CAN FOREIGNERS INVEST FREELY IN FRENCH POLYNESIA? CONSEQUENCES OF THE FRENCH CONSTITUTIONAL COUNCIL DECISION

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Investment projects especially in tourism are currently booming in French Polynesia and the future prosperity of the Territory relies largely on their success. However foreign investments remain highly controlled by the territorial authorities. The measures adopted by the Territorial Assembly on 21 November 1996 despite, or as a consequence of, decision 96-373 of the French Constitutional Council, set out all the legal requirements for foreign investors in a way which leads to strong reservations as to their validity and their practical implementation.

I INTRODUCTION

The geographical situation of French Polynesia appears to be an advantage. It is a privileged location at the centre of the Pacific Ocean which is generally described as the economic zone of the 21st century. Situated halfway between Los Angeles and Sydney, French Polynesia is an ideal stopping place on the routes which link the west coast of the United States to Australia, and it is beginning to establish itself as a place for leisure activities especially in the tourist industry. Tourism has for years been the principal industry of the Territory. Whole islands such as Bora Bora, Moorea, and Rangiroa, rely exclusively on tourism.

This activity has attracted many foreign investors and so far 40% of the main hotels are controlled by foreign companies, mainly Japanese.

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In 1996 the Pacific Testing Centre, called CEP,[1] having gradually reduced the volume of its activities since the 1970s, withdrew definitively from Mururoa, the strategic site where the French nuclear testing took place.

The question of life after the CEP[2] and the reconstruction of a less dependant economy economic compelled the French and the Territorial Governments to create bases of development aimed to reduce imports and to encourage a degree of self-sufficiency for the Territory. This new orientation demands large capital sums that can only[3] be achieved by opening up French Polynesia to the outside world in order to attract more foreign investments and capital.[4]

The 1984[5] statute for internal autonomy of the Territory confers very extensive powers on the local leaders. Notably they have responsibility for choosing partners in economic matters and for regulating all foreign investments made in the Territory.

Among the many amendments which have been made to the 1984 statute on the Territory of French Polynesia, Law 90-612 of 12 July 1990[6] and Law 96-312 of 12 April 1996[7] introduced a rearrangement of the provisions relating to the powers of the Territorial Government and of its members.

It was as a result of this that the original provisions, which aimed at authorisations given by the Council of Ministers for "the transfer of immovable property when the transferee is a civil or commercial company",[8] were redrafted in a way which went beyond simple refinements of a formal kind.

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1 Centre d'essais du Pacifique. On the impact of the Pacific Testing Centre on the economy of French Polynesia, see P. De Deckker "Decolonisation Processes in the South Pacific Islands: A Comparative Analysis between Metropolitan Powers" (1996) 26 VUWLR 368.

2 Vernaudon "Le Statut du Territoire et le Pacte de Progrès" (1996) 26 VUWLR 373.

3 France has agreed to help the territorial economy for a ten year period starting in 1997.

4 On the investment regime of French Polynesia, see Y-L Sage "The Investment Law of French Polynesia" *Essays on French Laws in the Pacific* VUWLR Monograph 8 , 1993.

5 On the constitutional structure of the Territory of French Polynesia, see B. Gille and Y-L Sage "The Territory of French Polynesia" in *Essays on French Laws in the Pacific* above n 4.

6 Above n 5, 1 to 3.

7 J. O. R. F 13 April 1996,p. 5693. Amended by Law 96-624 of 15 July 1996, J. O. P. F n 25 of 18 July 1996, p.1204.

8 Article 26-14 and 26-15 in the Law of 1990 , which became article 28 -13 and 28 -14 in the Laws of 1996.

The result of the 1996 Law was that under article 28 the Council of Ministers of the Territory:

§ 13 Shall authorise, on pain of nullity, every transaction which has the effect of providing an inter vivos transfer of immovable property or of the social rights relating to immovable property, unless the beneficiary is a French national resident in French Polynesia or, in the case of a artificial legal person, has its domicile there; the authorisation is equally needed for the transfer of company shares when the immovable property or immovable property rights amount to 75% or more of the total assets of the company;

§ 14 In the cases provided for in paragraph 13, has a right of pre-emption in the name of the Territory over all immovable property or the social rights involved subject to paying those entitled the amount of the immovables in question; where there is no agreement on these matters the value will be fixed as in a case of expropriation.[9]

The obvious concerns which lay behind this text were the same as those that motivated the original text of 1984[10] (that is to say to reserve to the governmental authorities of the Territory the possibility of controlling immovable property transfers that involved foreigners (particularly in the hotel sector)). However the new text, because of its more extensive formulation, gave rise to a series of questions concerning the range and effect of the provisions and their operation in practice.[11]

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9 Article 28, Article 24 and following in the Law of 1990, became article 28 and following in the Law of 1996.

10 Article 26 § 11 of the Law of 1984.

11 See for example criticisms raised in 1991 during the first roundtable discussions on the law of French Polynesia, about the limits and risks attached to these provisions. "[T]he text was conceived, it would seem, with the purpose of granting to the territorial government a control over investment from abroad, but paragraphs 14 and 15 of article 26 had many defects which are typical of this type of provision. There is no doubt that if the territorial government seeks to use in any systematic manner the possibilities offered by the 1990 reform in order to control the transfer of shares to which article 26 § 15 relates, the difficulties outlined, are likely to result in judgments against the government by the court.....Further when the many basic concerns with article 26-14 and 15 are remembered, it is clear that this law will be used with a great deal of circumspection by the territorial government". Y-L Sage "Les cessions d'actions des sociétés commerciales dans le statut de 1990" in *Première Table Ronde sur le Droit Territorial* Papeete, 1991.

The 15 March 1996, before the promulgation of the law of 1996, the French Prime Minister asked the Constitutional Council,[12] to rule on its constitutionality.

In its decision of 9 April 1996[13] the Constitutional Council, having previously noted that they were substantial amendments of the 1984 provisions, stated in relation to article 28:

> Considering that in terms of paragraph 13 of Article 28 the Council of Ministers of the Territory must under pain of a nullity approve every transaction which has the effect of an inter vivos transfer of immovable property or of related rights except if the beneficiary is a French national and domiciled in French Polynesia or, in the case of an artificial legal person, has its chief place of business is there; and that in addition the transfer of shares in commercial companies requires the same authorisation when immovable property or interests in immovable property constitute "75 percent or more of the totality of the assets of the corporation"; considering that this provision substantially modifies the regime for the authorisation of a transfer of immovable property that was instituted by paragraph 11 of Article 26 of the law of 6 September 1984 which related to the status of the Territory of French Polynesia; and that it is necessary therefore to examine the provision for its conformity with the constitution; considering that paragraph 13 of Article 28 sets up a discretionary regime for the prior authorisation for any transaction involving the transfer of property which can concern many categories of rights without stating the reasons by reference to which the Council of Ministers should in judicial terms base its decision; and that these approvals which are required to avoid the nullity of the transfer transaction in question amount to direct restrictions on the right to dispose of property which is an essential attribute of ownership; and that such restrictions are of such a serious character that the limitation on the right to property which results changes the meaning and operation of this right which is guaranteed by Article 17 of the Declaration of the Rights of Man and of the Citizen; and that there is therefore reason for the Constitutional Council to declare paragraph 13 of Article 28 of the Organic Law contrary to the Constitution and therefore in the text of paragraph 7 of Article 6 of that law also the words "and subject to the provisions of Article 28-13.
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> Considering that paragraph 14 of Article 28, which allows the Council of Ministers, in the cases provided for in paragraph 13 of the same Article, to exercise a right of pre-emption in

