

The International Tax Letter

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International news and analysis to help you in your international tax strategy.



Focus on: FRANCE: Law introducing "*fiducie*" into French law published



Law No. 2007-211 of 19 February 2007, introducing the concept of "*fiducie*" into French law, amends the French Civil Code and provides for specific tax measures regarding the *fiducie*. Although a *fiducie* may be used for some of the same purposes as an Anglo-Saxon trust, the civil law relating to the two legal bodies is different and the permitted uses of the *fiducie* are limited to management and hedging purposes.

The *fiducie* is an operation by which one or more persons (*constituants*) transfer assets or rights to one or more persons (*fiduciaires*) who own these assets and rights in a separate patrimony (estate) from their own assets and manage these assets or rights according to the provisions of the *fiducie* contract for the benefit of one or more persons (*bénéficiaires*).

Three limitations apply to the *fiducie*:

1. the *fiducie* may only be constituted by companies subject to corporate income tax. The *fiducie* is, therefore, not available to individuals;
2. no donation can be performed by means of a *fiducie*; and
3. the exercise of the *fiduciaire* functions is reserved to certain financial institutions (credit institutions and insurance companies) that are subject to reporting obligations.

The beneficiaries may be individuals or companies. *Constituants* and *fiduciaires* may cumulate their status with that of beneficiary.

As a general principle, the *fiducie* is fiscally neutral, so that the *constituant* remains the owner of the assets and rights for tax purposes. This feature was introduced to avoid any use of the *fiducie* for tax avoidance purposes. The exceptions to the transparency principle are limited to cases where the tax is imposed on an autonomous activity (VAT and business tax) that is constituted within the fiduciary assets (*patrimoine fiduciaire*). The profits of the *fiducie* are included into the taxable base of the *constituant*, according to the transparency principle. The profits are determined and taxed according to the rules applicable to the nature of the activity pertaining to the assets and rights allocated to the *fiducie*.

Contributions of assets to the *fiducie* do not lead to the taxation of latent capital gains at the end of the taxable year. Capital gains or losses are, however, taxable or allowable on

- the transfer of the *fiducie* contract by the *constituant* or
- the disposal of the assets by the *fiduciaire*.

The remuneration of the *fiduciaire* is taxable under the category of business profit.

Opportunities for taxpayers: new legal instrument for management and hedging purposes, fiscally neutral.

EUROPEAN UNION

Commission Communication on work of EU Joint Transfer Pricing Forum on dispute avoidance and resolution procedures and Guidelines for APAs within EU

On 26 February 2007, the European Commission issued a Communication summarizing the work of the EU Joint

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Transfer Pricing Forum (JTPF) in the field of dispute avoidance and resolution procedures and on Guidelines for advance pricing agreements (APAs) within the EU.

The existence within the EU of different sets of national transfer pricing rules is considered one of the major tax obstacles to cross-border economic activities within the Internal Market. Indeed, such inconsistencies give rise to high compliance costs for taxpayers and potential double taxation for intra-group transactions. In order to find a practical solution to this problem, the Commission set up the JTPF. This third Communication of the JTPF is intended mainly to prevent transfer pricing disputes and associated double taxation arising by introducing Guidelines for APAs within the EU.

The Commission has the view that APA Guidelines are an efficient tool for dispute avoidance with advantages for both taxpayers and tax authorities. In particular, as far as the taxpayer's position is concerned, the major benefit stemming from entering into an APA is to be found in the certainty over the taxation treatment of the transactions in the APAs, i.e. the taxpayer knows in advance how to establish the correct transfer pricing as this has been agreed between the tax authorities involved. The tax authorities also benefit from such certainty, as they no longer would have to conduct an audit to set the correct transfer pricing methodology. In addition, the Commission acknowledges that an APA may prevent costly and time-consuming examinations and litigation on major transfer pricing issues for both taxpayers and tax authorities and also avoid exposure to interest payments and penalties.

LUXEMBOURG

New specialized investment fund regime introduced

A new specialized investment fund (SIF) regime was introduced by the Law of 13 February 2007. This new regime replaces the Law of 1991 on undertakings for collective investments (UCIs) and amends the Law of 20 December 2002 on UCIs.

