

NATIONAL REPORT: FRANCE

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A. GENERAL

1. Are there special rules concerning the property relationship between spouses (explaining what is meant by spouses)?

- a. upon marriage and/or
- b. during marriage and/or
- c. upon separation and/or
- d. upon death and/or
- e. upon divorce and/or
- f. upon annulment?

If so, briefly indicate the current sources of these rules.

YES. Spouses are a man and a woman who are married to each other.

The special rules concerning the property relationship between spouses are called “*régime matrimonial*”. They apply

- upon marriage,
- during marriage,
- upon *de facto* separation. In case of a legal (judicial) separation (*separation de corps*), Art. 302 para. 1 French Civil Code states that “judicial separation always involves separation of property”, which means that if the spouses were married under the legal matrimonial property regime of community of property (*communauté légale*) or a conventional (contractual) regime like community of accrued gains (participation in acquisitions), this regime is automatically replaced by the one of separation of property.¹
- In case of death or divorce, the matrimonial property regime ceases, and that leads to its liquidation.
- If a marriage is annulled, several cases shall be distinguished: if both spouses married in bad faith (eg. they knew the cause of nullity), the annulment has a retroactive effect, so that no matrimonial property regime is deemed to have existed. Nevertheless, reality must be taken into account: the court will most of the time apply the rules of *société créée de fait* (factual company tacitly built between the spouses, *de facto* partnership) and each spouse will take back his contributions (*apports*). If both spouses married in good faith without being aware of the cause of nullity, the effects of the marriage remain notwithstanding the annulment, which means that the matrimonial property regime has

¹ Art. 302 para. 2 French Civil Code states that “Concerning property, the date at which judicial separation takes effect is determined as provided for in Articles 262 to 262-2”. According to Art. 262 French Civil Code, a divorce judgment is effective against third parties, as regards the property of the spouses, from the day when the formalities of mention in the margin, prescribed by the rules which apply to civil status, have been performed. With regard to divorce by mutual consent or by acceptance of the principle of the breakdown of the marriage, for irretrievable impairing of the marriage tie or for fault, Art. 262-1 para. 2 states that at the request of a spouse, the judge may backdate the effects of the judgment to the date when they ceased to live together and collaborate. Art. 262-2 deals with the case of fraud: “Any obligation contracted by one of the spouses on the responsibility of the community, any transfer of community property made by one of them within the limit of his or her power, after the originating petition, shall be declared void where there is evidence that there was fraud on the rights of the other spouse”.

existed and must be liquidated (Art. 201 para. 1 French Civil Code).² If only one spouse married in good faith, the marriage shall develop consequences only in favour of that spouse (Art. 201 para. 2 French Civil Code). In this case, the spouse who married in good faith shall choose between liquidation of the matrimonial property regime (that will then have existed until the annulment of the marriage) and application of the case law rules with regard to *société créée de fait*.³

The legal provisions dealing with matrimonial property regimes are contained in the French Civil Code. Some apply to all married couples without having regard to the special matrimonial property regime they may have chosen (Art. 212 to 226 French Civil Code: they are called *régime primaire impératif*, or *statut impératif de base*.⁴ The other ones are set up in Art. 1387 to 1581 French Civil Code and contain the rules applying to several possible matrimonial property regimes: legal community (*communauté légale*, Art. 1400 to 1496, and contractual community, *communauté conventionnelle*, Art. 1497 to 1535 French Civil Code), separation of property (*séparation de biens*, Art. 1536 to 1568 French Civil Code) and participation in acquisitions (*participation aux acquêts*, Art. 1569 to 1581 French Civil Code).

2. Give a brief history of the main developments and most recent reforms of the rules regarding the property relationship between spouses.

Before the French Revolution of 1789 France was divided in two parts: in the part where customary law applied (Northern France), the spouses were subject to a community regime, whereas in the part where written law, the so-called *régime dotal*, applied (Southern France), the scheme was closer to a type of separation of property;⁵ the wife gave her husband a dowry (*dot, biens dotaux*) that he could administrate and use, but she kept the administration, use and free disposition of her other assets, called *biens paraphernaux*.

The *Code Napoléon in 1804* opted for the legal matrimonial property regime of community of movables and acquisitions (*communauté des meubles et acquêts*) whereas other regimes, such as dowry, separation of property, community limited to the acquisitions during the marriage or universal community, could be chosen by the spouses through a special agreement. In the legal matrimonial property regime, only the immovables acquired by one spouse before the marriage and the ones acquired by donation or succession during marriage remained outside the common assets. All movables – even those acquired by donation before the marriage – and all assets (movable or immovable) acquired during the marriage were common to both spouses.⁶

However, this legal regime did not survive the following historical and social evolutions. The importance of movable property increased. The first reform act of the twentieth century was the *Law Act of 13 July 1907*, which stated that the assets acquired by the wife in the exercise of an independent profession, even if they were common assets, were reserved for her personal administration. However, due to evidentiary problems, third persons contracting with a wife still required her husband's agreement.

The *Law Acts of 18 February 1938 and 22 September 1942* brought an end to the “incapacity of the married wife” (*incapacité de la femme mariée*) who was not capable of acting alone without the agreement of her husband. Prior to this, however, French Case law had developed the

² Art. 201 French Civil Code: “A marriage which has been declared void produces, nevertheless, its effects with regard to the spouses, where it was contracted in good faith. Where good faith exists only on the part of one spouse, the marriage produces its effects only in favour of that spouse”.

³ A. Colomer, *Droit civil – Régimes matrimoniaux*, Litec, 12th ed., 2004, n°857 sq.

⁴ A. Colomer, *Droit civil – Régimes matrimoniaux*, Litec, 12th ed., 2004, n°61.

⁵ Ph. Malaurie and L. Aynès, *Les régimes matrimoniaux*, Defrénois, 2nd ed., 2007, n°27.

⁶ A. Colomer, *Droit civil – Régimes matrimoniaux*, Litec, 12th ed., 2004, n°14.

theory of the *mandat domestique*, which presumed that the husband had tacitly mandated her wife to conclude contracts related to their common life.

The very important **Reform Act of 13 July 1965**: After the Second World war (1946) French politicians were in favour of the matrimonial property regime of participation in acquisitions and tried to enact a law adopting this regime as the legal one. This attempt did not succeed. Some surveys were conducted to discover the opinion of the French population and the practice of the notaries public. It appeared that 3/4 of the French couples were married without any special contract (*contrat de mariage*), which means that they were subject to the legal matrimonial property regime. The Law Act of 13 July 1965 opted for the legal regime of community limited to the assets acquired by the spouses during the marriage (*communauté réduite aux acquêts*). All assets and debts in existence at the moment of the wedding remain personal to the spouse to which they belong; therefore the marital community starts with nothing.⁷ The spouses' gains, the movables and immovables purchased during the marriage (thereby excepting those acquired by donation or succession in principle) become common assets. Each spouse administers and is free to dispose of his/her personal assets (*biens propres*), but the husband remains the head of the community (*chef de la communauté*) and has the power to solely administer and even dispose of the common assets. In the reform of 1965, the freedom to conclude matrimonial agreements was maintained along with several proposed models of conventional matrimonial property regimes in the French Civil Code. A new regime appeared in the French Civil Code as a possible matrimonial property regime by spousal agreement: the *participation aux acquêts* (participation in acquisitions) which was inspired by the German law. The Reform Act of 1965 also instituted mandatory basic rules (*régime primaire impératif*) which apply to all married couples, regardless of the matrimonial property regime they may have selected (see Q 7).

The reform act of 1965 is the major one, but it had to be supplemented in order to guarantee the equality of men and women in the matrimonial property regimes. This was achieved by the Reform Act of 23 December 1985.

Although this last important **Reform Act of 23 December 1985** achieved the full equality of men and women in the matrimonial property regime, former Law Acts dealing with parental responsibilities (1970) and divorce (1975) had already deleted the idea of a hierarchy within the family. The Law Act of 23 December 1985 institutes a full equality (*parité conjugale*) between husband and wife in the legal matrimonial property regime: each spouse administers and disposes of his/her personal assets alone (with some exceptions aiming at safeguarding the family home), each spouse can solely administer (so-called rule of *gestion concurrente*) and dispose of the common assets (Art. 1421 French Civil Code⁸); only the most important decisions related to the common assets requires the agreement of both spouses (*cogestion*).⁹

Payment of debts which either spouse owes, for whatever reason, during the community, may always be enforced on community property unless there is fraud of the debtor spouse and bad faith of the creditor; in which case the enforcement may be subject to reimbursement due to the community (Art. 1413 French Civil Code). In order to insure the family minimum income, the French Civil Code contains two restrictions to this rule: 1) The earnings and wages of a spouse may be attached by the creditors of his or her spouse only where the obligation was contracted for the support of the household or the education of children,

⁷ A. Colomer, *Droit civil – Régimes matrimoniaux*, Litec, 12th ed., 2004, n°35.

⁸ Art. 1421 para. 1 French Civil Code: "Each spouse has the power to administer alone the common property and to dispose of it, subject to being accountable for faults committed in his or her management. Transactions entered into without fraud by a spouse are enforceable against the other". But a spouse may not alone dispose *inter vivos*, gratuitously, of the common property (Art. 1422, para. 1 French Civil Code).

⁹ D.R. Martin, *Les régimes matrimoniaux*, Dalloz, 2nd ed., 2005, p. 3.

under Art. 220 (Art. 1414)¹⁰ ; 2) if one spouse concludes a loan (*emprunt*) or stands as security for somebody (*cautionnement*) without the agreement of the second spouse, only the first spouse's personal assets, along with earnings and wages (that are common assets in the French legal matrimonial property regime) may be attached by the creditors.

The Reform Act n°2004-439 of 26 May 2004 on divorce also contains some provisions related to the matrimonial property regime (e.g. what happens with the so-called matrimonial advantages,¹¹ *avantages matrimoniaux*, and the donations between spouses in case of a divorce, see Art. 265 French Civil Code).

The most recent Reform Act n°2006-728 of 23 June 2006, reforming succession law, in some respects indirectly influenced matrimonial law.

3. Are there any recent proposals (e.g. parliament, reform bodies, academic community) for reform in this area?

There are no recent proposals for reform in the area of matrimonial property regimes.

4. Briefly explain whether or not the rules regarding the property relationship between spouses also apply to registered or civil partnerships?

The special rules concerning the property relationship between spouses do not apply to partners living together (so called *concubins*) without marriage.¹² In case of a registered partnership (*Pacte civil de solidarité*, PACS), special rules are set in Articles 515-4 et seq. French Civil Code with regard to the personal¹³ and to the property relationship between the partners, but no special matrimonial property regime in the strict meaning of that terminology applies¹⁴, even if a PACS leads to important financial consequences for the partners.

Some rules that are similar to some of the basic mandatory regime related to spouses do apply: Firstly, in accordance with article 515-4 French Civil Code, partners bound by a civil covenant of solidarity shall live together and provide mutual material and moral aid to each other. The terms of that aid depend on the financial means of each partner. If no agreement has been made with regard to the amount of the financial support, it shall be in proportion to their respective financial means. Secondly, the partners shall be jointly and severally liable with regard to third parties for debts incurred by one of them for the needs of everyday life, except where those expenses are obviously excessive (Art. 515-4 para. 2 French Civil Code). This is the parallel provision to Art. 220 French Civil Code that applies to married couples. This legal provision relates to the debts resulting from the usual needs – *besoins de la vie courante*. Thirdly, Art. 515-5 para. 3 French Civil Code states that the partner who is in

¹⁰ Where the earnings and wages are paid into a current or deposit account, the latter may be attached only under the conditions determined by decree, Article 1414 para. 2 French Civil Code.

