**The hand-to-hand gift, a Franco-Belgian perspective**

The hand-to-hand gift is a well-known concept in Belgium and France, but the term does not cover the same reality in the two countries, and the tax consequences are not the same.

The French and Belgian Civil Codes define a gift as a contract by which, during his lifetime, a person (the donor) immediately and irrevocably transfers ownership of an asset in favour of another person (the donee) who accepts it (French Civil Code; 4.132 §2 of the Belgian Civil Code).

In principle, a gift must be formalised by a notarial deed (Article 931 of the French Civil Code; Article 4.158 of the Belgian Civil Code). This is always the case for gifts of immovable property. However, for gifts of movable property, it is generally accepted that a manual gift is a valid gift which may be included in the estate in order to ensure equality amongst the heirs.

## 1. The hand-to-hand gift in Belgium

A hand gift is achieved simply by the donor handing over the gifted property to the donee. This mechanism is used in particular for donating works of art, paintings, jewellery or any other movable property that can be physically handed over.

A gift by transfer from the donor's account to the donee's account does not constitute a hand gift. It is qualified as an indirect gift that is made by means of a neutral legal act which, in itself, does not reveal the parties' intention to make a gift. A bank gift is the most obvious example of this. The bank transfer establishes the material element of the gift; on its own, it does not establish that the transfer was made with the intention to give, nor that the beneficiary accepted the gift. The transfer could be a loan, a loan repayment, a payment or a gift.

Nevertheless, if the communication of the transfer expressly refers to a “gift”, the transfer ceases to be a legally neutral act and the transfer may be recharacterized as a direct gift, subject to the applicable formal requirements.

For this reason, drawing up a written document is of evidential value, both for hand gifts and for indirect gifts, as it confirms that the gift has been made by specifying the conditions, charges and any terms of the gift (right of return, exemption from reporting to the estate, etc.).

This document is traditionally referred to as a “pacte adjoint”. It is an agreement signed between the donor and the donee, which attests both to the donor’s intention to make a gift and the donee’s acceptance. The “pacte adjoint” must be drawn up after the gift has been made, i.e. after the bank transfer. It does not create the gift, but merely records a gift that has been made before.

## 1.1. The tax regime for hand-to-hand gifts in Belgium

Gift tax is only due if the gift is registered, whether this is compulsory or voluntary. It is the registration that gives rise to the collection of the registration tax for gifts (Section 1 of the Registration Tax Code, Section 2.8.1.0.1. VCF).

The deeds subject to the registration formality are deeds of gift, movable or immovable, executed before a Belgian notary. Gifts of immovable property must be executed before a notary.

Deeds that are subject to mandatory registration are gift deeds, for movable or immovable property, executed before a Belgian notary. Gifts of immovable property must be passed before a notary.

However, gifts of movable property, such as hand gifts or bank gifts, do not need to be submitted for registration. The registration is optional.

Under Belgian law, inter vivos gifts enjoy a more favourable tax treatment than transfers upon death.

However, donations of movable property, such as hand-to-hand gift or bank donation, do not need to be presented for registration. Registration is optional.

Gift tax falls within the remit of the Regions. There is therefore not a single Belgian regime, but rather three sets of regional legislation. These are, however, based on largely similar principles and differ mainly in terms of certain specific rules and the applicable rates.

The applicable regional legislation is determined by the donor's tax residence. In the case of a gift made by a non-resident, the tax authorities take the donee's residence as the criterion; in the case of a gift between two non-residents, they let parties choose.

The registration of a gift of movable property is subject to a rate of 3% when made in the direct line of descent, between spouses or registered partners. It is 7% for all other gifts. The rates are 3.3% and 5.5% respectively in the Walloon Region. Registration can be carried out online via myminfin.

It should be noted that, in the case of a gift of bare ownership, unlike in France, gift tax is calculated on the gross value of the gift, without deducting the value of the usufruct.

Gift tax is, in principle, payable by the donee, but if the donor pays the tax, this does not constitute an additional gift.

## 1.2. Why bother to register a gift of movable property?

Although registration is optional, the "pacte adjoint" that records an indirect gift or a hand gift is frequently submitted for registration in order to avoid inheritance tax.