A SIF may be established in a legal form available under Luxembourg law and must have a minimum capitalization of at least EUR 1,250,000, paid-up within a period of 1 year of its establishment. A SIF must publish an audited annual report within 6 months of the end of the calendar year. The assets of a SIF must be valued at fair market value and the determination method must be defined in the management regulations or by-laws.

The new Law substantially broadens the scope of eligible investors. Specifically, the Law states that an investment fund may be established by institutional and professional investors and any other investor, who meets either of the two following criteria:

1. the investment is at least EUR 125,000; or
2. the investment is less than EUR 125,000, but a credit institution, a qualifying investment company or a management company certifies that the investor is informed and aware of the risk connected with the investment.

The Law does not contain any quantitative, qualitative, geographic or other restrictions. This means that the investors may freely determine their investment policies. The only requirement is that the investment policy must be based on risk diversification. There are also no borrowing restrictions.

The tax regime for SIFs is the same as for the funds established under the Law of 1991. Accordingly, a once only fixed capital duty of EUR 1,250 is due when a SIF is established. SIFs are also subject to a 0.01% subscription tax (*taxe d'abonnement*) on their net asset value. There are, however, exemptions for:

- investments in other UCIs governed by the Law of 2002, which have already been subject to the annual subscription tax;
- institutional cash UCIs; and
- pension pooling funds.

INTERNATIONAL MODELS

How to use UK Trust

Offshore trusts have long been used as an effective tax planning tool. High-tax jurisdictions, however, have increasingly introduced blacklists and CFC (Controlled Foreign Company) type legislation, which adversely affects

offshore trusts and companies. A UK trust can, in certain circumstances, be as tax efficient as an offshore trust. At the same time the UK does not appear on the blacklists used by other countries.

Where a trust has one or more UK resident trustees and one or more non-UK resident trustees, the trust will be resident outside the UK for income tax and capital gains tax purposes. This is provided that the settlor has not been resident nor ordinarily resident nor domiciled in the UK either immediately before the settlor's death (if the settlement arose on his death) or any time at which the settlor (or settlors) added funds to the settlement.

Care needs to be taken because a non-UK resident trustee will be treated as if he is resident in the UK if at any time he acts as trustee in relation to a business he operates in the UK through a branch, an agency or a permanent establishment.

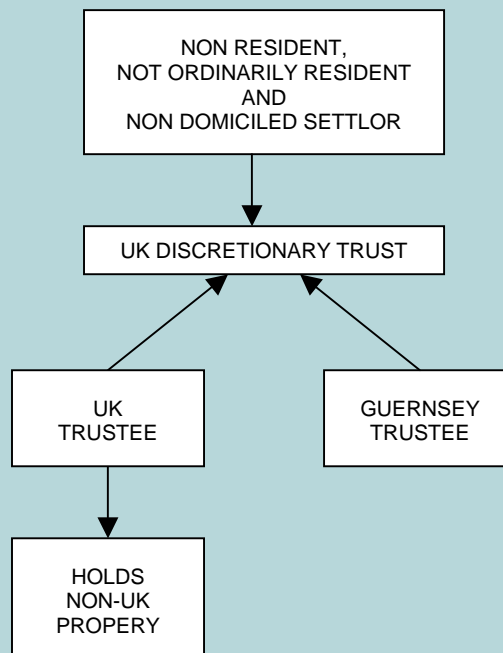
It is possible for assets to be held by any one of the trustees. This means that non-UK property can be in the sole name of a UK trustee, but be exempt from both UK income tax and capital gains tax.

In addition, UK inheritance tax will not be suffered by a UK trust as long as:

- the settlor is non-UK domiciled
- the trust assets are not actually situated in the UK.

A UK trust may be useful where there is a requirement for assets to not only be held within a tax-free vehicle, but also be registered in the name of an entity in a jurisdiction which does not appear on a blacklist.

This can be achieved as follows:



Income and gains will not suffer UK tax in the above example.