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12 Since the law of 1996 was declared an organic law, it had, before coming in force, to be submitted to the Constitutional Council, for a ruling on its constitutionality. On articles 46 and 61-1 of the French Constitution, see J Bell *French Constitutional Law* (Clarendon Press, Oxford, 1992) 31; L Favoreu *The Constitutional Council and the Parliament in France, Constitutional Review and Legislation: An International Comparison* (C. Landfried ed, 1988) 81-108; F Luchaire and G Conac *La Constitution de la Republique Française* (2 ed Economica, 1987) 899 to 914, 1111 to 1127.

13 Decision no 96-373 DC of 9 April 1996.

the name of the Territory of immovable property or the related rights in question on condition that the interested parties are paid the value of the said goods is not severable from paragraph 13; and therefore paragraph 14 of Article 28 of the Organic Law must be declared contrary to the Constitution.

This statement of principle, which was entirely predictable,[14] forms part of the strict application of constitutional principles which had previously been confirmed by the case law in similar matters.[15]

It is therefore quite logical that the Constitutional Council had decided that the provisions of paragraphs 13 and 14 of article 28 involved a patent violation of the right to dispose because of the discretionary nature of the authorisation which amounted to a derogation from the right of ownership on the one hand and the absence of justification in the public interest on the other.

Beyond the violations of constitutional principle, paragraphs 13 and 14 of article 28 also raised important reservations as to their application in practice and their compatibility with the rules of European Community law. This being the case, and account having been taken of the social and political implications of the decision of the Constitutional Council, the Territorial institutions adopted on 21 November 1966[16] a regulation with similar objectives to those of paragraphs 13 and 14 of article 28 of the law of 12 April 1996. However this text suffers from the same weaknesses as the law of 12 April 1996.

II THE VIOLATION OF THE RIGHT TO DISPOSE OF PROPERTY INTRODUCED BY PARAGRAPHS 13 AND 14 OF ARTICLE 28 OF THE LAW OF 12 APRIL 1996

The Constitutional Council criticised in severe terms what it considered to be "direct restrictions on the right to dispose of property which is an essential attribute of ownership"; adding "that such restrictions have a character of such seriousness that the limitation on ownership which results from them changes the meaning and extent of

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14 See above n 11.

15 Property is among the four rights that art 2 of the Declaration of the Rights of Man and the Citizen describes as "natural and imprescriptible" and is recognised as equal to the liberty and the resistance to oppression. See, decisions of the Constitutional Council of 18 October 1961, of 16 January 1982, and of 26 July 1984.

16 Délibération 96-141 APF du 21 Novembre 1996 portant réglementation des investissements étrangers en Polynésie Française, J.O.P.F 5 December 1996, p. 2110 et 2111.

operation of the right guaranteed by article 17[17] of the Declaration of the Rights of Man and the Citizen".

Furthermore, the discretionary character of paragraphs 13 and 14 of article 28 were obviously accentuated by the ambiguity of the terms used in order to determine the rights which are the subject of the text. This led the Constitutional Council to note and indicate without other detail that "they can refer to very many different categories of rights".

A On the drafting ambiguities in paragraphs 13 and 14 of Article 28 of the law of 12 April 1996

The text was formulated in an ambiguous way which could be the subject of legal debate. Further it would have been difficult to apply in practice.

From a simple reading of the provisions, certain drafting inadequacies, and even confusions, could be observed.

The first part of § 13 appeared to lay down a general principle that prior authorisation was obligatory for every inter vivos transfer of immovable property whether directly or by way of a transfer of social rights, subject to certain limited exceptions such as those in favour of a French national who is domiciled in French Polynesia or of a artificial legal person which has its domicile there.

The generally agreed meaning for the expression "social rights",[18] enabled it to be inferred that the application of the authorisation regime extended to transfers of portions of an interest as it does to shares. This then raised the question of the meaning of the rest of the paragraph. It seemed to provide a particular regime for the types of company identified in that section.

The use of the word "equally" in the passage also gave rise to ambiguity. It could be understood as indicating the desire of the legislator to clearly distinguish between a limited company and other types of company.[19] The benefit of a dispensation from authorisation (in the case of a company domiciled on the Territory) would therefore be reserved for the latter companies.

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17 Article 17 states that" Property being an inviolable and sacred right, none can be deprived of it except when public necessity, legally determined, obviously requires it, and on condition of a just an prior indemnity".

18 J F Artz *Encyclopédie Dalloz* "Sociétés" Action, n 1.

19 On the different types of company in French law, see J Le Gall *French Company Law* (Oyez Publishing London, 1974) 5-43.

But another interpretation could have been placed on § 13. This approach also recognised the value of the first phrases as a general principle subject to certain exceptions: The principle would not apply unless the companies concerned have assets which were constituted 75% or to greater extent by immovable property or interests in immovable property.

The second approach led to the important consequence that the provision did not apply to any company whose assets were below the given threshold. The transfer in those cases would therefore be free of the need of authorisation in this situation.

A third and more focused interpretation also involved an ambiguity. This third interpretation restricted the first part of the text to civil companies. It is well known that the business world accumulates immovable property by such arrangements because it is much simpler to deal with shares in a company than with immovable property. In this case authorisation would nevertheless have been needed because the transfer relates to immovable property or related social rights as the law indicated.

However in the case of any immovable property which was part of the company assets the authorisation would be needed only in the case of a commercial company limited by shares and to the extent that a particular transfer related to the immovable property (since a minimum proportion is the 75% required by the law). This analysis would obviously give a great advantage to a commercial company and would even lead to the dispensation from the need for authorisation for those that have not adopted the form of company limited by shares.

B On the legal significance of § 13 and § 14 of article 28

The clear understanding of § 13 of article 28 was difficult. Moreover an examination of §14 did not clarify matters. In providing for the rights of pre-emption for the benefit of the territorial government, the law restricted itself to providing for the right of pre-emption (on immovable property or of the social rights in question) without other detail.