This is a planning technique necessitated by a legal fiction in the Inheritance Tax Code, combined with a means of proof.

If the tax authorities establish that certain assets were gifted by the deceased in the five years before his death, those assets are deemed to still form part of his estate unless gift tax was paid (section 7 of the Inheritance Tax Code, section 2.7.1.0.5 of the VCF)

Furthermore, there is a legal presumption in the Code allowing the tax authorities to consider that all tangible personal property, cash and bearer securities which they establish were part of the deceased's estate in the five years before his death, form part of his estate to be deemed, until proven otherwise (section 108 of the Succession Code, section 2.7.3.2.5 of the VCF). Such evidence may, in particular, be provided by means of bank statements.

If a donor does not want to pay gift tax he must refrain from dying within five years of making the gift. It is therefore important to establish beyond any doubt that the gift was made more than five years before the donor's death.

If the donor is reluctant to pay gift tax and wishes to exclude his estate from inheritance tax, he must refrain from dying in the five years of making the gift. It is therefore important to establish beyond any doubt when the gift was made. Five years is a long time and paying gift tax at a reasonable rate may be an attractive option.

To establish the date of the gift beyond any doubt, or to reserve a right of usufruct, gifts were often made before a foreign (Dutch, French or Swiss) notary Their deeds had the same authentic value as those of a Belgian notary. Since 2020, notarial deeds drawn up abroad which constitute evidence of an inter vivos gift of movable property by a Belgian resident must be submitted for registration by one of the parties to the gift within four months of the gift being made.

### 1.3. Cross-border gifts

If the donor does not live in Belgium, gift tax may be payable in his country of residence, as is the case in France.

In Belgium, a donee who is a Belgian resident is not liable for registration fees on gifts; however, if he submits the "pacte adjoint" for registration, Belgian gift tax would be payable.

However, it is not in the donee's interest to submit the document for registration. In the event of the death of a non-resident donor, inheritance tax is limited to immovable property situated in Belgium and included in their estate. Articles 7 and 108 of the Inheritance Tax Code will not apply.

On the other hand, if it is the beneficiary of the gift who does not live in Belgium, it is in her interest to have the "pacte adjoint" registered to avoid the higher Belgian inheritance tax when the donor dies. Of course, if the donor plans to leave Belgium future, the payment of gift tax would not necessarily help to avoid inheritance tax in Belgium or in their country of residence.

It should be noted that gift tax may be payable in the country of residence of the donee. Indeed, in countries such as Germany, Spain and France, the location criterion for the collection of gift tax is, in certain situations, linked to the residence of the donee (see below).

Let's take the example of a Belgian resident who makes a gift of movable property before a Dutch notary to a donee who has her habitual residence in Spain. The deed must be registered in Belgium, and the donee will receive a tax assessment notice indicating the gift tax due on the registration (in the

Walloon Region and the Brussels-Capital Region, gift tax must be paid in advance). In Spain, the donee will also have to pay gift tax.

Gift tax may also be due in another country, because foreign law (and not necessarily the tax law) taxes the gift as a gift of real estate. For example, the gift of shares of a French real estate company (société civile immobilière, SCI) must be made before a French notary. These shares are real property in France but movable property in Belgium, the donee will have to present the French notarial deed for registration in Belgium and pay the Belgian gift tax. The legislator was aware of the risk of double taxation, but it took the position that the prevention of it was a regional competence.

The convention signed between France and Belgium in Brussels on 20 January 1959 covers double taxation in the field of inheritance tax but not registration duties for gifts. Moreover, Belgian domestic law does not have any provision to limit double taxation.

1.4. <u>A donor or donee resident in France takes up residence in Belgium.</u>

- The donor

  Where a donor who has previously made a gift of movable property that was subject to gift tax in France becomes a Belgian resident, his estate is subject to Belgian inheritance tax on their entire worldwide assets.

