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The proposed French Trust Register as from 2014 -

*Projet de loi relatif à la lutte contre la fraude fiscale et la grande délinquance économique et financière 2014*

28th November, 2013.

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### As at 28th November, 2013

Article 3 *bis* B of the French *Projet de loi relatif à la lutte contre la fraude fiscale et la grande délinquance économique et financière* will enact the proposed register of trusts for 2014. The provision will substantially amend article 1649AB CGI, which is the statutory basis for the current "event" and "levy" declarations, which until 1st January, 2014 remain as being either a freehand, plain paper basis or on an optional non obligatory form. From 1st January, 2014, that will change from an optional to an obligatory format, and will need to be declared in French language.

Quite how the French Parliament imagines that it and a declaring trustee can find a French word and term for a foreign property law concept which has no equivalent in its own language is another matter. The definition in article 792-0 *bis* CGI is a set of legal<sup>1</sup> - not equitable - relationships and to a concept governed by the Law of a State other than France for which by definition there is no French terminology. Double taxation on separate property law concepts is therefore an issue that will need to be addressed with care, on the basis of *l'intraduisible n'est plus français*. There will be a significant mixture of trust terminology in English and the remainder in French if any semblance of legal accuracy is to be retained.

This is probably the first in a series of attempts by civil law countries to initiate a register of foreign property law arrangements and interests for their own residents. Note that French have signed but not ratified the Hague Convention on Trusts of 1984, and have manifested no intention of so doing. The French tax administration is using an amended Hague definition out of context, and deploys a civil law contractual concept of an "*adminsitrateur*" in lieu of the

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<sup>1</sup> *The Commonwealth Secretariat representative is to be ruefully thanked for his less than helpful addition of the unqualified term "legal" to the Hague Convention definition of set of relationships in the travaux préparatoires dated September 1983, ruthlessly exploited by the administration of a Signatory state, that has not ratified that definition. Compromise by fudge is never a good move.*

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Convention's term in English and French of a Trustee. As the French administration has confirmed that it incorporates legal entities such as Foundations, it is not a Hague Convention definition.

The well-intentioned attempts made at the Hague Convention 1984 to have the trust accepted and facilitate its induction into civil law countries, may have led to its recognition in some states, Italy being one example. However, the French administration have consistently managed to throw spanners in the works at each stage of its induction into French law, as was shown by the devious manner in which they torpedoed the *fiducie* in the years following France's signature of the Hague Convention. They required each bank or financial institution to file a separate return attached to the institutions main tax return of each *fiducie* under its "administration", rather than trusteeship. The resulting paper blockages and risks of errors left the Parliament and the institutions seeking to induct this approach into French law powerless to proceed by fear only of the penalty risks for errors involved and the sheer weight of paper at the time.

The same administration, as a corporation, have managed through its governance at the OECD, to treat the matter as a "moralisation" of a concept that by its very nature is more ethical and moral regulation of respective property rights and interests than the Civil Law manages to achieve. When M. d'Aubert, the Chair of the OECD Peer Review Forum erroneously refers to the moralisation of a trust concept, he had to accept that the Countries which have the concept are perfectly able to distinguish between property law trusts having a bone fide purpose, and the inevitable minority which may have become perverted to other ends. His opinion of their effectiveness should, *moralement*, have been specified as being his own, rather than playing to the French groundlings at the expense of the global gallery.

A comparison of the closed French approach and the Italian open approach to trust principles is very instructive. Italian Courts have approved trusts under court order to provide solutions to civil law insufficiencies.

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❖ **Projet de loi relatif à la lutte contre la fraude fiscale et la grande délinquance économique et financière**

The final French senatorial report on this Bill and its amendments is available on <http://www.senat.fr/rap/112-738/112-73810.html>, and frankly discloses nothing else except the effect of political blind ignorance, its exploitation by a tax administration; and its consequential bad faith. Dealing with minority abuse is one thing, the quasi-religious stigmatisation of an internationally accepted system of property law by a secularised country in an absolute minority both economically and statistically needs no further comment from my part.

This measure is being enacted by the same chapter as introduces the current draconian measures against tax evasion in the current proposal: article 3 of the 2014 Law also addresses criminal conspiracy *en bande organisée* and VAT carousel fraud.

The Bill currently will require declaration of the following, as the Register will list:

- ❖ Trusts declared (despite names not being a requirement under most legislations, as they are not legal entities); and consequently
- ❖ The name of the Trustee(s) (*administrateur*);
- ❖ The name of the Settlor (*constituant*);
- ❖ The name(s) of the Beneficiary(ies) (*bénéficiaires*);
- ❖ The date of *constitution* of the trust

One addition merits attention: Where the *administrateur* has their fiscal residence in France, the requirements appear on the surface to be reduced; however, whether this is anodine or not is another question, as the fact that any "administration" by any French trustee can give rise to an

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entirely distinct tax treatment to that for overseas trusts. Note here that the French administration has already confirmed that Liechtenstein foundations and anstalts can be covered if these fall within the definition of article 792-0 *bis* CGI.