The difficulties already described were increased by the expression "inter vivos transfer of immovable property or social rights relating to it". Given the nature of the terms used, it was not impossible to think that the legislator wished to deal only with the transfer of an immovable property in its entirety. This would lead to an exemption from authorisation for any transfer of a part of an immovable property.

It was however difficult to see why companies limited by shares should be submitted to a particular and different regime since as it has been noted, it was possible to avoid the authorisation clause where the immovable property represented less than 75% of the assets of the company. Also once the limit of 75% was attained, the transfer would not be the

subject of authorisation other than in the case of the exceptions provided in the first part of § 13.

These then were the drafting difficulties presented by § 14. What then of the legal significance?

The limitations imposed by § 13 and § 14 of article 28 related principally to the transfer of interests in companies.

More precisely it was shares in commercial companies which were the focus of attention of these paragraphs. Since transfer might be impossible without authorisation in some cases, it was opportune to consider the legal significance of the provision in the context of the rules relating to the property in question.

Though the legislator has never precisely defined the notion of "share",[20] theory and case law are unanimous in the view that transferability and negotiability are two special characteristics of a share and thus distinguish shares from other interests in property.[21] According to article 271 of the Law of 24 July 1966,[22] negotiability is the norm once the company is registered in the company register.[23] For the theorists this is a matter of public policy because they see in negotiability the essence of the share. The Commercial Chamber of the Court of Cassation considers negotiability as essential for limited liability companies;[24] this approach has not been challenged for some long time. Further the laws relating to the de-materialisation of movable property in France have accentuated this negotiability.[25]

It is nevertheless recognised that "the restriction of negotiability of shares is not prohibited. Free negotiability is not an aspect of public policy and it is therefore possible to derogate from that freedom not only in the cases and subject to the conditions expressly

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20 Law number 88-1201 of 23 December 1988 which relates to organisations for the collective placement of moveable property, which it is true relates only to the application of this particular text, provides in Article 1 a definition which has the characteristics that one attributes to shares. P Merle *Droit Commercial "Sociétés Commerciales"* (2 ed Precis Dalloz) n 276. *Memento Pratique* F Lefebvre "Sociétés Commerciales" 1993, n 2585.

21 Ripert and Roblot *Traité de droit commercial* (LGDJ, 1989) n° 1252.

22 Law 66-537 of 24 July 1966.

23 J F Artz above n 18, n° 30.

24 Cass Com 22 October 1969, Bull Civ IV, 290; Rev Soc 1970, 288.

25 Law 81-1160 of 30 December 1981. Since 1 October 1982, only corporations listed on a stock exchange may issue or have outstanding shares in bearer form. Those corporations that are not listed had to convert their shares into nominative form before the 1 October 1982. Moreover all shares must be represented by an account opened under the bearer's name in the corporation's books, all transfers being simply recorded by the registration from one account to another .

provided by legislation but also by way of legal or extra-legal convention where legislation does not expressly provide any derogation".[26] And so, though in principle shares are freely transferable, in practice they can often temporarily be non-transferable.

A restriction could be of legal origin. It could for example be a question of rights subscribed for or bought by the employees of a company in the context of their share entitlement,[27] or of a rights which have been granted within the framework of work participation in the profits of the company.[28]

The restrictions which arise from convention are however the most frequent: Clauses of pre-emption for the benefit of shareholders or more exceptionally clauses prohibiting transfer which are justified by a legitimate commercial interest of the company. The transferability of a share is therefore subject to frequent variation. But it remains notable that in none of these cases, is the restriction on negotiability total because the restrictions are limited in time or subject to removal. A shareholder can never be prevented from withdrawing from the company. As a matter of principle a shareholder can never be prisoner to its property rights in shares.

The provisions of § 13 and § 14 of article 28 needed to be considered against this background. There were two matters for consideration — the jurisdiction of the legislator to make these changes, and the substance.

1 *The jurisdiction of the legislator to make the changes*

As far as the power of the French legislator, as opposed to the power granted to the Territorial Assembly,[29] is concerned there was never any question of restricting or limiting the free negotiability of shares.[30] There was a question however, whether the powers of control or of pre-emption given to the Council of Ministers of the Territory by this provision were not powers which remained within the sphere of competence of the State as those are defined by article 6 of the law of 1996.[31]

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26 M Jeantin "Les clauses de préemption statutaires entre actionnaires" Droit des Sociétés, July 1990, chr 190-244.

27 Non-transferability for five years, art 208-16, para 1 of the Law of 1966.

28 Rights which are frozen for five or three years, art 13 of Ordinance 86-1134 of 21 October 1986, D 1987, L 298, JCP 1987, III, 491.

29 Above n 5, 10.

30 See eg above nn 27 and 28.

31 Formerly art 3 of Law 84-820 of 6 September 1984.

Although partially modified by the Law of 12 July 1990 and the Law of 12 April 1996, article 6 has retained the authority of the State over the "civil law to the exclusion of civil procedure... the fundamental principles relating to commercial obligations".

The text appears to restate a principle set out in article 34 of the Constitution of the Fifth Republic which states that "legislation determines fundamental rights ... relating to property, real rights and civil and commercial obligations".[32]

Since the Law of 24 July 1966[33] is one of the two basic legislative texts relating to companies it appears to fall within this category. Moreover, and this was well before the enactment of the new text, the Constitutional Council in a decision of 14 October 1960 which related to companies said that "legal provisions, authorising significant derogations from the common law relating to limited companies, concern fundamental principles of commercial obligations and are therefore within the field of application of article 34".[34]

In the absence of any express abrogation of the principle, it could however have been considered by virtue of the rule that *Specialia generalibus derogant,*[35] that article 6 of the Law of 1996 was modified by § 13 and § 14 of article 28.[36] An even more generous line of reasoning would suggest that the provisions of 1996 were only rules relating to the application of the provisions of article 6 which therefore was not radically changed by this law.

However doubt remains when the focus shifts to the legal nature of the transfer of shares.

As a matter of principle this is a civil transaction and therefore the evidentiary rules of civil law apply and jurisdiction rests with the civil courts.[37] Therefore the rules applicable to such transactions remained also a matter within the control of the State. As far as the Court of Cassation is concerned, the transfer can take on a commercial character only when it has the result of ensuring the transferee of control of the company.[38]

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32 See J Bell above n 12, 182 ; F Luchaire and G Conac above n 12, 768, 769.

33 See above n 8.

34 Constitutional Council , D 1961, note Hamond.

35 The specific derogates from the general.

36 The same reasoning applies for art 3 of the Law of 1984 which has been modified by the provisions of art 26-14 and 26-15 of the 1990 Law.

37 Cass Com 5 December 1966, D 1967, 409, note J Schmidt.

38 Cass Com 28 Nov 1978, D 1980, 316, note Bousquet.

The question then arose, concerning this civil or commercial aspect (which depends on the extent of rights conferred), of the role of article 28 § 13.