¹¹ *Avantages matrimoniaux* are advantages that one spouse may infer from the clauses of a contractual community regime; they are normally not subject to the regime of gifts between spouses, see Art. 1527, para. 1 French Civil Code.

¹² Ph. Malaurie and L. Aynès, *Les régimes matrimoniaux*, Defrénois, 2nd ed., 2007, n°2. Especially the French Cour de cassation held that *concubins* are not obliged to contribute to the marriage expenses (*contributions aux charges du mariage*) in the meaning of article 214 French Civil Code and that the joint obligation (*solidarité*) of Art. 220 French Civil Code with regard to expenses related to the matrimonial life and the children's education does not either apply to them, see Cass. Civ. I, 17.10.2000, D. 2001. 497, obs. Cabrillac; 02.05.2001, JCP 2002. II. 10 009, obs. Cabrillac.

¹³ E. g. they shall live together, see Art. 515-4, para. 1 French Civil Code.

¹⁴ Ph. Malaurie and L. Aynès, *Les régimes matrimoniaux*, Defrénois, 2nd ed., 2007, n° 3.

possession of a movable is deemed to have the power to act alone (administration, use or disposition acts) with regard to this asset towards third persons who are in good faith.

The Law Act n°2006-728 of 23 June 2006 reforming succession law also adapted the legislation concerning the PACS in order to make this kind of contract more attractive and to bring it closer to marriage. Art. 515-5 new French Civil Code states e.g. that unless their agreement provides otherwise, each partner keeps administration, has use and free disposition of his or her personal assets and has the personal obligation to pay his personal debts which occurred before or during the PACS. If no partner can prove that one asset is his or her personal property, the asset is deemed to belong jointly (*indivisément*) to both partners (Art. 515-4 para. 2 French Civil Code).

Since the Reform Act 2006, the partners can choose between two kinds of property regime: 1. separation of property with a classical presumption of joint ownership for assets for which none of the partners can prove his or her personal ownership is the legally applicable regime if the partners have not made a contrary agreement (Art. 515-5 para. 2 French Civil Code);¹⁵ 2. the special agreement of the partners upon a regime of joint property on the assets acquired during the common life: Art. 515-5-1 states that the partners can decide in their PACS contract or in a later agreement that all the assets they will acquire together or separately during their partnership will be subject to the regime of joint ownership (*régime de l'indivision*);¹⁶ those assets are then deemed to be the joint property (half and half) of both partners.¹⁷ A third possibility could be for the partners to reach an agreement of joint ownership but with application of the general rules of the French Civil Code dealing with joint ownership (Art. 1873 et seq. French Civil Code).¹⁸

Since the Law Act of 23 June 2006, it appears that the property relationship between partners of a PACS can tender in the direction of a kind of separation of property but there is a possibility to choose the joint ownership model.

5. Are the rules concerning the matrimonial property relationship between spouses exclusive or are there other mechanisms of property law, such as joint ownership, which also play a role in relation between spouses?

The French Civil Code sets two kinds of rules related to the matrimonial property relationship between spouses: 1° the basic mandatory matrimonial rules (*régime primaire impératif*) that applies to all married couples (see Question 7) and 2° the specific matrimonial property regime chosen by the spouse before the marriage (or during the marriage if the spouses decide to modify their matrimonial property regime).

¹⁵ This legal provision is similar to Art. 1538 French Civil Code, which applies to married couples who choose the separation of property regime. See also the evidence rule set in Art. 1538 French Civil Code for married couples, and in Art. 515-5, para. 2 French Civil Code for PACS partners: Each partner can use all possible means of evidence to prove sole ownership of an asset. See Ph. Simler and P. Hilt, "Le nouveau visage du Pacs: un quasi mariage", *JCP G* 2006. I. 161, n°27.

¹⁶ This was the legal solution before the Reform Act of 2006.

¹⁷ Art. 515-5-2 French Civil Code, However, states some exceptions of assets that remain the personal property of one partner (e.g. assets with personal character like clothes..., assets obtained by donation or succession...). It is not sure whether this legal rule is a mandatory one or whether the partners could e.g. make an agreement instituting a kind of universal community of assets, see Ph. Simler and P. Hilt, "Le nouveau visage du Pacs: un quasi mariage", *JCP G* 2006. I. 161, n°32.

¹⁸ For this possibility, see Ph. Simler and P. Hilt, "Le nouveau visage du Pacs: un quasi mariage", *JCP G* 2006. I. 161, n°36.

The basic mandatory matrimonial rules specify a joint liability of the spouses, but only for the debts that relate to the support of the household (*entretien du ménage*) or the children's education (*éducation des enfants*); any debt thus contracted by one spouse binds the other jointly and severally (Art. 220 para. 1 French Civil Code). It is not joint ownership but joint liability.

The specific matrimonial property regime chosen by the spouses may also contain some rules related to joint ownership. E.g. in the conventional (optional) regime of separation of property, normally each spouse has personal assets; there are no common assets. But if neither spouse can prove that an asset belongs to him/her personally, the asset is deemed to be jointly owned by both spouses (see Art. 1538 para. 3 French Civil Code: joint ownership of the half for each spouse).

Parallel to the matrimonial property regime, some other mechanisms may apply to the property relationships of the spouses, e.g. a company created between the two spouses (*société entre époux*), with both spouses being shareholders. After dissolution of the marriage, unjust enrichment (*enrichissement sans cause*) can also be a legal basis for one spouse to obtain indemnity from the other.

6. What is the relationship, if any, between the law regarding the property relationship between spouses and the law of succession?

There is only an indirect relationship between the law regarding the property relationship between spouses and the law of succession.

During marriage one spouse may inherit some assets from relatives. The question that then arises is whether those assets remain the personal property of the inheriting spouse or become common assets of both spouses. In the French legal matrimonial property regime (community restricted to the assets acquired during marriage), those assets acquired by succession remain personal assets of the inheriting spouse. The same applies e.g. in case of separation of property (*régime de séparation de biens*).

At the dissolution of the marriage upon death of one spouse, the succession of the deceased spouse is opened and the matrimonial property regime will have an influence on the succession. Some legal provisions in succession law (contained in the French Civil Code) aim at safeguarding a certain standard of living to the surviving spouse: in some cases he is heir-at-law, some assets can be preferentially allocated to him (*attribution préférentielle*);¹⁹ succession law provisions also contain some rules reinforcing the existence of a status of the family home: see e.g. Art. 763 French Civil Code: if at the time of the death of one spouse the other spouse effectively²⁰ lives in a home either belonging to both spouses or only to the deceased spouse, the surviving spouse automatically has the right to stay in the dwelling for one year free of charge, and to use during the same time the pieces of furniture which furnish the dwelling (*droit de jouissance gratuite*). This right, stated in Art. 763 French Civil Code, is a direct consequence of the marriage (see Art. 763 para. 3) and not a succession right. It is a mandatory rule that the deceased spouse may not set aside by bequeathing the family home to another person in a Will).

Art. 764 French Civil Code also grants the surviving spouse a right to stay in the family home, but this is not a mandatory rule: unless the deceased spouse stipulated otherwise in a will before a notary public, at the time of the death a surviving spouse who effectively lives in a

¹⁹ See e.g. Art. 757-2 French Civil Code: the surviving spouse may be granted the preferential allocation of the family home and of the pieces of furniture with which it is garnished – provided that he/she has inheritance rights in full property that are at least as high as the value of the family home.

²⁰ It shall be the main dwelling of the surviving spouse, see Art. 763 French Civil Code.

dwelling belonging to either both spouses or to the deceased spouse alone has a right to stay in the dwelling and to use the furniture inside for the remainder of his or her life (so-called *droit d'habitation et d'usage*).²¹ However, subject to Art. 765 French Civil Code, the value of that right conferred to the surviving spouse shall be charged to the succession rights of the surviving spouse, which means that it shall be deducted from his or her succession portion.

These examples show that there is some indirect interconnection between the status of spouse and matrimonial and succession law. Another example can be given: two spouses may make an agreement before a notary public stating that the surviving spouse shall have the right to use all the assets belonging to the community – common assets – and all the personal assets of the deceased spouse until his or her own death (*donation au dernier vivant*).²² However, the children of the deceased spouse may claim for reduction of the donation if their reserved inheritance portion is affected by it.

7. Are there distinct rules concerning general rights and duties of the spouses (as referred to in section B) that are independent of the specific property relationship of the spouses (matrimonial property regimes as referred to in section C)?

YES.

The French Civil Code contains in its Articles 212-226²³ a list of rights and duties of the spouses that apply without having regard to the specific property relationship of the spouses. This means that those rules, often called *régime primaire impératif* (basic mandatory regime), apply to all married couples (but only to married couples, not to partners living together without being married to each other, and not to partners who live in registered partnership²⁴). All the rules stated in this basic mandatory regime aim to concretely ensure not only that the normal needs of the family can be met, but also that the independence of each spouse is

²¹ See also Art. 765-2 French Civil Code concerning the case where the family home was not the property of both spouses or of the deceased spouse but was subject to a lease (*contrat de bail*).

²² See *Dossiers pratiques Francis Lefebvre, Les successions et les libéralités après la réforme, Loi du 23 juin 2006*, 2006, n°4280 sq.

²³ Chapter VI (Respective Duties and Rights of Spouses) of Title V dedicated to Marriage.

²⁴ See *supra* Question 4.

safeguarded.²⁵ They are obligatory,²⁶ uniform, guidelines for all married couples, and they may not be excluded by an agreement to the contrary.²⁷

Spouses first owe each other respect, fidelity, support and assistance (Art. 212 French Civil Code: *respect, fidélité, secours and assistance*). They are both together responsible for the material and moral guidance of the family (Art. 213 French Civil Code).

Both spouses must normally contribute to the marriage expenses (*contribution aux charges du mariage*): Where an ante-nuptial agreement does not regulate the contributions of the spouses to the marriage expenses, they shall contribute to them in proportion to their respective means (Art. 214 para. 1 French Civil Code).²⁸ The marriage expenses are all expenses related to the kind and standard of living of the spouses (it is therefore not only a necessary minimum, by contrary to Art. 212 French Civil Code instituting a *devoir de secours*²⁹). For more details, see under Question 8.

The basic mandatory rules also aim at safeguarding the family home from a decision made by only one of the spouses: Neither spouse may unilaterally violate the rights that insure the lodging of the family, nor those of the furniture with within. The spouse whose consent to the transaction was not given may claim the annulment of it: the action for annulment is open to the nonconsenting spouse within the year after the day when he or she had knowledge of the transaction, without possibility of its ever being instituted more than one year after the matrimonial property regime was dissolved (Art. 215 para. 3 French Civil Code).³⁰

²⁵ See e.g. Art. 216 French Civil Code: Each spouse has full legal capacity; but his or her rights and powers may be restricted as a consequence of the matrimonial property regime and of the provisions of this Chapter. See also Art. 225 French Civil Code: Each of the spouses shall administer, bind and transfer alone his or her personal property; Art. 221 French Civil Code: “Each one of the spouses may open, without the consent of the other, a deposit account and a securities account in his or her personal name. With regard to the depositary, the depositor is always considered, even after dissolution of the marriage, to have free disposal of the funds and of the securities on deposit”; Art. 222: “Where one of the spouses appears alone to do an act of administration or enjoyment or a grant on a movable which he or she holds individually, he or she is considered, with regard to the third party in good faith, to have the power to do that act alone. This provision shall not apply to pieces of furniture referred to in Art. 215 para. 3, or to movable tangible property the nature of which gives rise to a presumption of ownership of the other spouse in accordance with Article 1404”; Art. 223: “Each spouse may freely follow a trade, collect his or her earnings and salaries and dispose of them after discharging marriage expenses”.