Otherwise the implementing decrees have not yet modified the existing declaration requirements under what will become formalised equivalents of Cerfa forms 2181 Trusts 1 and 2181 Trusts 2. Note however that the change will bring the content of the declaration, and its format under the direct control of the *Ministre*, who is responsible for the structure of the forms. Quite how this is to fit into the underlying French principles of declaration is entirely another matter, upon which I can advise. French *droits d'enregistrement* are fundamentally based on principles of French property law, in a domestic and private international law basis, so care will be needed to distinguish between over declaration of details, and correct declaration of what the *Ministre* has defined as declarable on each official form.

Recalling that there are two declarations, the "event" declaration, 2181 Trust 1 which will be used for gift and succession duty purposes, and also, note for other *droits d'enregistrement*, such as the transfer of indirect movable property interests representing immovables; and the levy declaration, 2181 TRUST 2 which falls more within the ISF context, but which is also inextricably linked into the *Enregistrement régime*.

It is an old principle of French tax law that only what is required to be declared be declared, whether this principle is subject to an exception of *abus de droit*, or *fraus legis*; that is French law in a private international law context is another issue, but note that there are changes in other areas where these principles are applied as well.

#### ❖ So-called SPVs owning French immovables or deemed immovable rights

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Trustees owning French and foreign vehicles to own French immovable property are on notice that they will need to readdress their position immediately, as the French administration are on record for over ten years as stating that they consider a trust interest to be subject to the 3% tax.

### ❖ The Register and its content

A separate decree, n° 2013-949 of 23 October 2013, has confirmed that as from 1st January, 2014, the previously informal declarations of events and the levy either on plain paper, or on non-obligatory forms (Cerfa n°s 2181 TRUST1 and TRUST2) will now become declarable on obligatory forms, and only French language will be permitted. The decree modifies article 16459AB CGI to that effect.

The Register is to be informed from the tax declarations filed on the basis of the modified article 1649 AB CGI will read as follows from 2014<sup>2</sup>, the additions are underlined for ease of reference :

Article 1649 AB

*L'administrateur d'un trust défini à l'article 792-0 bis dont le constituant ou l'un au moins des bénéficiaires a son domicile fiscal en France ou qui comprend un bien ou un droit qui y est situé est tenu d'en déclarer la constitution, le nom du constituant et des bénéficiaires, la modification ou l'extinction, ainsi que le contenu de ses termes.*

*Il est institué un registre public des trusts. Il recense nécessairement les trusts déclarés, le nom de l'administrateur, le nom du constituant, le nom des bénéficiaires et la date de constitution du trust.*

*Ce registre est placé sous la responsabilité du ministre chargé de l'économie et des finances.*

*Les modalités de consultation du registre sont précisées par décret en Conseil d'État.*

*L'administrateur d'un trust défini à l'article 792-0 bis qui a son domicile fiscal en France est tenu*

<sup>2</sup> unless declared unconstitutional, which is unlikely given the anti-evasion classification within which the register is situated.

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*d'en déclarer la constitution, la modification ou l'extinction, ainsi que le contenu de ses termes. » :*

*L'administrateur d'un trust*<sup>3</sup> *déclare également la valeur vénale au 1<sup>er</sup> janvier de l'année des biens, droits et produits mentionnés aux 1<sup>o</sup> et 2<sup>o</sup> du III de l'article 990 J.*

*Les modalités d'application du présent article sont fixées par décret*

*(amendments underlined)*

The remainder of the items declarable are currently defined by decree, and are set out at *Annexe III Code général des impôts* at art. 344 G *sexies* to 344 G *octies*.

The term *recense* means "lists", but has the added implication of a form of census and inventory. It is unclear exactly whether the term *nécessairement déclarés* implies that only those trusts which have to be declared are put on the Register, and that logic may not be clarified until it is too late. It is therefore possible that French resident beneficiaries of Employer funded pension schemes may still need to be declared, as they have not yet been formally released from the event declaration, only from the levy declaration. The notes on the back of the future obligatory forms may confirm this, but the French administration have yet to publicly settle their position on this. However non-employer funded arrangements, i.e. self employed will not escape unless there is a Ministerial confirmation or administrative instruction to that effect. Those who have settled in France on the basis of an EU protection using certain structures proposed by UK advisers, for example a SIPP, may need to take advice on their situation. Contrary to the United Kingdom where these rights are recognised as a matter of principle, France only pays formal lip service to the basic freedom of movement of persons and capital, and generally requires justification that the freedoms are applicable in tax matters.

Note that the current event declaration 2181 Trust1 is available on the Impôts website, but that the 2014 version of Trust 2, for the 2014 Levy declaration, is not yet available. The 2013 version is. However the consolidated versions of the decrees publishing their content are available on [www.legifrance.fr](http://www.legifrance.fr) at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028112367>. These have not

<sup>3</sup> The term "L'administrateur d'un trust" replaces "I": the amendment is not substantial.

