rate was 50%. However, from 1st January, 2013, the rate increased to 75% of the taxable amount. There can be no residual doubt that that is expropriative, and probably contrary to the various EU provisions on freedom of movement of capital and payments with residents of third countries. Those ramifications are not discussed here, however they are no longer academic.

Trustees will need specific advice on each point, as their position is not the same as an individual taxpayer.

Venture Capital and Private Equity Fund managers will need specific structural advice on this, which it is inappropriate to deal with here.

The majority of transactions and payments affected can be summarised as follows:

1. Salaries paid by a French employer to a Jersey resident remain subject to the article197 CGI rates of withholding, these are as follows:

Rates	*Year*	*Quarter*	*Month*	*Week*	*Day or part of a day*
0 % applicable under	*€14 245*	*€3 561*	*€1 187*	*€274*	*€46*
12 % applicable as from	*€14 245*	*€3 561*	*€1 187*	*€274*	*€46*
up to	*€41 327*	*€10 332*	*€3 444*	*€795*	*€132*
20 % applicable over	*€41 327*	*€10 332*	*€3 444*	*€795*	*€132*

These will also be subject to social contributions. this is simply to illustrate that the rate of 75% is not applicable.

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Whilst the general principle under article 197 CGI is that these rates apply to Pensions as well, the ETNC rules merely refer to "*salaires*", omitting the usual reference to "*pensions et retraites*", which would imply that pension may not be protected from the increase. However, taking the rate increase that for on bona fide pension payments paid by French Pension "*caisses de retraite*" would be entirely disproportionate and undeniably in breach of EU rules of the freedom of movement of payments. Care needs to be taken here.

2. Note the specific artists and athletes withholding tax régime, which is separate to that of employment income. Artists and athletes receiving payments from France via a Jersey vehicle may find the French payment to their employment company in Jersey by the French payer subjected to the higher rate of 75% as this is a separate withholding tax. Subject to the issue of whether pension have been incorporated by omission into the 75% régime, there is no specific provision for other types of salaries to be penalised;

3. Other types of professional earnings, such as self employed income will be subject to the increased rate of withholding on payment to a Jersey resident; unless the recipient proves that the object is not to localise the taxable income in a tax free or reduced tax environment. Compare Andorra. This is not limited to artists and athletes;

4. Dividend payments, and other corporate payments of a similar kind, including jetons de présence and deemed dividends

5. Certain types of interest payments, though not all;

6. Capital gains on sales by Jersey undertakings on French shares to a French undertaking, whether the seller is subject to income tax or corporate taxation;

7. Gains, realised by those falling into the category of marchands de biens, in other words those who deal professionally in buying holding and selling property in a professional manner;

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8. Capital gains on French immovable property, whether held directly or through French intermediate vehicles, it will also apply to transfers of shares in foreign companies, for example, Jersey or British which can be looked through under the société à prépondérance immobilière régime. It is inevitable that sales of interests in SCIs will be caught as will any sale by a French SCI of property when it is owned by a Jersey resident.

9. Capital gains on French shares and investments held directly and possibly indirectly by Jersey residents. It might be more difficult to track indirect holdings, but, for example were a trustee to sell French financial assets held under the financial instruments wealth tax declaration exception, the French might seek information as to the beneficial owners under the TIEA, even though it may not concern one of their residents. It is very unlikely that the disposal would be permitted by a French financial intermediary without divulgation of the beneficial ownership to the French resident purchaser, who pays the money over.

10. The exemptions from the 3% annual tax on immovable property holding companies will also be affected. The effect on real property funds will be significant, as the Blacklistng effectively removes the right to an exemption, in most cases, including most forms of foreign corporate holding whether private or more open. Even some of the more sophisticated Bond based structures out of Luxemburg will need addressing where these are held by Jersey structures, as French Inspectors will be avid to deem the bond to be a disguised form of equity participation, not debt.

Note that, as previously posted, the ownership by any foreign company, indirectly or indirectly of a French immovable right is subject to notarial registration and a duty of 1% in France on a sale of its shares, where its assets comprise indirectly more than 50% French immovable property. That will inevitably generate an enquiry if no capital gains declaration is filed and no Treaty exemption available.

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Note however that the punitive 75% rate will not apply to the deemed income tax assessment to three times annual rental value of those owning residences in France, that will remain subject to the normal rates defined in article 197C CGI.

British and French citizens living in Jersey will therefore be subject to entirely discriminatory provisions. The Protocol 3 to the Act of Accession of the United Kingdom to the European Communities, now Union, 1972 enables these to benefit from the freedoms of movement of capital and payments irrespective of their residence. They are citizens of the Union. Not all of them are "Channel Islanders", who notwithstanding do have a TFEU right to citizenship of the Union and the right of residence defined in that Treaty. It is possible to correlate the two rights and freedoms to deflect certain discriminatory practices which ill perhaps follow on from the changes. The French will have difficulty in discriminating within the Common market and the Union, as the tax avoidance derogations do not stretch that far.

For reference, the following points need to be borne in mind. The ETNC classification has deeper structural consequences:

1. Transfer pricing assessments will now be done on a different basis, which will affect the workings of the common market in goods and agricultural produce exported;

2. The control exercised over French corporate group régimes will change to the punitive arrangements for those having subsidiaries, and also branches within the Islands;

3. Rebuttable disallowance of income and corporation tax deductions for French undertakings making payments to Jersey undertakings and businesses;

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4. Removal of French investment advantages and marketing advantages for fund vehicles established in Jersey;

5. Issues as to the annual 3% Tax on immovable property holding companied and indirect holdings through these need to be addressed.

We are fortunate that actual trading profits between France, Cherbourg and Saint Malo in goods are not, yet, otherwise affected by these measures, as then a potential strategic lifeline could be threatened.

However, it is clear that those EU nationals, working between France and Jersey in the normal manner on a self employed basis may be subject to expropriative taxation, as the punitive rates will apply to personal self-employed remuneration, rather than salaries in general, other than those paid indirectly to artistes and athletes via offshore structures. I stress that the CGI does not require any French employer of a Jersey resident to make any withholding at the increased rate. Neither should the tax rate applied in France to a pension payment from Jersey to a French resident be affected, for the moment. The TIEA is still in force, and therefore the French Pension provider should be exempting the payments from any withholding tax under that agreement, which has not been repudiated by the French. The manner in which the French are adjusting their internal legislation to clip off exemptions which would otherwise be available in principle, is becoming worrying.

This is also a question of citizenship of the European Union, and the rights that are attached to it.

British and French citizens living in Jersey will therefore be subject to entirely discriminatory provisions. The Protocol enables these to benefit from the freedoms of movement of capital and

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payments irrespective of their residence. They are citizens of the Union. Not all of them are Channel Islanders. The payments for example with the scope of the freedom of movement of goods is thereby also potentially jeopardised, at a subsidiary level.

Actual, rather than fictive, residence in Jersey is not tax "avoidance", from the perspective of the freedom of movement of capital and that of payments. However, to what extent the French Ministers' behaviour trickles down to the everyday administration of taxation to the extent that individuals become affected by it, remains to be seen.

It would be unwise to rely upon the overall administration dealing with this in a friendly manner, as whilst the actual treatment and attitude varies between local tax offices, the changes might provoke further toughening of certain offices' attitudes.

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