It was possible to see in it a simple case of the legislator modifying an earlier law by a new one. But it was nevertheless possible that the goal of the State was to transfer some of its prerogatives as they related to the civil law which in particular concerns the general rules of company contracts.[39]

2 *The substance of the provision*

When attention is turned to the substance of the provision, it is possible that the limit on the negotiability of the shares was the major reservation made in respect of the reform brought in by the Laws of 1990 and 1996.

The text had to be understood in the context of the meaning and range of application of the principle of negotiability of shares.

The principle was not expressed by article 271 of the Law of 24 July 1966 in terms any more definite than the power of disposition given to any owner by article 544 of the Civil Code.

Therefore, it is usual to assess the restrictions placed on an owner against the rule derived from the free negotiability of shares. The case law has extended well established principles of law to shares and rights in companies, and this case law has been confirmed in one particular field by article 900-1 of the Civil Code (clauses of inalienability).[40]

On further inquiry into the ambit of the principle, one may see in it nothing more than a simple example of the right that any owner has to dispose of his or her goods and to note that for some long time this freedom has accommodated itself to the existence of contractual and legal restrictions. But all academic writers are in agreement in maintaining that company law and the rule relating to free negotiability of instruments, retains a quite special force. A shareholder cannot be prevented from withdrawing from participation in the company: "It cannot be admitted that a shareholder is deprived of the right to negotiate his title".[41]

It should be noted however that there is a difference in theoretical starting points between the principle of negotiability (which has been stated to be the essence of a company limited by shares) and free negotiability. The principle has as its first function to take account of the financial interests of the shareholders — those who made an investment at

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39 Articles 1832 to 1873 of the Civil Code.

40 J Hamel, G Lagarde and A Jauffret *Droit Commercial* (TI, Vol 2, Dalloz, 1980) n° 523.

41 Ripert and Roblot above n 21, n° 1252.

the time of the taking of the title documents. In civil law terms, it is property interests that are involved. But from this perspective, any purchaser is interchangeable with any other. The question of the individuality of each person is of little consequence if the offer made for the property is satisfactory. In fact, the principle of negotiability does not imply total freedom of a shareholder to choose the purchaser of the shares at any time. Freedom to negotiate the property certainly does not have the significance today that it had formerly.[42] This position is very clear in relation to clauses of first purchase, and approval clauses.[43]

Article 28 § 14 was of this kind to the extent that it envisaged the substitution of the Territory for any purchaser by way of a pre-emptive right, and the substitution would take place according to the rules which related to expropriation in any case where there was no agreement on the price of the immovable property.

However, if it is acceptable to accommodate conditions relating to the transfer, it was not possible to admit the fact that the shareholder may be unable to withdraw from the company if such is his wish. This rule is formally imposed by the legislator in relation to approval clauses,[44] and the case law refers to that right frequently.[45]

Literally, article 28 betrayed a mixed character, halfway between pre-emption (a tendency to manage the participation) and inalienability (tending to a blocking or a stagnation of capital). The text had in effect a double filtering consequence: it enabled the directing of the movement of shares by interposing a new shareholder (in the event the Territory), but also it could have placed an unavoidable obstacle to the negotiability of the shares when the government did not use its right of pre-emption.

Clearly the right of pre-emption offered to the government of the Territory did not, by itself, effect any deprivation of property which would fall within the ambit of article 17 of the Declaration of the Rights of Man and the Citizen. However this does not mean that legislation can restrain the exercise of property rights without providing the corresponding compensation.[46]

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42 Mazeaud et Chabas *Leçons de Droit Civil* T II, 2 Vol ed Montchrétien,1984, 29.

43 J F Artz above n 18, n° 503 and following.

44 For example, see art 274 of the Law of 1966.

45 Cass Com 22 November 1969, Rev Soc 1970, 288.

46 Constitutional Council, decision 83-162 of 19 and 20 July 1983, GP 1983, Lég 583. In its decision of 9 April 1996, the Constitutional Council considered that all limitations attached to the property right were so important that they actually, completely changed the meaning and the scope of the art 17 of the Declaration of the Rights of Man and the Citizen.

It remains the case that the right of pre-emption is only one possibility which can be considered and that it does not create a duty. It has been properly emphasised that though legislation or extra judicial arrangements "can impose on a shareholder the duty of first offering the shares to one or more identified people before transferring the property to another, this duty does not make the shareholder a prisoner of the company since the full freedom is recovered if the pre-emption right is not exercised".[47] Here, by the effect of the legislation, the shareholder deprived of the prior authorisation and confronted by the inaction of the governmental authorities, would be the hostage of the company.

The challenge of the principle of negotiability of shares, which it must be emphasised is a rule of public order, was patent in § 13 and § 14 of article 28. It justified therefore the strongest of reservations.

Moreover, some types of behaviour would be deemed to amount to the same thing as an express refusal. In the absence of any detail concerning the authorisation process and the time limits — in particular about the time limit given to the authorities to exercise the right of pre-emption — it is appropriate to refer back to the traditional rule of administrative law according to which the administration has 4 months in which to declare its position. After this time has passed, and if there has been no answer, a refusal is presumed. And in such cases, the disappointed shareholder would not however be able to freely transfer the shares because it is stated at the beginning of § 13 that the approval must be obtained "on pain of nullity".

III THE APPLICATION OF §§ 13 AND 14 OF ARTICLE 28

The practical implementation of § 14 and § 15 of article 26 of the law of 1990[48] was already a real matter of concern from the practitioners' point of view.

By way of illustration, the question could be asked "How did one determine what property forms 75% or more of the assets of a commercial company?" or, for instance, "What would be the situation of a transfer such as may result for example from a collective procedure when only foreigners were involved?"

More generally, the situation was that this piece of legislation was not in a form that could be implemented.

If a transfer which was not authorised (or which was secret) was null, in the absence of any substitution of the beneficiary (the Territory) or the third person transferee, the government authorities had to have been in a position to ensure that all transfers of shares

47 Guyon *Jurisclasseur* Sociétés, fasc. 97 B, n° 3.

48 Which became art 28 § 13 and § 14 in 1996.

in companies were brought to its knowledge. There was no such provision in the 1990 and 1996 laws.

Moreover, under the current company law as applied in French Polynesia, title in company shares is transferred in the simplest possible manner, either by annotation of the transfer on the register for registered shares, or by physical transfer for bearer shares.

The situation is therefore the same as that which prevailed in the metropol before the reform of the law by Law 81-1160 of 30 December 1981,[49] which related to the de-materialisation of stocks. That law has not as yet been promulgated for the Territory of French Polynesia,[50] and therefore it remains at present impossible to control share transfers in any serious way.

The application of the reform of 1990, in respect of the transfer of company shares, therefore stood to remain substantially a dead letter. Since its implementation in 1990[51] these provisions were never applied, or if applied it may be assumed that decisions from the territorial government were always satisfactory for petitioners.