²⁶ See Art. 226 French Civil Code: All the provisions of this Chapter, on all questions where they do not save the application of ante-nuptial agreements, apply by the sole effect of marriage, whatever the matrimonial property regime of the spouses may be.

²⁷ D.R. Martin, *Les régimes matrimoniaux*, 2nd ed., 2005, p. 17, who defines the basic rules as “*un substrat matrimonial, à portée générale et obligatoire, sur quoi se greffent, en superstructure, les règles du régime matrimonial choisi*”.

²⁸ Art. 214 para. 2 French Civil Code: Where one of the spouses does not fulfil his or her obligations, he or she may be compelled by the other to do so in the manner provided for in the French Code of Civil Procedure.

²⁹ Normally, this duty to support the other spouse – which requires that the other spouse is in need – is covered by the contribution to the household expenses (see A. Colomer, *op. cit.*, n°105), so that the duty to support only applies concretely in case of judicial separation or during divorce proceedings.

³⁰ See also Art. 1751 French Civil Code: “The right to a lease of premises, without professional or commercial character, which is actually used for the dwelling of two spouses and even where the lease was concluded before the marriage, is, whatever their

Art. 220 French Civil Code states a very important rule for the daily life: Can each spouse contract alone for the needs of the household? If yes, is one spouse liable for the household debts incurred by the other? And if so, to what extent? Art. 220 grants each spouse the power to individually make contracts which relate to the support of the household or the education of children: any debt thus contracted by the one binds the other jointly and severally. However there are some exceptions: 1. Joint and several obligations do not arise as regards expenditures that are manifestly excessive with reference to the standard of living of the household, to the usefulness or uselessness of the transaction, to the good or bad faith of the contracting third party; 2. Nor do they do not arise if they were concluded without the consent of both spouses, as regards instalment purchases or loans unless those relate to reasonable sums needed for the wants of everyday life. For more details about the scope of this legal provision and case law, see under Question 9.

The mandatory basic regime also provides possible measures in case of crisis. Several situations shall be distinguished: 1. the case of danger (*peril*): Art. 220-1 French Civil Code states that "Where one of the spouses fails seriously in his or her duties and thus imperils the interests of the family, the family causes judge may prescribe any urgent measure which those interests require".³¹ The duration of the measures taken shall be determined by the judge and may not exceed three years, including a possible extension (Art. 220-1 para. 4 French Civil Code). 2. The case of deficiency (*carence*) with two possible sub-cases: either one spouse refuses to enter into a useful transaction for which his or her agreement together with the one of the other spouse is required, or he or she is not able to express his or her will (disease, absence...); subject to Art. 217 French Civil Code, a spouse may be authorised by the court (so-called system of *autorisation judiciaire*) to enter into a transaction for which the assistance or the consent of the other spouse would be necessary, where the latter is not able to express his or her intention or where his or her refusal is not justified by the interest of the family.³² The transaction entered into is then effective against the spouse whose assistance or consent was lacking, but without any personal obligation incumbent on him or her resulting from it.

The French Civil Code also rules a possibility of a *habilitation judiciaire* in favour of one spouse: See Art. 219 French Civil Code: "Where one of the spouses is unable to express his or her intention, the other may be judicially entitled to represent him or her, in a general manner or for some particular transactions, in the exercise of the powers resulting from the

matrimonial property regime may be and notwithstanding any agreement to the contrary, considered to belong to both spouses".

³¹ Kinds of urgent measures that the judge may prescribe: He may in particular forbid that spouse to make, without the consent of the other, grants of his or her own property and of that of the community, movable or immovable. He may also forbid the displacing of movables, subject to the specifying of those which he attributes to the personal use of the one or the other of the spouses (Art. 220-1, para. 2 French Civil Code). The most recent Reform Act of 26.05.2004 on Divorce included a new para. 3 into Art. 220-1 French Civil Code; this add relates to the situation where violence is practiced by one spouse endangering his or her spouse, one or several children: the judge may rule on the separate residence of the spouses, specifying which of the spouses shall continue to dwell in the conjugal lodging. Save particular circumstances, the enjoyment of this lodging must be attributed to the spouse who is not the author of the violence. The judge shall give judgment, if necessary, on the details of exercise of parental authority and on the contribution to the marriage expenses. The measures taken lapse where, upon expiry of a period of four months from their being handed down, no petition for divorce or judicial separation has been lodged.

³² More generally, a spouse may always give the other a written authorization to represent him or her in the exercise of the powers that the matrimonial property regime confers to him or her, see Art. 218 French Civil Code.

matrimonial property regime, the terms and extent of that representation being fixed by the judge".³³ In that case, the spouse exercises by representation the other spouse's personal powers, by contrary to Art. 217 French Civil Code where the spouse asks for judicial authorization to enter into a transaction for which *the assistance or the consent* of the other spouse would be necessary (which means that both spouses should agree upon the transaction).

B. GENERAL RIGHTS AND DUTIES OF SPOUSES CONCERNING HOUSEHOLD EXPENSES, TRANSACTIONS IN RESPECT TO THE MATRIMONIAL HOME AND OTHER MATTERS IRRESPECTIVE OF THE SINGLE MATRIMONIAL PROPERTY REGIME

8. What, if any, are the obligations of spouses to contribute to the costs and expenses of the family household? In answering this question, briefly explain what your system understands by "costs and expenses of the family household".

See Art. 214 French Civil Code: "Where an ante-nuptial agreement does not regulate the contributions of the spouses to the marriage expenses (*contribution aux charges du mariage*), they shall contribute to them in proportion to their respective means.

Where one of the spouses does not fulfil his or her obligations, he or she may be compelled by the other to do so in the manner provided for in the French Code of Civil Procedure".

Art. 214 French Civil Code applies to all married couples without regard to the matrimonial property regime they are subject to.

The so-called *contribution aux charges du mariage* are the costs and expenses of the family household related to the standard of living of the spouses/family. The concept is therefore broader than the *dépenses ménagères* (household expenses) for which Art. 220 French Civil Code states a joint and several liability of both spouses (see under Question 9). Household expenses encompass of course the expenses related to the children, but also expenses related to the spouses/family. They depend on the standard of living that the spouses have chosen.³⁴ The contribution shall be paid even if the other spouse is not in need.³⁵

With regard to the duty to contribute to the household expenses, the spouses have freedom to reach an agreement before the wedding in a marital agreement (*contrat de mariage*) before a notary public. The agreement can also be concluded or modified during the marriage if the spouses decide to modify their matrimonial property regime (see Art. 1397 French Civil Code). However, French scholars exclude the possibility that such an agreement could oblige one spouse to pay to the other spouse all his gains and earnings or, to the contrary, that one spouse could be exonerated of any contribution.³⁶

Where no written agreement has been made on this issue, the spouses shall contribute in proportion to their respective means.

³³ Para. 2 of Art. 219 French Civil Code states that failing a legal power, power of attorney or judicial entitlement, the transactions entered into by a spouse in representation of the other are effective with regard to the latter according to the rules of management of another's business (*gestion d'affaires*).

³⁴ A. Colomer, *Droit civil – Régimes matrimoniaux*, Litec, 12th ed., 2004, n°106; Cass. Civ. I, 20.05.1981, *Bull. Civ. I*, n°176: the *contribution aux charges du mariage* may encompass pleasure expenses (*dépenses d'agrément*) like the acquisition of a holiday home.

³⁵ Cass. Civ. I, 23.06.1970, *D.* 1971. 162, obs. Larroumet; A. Colomer, *Droit civil – Régimes matrimoniaux*, Litec, 12th ed., 2004, n°105.

³⁶ A. Colomer, *Droit civil – Régimes matrimoniaux*, Litec, 12th ed., 2004, n°108.

Most of the time, the payment of the contribution does not lead to difficulties where harmony prevails between spouses. It is paid day by day either *in natura* or in value³⁷ (housework, contribution to the other spouse's professional activity, bank transfer on a bank account ...). However if one spouse refuses to contribute – e.g. during a factual separation³⁸ – the other spouse can bring an action before the court of first instance (*tribunal de grande instance*, jurisdiction of the family cause judge³⁹) in order to obtain a judgment setting the amount to be paid by the defendant spouse as a contribution to the household expenses.⁴⁰ If the defendant does not pay, special enforcement proceedings that are simpler and more effective than the normal ones can be used by the creditor spouse (*procédure de paiement direct*, Law Act n°73-5 of 2 January 1973, *procédure de recouvrement public des pensions alimentaires*, Law Act n°75-618 of 11 July 1975). The contribution to the household expenses can also be demanded (or even claimed) by one spouse at the dissolution of the marriage.

9. Is one spouse liable for the household debts incurred by the other? And if so, to what extent?

See Art. 220 French Civil Code: “Each one of the spouses has the power to make alone contracts which relate to the support of the household or the education of children: any debt thus contracted by the one binds the other jointly and severally.

Nevertheless, joint and several obligations do not arise as regards expenditures that are manifestly excessive with reference to the way of living of the household, to the usefulness or uselessness of the transaction, to the good or bad faith of the contracting third party. (Act No. 85-1372 of 23 Dec. 1985) They do not arise either, where they were not concluded with the consent of the two spouses, as regards instalment purchases or loans unless those relate to reasonable sums needed for the wants of everyday life”.

The Law Act of 13 July 1965 gave both spouses full equality over the power to individually make any contracts related to the family household and to the children's education.⁴¹ Art. 220 French Civil Code applies as a basic mandatory rule to all married couples⁴² without regard to the matrimonial property regime chosen by the spouses.⁴³

³⁷ D.R. Martin, *Les régimes matrimoniaux*, Dalloz, 2nd ed., 2005, p. 21.

³⁸ In principle, the spouses shall contribute to the household expenses without having regard to the fact that they live together or not; however, the court issuing a judgment on a contribution claim brought by one spouse can take into account all circumstances of the case, see Cass. Civ. I, 06.01.1981, *Bull. Civ. I*, n°6. The mere fact that one spouse refuses to cohabit with the other spouse does not automatically deprive the creditor spouse from his right to obtain the payment of a contribution to the household expenses if there are serious and sufficient grounds not to live together, Cass. Civ. I, 18.12.1978, *Bull. Civ. I*, n°393.

³⁹ See Art. 1070 French Code of Civil Procedure.

⁴⁰ The family causes judge can rule that the debtor spouse also has to pay a contribution for the past if he has not contributed to the household expenses for a long time.

⁴¹ Before 1965 the Law Act of 22.09.1942 stated that the married woman had power to represent her husband for all contracts related to the household; those contracts made by the wife bound the husband toward third persons except in some limited cases. This rule was called *mandat domestique* because the law presumed that the husband, who was still the head of the family, had given his wife a power of attorney.

