

Register of trusts and privacy: French case law in perspective with the fifth Anti-Money Laundering Directive register

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Abstract

Since the last financial crisis in 2008, a tremendous international movement against tax fraud has been initiated. Because of the current high tax burden, this movement was supported by the idea of a better enforcement of tax rules in order to make tax evaders a fresh source of tax. A corollary of this movement is promoting transparency.

As part of this trend, France decided to create a set of tax rules for trusts, which were ignored by its legislation at that time. Indeed, the *trust* is viewed in France as a legal instrument enabling tax evasion—at least when used by French taxpayers—on the grounds that it could hide the identification of the beneficial ownership.

The trust is viewed in France as a legal instrument enabling tax evasion

In this respect, a French law put in place in 2011¹ a tax regime for those trusts having French connections. In order to ensure the transparency of trusts and allow the taxation of trust assets in the hands of beneficial owners, this law created a trust declaration

whether the settlor, one of the beneficiaries or one of the trustees, is a French tax resident, or when an asset in the trust is located in France. France thus anticipated the need for a complete transparency of these instruments before the European Union has taken an interest in trusts.

Within the same movement, France set up in 2013 a publicly available Register of Trusts. This register is in some ways a precursor of the registries ruled by the fourth Anti-Money Laundering Directive (AMLD 4)² and the fifth Anti-Money Laundering Directive (AMLD 5)³ at the European level. By a decision dated 21 October 2016,⁴ the French Constitutional Court (*Conseil Constitutionnel*) cancelled this Public Register of Trusts.

This case brings to light the ability of the French Parliament regarding public registries that are intrusive provisions, nonetheless, perceived as a positive evolution of the fight against tax fraud and tax evasion. Learning from the decision of the French Constitutional Court, it is possible to wonder about the compliance of similar European provisions with respect to French law.

Learning from the decision of the French Constitutional Court, it is possible to wonder

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1. Amending Finance Act for 2011 no 2011-900 dated 29 July 2011.

2. Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.

3. Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU.

4. Decision no 2016-591 QPC dated 21 October 2016.

about the compliance of similar European provisions with respect to French law

After outlining this case law (section ‘The French case law on the domestic Public Register of Trusts’), we will confront it to the European provisions concerning public registries (section ‘What lessons may be learned from the French case law with regard to the registers provided for in European law?’).

The French case law on the domestic Public Register of Trusts

The creation of a French Register of Trusts anticipating European regulations

The French Parliament adopted a particularly important law on 6 December 2013 to combat tax fraud. Through this law, the Parliament intended to reinforce trusts transparency by compiling, in a public register, the information gathered together in the context of the trust reporting provided by the above-mentioned law of 2011. It can be noted that this measure was not initiated by the French government, but adopted following the submission of a parliamentary amendment.

As stated in parliamentary work, the purpose was to:

provide more transparency on these opaque legal structures through which transits 80% of worldwide tax evasion.⁵

Actually, according to the parliament, the link between trusts and fraud was proven. This lack of confidence vis-à-vis these kind of structures was supported for years by non-governmental organizations (NGOs), who called for a complete transparency with the creation of a Public Register of Trusts similar to the companies register.

Once the law was enacted, an implementing decree had to be adopted by the government for this register to become effective, which happened on 10 May 2016.

Through a recent procedure in France allowing to question the compliance of a law with the French Constitution (*Question Prioritaire de Constitutionnalité*), a US citizen tax resident in France asked the French Constitutional Court the question of whether the public nature of the Register of Trusts complied with the constitution, especially regarding the right to privacy guaranteed by Article 2 of the Declaration of the Rights of Man and of the Citizen (*Déclaration des Droits de l’Homme et du Citoyen*).

Cancellation of the French Public Register of Trusts on the grounds of an infringement of the fundamental right to privacy

In this case, a US national was a French tax resident. Her US trust had been declared to the French authorities by virtue of the aforementioned law of 2011. She argued that access to information relating to the trust in a public register could lead to the disclosure of her testamentary intentions.