However, since these provisions were changed in the 1996 law, the decision of the Constitutional Council was obviously necessary to provide a clear limit to the territorial government's power as far as transfers of immovable property were concerned.

Assuming that these provisions had been declared valid from a constitutional perspective, the fact remains that the operation of § 13 and § 14 of article 28 clearly created a number of problems. The mention of some of them will suffice to give an idea of the difficulties which would have been involved. Some concerned the very applicability of the text, and others its application in practice. The application of the legislation in time was an obvious question. The impact of the legislation of the European Community was also of importance.

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49 See above n 21.

50 According to the principle of legislative speciality, French laws, except for laws intended to regulate the State as a whole (which are called laws of sovereignty - for example constitutional statutes or texts relating to governmental bodies), must follow the compulsory procedures of promulgation and publication. This involves a consultation of the Territorial Assembly and after that it is in the High Commissioner's power to promulgate the law. On the procedure to follow, see Y-L Sage "The Application of Legislation in the French Overseas Territories of the Pacific" VUWLR Monograph 8 , 1993, 15-35.

51 Then art 26-14 and 15 of the Law of 12 July 1990.

A Problems related to the application in time of the § 13 and § 14 of article 28

The statutes of commercial companies are the constitutions of the companies and have the effect of law for the parties who have freely chosen to take shares.[52] It is clear that company statutes can provide clauses of approval or of pre-emption which have as their object either the avoiding of the involvement of third parties in the capital of the company, or of ensuring an equilibrium between the shareholders of the company.[53] And it is clearly with a view to the advantages that they will get from the contract and from the law applicable at the time when they make the contract that the parties have taken shares in the company.

The possibility which was given to the authorities of the Territory by article 28 § 13 to refuse approval to a transfer of ownership could have reduced the principle of the negotiability of shares to nothing; and in the same way the right of pre-emption of one or more shares could have resulted in depriving of all force clauses in company statutes, or conditions outside the company statutes, which envisaged a right of pre-emption for the benefit of other shareholders or the company itself. This then involved a major upsetting of the arrangements made by the contracting parties.

On this matter, legal theory and the case law in general considers "that it would be unjust for a new piece of legislation to come and upset the economic aspects of a contract which was based on the equivalence of the performances of the parties and to permit one of the contracting parties to avoid its obligations".[54] The result will be different only if the legislator imposes the immediate application of the new law or if an overriding public policy reason demands it.[55]

Looked at from that point of view, it is to be noted that there was no special provision in the Law of 1990 or 1996 which required immediate application and the question arose whether there was any overriding principle of public policy which would justify this result.

For its part, the case law is "very protective of the security of contracts"[56] and the courts maintain a very rigorous control of the existence of overriding reasons of public policy

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52 Article 1835 of the Civil Code. J Le Gall, above n 19, 51.

53 Y Chaput "La liberté et les statuts" Rev Soc 1989, p 361.

54 Mazeaud et Chabas *Leçons de Droit Civil* (Ed. Montchrétien, 1986) T I 210.

55 Cass Com 15 June 1962, Gaz.Pal. 1962.2.200.

56 Cass Civ 3, 3 July 1979, JCP 1980 II 19334, note Dekeuwer-Defossez.

which could impose, by the fact of new legislation, contractual obligations other than those that were initially undertaken by the parties.[57]

So in such cases, in order to avoid the necessity for prior approval, it could have been maintained that the normal operation of approval clauses and pre-emption clauses which were provided in the statutes of companies limited by shares which were created before 14 July 1990[58] could have only a subsidiary role. They would not operate in most cases unless there was a failure to purchase by the territorial government which did not authorise a transfer of the shares with the result that the nature of the original contractual undertakings by which the shareholder was bound were changed.

This would have been the case for example for a shareholder in a public limited liability company which was created before the promulgation of the Law of 12 July 1990 and who wished to transfer his shares in the company, of which 75% or more of the capital was constituted by immovable property, to his spouse, his ascendants or descendants, and who saw the possibility that the Territory would have claimed a right of pre-emption, though article 274 § 1 of the Law of 1966 suggests that these people have an absolute right to become shareholders in the company because they are in some way assimilated to the principal shareholder.

Furthermore, the difference between the reasons and the spirit of the right of pre-emption as it is traditionally conceived in the statutes of limited liability companies, is radically different from those which have motivated the territorial government.

In those cases where shareholders saw a possibility of increasing their participation in the capital of the company or "preventing the existing proportion in the sharing of the capital between the shareholders being modified by the withdrawal of one of them",[59] the territorial authorities would have used their right to intervene as an instrument of political or economic intervention as the needs of the moment dictated. This is far from constituting an overriding public policy reason. However, there may be recognised in this law a new advance for the infamous "economic policy" requirement.[60]

When it is realised that the limited liability companies which could be affected by the provisions of § 13 and § 14 of article 28 were, in French Polynesia, almost exclusively

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57 Mazeaud et Chabas, above n 54, 209.

58 Which is the date of the promulgation of the Law of 12 July 1990.

59 Ripert and Roblot, above n 21, n° 1256.

60 B Starck, H Roland, L Boyer *Droit Civil, Les obligations* "II Contrat" (Litec, 1989) 265, n° 617 et seq G Couturier, L'ordre public de protection, et malheur d'une vieille notion neuve: Etudes Flour, 95 et seq.

companies which owned hotels, it is difficult to avoid the thought that these provisions were not totally politically neutral in their motivation. It was also a matter of concern that the involvement of the Territory in the capital of one of these companies could be arranged so easily and at so little cost as the result of a transfer sought for or to a foreign purchaser.

B The compatibility of § 13 and § 14 of article 28 with the European Community law

Despite the fact it did not fall within the scope of the Constitutional Council's power, the applicability of § 13 and § 14 of article 28 have also to be considered in the light of European Community Law.

More precisely the requirement of compulsory authorisation for transfers would be contrary to higher principles on which depend the free and open economy aspired to by the drafters of the Treaty of Rome.

Because the law was imposed on every transfer for the benefit of a natural or artificial legal person resident in one of the States of the European Community by contrast with what would happen in the case of a purchaser of French nationality, the formalities of the new law could be regarded as constituting a violation of the principles set out in the Treaty of Rome.[61]

Could this degree of discrimination in the new law be accepted given that the admitted objective of the Treaty of Rome is to guarantee the freedom of establishment in any of the countries of the common market?[62]

It cannot be denied that the freedom of movement offered to residents of states, members of the European Community concerns company law.

In order to build a single market and achieve an unlimited area in which persons, capital, goods and services freely circulate implies a freedom of movement for companies as much as it does for capital. The free flow of markets seems to have as its corollary the access to the capital of a limited liability company, and therefore a prohibition on all absolute restrictions.

