

# Decision of the French Constitutional Court number 2016-591 QPC of 21 October 2016 ‘Mrs Helen S’

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## Introduction

The French Constitutional Court was requested to answer a priority constitutional question (QPC) by the French State Council (Order number 400913) on 22 July 2016. The QPC was asked by Mrs Helen S as to the constitutionality of the second line of Article 1649 AB of the French tax code, as amended by Act number 2013-1117 of 6 December 2013, relating to the fight against tax fraud and high profile economic and social criminality.

In its Decision number 2016-591 QPC of 21 October 2016, the French Constitutional Court ruled in favour of Mrs Helen S’s QPC and declared the second line of Article 1649 AB of the French tax code unconstitutional, as of the date of the publication of its decision, 23 October 2016.

The second line of Article 1649 AB of the French tax code, as amended by Act number 2013-1117 of 6 December 2013, introduced a public trust registry in France. Even though the French Constitutional Court did consider that second line to be unconstitutional, it did not consider the public trust registry to be unconstitutional in itself, but rather the lack of limitations as to the persons allowed to consult the registry and the lack of consideration given to the privacy interests of the persons listed in the registry.

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## The legal provision challenged

Article 1649 AB of the French tax code, introduced through Act of 29 July 2011, provides for two disclosure obligations regarding trusts:

an ‘event based’ tax return, when the trust is being set-up, modified or vested;

an ‘annual’ tax return, as to the value of the assets and the income generated in the trust.

Presented in a simplified manner, disclosure obligations are generally to be complied with by the trustee, when he, the settlor or one of the beneficiaries has a tax residence in France, or when the trust holds assets in France. Failure to comply with the disclosure obligations can lead, amongst other things, to a fine ranging up to 12.5% of the capitalized assets held in the trust. The trustee, settlor and certain beneficiaries are jointly liable for this fine.

Act number 2013-1117 of 6 December 2013, amending the second line of said Article, introduced a public trust registry, containing the identity of the settlor, trustee and beneficiaries, as well as the date of creation of the trust.

Articles 368 to 368 C of Annex II of the French tax code, created by Decree number 2016-567 of 10 May 2016, detailed the information that could be accessed, even extending some of the information to be provided when compared to the elements listed in Article 1649 AB of the French tax code. The decree also detailed how the information could be accessed,

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granting in principle general access to the registry. The records are kept for 10 years after the vesting of the trust.

An Order of 21 June 2016 made the trust registry accessible as of 4 July 2016, but this order and thus the accessibility to the registry were barred as of the decision of the French State Council of 22 July 2016, to submit Mrs Helen S's QPC to the French Constitutional Court.

## The QPC of Mrs Helen S

Mrs Helen S is an American citizen and tax resident of France. She had set up several trusts in the USA, and, as a French tax resident, her trustee had to comply with the French disclosure requirements of Article 1649 AB of the French tax code.

Mrs S asked the French State Council in a fast-track procedure to suspend the execution of Decree number 2016-567 of 10 May 2016, relating to the public trust registry. As basis for her demand, Mrs S asked the French State Council to submit to the French Constitutional Court her QPC, since she was of the opinion that Article 1649 AB of the French tax code disproportionately violated her right to privacy, protected by Article 2 of the *Declaration of the Rights of Man and Citizens* of 1789.

Mrs S claimed that by making public, without any real restrictions, certain private information in the registry, specifically the identity of the beneficiaries of the trusts she had set up, would show how she chose to organize the distribution of her assets after her death.

Mrs S also argued that the provision would violate the equality principle.

The French State Council submitted the QPC to the French Constitutional Court, deeming it sufficiently serious.

## The constitutional analysis

The French Constitutional Court only analysed the argument of the violation of Mrs S's privacy and

did not examine the other legal arguments presented by Mrs S.

### **The constitutional protection of privacy**

According to case law, Article 2 of the *Declaration of the Rights of Man and Citizens* of 1789, which states that '*The goal of any political association is the protection of the natural and eternal rights of men. These rights are liberty, property, safety and resistance against oppression*', generally grants protection of privacy (French Constitutional Court: Decision number 99-416 of 23 July 1999; Decision number 99-419 of 9 November 1999).

In reference to Article 2 of the *Declaration of the Rights of Man and Citizens* of 1789 and its protection of privacy, the French Constitutional Court observed in the present matter that any collection, recording, keeping, checking and transfer of personal data must be justified by a public interest and be executed in an adequate and proportionate manner toward that public interest.

The French Constitutional Court noted that Article 1649 AB of the French tax code requires the gathering in a public registry of the names of the settlor, trustee and beneficiaries, as well as the date of creation of the trust.

### **The public interest of the fight against tax fraud**

The French Constitutional Court accepted the argument of the State that the aim of the registry is to tackle tax fraud and money laundering.

In the official court comments to the present decision of French Constitutional Court, reference was made to reports of Transparency International France, which asserted that 80 per cent of illicit tax evasion is organized through trusts. Also cited was a 2003 report issued by the Financial Action Task Force, requesting that the member jurisdictions take action to facilitate the access to the information in relation to trusts. Finally, directive 2015/849/EU of 20 May 2015 aimed at preventing money

laundering seems also to have been taken into consideration.

### ***The lack of adequacy and proportionality***

The Constitutional Court in the present decision concluded that a public registry giving access to the names of the settlor, the trustee and the beneficiaries of a trust, gives information as to how one intends to structure his assets. This constitutes a violation of one's privacy.

The Court further notes that the legislature: did not specify the quality one needs to have, nor his motives, to consult the registry, and did not limit the circle of persons that can access the registry that is under the responsibility of the French tax authorities.

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As a consequence, the Court concluded that line 2 of Article 1649 AB of the French tax code is unconstitutional, and thus not applicable, as it is a disproportionate violation of the protection of privacy.

As indicated in the introduction, it should be noted that the French Constitutional Court did not consider the public trust registry unconstitutional *per se*.

It is therefore very likely that the French government will put in place new draft legislation to reinstate a public trust registry, possibly before the end of this year as an amendment to the current draft finance bill, but this time with some caveats as to the persons allowed to access such a registry, to comply with the present Constitutional Court ruling.

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