Through the *Question Prioritaire de Constitutionnalité*, the case was brought to the French Constitutional Court.

Two constitutional principles appeared to be at stake: on the one hand, the objective of fighting tax evasion and, on the other hand, the right to privacy protected by Article 2 of the Declaration of the Rights of Man and of the Citizen.

In accordance with its pre-existing case law, the Constitutional Court carried out a proportionality analysis on the impact of the Public Register of Trusts with regards to the right to privacy.

On the one hand, the Constitutional Court noted that the public register made it possible to reveal to the public the personal information: as an instrument of estate planning, trust may provide information on the way a person intends to dispose of his/her assets.

On the other hand, the Constitutional Court underlined the lack of supervision of access to the register, on the grounds that:

5. Summary statement, Rectified amendment no 68, Law no 2013-1117.

the Parliament, which did not specify the quality nor the motives that justify consulting the register, did not limit the people that have access to the information in this register, placed under the responsibility of the tax administration.

In those circumstances, the court commented in this decision that:

these disputed provisions have a clearly disproportionate effect on the right to respect for private life with regard to the objectives sought.

Provisions have a clearly disproportionate effect on the right to respect for private life with regard to the objectives sought

The Constitutional Court finally considered that unrestricted and unregulated access to the register of trusts was manifestly disproportionate to the right to privacy.

Its position seems to be in line with its protective previous case law regarding personal data.

As an example, the Constitutional Court had already ruled about a mechanism of a nature somehow similar to the one observed in the Public Register of Trusts,⁶ ie creation of reporting obligations allowing the tax administration to collect information, in a file called FICOVI, on life insurance policies that were subscribed with banks and insurance companies established in France (notably the amount of premiums paid and redemption value of the policies), in order to improve the control thereof.

In its decision, the Constitutional Court recognized that, despite the breach to the right to privacy of such a measure, this infringement was not contrary to the constitution as proportionated.

The absence of disproportion in this infringement was mainly due to the fact that the information collected via these reporting obligations and the FICOVI file were:

at the sole destination of the tax administration which is held incommunicado in the conditions laid down in Article L. 103 of the Tax Procedures Code.

If a register whose data are exclusively for the use of the administration does not disproportionately infringe the right to respect for privacy, then it did not allow so far to determine whether the parliament could extend the circle of recipients of this information, and if so in what proportions.

The decision concerning the Public Register of Trusts brings a welcome light to this question. By merely indicating that the legislator should have specified 'the quality and the reasons for consulting the register', and that it should have limited 'the circle of persons having access to the data in this register', the Constitutional Court does not seem to have wanted to restrict only to the tax administration and other officials involved in the fight against tax fraud access to information relating to the privacy of persons mentioned in the register.

Actually, the Constitutional Court seems to leave the door open for the adoption of a new Register of Trusts or similar registers, access to which could be extended to persons other than officials of state administrations, since they argue a 'quality' or 'reasons for consulting the register'. However, it does not specify to what extent the circle of people having an access can be expanded. In this regard, it should be noted that following the cancellation of the Constitutional Court, the new French Register of Trusts is only accessible to certain specific authorities, such as the French financial intelligence unit (FIU), the judicial authorities, and the tax and custom administrations. The French legislator thus did not want to take new risks by widening too much access to the register.

What lessons may be learned from the French case law with regard to the registers provided for in European law?

The French Public Register of Trusts is today a forerunner in terms of trust transparency. The clarifications provided by the French Constitutional Court lead to wonder about the applicability in France of

6. Decision no 2013-564 DC dated 29 December 2013, Amending Finance Act for 2013.

Register of Trusts set up in accordance with the European law.

The clarifications provided by the French Constitutional Court lead to wonder about the applicability in France of Register of Trusts set up in accordance with the European law

Regarding the register provided for in the AMLD 4

The first European attempt to introduce a register of trusts was embodied in Article 31 of the AMLD 4, which provides for the establishment of a register of trusts, including information on:

the identity of the settlor, the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries and any other natural person exercising effective control over the trust.