⁴² In principle without regard to a possible factual separation, Cass. Civ. I, 10.03.1998, *Bull. Civ. I*, n°101. But the court may take into account all circumstances and decide that in case of a factual separation between the spouses, a phone subscription contract by one spouse does not bind the other spouse jointly and severally if the debt was not related to the household, see Cass. Civ. I, 15.11.1994, *Gaz. Pal.* 1995. 2. 666, obs. Mathieu.

⁴³ In case of separation of property, the spouse who paid the expenditure can require that the other spouse shall reimburse a part of the debt in proportion to his/her means of contribution. With the legal regime of community restricted to the assets acquired during

What is a debt that relates to the support of the household or the education of children (so-called *dette ménagère*)? All usual expenses shall be considered, like food, heating, clothes, illness expenses, phone subscription,⁴⁴ hospital expenses for a child,⁴⁵ joint ownership costs (*charges de copropriété*), national insurance contributions, rent for the family home, TV, computer, school expenses etc. Even if Art. 220 French Civil Code only mentions *contracts*, French case law extends the scope of this legal provision to some expenses which are not related to a contract (like some national insurance contributions⁴⁶ or joint ownership costs). The French Cour de cassation holds that Art. 220 French Civil Code applies to any debt (even not based on a contract) related to the support of the household or the education of the children.⁴⁷

There is much case law dealing with the outlines of the *dettes ménagères*; the appellate courts do not always share the same views on this issue. Some leisure expenses may also sometimes lead to joint and several liability of the spouses, depending on the standard of living of the spouses that may give rise to expenses of a normal or exceptional character.⁴⁸ The French Cour de Cassation stated generally that the investment expenses of a couple, especially the ones aiming at acquiring immovables, do not fall into the category of *dettes ménagères* leading to an automatic joint and several liability of the spouses.⁴⁹

Where the debt contracted by one spouse binds the other jointly and severally, all the assets of both spouses (and also the common assets in case of community) can be attached by the creditor. But concerning the legal regime of limited community (*communauté réduite aux acquêts*), some special provisions are stated in Art. 1414 French Civil Code⁵⁰ with regard to the earnings and wages of a spouse in order to safeguard the financial independence of the spouse who did not contract the debt.

Art. 220 para. 1 French Civil Code institutes joint and several spousal liability for debts related to the household or the children's education. However para. 2 and 3 contain some exceptions.

1. Obviously excessive expenses, Art. 220 para. 2 French Civil Code.

Joint and several obligations do not arise as regards expenditures that are *manifestly* excessive. "Manifestly" means that the court does not need to go very deep into the nature of the

marriage, the debts which relate to the support of the household or the education of children fall in community (e.g. are common debts of both spouses); the creditor can attach the personal assets of both spouses and their common assets because of the joint and several liability, see A. Colomer, *Droit civil – Régimes matrimoniaux*, Litec, 12th ed., 2004, n°92.

⁴⁴ Cass. Civ. I, 05.11.1994, *JCP* 1995. I. 3869, n°1, obs. Widerkehr.

⁴⁵ Cass. Civ. II, 10.04.1996, *JCP* 1997. I. 4008, n°1, obs. Simler.

⁴⁶ Cass. Soc., 12.05.1977, *Bull. Civ.* V, n°316.

⁴⁷ Cass. Civ. I, 07.06.1989, *D.* 1990. 21, obs. Massip.

⁴⁸ See e.g. Paris, 11.10.1989, *JCP N* 1991. II. 57, obs. Simler: no joint liability of the spouses for a flying ticket bought by the husband for a pleasure trip; *contra*: Paris, 05.07.1996, *Dr. Famille* 1997, n°50, obs. Beignier (with regard to the spouses' standard of living, the expense was normal).

⁴⁹ Cass. Civ. I, 11.01.1984, *Defrénois* 1984. 933, obs. Champenois.

⁵⁰ Art. 1414 French Civil Code: "The earnings and wages of a spouse may be attached by the creditors of his or her spouse only where the obligation was contracted for the support of the household or the education of the children, under Article 220.

Where the earnings and wages are paid into a current or a deposit account, the latter may be attached only under the conditions determined by decree". See also Decree n°92-755 of 31.07.1992, article 48.

expense or in the life of the spouses to determine whether the joint and several liability of the spouses shall be excluded.

Three kinds of criteria are mentioned in order to facilitate the court's estimation⁵¹ whether the expense related to the household or the children's education was manifestly excessive:

- the way of living of the household,⁵²
- the usefulness or uselessness of the transaction,
- the good or bad faith of the contracting third party.

2. Special contracts: installment purchases (*ventes à tempérament*) and loans (*emprunts*), Art. 220 para. 3 French Civil Code.

Since the Law Act No. 85-1372 of 23 December 1985 para. 3 of Art. 220 states that there is no joint and several spousal liability for installment purchases or loans unless the amounts are reasonable and needed for the wants of everyday life. This means that where such a contract is not concluded with the consent of both spouses, only the spouse who made the contract has to pay the debt. There is again an exception within the exception regarding loans (*emprunts*): if the loan contracted by one spouse alone is a reasonable sum needed for the wants of everyday life, both spouses are bound and the creditor can therefore attach all personal assets of both spouses (and also the common assets in case of a community regime).

Where the joint and several liability of both spouses does not apply, the spouse who made the contract shall pay the expenses himself. In case of separation of property, only his or her personal assets can be attached. In case of legal community, his or her personal assets and the common assets can be attached by the creditor.

10. To what extent, if at all, are there specific rules governing acquisition and/or transactions in respect of the matrimonial/family home irrespective of the matrimonial property regime? In answering this question, briefly explain what your system understands by "matrimonial/family home".

See Art. 215 para. 3 and Art. 1751 French Civil Code.

1. Art. 215 para. 3 French Civil Code.

"The spouses may not, separately, dispose of the rights whereby the lodging of the family is ensured, or of the pieces of furniture with which it is garnished. The one of the two who did not give his or her consent to the transaction may claim the annulment of it; the action for annulment is open to him or her within the year after the day when he or she had knowledge of the transaction, without possibility of its being instituted more than one year after the matrimonial property regime was dissolved".

2. Art. 1751 para. 1 French Civil Code.

"The right to a lease of premises, without professional or commercial character, which is actually used for the dwelling of two spouses and even where the lease was concluded before the marriage, is, whatever their matrimonial property regime may be and notwithstanding any agreement to the contrary, considered to belong to both spouses.

In case of divorce or judicial separation, that right may be allotted by the court seized of the application for divorce or judicial separation, on account of the social and family interests concerned, to one of the spouses, subject to the rights to reimbursement or indemnity for the benefit of the other spouse.

In case of death of one of the spouses, the surviving spouse co-lessee has an exclusive right on it, except where he or she expressly renounces it".

⁵¹ A. Colomer, *Droit civil – Régimes matrimoniaux*, Litec, 12th ed., 2004, n°100.

⁵² See e.g. Paris, 05.07.1996, *Dr. Famille* 1997, n°50, obs. Beignier: leisure expenses (travel expenses) of 190 000 Francs (about 29 000 €); the appellate courts applies Article 220, para. 1 French Civil Code (joint and several liability) because of the vast wealth of the spouses).

Those two legal provisions – which are mandatory (*d'ordre public*) – aim at protecting the family home (*logement de la famille*). The family home is the dwelling where the spouses/the family mainly lives (notion of *résidence principale de la famille*).⁵³ However, Art. 215 French Civil Code does not require that the spouses live together and applies even in cases of factual separation, judicial separation and also during the course of divorce proceedings.⁵⁴ Art. 215 prevents one spouse from individually disposing of the rights that insure the lodging of the family (or of the furnishings⁵⁵). Those rights can be: ownership (*propriété*), living right (*droit d'habitation*), usufruct, civil company shares giving a right to use a home, lease.... One spouse may not alone sell the family home, encumber a mortgage on it, donate it or give an usufruct on it⁵⁶.... Not only disposition acts are concerned; a spouse may e.g. not give the family home in lease to a third person without the agreement of the other spouse.⁵⁷

However, the French Cour de cassation holds that the spouse who has the ownership of the family home may dispose of it by a Will, because Art. 215 French Civil Code applies only during the marriage, and the Will shall only lead to consequences after that spouse's death,⁵⁸ e.g. after dissolution of the marriage. A creditor may also attach the family home belonging personally to one spouse.

The acts related to the family home, whether it belongs personally to one spouse or to both, require the consent of both spouses. This consent must be certain and clear; it does not, however, need to be a written one.⁵⁹ Some scholars suggest that the consent can be tacit if it is given at the time of the transaction, but should be written if it is given before the transaction.⁶⁰

A spouse who does not give his or her consent to the transaction related to the family home may make a claim for the transaction's annulment. If the legal conditions are fulfilled, the annulment shall be pronounced by the court (*nullité de droit*). The action for annulment is open to a nonconsenting spouse within the year after the day he or she had knowledge of the transaction. without possibility of its being instituted more than one year after the matrimonial property regime was dissolved. The annulment divests the transaction of any consequences; the annulled transaction has neither effect towards the spouse who entered into the transaction, nor to any implicated third persons.

Art. 1751 para. 1 French Civil Code, which is also mandatory (*d'ordre public*), applies to spouses living in a family home that one of them rents. This legal provision applies only to a house which is exclusively used as a home, as a residence (*habitation*); which is not the case for Art. 215 para. 3 French Civil Code. Art. 1741 para. 1 states that during the marriage, the right to a lease of premises related to the dwelling of the spouses is deemed to belong to both spouses, even if only one made the lease contract. The spouses' matrimonial property regime cannot exclude this rule nor may the spouses reach an agreement to the contrary of the rule stated in Art. 1751 para. 1 French Civil Code. The consequences of Art. 151 Para. 1 are that one spouse may not alone dispose of the right to a lease of premises without the agreement of the other spouse. The lessor cannot terminate the lease contract without sending each spouse,

⁵³ See Cass. Civ. I, 22.03.1972, *Bull. Civ. I*, n°93; D. 1972. Somm. 165.

⁵⁴ A. Colomer, *Droit civil – Régimes matrimoniaux*, Litec, 12th ed., 2004, n°68.

⁵⁵ For the concept of *meubles meublants*, see Art. 534 French Civil Code: pieces of furniture dedicated to the use or the ornament of a dwelling....

⁵⁶ See A. Colomer, *Droit civil – Régimes matrimoniaux*, Litec, 12th ed., 2004, n°72.

⁵⁷ Cass. Civ. I, 16.05.2000, D. 2000. IR. 192.

⁵⁸ Cass. Civ. I, 22.10.1974, D. 1975. 645, obs. Foulon-Piganiol: "*l'article 215 qui protège le logement de la famille pendant le mariage ne porte pas atteinte au droit qu'a chaque conjoint de disposer de ses biens à cause de mort*".

⁵⁹ Cass. Civ. I, 13.04.1983, *Defrénois* 1983, Art. 33 158, obs. Champenois.

⁶⁰ G. Champenois, *Defrénois* 1983, Art. 33 158; A. Colomer, *Droit civil – Régimes matrimoniaux*, Litec, 12th ed., 2004, n°76.

separately, a letter of cancellation. Each spouse is debtor of the rent; this is a joint and several obligation of both that remains until the divorce judgment develops its consequences towards third persons.

After marriage, in cases of divorce or judicial separation (*séparation de corps*), the court has discretionary power to allot the right to lease of premises related to the former family home to one of the spouses with regard to the "social and family interests at stake".⁶¹ The non-allotted spouse can have rights to reimbursement or indemnity.