This freedom of access is nothing other, in the first instance, than a freedom to participate in the ownership of a company situated on the territory of another member state (and even to control it).

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61 Article 3 of the EEC Treaty specifies the tasks of the Community, as including "the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital".

62 See art 54 § 3 g of the Treaty of Rome (Provision not amended by the 1992 Treaty on European Union).

In concrete terms, it is a freedom to take on the mantle of a company member either in the context of the creation of the company or by way of the purchase of an interest in the company. This freedom is moreover expressly envisaged by article 221 of the Treaty which provides that "national treatment as far as the financial participation of residents of other member states in the capital of companies in the sense of Article 58 of the Treaty is concerned is to be without prejudice to application of other provisions of the Treaty".

It is true that this right to participate in corporate investment is an obvious condition for the effectual exercise of the fundamental right of establishment (article 52) and one of the foundations of the Common Market.[63] It is therefore not possible to create restrictions by provisions relating to the movement of capital, particularly since the capital movement has been freed up.[64]

It is also a fact that this freedom to acquire the shares of companies situated on the territory of another member state is at the base of the serious reservations that France had concerning privatisation proposals.[65]

Further article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms,[66] whose words are almost identical to those of article 17 of the Rights of Man and the Citizen, demonstrates an obvious maladjustment of the prescriptions of article 28 of the Law of 1996 with the fundamental principles of European law.[67]

Applied to the case of French Polynesia the question concerns the provisions relating to the "association of overseas countries and territories" in Part VI of the Rome Treaty.

Here the answer is clear that the freedom of movement of capital is excluded. Since the Territory is within the category of "overseas countries and territories", it falls under the

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63 Gavalda and Parleani, Liberté, égalité et fraternité en droit communautaire des sociétés, Rev Soc 1989-449, n° 12 K Lipstein *The Law of the European Economic Community* (London, Butterworths, 1974) 28.

64 Especially by the Directives of 12 April 1960, and of 22 January 1963 (for shares quoted on the Stock Exchange) and of 17 November 1986 (for shares not quoted on the Stock Exchange).

65 Indeed the Law of 16 April 1986 (art 10 and 13) sought to fix the limits of participation — that is to say they gave a priority to applications by French residents. Gavalda and Parleani *Droit communautaire des Affaires* (Litec, 1988) n° 97 et seq.

66 First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms 20 March 1952.

67 "Every natural or legal person has is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by law and the general principles of international laws" (article 1 of the First Protocol), for a comparison see above n 16.

special regime provided by article 227 § 3 of the Treaty (which refers back to articles 131 to 136 bis) which article was the subject of a decision by the Council of the European Community of 25 July 1991.

In this case, the regime applicable to the right to set up a business is dealt with in article 132-5 of the Treaty which provides that in relations between member states and overseas countries and territories there will be a right of establishment for residence, companies and enterprises on a non-discriminatory basis (subject to article 136). Therefore, as a consequence of the Directive of 23 November 1959[68] and of successive association regimes, residents or companies from member states must be treated on a non-discriminatory basis in the overseas countries and territories, except if the member state to which they relate does not in respect of the activity involved provide identical advantages to residents and companies of the member state to which the territory relates, and therefore to companies subject to its legislation.

To the extent that French law admits no discrimination between the French of the metropol and Polynesians, in the Territory the residents of states which are members of the community other than France must have the benefit of a right of establishment subject to the same conditions as a French citizen or a French company.[69]

However at the request of representatives of the French overseas territories, French territorial collectivities and the French government, a new text relating to the right of establishment was adopted in the decision on association in 1991.[70]

Article 232, which replaces article 176 of the earlier decision on association, reaffirms, in relation to the right to set up business under the provision of services, the principle of equal treatment for individuals and companies from member States.

The text of the decision gives the competent authorities of the overseas territories and countries the right of establishing rules which derogate from the principle in favour of local inhabitants and local activities to the extent that those derogations are "limited to sensitive sectors of the economy of the overseas country or territory concerned and have as their aim the promotion and support of local employment". The request in respect of the derogation must be notified to the Commission and indicate the sectors of the economy concerned and the period for which the derogation is to operate.

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68 J O C E 10 February 1960.

69 See for example in relation to the freedom of establishment of certain health professionals, the judgment of 12 December 1990, case C.263/88.

70 Decision 91/482 EC dated 25 July 1991.

What would have been the effect of all of this for article 28 § 13 and § 14 of the 1996 law of French Polynesia?

Paragraph 13 clearly avoided the legal difficulties of the domestic law to the extent that by making no discrimination among French citizens, it assured respect for equality. The answer however would not be so clear as far as the community laws were concerned.

Leaving aside the question of an authorisation from the Commission to derogate, the text of article 28 § 13 and § 14 was in itself far from meeting the conditions required to avoid a restriction on the basic principle of non-discrimination in respect of the establishment of business. The reservations related not only to the limitation of the derogation in terms of time, the factors concerning the sensitivity of the economic sectors involved, and also the hypothetical aim of promoting and maintaining local employment.

IV REACTION OF THE TERRITORIAL AUTHORITIES TO THE DECISION OF 9 APRIL 1996

If there is one area in which the sensitivities of Polynesians are well noted it is undeniably that of immovable property transactions for the benefit of non-residents.[71] By way of example, the provisions of the decree of 25 June 1934 concerning the administrative approval for the transfer of land and the subsequent texts, illustrate in an eloquent manner the strict control of land acquisitions.[72]

The decision of the Constitutional Council which instituted complete freedom for non-residents of Polynesia was manifestly contrary to former habits and gave rise to a veritable return to earlier principles[73] whose acceptance today could only come at a cost which was intolerable for the territorial authorities. It is therefore no real surprise that on 21 November 1996[74] the Territorial Assembly of French Polynesia made a regulation (the term

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71 Y-L Sage "Evolution of Land Policy in French Polynesia" Cant LR (April, 1997).

72 The principle of the prohibition of land sales and leases can be found already in the codes which were in force before the annexation of the Kingdom of Tahiti by the French (see Y-L Sage, "Tahitian Courts in Tahiti and its Dependencies" (1988) 18 VUWLR 370, 372). From 1874, the date of the promulgation of the Civil Code in Tahiti until 1932 the acquisition of land in any form was entirely free. The Decree of 4 July 1934 re-instituted the necessity for prior approval from the French administration for any change of land holding, and the Decree of 25 June 1934 made amendments of detail to that. The law on the status of the Territory of 6 September 1984 transferred this power of approval to the Council of Ministers of the Territory by art 26 §11, which became art 26 §14 in the Law of 12 July 1990, and §13 of art 28 in that of 12 April 1996. In respect of the procedure put in place by the Decree of 1934, see R Calinaud "L'autorisation administrative de transfert immobilier" Revue Juridique Polynésienne (1), Juin 1994, 25 et seq.