Member States had to introduce such a register for any trust 'governed under their law'.

According to this directive, the register must be accessible without restriction to the competent authorities and FIUs and may be opened to 'obliged entities' within the context of vigilance with regard to customers. In all likelihood, as the directive did not provide for a wider publicity, no one else could have access to the information on that register, even persons claiming a legitimate interest.

At the time of the analysis of the case by the Constitutional Court, this measure had not gone unnoticed. However, to the extent that French law does not allow to set up trusts, the provisions of Article 31 of the AMLD 4 have not been transposed into domestic law.

Nevertheless, Article 30 of the said directive, which provides for a central register for companies and other legal entities accessible, *inter alia*, to any person able to demonstrate a legitimate interest, has been transposed into French law. Although the directive does not indicate how these two registers

should be linked together, their combined application may mean that when the beneficial owner of a company or other legal entity incorporated in France in accordance with national law is the beneficiary of a trust, the 'screen' formed by the trust disappears. Consequently, the identity of the beneficiary and the information known on the actual interest should then be made available to any person or organization capable of demonstrating a legitimate interest.

Regarding the register provided for in the AMLD 5

As part of its fight against fraud and tax evasion, the European Parliament adopted a new ALMD 5 on 30 May 2018. In this context, Article 31 has been substantially amended to ensure greater transparency.

In its new version, the connecting factor of Article 31 is now the administration of the trust in the Member State in charge of collecting relevant information, namely the location of the trustee(s). If the trustee(s) fail(s) to be located in a Member State of the Union, then the connecting factor becomes the place of a business relationship or of acquisition of real estate.

While the nature of the information to be communicated has not changed, the list of people having access to the register has been expanded.

First, the AMLD 5 extending access to any person able to demonstrate a 'legitimate interest' would be entitled to access the register and obtain the identity of the beneficial owner and the extent of the effective interest held. Member States are, however, free to allow access to additional information.

Secondly, the AMLD 5 extends access to any person:

that files a written request in relation to a trust or similar legal arrangement which holds or owns a controlling interest in any corporate or other legal entity other than those referred to in Article 30(1), through direct or indirect ownership

For this second route, where one could access to information related to the beneficial owner of a trust if

it controls a legal entity incorporated within the territory of a non-Member State, the directive does not refer to legitimate interest test, hence may grant a broader access to the public.

The Directive, however, introduces the possibility of restricting access to the information contained in the register in the event of exposure to a disproportionate risk of fraud, kidnapping, blackmail, extortion, harassment, violence, or intimidation.

The question then arises as to whether the creation of a new register of 'AMLD 5' trusts, accessible in some cases to third parties, would be considered as compliant with fundamental rights and freedoms. This control takes place both under French Constitutional law and European law.

Creation of a new register of 'AMLD 5' trusts, accessible in some cases to third parties, would be considered as compliant with fundamental rights and freedoms

With regard to the French constitutional review, insofar as the register is provided for by international commitments, the control carried out in France could be limited. Indeed, under French law, if the Constitutional Court ensures compliance with the requirement of transposition of directives, its control is subject to a double limit:

- the transposition of a directive cannot run against a rule or principle inherent in the constitutional identity of France, unless permitted by the Constitution (i) and
- the court must ensure that the legislative provisions of transposition do not clearly infringe the directive which they aim to transpose (ii).

(i) In practice, the fact that the register of trusts is provided for by a European Directive severely limits the review of the French Constitutional Court. Indeed, it could only censor the register of trusts

provided for by the AMLD 5 if the right to respect for private life was a principle inherent in the constitutional identity of France.

However, nowadays, the notion of *principle inherent in the constitutional identity of France* is not clearly defined in constitutional case law. According to the doctrine,⁷ such rules or principles are constituted by those, among the constitutional norms, which reflect the particularity of the French legal order, insofar as these norms would not have an equivalent protection in the European Union legal order.