If a marriage is dissolved by death, the surviving co-lessee spouse has an exclusive right to the lease of the family home, except where he or she expressly renounces it.

Some special provisions related to the family home which favour the surviving spouse are also set in the part of the French Civil Code dealing with succession law (Art. 763 and 764 French Civil Code, see under Question 6).

11. To what extent, if at all, are there specific rules governing acquisition and/or transactions in respect of household goods irrespective of the matrimonial property regime? In answering this question, briefly explain what your system understands by "household assets".

The French Civil Code does not contain any specific rules governing acquisition and/or transactions in respect of household goods irrespective of the matrimonial property regime, except the ones mentioned under Question 9 and Question 10. The only specific rules are therefore those concerning joint and several liability of both spouses in case of household expenses (*dettes ménagères*, Art. 220 French Civil Code) and the special provisions aiming at protecting the family home (Articles 215 para. 3 and 1751 French Civil Code).

12. To what extent, if at all, are there other rules governing transactions entered into by one spouse irrespective of the matrimonial property regime (e.g. entering into guarantees, incurring debts...)?

The only other rules governing transactions entered into by one spouse irrespective of the matrimonial property regime have already been mentioned under Question 9 and Question 10.

They concern instalment purchases (*ventes à tempérament*) and loans (*emprunts*). Art. 220 para. 3 French Civil Code: Joint and several obligations "do not arise either, where they were not concluded with the consent of the two spouses, as regards instalment purchases or loans unless those relate to reasonable sums needed for the wants of everyday life".

The Law Act No. 85-1372 of 23 December 1985 para. 3 of Art. 220 states that there is no joint and several liability of the spouses as regards instalment purchases or loans unless those relate to reasonable sums needed for the wants of everyday life. This means that where such a contract is not concluded with the consent of both spouses, only the contracting spouse is liable for the contracted debt. Again, however, there is an exception within the exception regarding loans (*emprunts*): if one spouse contracts for a loan that is a reasonable sum needed for the wants of everyday life, both spouses are bound and the creditor can therefore attach all personal assets of both spouses (and also the common assets in case of a community regime).

Legal rules also prohibit the entering into guarantees by only one spouse where the family home is concerned. One spouse may not alone institute a mortgage in favour of a third

⁶¹ A. Colomer, *Droit civil – Régimes matrimoniaux*, Litec, 12th ed., 2004, n°83.

person. A personal security (*cautionnement*) is, however, possible⁶² because it is not a “*droit réel*” (real security). See under Question 10.

Of course, other legal provisions can apply, depending on the matrimonial property regime chosen by the spouses. In case of legal community e.g., Art. 1415 Code civil states that each spouse may obligate only his separate property and his income, by surety or loan, unless they have been contracted with the express consent of the other spouse, who, in that case, does not obligate his separate property. See also Art. 1422 para 1 Code civil: “Nor may one spouse, without the other, assign a common property to the guarantee of a third person's debt.”

13. To what extent, if at all, are there specific rules concerning one spouse acting as agent for the other?

There are specific rules concerning one spouse acting as agent for the other. A distinction shall be made between a spousal authorization for one spouse to represent the other, and a judicial authorization for the same thing.

1. Art. 218 French Civil Code: authorization given by one spouse.

“A spouse may give the other a written authorization to represent him or her in the exercise of the powers that the matrimonial property regime confers to him or her. He or she may, in all cases, freely revoke that authorization”.

This legal provision is very general. In cases lacking precision, the general rules related to the power of attorney (*mandate*) apply (ie. Articles 1984 et seq. French Civil Code). The authorization may be given tacitly, expressly, in a general or a special manner.⁶³ The spouse who is represented by the other spouse is bound by the transaction entered into on his behalf. The authorisation may be freely revoked by the represented spouse.

2. Art. 219 French Civil Code: judicial authorization.

“Where one of the spouses is unable to express his or her intention, the other may be judicially entitled to represent him or her, in a general manner or forms some particular transactions, in the exercise of the powers resulting from the matrimonial property regime, the terms and extent of that representation being fixed by the judge.

Failing a legal power, power of attorney or judicial entitlement, the transactions entered into by a spouse in representation of the other are effective with regard to the latter according to the rules of management of another's business”.

In accordance with Art. 217 French Civil Code, a spouse may be authorised by a court (so-called system of *autorisation judiciaire*) to enter into a transaction for which the assistance or the consent of the other spouse would be necessary, where the latter is not able to express his or her intention or where his or her refusal is not justified by the interest of the family. Any kind of impediment may be considered: disease, imprisonment, absence, etc.

A spouse may claim for general representation of the other spouse, or for a more limited representation with regard to special transactions. In the community regimes, the representation may apply to transactions with respect to the common assets as well as to acts related to the personal assets of the spouse who is unable to express his or her intention. The court decides on the scope of the representational power of the claimant spouse; the interests of the other spouse are to be considered. The transactions entered into by the representing

⁶² See Cass. Civ. I, 21.06.1978, *JCP* 1978. IV. 264; D. 1979. 479, obs. Chartier: in case of a personal security, “*les dispositions de l'article 215 doivent, hors le cas de fraude, être considérées comme inopposables aux créanciers sous peine de frapper les biens d'une inaliénabilité contraire à la loi*”.

⁶³ However, where a mortgage is created or any dispositional act made, the mandate shall be precise and express (see Art. 1988 French Civil Code and A. Colomer, *Droit civil – Régimes matrimoniaux*, Litec, 12th ed., 2004, n°119)

spouse bind only the represented spouse, because the agent spouse (*mandataire*) only acts on the other spouse's behalf, not on his or her own. The liability of the representing spouse is subject to the general provisions concerning representation and agency.

With Art. 219 French Civil Code, one spouse exercises, by representation, the other spouse's personal powers; in contrast, through Art. 217 French Civil Code one spouse claims for judicial authorization to enter into a transaction for which *the assistance or the consent* of the other spouse would be necessary (which means that both spouses should agree upon the transaction, see under Question 7⁶⁴).

If one spouse would enter into a representational transaction on behalf of the other spouse without having any legal power, power of attorney or judicial entitlement, the transaction would be effective with regard to the latter spouse according to the rules of management of another's business (Art. 219 para. 2 French Civil Code). Therefore, it should be examined whether the transaction was useful and in the interest of the represented spouse (comp. Art. 1372 et seq. French Civil Code⁶⁵).

14. What restrictions or limitations, if any, are there concerning transactions between spouses irrespective of the matrimonial property regime (e.g. gifts...).

As already mentioned under Question 10, one spouse may not alone make a donation of the family home in favour of a third person (Art. 215 para. 3 French Civil Code).

Excepting this case, the French Civil Code's general, mandatory, basic rules - applying to all married couples without regard to the matrimonial property regime chosen by the spouses - state the full legal capacity of each spouse; even if his or her rights and powers may be restricted as a consequence of the matrimonial property regime and of the provisions of the basic regime (Art. 216 French Civil Code). Art. 225 French Civil Code states that "each of the spouses shall administer, bind and transfer alone his or her personal property". Each spouse may also open, without the consent of the other, a deposit account and a securities account in his or her personal name (Art. 221 French Civil Code). With regard to the depositary, the depositor is always considered, even after dissolution of the marriage, to have free disposal of the funds and of the securities on deposit (Art. 221 para. 2 French Civil Code). This presumption makes the functioning of bank accounts easier and reinforces the independence of each spouse.

Another legal presumption is contained in Art. 222 French Civil Code: "Where one of the spouses appears alone to do an act of administration or enjoyment or a grant on a movable which he or she holds individually, he or she is considered, with regard to the third party in good faith, to have the power to do that act alone. This provision shall not apply to pieces of furniture referred to in Art. 215 para. 3, or to movable tangible property the nature of which gives rise to a presumption of ownership of the other spouse in accordance with Art. 1404".

Earnings and salaries are also subject to a large independence of each spouse, because each of the two spouses may collect them and dispose of them after discharging household expenses (Art. 223 French Civil Code).

⁶⁴ In accordance to Art. 217 French Civil Code, a spouse may be authorised by court (so-called system of *autorisation judiciaire*) to enter into a transaction for which the assistance or the consent of the other spouse would be necessary, where the latter is not able to express his or her intention or where his or her refusal is not justified by the interest of the family. The transaction entered into is then effective against the spouse whose assistance or consent was lacking, but without any personal obligation incumbent on him or her resulting from it.

⁶⁵ For an example, see Cass. Civ. I, 05.03.1985, *Bull. Civ. I*, n°86: undoubted usefulness of mending works initiated by the wife in the castle belonging personally to the husband who was in jail; the castle was the family home.

Of course, other legal provisions can apply, depending on the matrimonial property regime chosen by the spouses. In case of legal community, see e.g. Art. 1422 para 2 Code civil (One spouse may not, without the other, dispose *inter vivos*, gratuitously, of the common property).

C. MATRIMONIAL PROPERTY REGIMES

C.1. General issues

15. Are spouses entitled to make a contract regarding their matrimonial property regime?

Yes. As stated in Art. 1387 French Civil Code the law only regulates the property relationship between spouses in default of a contract.

16. What regime is applicable, using the list below,⁶⁶ if spouses have not made a contract (default regime) or are not allowed to make a contract or are not allowed to make a contract with binding effect?

In France, if spouses have not made a contract, the community of property is the default regime (*communauté légale* also called *communauté réduite aux acquêts*) (Art. 1400 French Civil Code).

17. Using the list above, are there other alternative matrimonial property regimes regulated by statute for which spouses can opt besides the default regime (where applicable)?

The French Civil code regulates three types of matrimonial property regimes besides the default of community of property:

1. The conventional community (Art. 1497-1528 French Civil Code).
2. The separation of property (Art. 1536-1543 French Civil Code).
3. The participation in acquisitions (Art. 1569-1581 French Civil Code).

18. Briefly describe the regimes indicated in the answers to:

a. Question 16.

In cases where the spouses have not entered into a marital agreement, the matrimonial property regime determined by law is that of community property (*communauté légale*) and is governed by Art. 1400 to 1491 French Civil Code. Three categories of assets may be involved: the community assets (*biens communs*), the personal assets of the wife (*biens propres de la femme*) and the personal assets of the husband (*biens propres du mari*). The community is comprised of, in principle, the acquisitions made by the spouses together or separately during the marriage and being both the result of their personal activity and of savings made from the benefits of their personal assets (Art. 1401 French Civil Code); and definitively or saving compensation all the debts of the spouses (Art. 1409 French Civil Code). After dissolution, the community is equally divided between the spouses (Art. 1475 para. 1 French Civil Code).

b. Question 17.

1. The conventional community (Art. 1497-1527 French Civil Code).

The conventional community is not a regime by itself, but it provides the possibility to modify certain clauses of the default community of property regime. These modifications may concern the assets comprising the community, the administration of the community and/or the dissolution and distribution of assets. The normal rules of the default community

⁶⁶ For an explanation of this list, see the document: CLASSIFICATION OF MATRIMONIAL PROPERTY REGIMES PROPOSED BY THE CEFL.

of property will still be applicable regarding all points where no modification was agreed upon in the marital agreement (Art. 1497 French Civil Code).

a. Modifications concerning the assets comprising the community.

The French Civil code expressly describes two types of modifications concerning the category of assets which fall into the community. Spouses may, however, agree on other kinds of modifications concerning this point. The first type of modification expressly described consists of the community of movables and acquisitions (Art. 1498-1501 French Civil Code) and the second type of the universal community of property (Art. 1526 French Civil Code).

i. The community of movables and acquisitions.