73 R Calinaud, above n 72.

74 See above n 16.

is used here for decisions from the Territorial Assembly) which tends once again to submit all transactions involving foreign investments to a regime of prior approval. This new system is in spirit, if not in the letter, a clear return to the restrictions of the former law of April 1996, but it remains legally of such doubtful validity that its future operation should be negligible.

A Return to the principle of control and prior authorisation of foreign investments in French Polynesia

At a formal level the regulation of 21 November 1996 falls precisely within the framework of the powers which are devolved to the Territorial Assembly by the law of 1996.[75] The regime put in place by this regulation distinguishes between investments which have to receive a prior approval (that is to say, all foreign investments which relate to the acquisition of immovable property in the fishing sector, in the area of aquaculture, pearl culture, and audio-visual activities and telecommunications) and on the other hand those which free in principle nevertheless remain subject to an a posteriori declaration when the investment has been made.

The power[76] to grant a prior approval has been delegated to the Council of Ministers which must make its decision known within 60 days.[77] A failure to respect the rules applicable is sanctioned by the nullity of the documents and any transactions effected.[78]

As far as the investments which are subject to an *a posteriori* declaration (that is to say those which do not fall within the category of the obligatory prior authorisation) they have to be brought to the attention of the President of the government[79] within a period of 3 months from the date of their making. However, foreign investments which do not exceed 20 percent of the paid up capital of a company or of the voting rights of a company which is quoted on the Stock Exchange for $33^1/_3$ percent of the paid up capital or of the voting rights of a company which is not "on the Stock Exchange" are exempt from the requirement of such

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75 Article 60 "All matters which are within the competence of the territory are dealt with by the Assembly of French Polynesia ...". The Territorial Assembly was presented with the legislative proposal on 15 October 1996; the proposal emanated from the territorial government.

76 Article 28 § 21 of the Law of 12 April 1996.

77 Article 4 of Regulation 96-141 APF of 21 November 1996.

78 Article 8 of Regulation 96-141 APF of 21 November 1996.

79 Article 6 of Regulation 96-141 APF of 21 November 1996.

a declaration.[80] If this approval procedure is not respected, independently of any criminal sanctions that may follow, the transactions are null.[81]

B Analysis of the Regulation of 21 November 1996

Whether the regulation of 21 November 1996 is analysed as a clear declaration of defiance of the decision of the Constitutional Council or more simply as an attempt to manipulate the principles to which that decision refers, its legal application should be limited.

Indeed, even a brief examination of the text[82] discloses that it can be subjected to serious criticisms which in many respects are the same as those that applied to paragraphs 13 and 14 of article 28 of the Law of April 1996.

First, though the new text reaffirms in article 1 the principle that foreign investments in French Polynesia are free, it goes on to add a certain number of restrictions which reduce to almost nothing this principle of freedom. In effect, practically no area of economic importance escapes the control system set up by this law.[83]

Further, if the text were taken literally, foreign investments in the hotel sector would be entirely free.[84] It is however necessary to be somewhat more cautious in the analysis and to go beyond the first impressions. All of those cases where investment in the hotel industry takes the form of an interest in a civil partnership involving land which controls all or part of the immovable assets of a hotel[85] involve an acquisition of immovable property rights which immediately falls within the ambit of article 2 of the decision.

Furthermore, unlike paragraphs 13 and 14 of article 28 of Law 96-312 of 12 April 1996 which, in practice, was concerned with all transactions entered into by foreigners which related not only to the acquisition but also the sale of immovable property rights, the

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80 Article 6 § 2 of Regulation 96-141 APF of 21 November 1996.

81 Above n 80.

82 It is likely that the decision contains other mistakes additional to those dealt with in this article. For example, it is curious that the requirement is that applications for approvals and for *ex post facto* declarations must be made to the President of the Territory. There is nothing in the statute of 1996 which authorises this provision — only the Council of Ministers has the authority to make decisions on overseas investments (art 28 § 21) and furthermore, the Council of Ministers is obliged to make its decisions collegially (art 26 § 1).

83 For the economic activities in question, see above.

84 Article 2 of Regulation 96-141 APF of 21 November 1996.

85 This represents the current situation in French Polynesia.

regulation of 21 November 1996 for its part prima facie concerns all investments of whatever kind which may be made in the Territory by foreigners.

In respect of the terminology used in the law, two things are to be noted. The language is once again imprecise and elliptical, doubtless on purpose,[86] with the corollary that the system set up is a discriminatory one which is similar to the deficiencies of the former paragraphs 13 and 14 of article 28.[87]

By way of example of this imprecision of language, it is sufficient to note that the idea of investment is not in French law a precise legal notion and that it refers to an economic activity of extremely broad nature. This is therefore undeniably a cause for difficulties of interpretation.[88]

The discriminatory system relates to the use of the adjective "foreign" which is used without other explanation in respect of investments which are the object of the decision, and this raises a number of questions for lawyers. Does it refer to investments made by all non-residents?[89] If this is the correct view, can it be deduced that non-resident French citizens are able to benefit from total freedom in matters of investment in French Polynesia?[90] What of corporate legal persons under French law whose seat of business is in France? Can they be considered as foreigners because they are not resident in French Polynesia? If the notion of residence is not the basis for the distinction, may it be maintained that corporate bodies controlled by foreigners but which are regarded in French law as having French

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86 This broad and ambiguous approach to investment provides for greater control by the territorial authorities.

87 See above Part II.

88 The only notion that does exist is that of "direct investment" which is provided for in Decree number 89-938 of 29 December 1989 as amended by Decree number 90-58 of 15 January 1990, which regulate financial relations between France and other countries. For example, should investment be seen as the totality of the data and computer programmes which come from abroad without which the management of modern undertakings even in French Polynesia would be impossible? What would be the situation in the audio-visual and telecommunications fields (which, in the case of telecommunications, will not be a state monopoly after 1998) in those situations where foreign companies use technical means linked to overseas (such as satellites and computer terminals)? Will all of these have to be submitted to the territorial government for approval?

89 And they could be both French from the metropol as well as non-French.

90 The status of resident in fiscal matters is regularly granted to non-French citizens.

nationality[91] can freely invest in French Polynesia? What conclusion should be reached in respect of an investment operation between two corporate bodies and/or natural persons of foreign nationality which are already active in the Territory and which wish to transfer property which is already in French Polynesia? Should it be considered that they will be excused from the need to get prior approval and from the need for the declaration because they are already authorised to carry on their business in the territory?