According to this approach, to the extent that privacy is also a freedom protected at European level,⁸ it is doubtful that this principle is inherent to the constitutional identity of France.

(ii) Therefore, the Constitutional Court would only be able to check if the legislative provisions of transposition do not manifestly disregard the directive which they are intended to transpose.

With regard to the AMLD 5, three questions may arise:

- What would be the connecting criterion used by each Member state?

The French legislator may be tempted, like the public register censored in 2016, to include in the register of trusts all the trusts declared in application of the law of 2011, namely those having a settlor, a beneficiary or a trustee residing in France for tax purposes, or an asset located in France. In doing so, the legislative provisions could be subject to cancellation since the scope of the register would clearly exceed the requirements of the directive, according to which the Member States in charge of collecting the relevant information is the one of location of the trustee(s)'(s) tax residence, or, in the absence of a trustee residing in a Member State, the place of a business relationship or acquisition of real estate. Although the notion of 'business relationship' is not defined, it is doubtful if

7. Edouard Dubout, '“The Rules or Principles Inherent in the Constitutional Identity of France”: a Supra-constitutionality?', about a decision of the French supreme administrative Court dated 8 February 2007, Arcelor Lorraine Company.

8. art 7 of the Charter of Fundamental Rights of the European Union.

it could include the place of residence of the settlor or the beneficiaries of the trust.

- How would be transposed locally the ‘legitimate interest’ test?

More interesting is the question of how the key concept of ‘legitimate interest’, allowing access to the register, will be transposed. Thereupon, it is useful to look at how the same concept was previously transposed into domestic law when it figured in Article 30 of AMLD 4 relating to the register of ‘corporate and other legal entities’.

In French law, access to this register has been framed in this way: anyone wishing to consult it must justify a legitimate interest before the judge in charge of the surveillance of the trade and companies register. Third parties must lodge an application to the Commercial Court, which must specify, under penalty of inadmissibility, ‘the object and basis of the application, as well as the indication of the documents on which it is based’. Following its referral, the court is then free to examine the case to ground its decision on all the facts relating to the case submitted, including those that have not been alleged. At this point, the court has the faculty to hear without formalities the persons able to enlighten its analysis as well as those whose interests may be affected by its decision.

It is clear that the French lawmaker has not defined the notion of ‘legitimate interest’, which constitutes the keystone of the access to the company register. However, this notion seems to be appreciated in the light of the purpose of the AMLD 4, namely the fight against money laundering, the financing of terrorism, and related underlying offenses.

In practice, the assessment of the legitimate interest by the judge in charge of the surveillance of the trade and companies register could, in the absence of a legal framework, be contrary to the spirit of the directive. For example, third parties with a legitimate interest in knowing the identity of a beneficiary (but not acting

to combat money laundering, the financing of terrorism, or related underlying offenses) could then potentially be authorized to access the company register.

Assuming that a similar transposition is carried out in French law for the register of trusts provided for by the AMLD 5, we could then question the adequacy of the transposition law with regard to the directive it aims to transpose, and the right to respect for privacy.

Indeed, the AMLD 5 does not directly define the notion of legitimate interest in accessing the register of trusts, but provides that the Member States must define it in their national law. However:

those definitions should not restrict the concept of legitimate interest to cases of pending administrative or legal proceedings, and should enable to take into account the preventive work in the field of anti-money laundering, counter terrorist financing and associate predicate offences undertaken by non-governmental organisations and investigative journalists, where appropriate.⁹

As a result of this clarification, two observations should be made. First of all, the Member States have the possibility to adapt the content of this notion, without, however, being able to infringe preventive actions of NGOs or investigative journalists. Secondly, the legitimate interest must be understood in the context of the fight against money laundering, financing of terrorism, or related underlying offenses.

Thus, if the French parliament would transpose the notion of ‘legitimate interest’ provided for by the AMLD 5 in the same way as for the AMLD 4, the law of transposition may grant an access exceeding the purpose of the directive. However, does the transposing legislative provisions clearly infringe the directive which they aim to transpose? The issue seems not clearly determined.