The community of movables and acquisitions is composed of, along with the assets comprising the community according to the rules of the default regime, movable property of which the spouse had ownership or possession on the day of the marriage or which has fallen to them afterwards through succession or gift unless the donor or testator has stipulated the contrary. Nevertheless, movable property, which would have been part of the category of personal assets by nature by virtue of Art. 1404 when acquired during the community, will remain personal (Art. 1498 French Civil Code). On the question of assets personal by nature see Question 22.

Movable property acquired after the conclusion of the contract but before the marriage has been celebrated will be added to the community unless some clause of the contract says otherwise.

As there is a correlation between the assets and the debts, some parts of the pre-marital debts and the debts burdened with succession or gifts will be deemed to belong to the community of property. The fraction of debts which the community bears is proportional to the assets it received according to Art. 1498. Those debts are the final responsibility of the community (Art. 1500 French Civil Code).

However, the division of the debts prior to the marriage or burdening successions and gifts may not prejudice creditors. In consequence, the creditors keep, in all cases, the right to seize assets which previously constituted their pledge. They may also enforce their payment against the whole of the community when the movables of their debtor has been merged into the community and can no longer be identified according to the rules of Art. 1402. (Art. 1501 French Civil Code). On the question of proof of personal assets see Questions 28 and 29.

ii. The universal community.

Spouses may establish by marital agreement a universal community of their property, both personal and real, present and future. However, except by contrary stipulation, property which Art. 1404 declares personal in nature does not fall into such community (on the question of assets personal by nature see Question 22). A universal community bears definitively all the debts of the spouses, present and future (Art. 1526 French Civil Code).

b. Modifications concerning the administration.

The French Civil Code also expressly regulates the possibility of agreeing to jointly administer the community. In such cases, the instruments of disposition and also of administration of common assets are to be made under the joint signature of the two spouses and they carry, as a matter of law, solidarity of obligations. Instruments preserving rights from extinction may be made separately by each spouse. (Art. 1503 French Civil Code).

c. Modifications concerning the distribution of assets.

The third category of modifications expressly regulated by the French Civil Code concerns the distribution of assets. Two different kinds of modification can be distinguished. First the spouses may agree upon a clause of levy (*clause de prélèvement*) allowing one of them the power to appropriate a certain common asset (on condition of indemnity or without). They may also agree to depart from the normal distribution rule stating that the community shall

be divided by half. When a modification generates an advantage to one spouse, it is called a matrimonial advantage (*avantage matrimonial*) which is subject to a specific system. This system is defined by Art. 1527 French Civil Code and its most important element is that matrimonial benefits should not, in principle, and notwithstanding the fact that they grant an advantage to one of the spouse, be considered as gifts.

Nevertheless, in some situations they may be considered as gifts: when children from “another bed” are present. In that case, any agreement which has a consequence of giving to one of the spouses more than the share regulated by Art. 1098 in the Title Gifts Inter Vivos and Testaments (the so called disposable part of the estate) is ineffective for any excess (Art. 1527 para. 2 French Civil Code). However, since the Act of 23 June 2006 these children may renounce to their rights to ask for a reduction of the matrimonial benefit, in which case they will get some other rights (Art. 1527 para. 3 French Civil Code).

Most of these advantages are supposed to apply in case of dissolution by death. What happens when the community is dissolved by divorce, i.e. during the lifetime of both spouses? Then, the new Art. 265 French Civil Code will apply.⁶⁷ The Article is applied differently based on whether the matrimonial advantages take effect during the marriage or only at the dissolution. Matrimonial advantages that take effect during the marriage are not affected by divorce. Matrimonial advantages that take effect only at the dissolution of the matrimonial property regime or at the death of one spouse are revoked by operation of law in cases of divorce unless the spouse who granted them decides otherwise. This decision must be established by the judge at the time of the divorce decree and shall render irrevocable the upheld advantage or transfer. Now that the system of the matrimonial advantages has been set out, the different types of clauses which may change the normal rules of distribution and are expressly regulated by the French Civil Code will be exposed. First, we will look into the clauses on levy (*clauses de prélèvement*) and then at the clauses which more generally modify the distribution.

i. Clauses on levy (*clauses de prélèvement*).

The spouses may stipulate that the survivor of them, or one of them if he or she survives, or even one of them in all cases of dissolution of the community, will have the option of levying on certain common assets, with the responsibility of accounting thereon to the community, according to the value which they have at the day of partition, if it is not otherwise agreed (Art. 1511 French Civil Code). This clause is then called a *clause on levy on condition of indemnity* (*clause de prélèvement moyennant indemnité*). The contract of marriage may fix the basis of evaluation and the modalities of payment of a possible net balance. Account being taken of such clauses and in default of agreement between the parties, value of assets will be fixed by the court (Art. 1512 French Civil Code). The option of levying lapses if the benefiting spouse does not exercise it through a notification made to the other spouse or heirs within a period of one month, counting from the day when the latter summoned him or her to take part. Such summoning may not itself take place before the expiration of the period provided in the Title succession for making inventory and deliberating (Art. 1513 French Civil Code). Levying is an operation of partition: property levied is imputed against the share of the spouse benefiting; if its value exceeds such share, it gives rise to depositing of the net balance. The spouses may agree that the indemnity due by the maker of a levy will be imputed subsidiary against his or her rights in the succession of the predeceased spouse (Art. 1514 French Civil Code).

This kind of clause is usually agreed upon to allow the surviving spouse the ability to carry on with his or her occupation by obtaining ownership of the asset necessary to it. As it is often used to pass on a business (*fonds de commerce*) this clause also carries the name “commercial clause”.⁶⁸

⁶⁷ Act n°2004-439 of 26.05.2004.

⁶⁸ R. Cabrillac, *Droit Civil – Les régimes matrimoniaux*, Montchrestien, 2007, n°235.

Spouses may also agree in their marital contract that the surviving spouse, or the survivor of the spouses if there is no surviving spouse, will be authorized to levy on the community before any partition, either a certain sum or certain property in kind or a certain quantity of a determined kind of property (Art. 1515 French Civil Code) and this without any indemnity (*clause préciput*).

ii. Clauses which modify the distribution.

These types of clauses modify the distribution by attributing a bigger share of the community to one of the spouses (Art. 1520 French Civil Code). They are often called matrimonial advantages (*avantages matrimoniaux*), which means that they are not considered as gifts, either as to substance or as to form, but simply as agreements relating to marriage and between partners (Art. 1525 French Civil Code). Unless otherwise stipulated, however, they do not prevent the heirs of the predeceased spouse from taking back the assets and capital fallen into the community in the name of the decedent; that is to say the assets present at the time of the beginning of the community or acquired later on through succession, gift or legacy. (Art. 1525 para. 2 French Civil Code).

- Spouses may agree upon a clause of unequal shares.

A clause of unequal share makes it possible to depart from the rule of separation into two equal shares. The liability of the debts will then also be reduced or increased proportionately to the share of the assets (Art. 1521 French Civil Code). In fact, the agreement is void if it obliges the spouse whose share has been reduced (or his or her heirs) to bear a larger share in the debts, or if it dispenses them from bearing a share in the debts equal to that they take in the assets (Art. 1521 French Civil Code).

- The spouses may also agree upon a clause of allotment of the entire community.

This kind of clause makes it possible to attribute the entire community to one spouse in case the community is dissolved by the death of one spouse. The spouse who thus retains the entire community is consequently obliged to pay all its debts. The clause may also stipulate that one of the spouses will have, for the case of survival, in addition to his or her half, the usufruct of the predeceased's share. In that case, he or she shall contribute to the debts, as to the usufruct, according to the rules of Art. 612. (Art. 1524 French Civil Code). The spouse who thus retains the entire community is consequently obliged to pay all its debts. The clause of allotment of the entire community is often combined with the agreement of a universal community.

2. The separation of property (Art. 1536-1543 French Civil Code).

The name of this regime speaks for itself. Each spouse keeps in principle the administration, enjoyment and free disposition of his or her personal assets and remains solely liable for his or her debts.

3. The participation in acquisitions (Art. 1569-1581 French Civil Code)

When the spouses have declared themselves to be married under the regime of participation in acquisitions, each of them keeps the administration, enjoyment and free disposition of his or her own property owned at the time of marriage and that acquired subsequently by succession, gift or purchase. During the marriage this regime functions as if the spouses were married under the regime of separation of property. At the dissolution of the regime, each spouse has the right to a half share in value of the net acquisitions existing in the patrimony of the other spouse and assessed by the double valuation of the original patrimony and the final patrimony (Art. 1569 French Civil Code).

19. Indicate the frequency of the use made of the regimes (where possible by reference to statistical data) referred to in Questions 16 and 17.

In France, 16% of spouses make a pre-nuptial agreement, 3% a post-nuptial one, so 19 % in total. 89% of all spouses are married under the default regime of community. 7,4% of spouses who made a marital agreement chose the default community regime or a regime akin to the default. 6,3 % chose the separation of property and 3,3% the universal community.⁶⁹

⁶⁹ A. Barthez et A. Laferrère, "Contrats de mariage et régimes matrimoniaux", *Économie et Statistique* 1996, p. 127-144.

C.2. Specific regimes

I. Community of property

I.1. Categories of assets

20. Describe the system. Indicate the different categories of assets involved.

If the spouses have not elected differently by means of marital agreement, they are married under the legal regime of community of property (Art. 1400 French Civil Code). Three categories of assets may be involved:

- The community;
- The personal assets of the husband;
- The personal assets of the wife.

21. What is the legal nature of the different categories of assets, in particular the community?

The main question is: does the community have corporate personality (*personnalité morale*)? The question has been controversial for quite some time, but it seems that nowadays one can assert that the community does not have a corporate personality. The majority of authors consider the community as some kind of undivided ownership not subject to the normal rules of undivided ownership.⁷⁰

22. What do the personal assets of each spouse comprise?

There are several categories of personal assets. Assets may be personal due to: 1. their origin, 2. their nature, or 3. their connection to another personal asset.

1. Assets personal due to their origin are the assets present at the time of the coming into existence of the community, as well as assets acquired through succession, gift or legacy (Art. 1405 French Civil Code).

Art. 1405 states that the assets of which the spouses had ownership or possession on the day of the celebration of the marriage remain personal; however, the correct phrasing should be: at the time of the coming into existence of the community. Regardless, this time limit implies that difficulties may arise if the date of the purchase is not certain, e.g. in case of acquisitive prescription or if the acquisition was the result of the exercise of an option during the existence of the community of an unilateral undertaking to sell prior to the community. In case of an acquisitive prescription that was started before the beginning of the community, the asset is personal (what counts is the fact that the spouse had the possession). In case of the exercise of an option, the asset falls into the community. Indeed, the title of acquisition is the exercise of the option and not the undertaking.⁷¹ If the promise of sale was reciprocal, the asset is personal. Indeed, according to Art. 1589 French Civil Code, the reciprocal promise of sale is the same as sale.

Assets acquired through succession, gift or legacy are also personal, unless stated otherwise. As expressly stated in Art. 1404 sub. 2 French Civil Code, assets fall into the community where a gratuitous transfer is made jointly to both spouses.

2. Assets personal by nature are assets with a personal character and instruments necessary to the profession of one of the spouse (Art. 1404 French Civil Code).