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modified the potential scope of the declarations, so it is possible that the *Ministre* may change and require more than the current forms

As the provisions will allow amendment of the decrees implementing the forms and their content, the Register will draw on the items declared, under the amended decrees, rather than being limited by statute. Hence the term *recense ... les trust déclarés* "listing trusts ... declared".

For the moment, the actual trust documents themselves will not need to be filed. Until now that has not been an obligation, and is not yet required by the decree or forms 2181 1 or 2.

The decrees which have been published to date still only to require a summary of the terms of the trust, not the deed or instrument itself.

Whether other documents, such as precatory letters of wishes will also be required in the future remains to be seen. For the moment the term "*contenu du trust*" has not yet been interpreted as a matter of registration formality as requiring the registration of the trust deed or letter of wishes. That tends to happen on investigation. The extent to which such confidential information will actually be published and made available for public inspection is a matter of concern, and will need to be followed.

However this may open up the possibility of defining which modifications are actually "declarable", and which are not, as the issue now becomes one of *enregistrement* of entitlement, transfers and disposals.

It is therefore essential to file "event" declarations confirming the extinction of trust interests in 2013 promptly, and with advice. Note the penalties are of a minimum of €10,000 and if higher 5% of the trust assets, increasing to . Prudence requires that any trust with a French connection be reviewed, and if possible any unnecessary French connection severed or curtailed prior to the coming into force of the Register.

The Register may therefore be implemented from existing materials. whether a rectification facility will be enabled is another issue of concern.

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The concept of a public register of foreign property mechanisms administered by a tax administration, normally bound by strict rules of confidentiality, and subject to penalties of 5% or a minimum of €10,000 for non-compliance is a matter upon which I have been requested not to address in this forum.

It is likely that these Registration and public consultation provisions will be brought into force with effect from 1st January, 2014, and will probably be brought in late in 2014 with retrospective effect to that date, given the prior difficulties that the French administration had in drafting the first set of declarations and implementing decrees after 2011.

I stress that the administration was uncomfortable about administering the register, and it is still possible that the decrees may be amended further.

To summarise, the amendments :

- I. Raise the level of the implementing measure for the declaration of the identity of the constituent/settlor and the beneficiaries from the decree to a statutory basis, to enable the Register to function;
- II. Create the Register, attributing its administration to the Tax administration, or *ministre chargé de l'économie et des finances*; and finally, enabling its consultation by the public under conditions to be fixed by decree;
- III. Will render publicly available at least the following: The trusts declared, the name of the Trustee, the name of the settlor, the name of the beneficiary, and the date of its constitution; *to be confirmed* whether the remainder of the asset disclosures on the event declaration 2181 Trust1 § 7 will also be publicised;
- IV. Deploy a provision to ensure that any French trustees are caught by the general definition at article 792-0 *bis*: CGI. However such a French trustee is only required to declare the constitution, modification and extinction of the trust on the "event" declaration, not the name of the *constituant*/settlor and the beneficiaries. That omission is curious, and potentially discriminatory, and may have the consequence of catching those



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in a position of trustee by virtue of the LPA 1925, and the Trusts of land legislation in 1996, together with any residual Settled Land Act trustees who may reside in France.

- V. Amend the current declaratory profile and content of the two current declarations, to render the forms official and obligatory, and in French.

This will correlate with the decree n° 2013-949 of 23 October 2013 requiring that the trust declarations required be in French and on an official CERFA form.

The decree only modifies articles 344 G *sexies* and 344 G *septies* Annexe III CGI to that extent.

It is unlikely that the French have really appreciated the concept of the English trust of land under the English conveyancing system. It is necessary now to carefully weigh potential administrative cost to any settlor or beneficiary of an English trust of land, who moves to France, and also those still running under the Settled Land Act 1925. Whilst these are arguably immovable interests under PIL principles, and definitely not the type of trusts which the Senatorial commission is intent on eliminating, one cannot now rely on common sense as to recognition of foreign property mechanisms in this area.

#### ❖ **Public consultation of the Register**

Doubtless the extent of the Public consultation regulations will be outlined in due course, but probably not until after this enabling law has been passed.

The Public order issues that this raises are substantial. It will be inevitable that those using trusts in France will become subject to ignorant criticism and, worse, potential hysterical and virulent minority harassment from ATAC related groups or individuals with less 'ethical' motivations.

The politicians pushing this through have responded to those opinionated views, not to common sense or constitutional respect of "*la vie privée*". It may be that those associations, benefitting as they do from the régime 1901 may find themselves forced to restrain themselves in France.



E: [oc@overseaschambers.com](mailto:oc@overseaschambers.com) | Chestnut Farm  
T: +44 (0)1534 625 879 | Mont du Ouaisne  
F: +44 (0)1534 491 195 | St Brelade  
[www.overseaschambers.com](http://www.overseaschambers.com) | Jersey, JE3 8AW

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Peter Harris  
*Barrister in overseas practice*  
LLB. (Hons.) Dip. ICEI (Amsterdam)  
*Revenue Bar Association, Mediator*  
E: [peter.harris@overseaschambers.com](mailto:peter.harris@overseaschambers.com)

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