If the French parliament would transpose the notion of ‘legitimate interest’ provided for by the AMLD 5 in the same way as for the

9. Recital 42 of the AMLD 5.

AMLD 4, the law of transposition may grant an access exceeding the purpose of the directive

Assuming that the Constitutional Court is able to control the conformity with the constitution, it should be recalled that by its decision dated 21 October 2016, the court specified that a new register of trusts could be complying with the constitution, provided that the access is restricted to persons who have a 'quality' or 'motives that justify consulting the register.' Therefore, the question of the validity of a new register leads to examine whether or not the limited access to persons justifying a legitimate interest—in a wide meaning—infringes the right to respect for privacy. This question is so far unprecedented.

In parallel, any person wishing to challenge the validity of this register of trusts could also bring the case before the domestic court and request the transmission of a preliminary ruling to the court of justice of the European Union in order to, primarily, question the validity of the register as provided by the AMLD 5 and, in the alternative, ask how to interpret the concept of legitimate interest within the meaning of the AMLD 5.¹⁰

According to the answer given, this would be an opportunity to highlight either the non-compliance of the AMLD 5 trusts register system, or the possible non-compliance of the domestic transposition law, if it extended more than necessary access to the register of trusts.

In the context of such an analysis, it should be recalled that Article 52 of the Charter of Fundamental Rights of the European Union provides limitations that may be made to the exercise of the rights and freedoms recognized by the charter only if they are necessary and effectively fulfill objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others. The Court of justice of the European Union should then determine whether the mechanism for access to the register of trusts provided for in Article 31 of the AMLD 5 is

proportionate to the objective sought by the directive. On this point, the powers of restriction to access to the register referred to in the directive, whether to justify a legitimate interest or to avoid a serious risk, seem to be in line with a search for proportionality regarding the objective pursued. However, is the principle of respect for privacy sufficiently protected with regard to the exemptions?

Assuming that the answer is positive, it seems that it is then the law of transposition that should be analysed by the Court of justice of the European Union to make sure that the adopted domestic provisions did not go beyond what was necessary in view of the purpose of the Directive.

- Is the general access granted for trusts controlling a non-EU legal entity valid?

As indicated previously, the appropriate recourse to analyse the validity of the general access granted for trusts controlling a non EU legal entity will be determined based on the transposition law.

If the law sticks to the directive provisions, it is likely that French jurisdiction will not be competent to lead such an analysis but will refer a preliminary ruling to the court of justice of the European Union.

The question would then consist in determining if a general access in case of trust controlling a non-EU legal entity—which are not in the scope of the central register for companies—is proportioned to the objective of fight against money laundering, financing of terrorism, or related underlying offenses.

The philosophy of this general access can certainly be understood as a supplement of the central register for EU companies, in a way to somehow provide information on beneficial owners of non-EU companies that would not be available otherwise. However, from a practical standpoint and if ever an individual would learn of the existence of a trust in these circumstances, the public could get a broader access to information on trusts that hold non-EU companies, than to trusts that hold financial or real estate assets directly, where

10. In particular, CJEU, 22 October 1987, Foto-Frost, case referenced 314/85.

the features of the trust would only be accessible to persons with legitimate interest.

As indicated previously, the question would then be between the hands of the Court of justice of the European Union, to balance between the need of transparency and the respect for privacy. But there, as the legitimate interest test is not applicable, it would maybe more tricky for the court to validate this general access for trusts controlling a non-EU legal entity.

In conclusion, the question of the conformity of the register of trusts provided for by the AMLD 5

with regard to the right to respect for privacy is currently pending. This question will be largely influenced by the transposition that will be carried out by the Member States. It is therefore necessary to be patient and to wait for the adoption of appropriate measures.

In conclusion, the question of the conformity of the register of trusts provided for by the AMLD 5 with regard to the right to respect for privacy is currently pending

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