  In this scenario, a gift of movable property not registered in Belgium could be subject to inheritance tax under the legal presumption of Article 7 of the Inheritance Tax Code, if the donor dies within five years of the gift being made. It may therefore be advisable to voluntarily register the gift that was previously made. However, if the gift was made before a French notary, the deed may be registered at a fixed fee of €50, as the donee was not a Belgian resident at the time of the gift.

  That registration would allow the gift to be subject to the gift tax regime rather than inheritance tax, thereby neutralising the risk of the presumption under Article 7 of the Belgian Inheritance Code being applied.

- The donee

  When a Belgian resident makes a gift to a donee who has been resident for more than six years, France may tax the French and foreign assets received by the donee pursuant to Article 750 ter, 3° of the French General Tax Code (CGI).

  In Belgium, the donee’s residence is not a criterion used for the collection of gift tax; only the donor’s tax residence is taken into account. The donee’s subsequent transfer of residence to Belgium therefore has no bearing on the tax treatment of the gift and does not give rise to the levying of Belgian gift tax.

  However, registration will help to avoid Belgian inheritance tax.

## 2. Hand-to-hand gifts in France

In France, a hand gift covers much more than a simple hand-to-hand transfer.

A hand-to-hand gift referred to in Article 757 of the French General Tax Code (CGI), consists of the simple physical handover of movable property: an object, a sum of money, a cheque, or even securities or financial instruments, or a bank transfer.

The hand-to-hand gift is an exception to the formal requirements laid down in Article 931 of the Civil Code for inter vivos gifts: a notarial deed is not mandatory if there is an effective and irrevocable transfer of possession of the gifted item (French Court of Cassation, Civil Chamber 1, 11 July 1960). A bank transfer also constitutes a manual gift if there is a transfer of possession from the donor to the beneficiary. (French Court of Cassation, 1st Civil Chamber, 12 July 1966). The same applies to the transfer of dematerialised securities by electronic transfer. The same applies to the transfer of dematerialised securities by account-to-account transfer.

### 2.1. The tax regime of hand-to-hand gifts in France

Hand-to-hand gifts are subject to transfer duties on gifts, except for customary gifts.

For the gift tax to be due, the hand-to-hand gift must be declared by the donee in a document that must be registered (Article 757 CGI). The gift must be declared within one month of the gift via the online declaration service, accessible from the donee's personal account on www.impots.gouv.fr.

Gifts are subject to the same tax regime as inherited property; gift tax is calculated according to the progressive scale in Article 777 CGI, with progressive tax rates according to the proportion of the taxable share and the degree of kinship. The rates range from 5% to 45% for direct descendants, 35% to 45% between siblings, and 55% between relatives up to the fourth degree.

Gift tax is calculated after applying the allowances provided for in Articles 779 et seq. CGI. These allowances vary according to the degree of kinship: each child is entitled to an allowance of €100,000 on gifts made by each of their parents. A spouse or registered partner is entitled to an allowance of €80,724. Each grandparent is entitled to an allowance of €31,865 for gifts made to a grandchild.

Furthermore, Article 790 G of the General Tax Code (CGI) provides for a specific exemption scheme for family gifts of money. Where the donor is under eighty years of age and the donee is of legal age, sums given in cash may qualify for an additional exemption of €31,865, which may be combined with the standard allowances.

These allowances are renewable every fifteen years: Article 784 CGI provides for a mechanism to take account of earlier gifts. Thus, only gifts made during the fifteen years before a new gift are taken into account when determining whether the allowances have already been used and, if so, whether gift tax is due on new gifts.

Unlike in Belgium, in the case of a gift of bare ownership of movable property, gift tax is calculated on the net value of the property, after deducting the value of the usufruct. This value is determined according to the age of the donors. Two parents aged 57 may each gift €200,000 to each of their children, resulting in net value of €100,000, which is fully exempt.

It is the responsibility of the beneficiary to declare the gift, even if no gift tax is due because of the allowances. The declaration serves to record the date of the gift officially and to avoid future complications, particularly in the event of inheritance.

If a hand-to-hand gift has not been declared, it is subject to gift tax in the following situations:

- When it is declared by the donee in a document that must be registered.
- When it is the subject of an acknowledgement in court.
- Where it is disclosed by the donee to the tax authorities, either voluntarily, or in response to a request from the authorities, or during a tax audit.