⁷⁰ Ph. Malaurie and L. Aynès, *Les régimes matrimoniaux*, Defrénois, 2nd ed., 2007, n°34, F.Terré and Ph. Simler, *Droit civil – Les régimes matrimoniaux*, Dalloz, 3rd ed., 2001, n°269.

⁷¹ Cass. Civ., 07.03.1938, *Recueil Dalloz hebdomadaire*, 1938.260.

The category of assets personal by nature can be divided into two categories. The first category is comprised of assets which are personal without any compensation to the community and the second category is comprised of those assets which remain personal saving compensation.

a. Personal without any compensation (Art. 1404 para 1 French Civil Code):

- apparel and clothes for the personal use of one of the spouses;
- actions in reparation for corporal or moral harm;⁷²
- inalienable claims and pensions;⁷³
- other assets.

Other assets may be personal, following the general rule of Art. 1404 which states that all assets which have a personal character and all rights exclusively attached to the person remain personal. This goes for example for honorary distinctions, letters and family heirlooms.⁷⁴

Other assets may also be personal according to other kind of legislation, and this is then often due to the fact that they are non-transferable. This is, for example, some types of lease contracts, of life annuities (*rente viagère*) and of some life insurances (Art. L. 132-16 French Insurances Code) but also of the moral right of authors of literary and/or artistic work (Art. L. 121-9 para. 1 French Code of Intellectual Property).

Life insurance is becoming more and more important, and all types of life insurance are present on the market. As far as the distribution of assets is concerned, no answer can be given that will be applicable to all these different kinds of life insurances. Several distinctions must be made.

Art. L. 132-16 French Insurance Code aims at life insurance undertaken by one spouse for the benefit of the other surviving spouse. In these cases the benefit of the insurance shall constitute the beneficial spouse's personal property. If the community has paid the premiums it will not get any compensation, except for the situation where the premiums have been clearly excessive regarding the possibilities of the community.

The situation with other types of insurance is, however, less clear. What should be kept in mind is that the idea behind life insurance is one of foresight, and that the aim sought will not be reached if the beneficial spouse must share the capital or reimburse the community. Therefore, if the aim of the insurance is not based on foresight for the future of the surviving spouse but is instead part of a savings plan, the capital will usually fall into the community, and if the capital is personal it will be saving compensation of the paid premiums

b. The instruments necessary to the profession of one of the spouses remain personal saving compensation (Art. 1404 para. 2 French Civil Code). The usual example of this kind of assets is the collection of books of a (law) professor.

3. The category of assets personal due to their connection with another personal asset may be subdivided in two categories. Firstly, they may be personal because they are attached to another personal asset, and secondly, because they replace another personal asset.

a. The case of attachment.

⁷² Cass. Civ. I, 12.05.1981, *Bull. Civ. I*, n°156.

⁷³ E.g. a personalised housing allowance (*Allocation personnalisée au logement (APL)*), see Amiens, 30.09.2004, *JCP* 2005.I.128, n°10, obs. Simler; *Dr. fam.* 2004, n°183, obs. Beigner.

⁷⁴ E.g. entomological collection made of insects that have been collected by the spouse himself. See Grenoble, 12.01.2004, *JCP* 2005.I.128, n°11, obs. Simler; *Dr. fam.* 2004, n°229, obs. Beignier.

The assets acquired as accessory to a personal asset or as increase of personal assets remain personal saving compensation if the occasion arises (Art. 1406 para. 1 French Civil Code). E.g. the building erected during the marriage on land belonging to the personal assets of a spouse and using funds coming from the community is by itself a personal asset saving compensation.⁷⁵

The acquisition of a part of a property of which one of the spouses was a joint owner also becomes personal saving compensation to the community (Art. 1408 French Civil Code).⁷⁶

b. The case of replacement.

i. Where there is real subrogation by operation of law.

- Claims and indemnities which replace personal assets.

Also constitute separate assets through the effect of real subrogation, claims and indemnities that replace separate assets (Art. 1406 para. 2 French Civil Code). This is for example the case of the insurance payment which takes the place of the destroyed asset.

- Exchange.

The asset acquired in exchange for a personal asset of one of the spouses is itself a personal asset, saving compensation to the community or by it, where there is a balance (Art. 1407 French Civil Code). However, if the net balance charged to the community is greater in value than the asset transferred, the asset acquired in exchange falls into the community, saving compensation for the benefit of the transferor. This is a mandatory disposition.

ii. Where the real subrogation is subject to conditions: investment or re-investment of personal assets.

- Ordinary investment or re-investment.

This is the simplest case: a spouse uses some money belonging to his or her personal assets or sells a personal asset, with this money he or she buys an asset which he or she intends to make personal also. To make this happen, the spouse has to fulfil certain conditions (Art. 1434 French Civil Code).

The spouse must make two declarations in the instrument of acquisition:

First, the spouse must declare that the acquisition has been made from separate funds or from funds coming from the alienation of a separate asset.

Secondly, the spouse has to make clear his or her wish to make this asset belong to his or her personal assets. If these conditions are fulfilled the asset belongs to the category of personal assets. However, there may be cases where the acquisition has been financed by both personal funds and funds coming from the community. If the price and expenses of the acquisition exceed the sum from which investment or re-investment was made, the community is entitled to compensation for the excess. If, however, the share of the community is greater than that of the acquiring spouse, the property acquired falls into community, subject to compensation due to the spouse. This rule is also compulsory.

- Investment or re-investment in anticipation.

In this case the chronology is different. A spouse would like to buy an asset he or she wishes to be personal but he or she doesn't have the personal funds available right away. This is possible, in accordance with Art. 1435 French Civil Code and is called investment or re-investment in anticipation. Where investment or re-investment is made in anticipation, the property acquired is separate, provided that the sums expected from the separate assets are paid to the community within five years after the date of the transaction. This construction is generally analyzed as a precedent condition: the asset is common until the sum expected from the separate assets is paid.

⁷⁵ Cass. Com. , 12.06.2003, *Bull. Civ.* IV, n°105.

⁷⁶ Cass. Civ. I, 14.05.1991, *JCP* 1992.II.21820, obs. Pillebout.

- Investment or re-investment after the event.

In this case a spouse has acquired an asset without making the two declarations required by Art. 1434 French Civil Code. Can he or she still make this asset fall into his or her personal assets?

Yes, as stated in Art. 1434 *in fine*: "Failing such declaration in the instrument, investment or re-investment takes place only through agreement of the spouses". This case of investment or re-investment, however, only takes effect in the reciprocal relationship of the spouses.

23. Is substitution of personal assets (e.g. barter agreement) governed by specific rules? Distinguish where necessary between movables and immovables.

Yes, the substitution of personal assets is governed by specific rules. Two main categories of substitution must be distinguished. Firstly, those cases in which a real subrogation by operation of law takes place, and secondly, those situations in which a spouse uses or re-uses his or her personal assets to acquire a new asset.

1. Real subrogation of personal assets by operation of law.

a. Claims and indemnities which replace personal assets.

Claims and indemnities which replace separate assets constitute separate assets, through the effect of real subrogation (Art. 1406 al. 2 French Civil Code). This is for example the case of the insurance payment which takes the place of the destroyed asset.

b. Exchange of personal assets.

The asset acquired in exchange for a personal asset of one of the spouses is itself a personal asset, saving compensation to the community or by it, where there is a balance (Art. 1407 French Civil Code). However, if the net balance charged to the community is greater in value than the asset transferred, the asset acquired in exchange falls into the community, saving compensation for the benefit of the transferor. This is a mandatory disposition.

2. Real subrogation of personal assets subject to conditions: investment or re-investment of personal assets.

a. Ordinary investment or re-investment.

This is the simplest case: a spouse uses some money belonging to his or her personal assets or sells a personal asset, with this money he or she buys an asset which he or she intends to make personal also. To make this happen, the spouse has to fulfil certain conditions (Art. 1434 French Civil Code).

The spouse must make two declarations in the instrument of acquisition:

First, the spouse must declare that the acquisition has been made from separate funds or from funds coming from the alienation of a separate asset.

Secondly, the spouse has to make clear his or her wish to make this asset belong to his or her personal assets. If these conditions are fulfilled the asset belongs to the category of personal assets. However, there may be cases where the acquisition has been financed by both personal funds and funds coming from the community. Where the price and expenses of the acquisition exceed the sum from which investment or re-investment was made, the community is entitled to compensation for the excess. Where, however, the share of the community is greater than that of the acquiring spouse, the property acquired falls into community, subject to compensation due to the spouse. This rule is also compulsory.

b. Investment or re-investment in anticipation.

In this case the chronology is different. A spouse would like to buy an asset he or she wishes to be personal but he or she doesn't have the personal funds immediately available. This is possible, in accordance with Art. 1435 French Civil Code and is called investment or re-investment in anticipation. Where investment or re-investment is made in anticipation, the property acquired is separate, provided that the sums expected from the separate assets are

paid to the community within five years after the date of the transaction. This construction is generally analyzed as a precedent condition: the asset is common until the sum expected from the separate assets is paid.

c. Investment or re-investment after the event.

In this case a spouse has acquired an asset without making the two declarations required by Art. 1434 French Civil Code. Can he or she still make this asset fall into his or her personal assets?

Yes, as stated in Art. 1434 *in fine*: "Failing such declaration in the instrument, investment or re-investment takes place only through agreement of the spouses". This case of investment or re-investment however only takes effect in the reciprocal relationship of the spouses.

24. Is investment of personal assets governed by specific rules? Distinguish where necessary between movables and immovables.

Yes the investment of personal assets is governed by specific rules. One may distinguish between ordinary investment or re-investment and situations where the chronology of actions is reversed.

1. Ordinary investment or re-investment.

This is the simplest case: a spouse uses some money belonging to his or her personal assets or sells a personal asset, with this money he or she buys an asset which he or she intends to make personal also. To make this happen, the spouse has to fulfil certain conditions (Art. 1434 French Civil Code).

The spouse must make two declarations in the instrument of acquisition:

First, the spouse must declare that the acquisition has been made from separate funds or from funds coming from the alienation of a separate asset.

Secondly, the spouse has to make clear his or her wish to make this asset belong to his or her personal assets. If these conditions are fulfilled the asset belongs to the category of personal assets. However, there may be cases where the acquisition has been financed by both personal funds and funds coming from the community. Where the price and expenses of the acquisition exceed the sum from which investment or re-investment was made, the community is entitled to compensation for the excess. Where, however, the share of the community is greater than that of the acquiring spouse, the property acquired falls into community, subject to compensation due to the spouse. This rule is also compulsory.

2. Investment or re-investment in anticipation.

In this case the chronology is different. A spouse would like to buy an asset he or she wishes to be personal but he or she doesn't have the personal funds available right away. This is possible, in accordance with Art. 1435 French Civil Code and is called investment or re-investment in anticipation. Where investment or re-investment is made in anticipation, the property acquired is separate, provided that the sums expected from the separate assets be paid to the community within five years after the date of the transaction. This construction is generally analyzed as a precedent condition: the asset is common until the sum expected from the separate assets is paid.

3. Investment or re-investment after the event.

In this case a spouse has acquired an asset without making the two declarations required by Art. 1434 French Civil Code. Can he or she still make this asset fall into his or her personal assets?

Yes, as stated in Art. 1434 *in fine*: "Failing such declaration in the instrument, investment or re-investment takes place only through agreement of the spouses". This case of investment or re-investment however only takes effect in the reciprocal relationship of the spouses.