Furthermore, it should be recalled at this point, that as far as the law of the European Community is concerned, it is not possible to set up distinctions between persons coming from different jurisdictions within the European Union. Members of the economic community have the benefit of the provisions of the Treaty of Rome which guarantee to them the same treatment as that given to French citizens. Now, to the extent that the decision of 21 November 1996 concerns "every foreign investment activity"[92] without other detail, investors and natural and corporate persons from other countries in the European Union will always be the subject of a discriminatory system which is not justifiable for the same reasons as those earlier indicated for paragraphs 13 and 14 of article 28 of the April law.[93]

This absence of clarity in the drafting of the text will doubtless be the key point of issue in important cases if the courts have to deal with this matter, but it is already possible to foresee that the only foreign investments which will be involved will be those from outside the European Union.[94] Furthermore, it is no longer possible for these investors to ignore (subject to the existence of any treaty of reciprocity with France which does not exclude the exercise of a commercial activity in overseas territories) the possibility that they may have granted to them the same rights as French citizens.[95]

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91 Companies which have their head office or their main business centre, or their management in France and are properly licensed in France are deemed to have French nationality. See for example Cass Civ 8 February 1972, Clunet 1973, 218, note Oppetit, Cass Civ 10 March 1976 D, 1976, IR 163.

92 Article 2 of Regulation 96-141 APF of 21 November 1996.

93 See above Part III, B. As far as telecommunications are concerned, see H Ungerer "EC competition in the telecommunication, media and information technology sectors" 19 Fordham Int Law J 1111-1177.

94 Some foreigners benefit from special regimes, for example Andorrans, Monagasques and Algerians, and since the law of 17 July 1984 all are entitled to the status of resident, valid for 10 years and renewable as of right (art 17, Ordinance of 2 November 1945, as amended by Decree of 6 September 1991, JCP 1991 III 65032). Furthermore, some countries have made treaties with France which facilitate the setting up of their citizens as traders in France (eg, countries of Africa, USA, Switzerland).

95 But without the right to participate in elections for Chambers of Commerce and for the commercial courts.

To the extent that one can go beyond the terminological difficulties, the fact remains that the system instituted by the territorial authorities in November will result in the same ill consequences as those which were denounced by the Constitutional Council.

The regulation of 21 November 1996 seems to be concerned only with investments which are coming back to the Territory of French Polynesia. This is of course to take an extremely limited view of the reality of the business world which must admit the ability for capital and investment movement at the same time as facilitating sales and purchases. The procedure for prior authorisation of transactions as it is set out in the regulation of 21 November restricts the vendor,[96] even the vendor who is a French citizen resident in French Polynesia in the choice of potential purchasers since the latter, if they are foreigners, by that reason alone expose themselves to a refusal which will not be justified in the public interest. On all counts, this amounts to the vendor being prisoner of his or her property or in seriously restricting the vendor's right to dispose freely of property in the manner understood by article 17 of the Declaration of the Rights of Man. This is even more truly the case since as in paragraphs 13 and 14 of article 28 of the April law,[97] there is no factor which guarantees that the decisions of the Council of Ministers will not be taken on a purely arbitrary basis, particularly if it is noted that in the case of a refusal, the decision of the Council of Ministers is not supported by an obligation to purchase by the Territory.[98]

Title 2 of the decision has really no legal purpose except as information[99] because it contradicts the applicable law. Indeed, outside of any possible limitation on the principle of freedom of trade in industry[100] for those who are members of the European Community,[101] the Law of 12 April 1996 provided only for the grant of approvals with the

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96 This is so whatever the nature of the property involved, so long as it falls within the list of cases set out in art 2 of Regulation 96-141 APF of 21 November 1996.

97 See above Part III A.

98 The same reasoning applies mutatis mutandis as to art 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (20 March 1952). See above n 65. This also opens the possibility to a temptation to refuse the approval knowingly in order to enable acquisitions by territorial authorities through third persons.

99 There is no legal requirement for this.

100 This is a general principle of law recognised by the Constitutional Council as being of constitutional value (Decision 16 January 1982, D 1983, note Hamon). This involves a restriction on the freedom of enterprise.

101 Or those who would benefit from similar treatment to that of French citizens by virtue of a bilateral treaty, see above n 93.

result that a posteriori declarations are not within the ambit of the powers of the Council of Ministers; the Territorial Assembly could therefore not add them to the basic law.[102]

V CONCLUSION

Considering all the above limits, foreign investors might think that investments in French Polynesia still remain controlled to an unacceptable level. If some limits can be imposed by the Territory, they certainly cannot go against the basic principles governing French and European law.

While waiting for the annulment of the provisions of the regulation of 21 November 1996,[103] or at least the limitation of its scope, or if foreign investors do not wish[104] to bring their investments to the knowledge of the territorial authorities, ways of avoiding the application of the text exist.[105]

The two principal possibilities for a foreign investor who does not wish to have to divulge investments to the local authorities in French Polynesia are either to set up (or purchase) in metropolitan France[106] a body corporate under French law by following the provisions of the law applicable in the metropol,[107] before making the investment in the territory of French Polynesia. The same procedure can be followed by organising a prior community investment and then transplanting it to French Polynesia.[108]

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102 What is more the obligation is to direct the a posteriori declaration to the President of the Territory. As to reservations concerning the power of the President in this matter, see above n 82.

103 Which would now be done by an administrative court and not by the Constitutional Council.

104 Businesses, particularly those that involve substantial capital, as is in the case of the hotel industry, and as will also be the case in respect of audio-visual and telecommunications matters, particularly in a small territory such as French Polynesia, do not always find the publicity which surrounds requests for approval, to their liking.

105 With the exception of investments which are subject to the requirement of an a posteriori declaration. The two possibilities are not mutually exclusive.

106 The result would be different if the establishment of the body was in French Polynesia, because then it would be governed by the provisions of art 2 of Regulation 96-141 APF of 21 November 1996.

107 As to the relevant law, see above n 85.

108 This could be by a member state of the European Union operating directly in French Polynesia, or by one of the member states of the European Union operating first in metropolitan France (Article 11 of Decree number 90-58 of 15 January 1990) with the object of later investment in French Polynesia.

Alternatively an investor may become the purchaser of bearer shares in a limited liability company[109] since such a transfer will in the present state of the applicable law in French Polynesia be secret.[110]

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109 An existing one or one specially created for this purpose either directly or by a change in form from another type of company. For example, companies involved in the pearl industry can easily change their owners because they are established as sociétés anonymes (limited liability companies).

110 See above Part III, and note 50.

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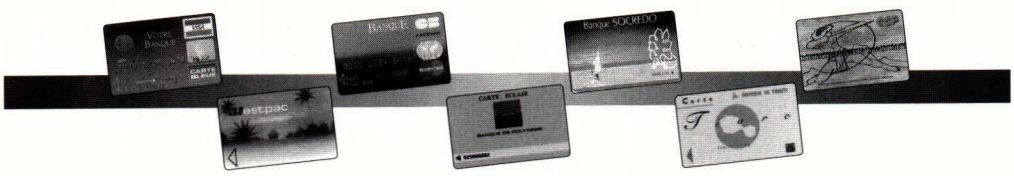

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