Where a hand-to-hand gift is disclosed, the donee must declare it within one month of such disclosure (Article 635A CGI). However, where the disclosure is voluntary and the gift exceeds €15,000, the donee may, at the time of disclosure, opt to declare it (and pay the gift tax) within one month of the donor's death. Conversely, where the disclosure of such a gift results from a request by the tax authorities or a tax audit, the donee is obliged to declare the gift within one month of its disclosure.

Gift tax is payable by the donee. If the donor pays the tax, the amount of the tax is not regarded as an additional gift.

In France, gift tax that has already been paid is not set off against the inheritance tax due upon the donor's death. However, gifts made during the 15 years preceding death are taken into account when calculating inheritance tax, in particular in respect of the tax recapture on previous gifts. They may therefore affect the allowances that are still available and the application of the progressive tax scale, in accordance with Article 784 CGI.

In the event of a succession, gifts made within the 15 years preceding death are reintegrated into the estate for the purpose of calculating inheritance tax. This means that the allowances used in connection with previous gifts will not be available for the succession if death occurs within this period.

### 2.2. <u>How can one optimise the hand-to-hand gifts?</u>

As a general rule, it is advisable not to wait too long to make lifetime gifts, in order to maximise the number of 15-year cycles.

It is advisable to prioritise assets with high potential for increase in value (property, shares in property investment companies) as any capital gains realised after the gift is made are not included in the estate. Furthermore, gifting bare ownership helps to reduce the taxable base for gift tax.

If both parents each make a gift up to their allowance of €100,000, this amounts to €200,000 per child every fifteen years. They can include grandchildren through a gift from grandparent to grandchild, utilising the €31,865 allowance.

2.3. Cross-border gifts

Gifts of movable property are taxable in France, in accordance with Article 750 CGI, when the donor is domiciled in France or when the donee has been resident in France for at least six years during the ten years preceding the year in which they receive the gift. Gift tax is due regardless of whether the deed is executed in France or abroad, and irrespective of whether the assets transferred are movable or immovable.

A gift made by a French resident to a Belgian resident will therefore be taxed in France because the donor is a French tax resident. Furthermore, the Belgian resident donee will be required to submit the notarised deed for registration in Belgium.

A gift made by a Belgian resident to a French resident will be taxed in France due to the donee's French tax residence, provided she has been resident there for six years.

France has concluded agreements concerning gift tax with Austria, Germany, Guinea, Italy, New Caledonia, Saint Pierre and Miquelon, Sweden and the United States. The treaty signed between France and Belgium in Brussels on 20 January 1959 covers double taxation in relation to inheritance tax but not gift tax.

2.4. A donor or donee who is a Belgian resident takes up residence in France.

- The donor

  Where a donor who is a Belgian tax resident makes an unregistered gift of movable property to a donee who is also a Belgian resident, no Belgian gift tax is payable at the time of the gift, provided the gift is not voluntarily submitted for registration. The legal fiction set out in Article 7 continues to apply, and unregistered gifts made less than five years before death are liable to inheritance tax.

  If the donor subsequently transfers his tax residence to France and dies there as a French tax resident, his movable estate is no longer subject to Belgian inheritance tax. Belgium may then only charge inheritance tax on immovable property situated on its territory. In this scenario, the Belgian legal fiction regarding inheritance applicable to unregistered gifts of movable property no longer applies.

  However, the gift may be subject to French inheritance tax pursuant to Article 750 ter, 1° CGI. The earlier gift must also be examined in the light of the French rules relating to the tax recapture for gifts made within 15 years prior to death (Article 784 CGI).

- The donee

  The transfer of the donee's residence to France after the gift was made, does not, in itself give rise to the levying of French gift tax on a gift that did not fall within the scope of French tax on the date it was made.

However, if the donee subsequently meets the residence condition of Article 750 ter, 3° CGI (residence of more than six years), any future gifts or inheritances may fall within the scope of French tax law, including where they relate to assets situated outside France.

It may be advisable to declare the gift in France in order to benefit from tax allowances and the fifteen-year cycle.

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