25. What assets does the community comprise? Are there special rules governing the spouses earnings?

Art. 1401 French Civil Code states that the community comprises, so far as its assets are concerned, the acquisitions made by the spouses together or separately during the marriage and being both the result of their personal activity and of savings made from the benefits of their personal assets. This principle is completed with Art. 1403 French Civil Code which concerns the fruits from the personal assets: "Each spouse retains full ownership of his or her personal assets. The community is entitled only to the fruits received and not consumed. Compensation may be due to it, at the time of the dissolution of the community, for fruits which a spouse failed to collect or has fraudulently consumed, without, however, any inquiry being receivable beyond the last five years".

Thus three categories of assets falling into the community can be distinguished:

1. assets acquired against payment during the existence of the community;
2. profits and earnings of the spouses;
3. benefits of the personal assets of the spouses.

1. To this first category also belong the assets created (physically or intellectually) during the existence of the community. As the acquisition must take place during the existence of the community, it is important to determine the exact moment of the acquisition: in principle the qualification as community asset depends on the moment the transfer of ownership takes place.

2. The profits and earnings of the spouses.

The question of the qualification of the profits and earnings of spouses has raised a lot of discussions. Nowadays the discussion is, however, closed: profits and earnings are common assets even before they have been collected. This applies to all kind of earnings and substitutes (unemployment benefit, redundancy payment...). The same applies to the monetary proceeds resulting from the exploitation of a work of the mind or from the total or partial assignment of the right of exploitation (Art. L. 212-9 para. 2 French Intellectual Property Code).

3. The benefits of the personal assets of the spouses.⁷⁷

26. To which category of assets do pension rights and claims and insurance rights belong?

The benefits which are equivalent to salaries like e.g. unemployment benefits, redundancy payment, disability benefit, etc., fall into the community according to the main rule concerning the profits and earning of the spouses (Art. 1401 French Civil Code).

Other kinds of claims and insurance rights however will be separate assets in conformity with the rule of Art. 1404 French Civil Code: "Constitute personal assets [...] actions in reparation for corporal or moral harm, inalienable claims and pensions, and more generally, all property (assets) which has a personal character and all rights exclusively attached to the person...". See Question 22.

27. Can a third party stipulate in e.g. a gift or a will to what category of assets a gift or bequest will belong?

Following the main rule (See Question 22), a gift or a bequest will in principle belong to the personal assets of the beneficiary spouse (Art. 1403 French Civil Code). However, as expressly

⁷⁷ See Cass. Civ. I, 04.01.1995, *Defrénois* 1996, art. 36358, obs. Champenois.

stipulated in Art. 1405, a third party can stipulate that the gift or bequest must fall into the community (Art. 1405 para. 2 French Civil Code).

28. How is the categorisation of personal or community assets proved as between the spouses? Are there rebuttable presumptions of community property?

Art. 1402 French Civil Code states that any property, real or personal, is considered acquiescent of the community if it is not proved that it belonged to one of the spouses through application of a provision of law. In other words there is a rebuttable presumption of community property.

Any asset, movable or immovable, is deemed an acquisition of the community where it is not proved that it belongs to the personal assets of one of the spouses in accordance with a provision of law. When the asset is among those which do not show by themselves proof or indication of their origin, the fact that the property or assets form part of the personal assets of the spouse, shall, where there is a dispute, be established in writing. In default of inventory or other pre-existing proof, the judge may take into consideration all writings, in particular family papers, records and diaries as well as bank documents and invoices. He may even admit evidence by testimony or presumption, where he establishes that it was materially or morally impossible for a spouse to obtain a written proof (Art. 1402 para. 2 French Civil Code).

29. How is the categorisation of personal or community assets proved as against third parties? Are there rebuttable presumptions of community property?

The categorisation of personal assets may be proved against third parties in the same way as between spouses. Art. 1402 French Civil Code states that any property, real or personal, is considered acquiescent of the community if it is not proved that it belonged to one of the spouses through application of a provision of law. In other words there is a rebuttable presumption of community property.

Any asset, movable or immovable, is deemed an acquisition of the community where it is not proved that it belongs to the personal assets of one of the spouses in accordance with a provision of law. When the asset is among those which do not show by themselves proof or indication of their origin, the fact that the property or assets form part of the personal assets of the spouse, shall, where there is a dispute, be established in writing. In default of inventory or other pre-existing proof, the judge may take into consideration all writings, in particular family papers, records and diaries as well as bank documents and invoices. He may even admit evidence by testimony or presumption, where he establishes that it was materially or morally impossible for a spouse to obtain a written proof (Art. 1402 para. 2 French Civil Code).

30. Which debts are personal debts?

The distribution of the debts between the personal assets of both spouses and the community depends on two different things. One concerns the distribution of the assets and depends on the correlation between the assets and the debts. The other one concerns the distributions of powers and depends on the relationship between the debts and the powers of the spouses. Therefore the distinction between personal and community debts will not always work properly as far as French law is concerned. When the words "personal debts" are used this refers to the debts which, in the end, should be borne by the separate assets of one spouse. Debts may be personal due to their nature or to their purpose.

1. Personal debts due to their nature.

Several types of debts are personal due to their nature. First, the debts for which the spouses were obligated on the day of the celebration of the marriage and the debts with which the successions and gratuitous transfers falling to them during the marriage are burdened,

remain personal to them, both as to capital and arrearages or interest (Art. 1410 French Civil Code). The same rule also applies to fines incurred by a spouse by reason of penal infractions, or reparations or expenses to which he or she had been held liable for torts (Art. 1417 French Civil Code). And finally, the debts which have been contracted by one of the spouses in disregard of duties which the marriage imposed on him or her are also personal due to their nature (Art. 1417 para. 2 French Civil Code).

2. Personal debts due to their purpose.

Debts contracted in the personal interest of one of the spouses, for example for the acquisition, preservation or improvement of a separate property are personal due to their purpose (Art. 1416 French Civil Code).

31. Which debts are community debts?

For some introductory words on the distribution of debts see Question 30. Here also the same warning applies. When the words “community debts” are used, this refers to the debts which should, in the end, be borne by the community. Debts may be community debts due to their nature or to their purpose.

1. Community debts due to their nature.

Two types of debts are common due to their nature.

The maintenance claims due by the spouses and the debts contracted by the spouses for the upkeep of the household and the education of children, in accordance with Art. 220 (Art. 1409 French Civil Code).

2. Community debts due to their purpose.

According to the main rule of Art. 1409 other debts arising during the community may also be common, this time due to their purpose. There is some kind of presumption of the community of debts, as the debts are considered community debts unless they have been contracted in the interest of the personal assets of one of the spouses (Art. 1416 French Civil Code: “The community which has satisfied a debt for which it may have been sued under the preceding Articles, is nevertheless entitled to compensation whenever that undertaking had been contracted in the personal interest of one of the spouses, for example for the acquisition, preservation or improvement of a separate asset”).

32. On which assets can the creditor recover personal debts?

As far as the recovery is concerned, no clear distinction can be made between personal debts and community debts. Indeed as stated in Art. 1413 French Civil Code, “the payments of debts for which either spouse is obligated, for whatever reason, during the community, may always be enforced against the common assets”. This means that a creditor may in principle recover personal debts on all the assets of his or her debtor, thus on his or her personal assets and on the community assets.

However this main rule does not apply, at least in principle, to a certain category of personal debts. (1. below) There is a general limitation in case of fraudulent entente between the debtor spouse and the creditor (2. below).

Two other limitations to the recovery right of creditors must also be mentioned. The limitation may concern certain community assets (profits and earnings of the non-debtor spouse) (3.a.) or certain types of debts (3.b.)

1. The main rule does not in principle apply to the debts which are personal according to Art. 1410 French Civil Code, that is debts which the spouses owed on the day of the celebration of the marriage, or with which the successions and gratuitous transfers falling to them during the marriage, are burdened. Indeed, as stated by Art. 1411 para. 1 French Civil Code, in those cases creditors of either spouse may only enforce payment on the separate property “and the income” of their debtor. However, these creditors may also seize community assets where the

movables which belonged to their debtor on the day of the marriage or which fell to him by succession or gratuitous transfer have been merged into the community assets and can no longer be identified under the rules of Article 1402. On the question of proof of personal assets see Questions 28 and 29.

2. General limitation to the recovery right of creditors in case of fraudulent entente between the debtor spouse and the creditor.

Payments of debts for which either spouse is obligated, for whatever reason, during the community, may always be enforced against the common assets, unless there was fraud of the debtor spouse and bad faith by the creditor, and saving compensation, if any, due to the community (Art. 1413 French Civil Code). The two conditions, fraud and bad faith are cumulative. The question of whether the creditor may still recover his or her debts from the personal assets of his or her debtor is still debated.⁷⁸

3. Specific limitations to the recovery right of creditors.

a. Exclusion of the profits and earnings of the non-debtor spouse of the right of recovery of the creditors (Art. 1414 French Civil Code).

The profits and earnings of a spouse may be seized by the creditors of the other spouse only if the obligation was contracted for the upkeep of the household or the education of the children, in accordance with Art. 220 (Art. 1414 French Civil Code). In other words, they may not be seized for any other kind of obligations contracted by the other spouse.

In most of the cases, profits and earnings are paid into a checking or deposit account, which makes them difficult to identify. That is why Art. 1414 French Civil Code states *in fine*: "when the profits and earnings are paid into a checking or deposit account, they may be seized only under the conditions determined by decree". Art. 48 of the decree of 31 July 1992 states that the creditors cannot seize what corresponds to a one month salary.

b. Specific limitations to the recovery right of creditors in case of loan or surety.

Each spouse may obligate only his or her personal assets and his or her income, by surety or loan, unless they have been contracted with the express consent of the other spouse, who, in that case, does not obligate his or her personal assets (Art. 1415 French Civil Code).

The recovery right of the creditor will differ consequent to whether the other spouse gives his or her consent.

i. The other spouse did not give his or her express consent.

In this case, the surety of the creditors is restricted to the income and personal assets of the debtor spouse. The ordinary common assets and the profits and earnings of the other spouse are consequently protected. The income of the debtor spouse is comprised of his or her profits and earnings and the income of his or her personal assets. Here again, the creditor will be confronted with the difficulty of identifying the amount of money when it is pooled with ordinary common assets as, for example, in a bank account. This time however the French legislator did not provide rules for identifying the fixed amount the creditor could seize. Therefore his or her right depends on two conditions: the creditor will have to prove that the assets he or she wishes to seize constitute profits and earnings or income of the personal assets of the debtor, and that these assets did not become ordinary common assets.

ii. The other spouse did give his or her consent.

If the other spouse gave consent, the creditor may seize the common assets, but not in principle the personal assets of the other spouse. The situation of the profits and earnings of the spouse who did give his or her consent is, however, not entirely clear. Even if the letter of

⁷⁸ R. Cabrillac, *Droit Civil – Les régimes matrimoniaux*, Montchrestien, 2007, n°190.

the text of Art. 1415 French Civil code leads to another conclusion, the majority of authors consider that the earning and profits of the consenting spouse may not be seized.⁷⁹

33. On which assets can the creditor recover community debts?

As already stated in Question 32, as far as the recovery of debts is concerned, no clear distinction can be made between personal and community debts. Indeed, as stated in Art. 1413 French Civil Code, “the payments of debts for which either spouse is obligated, for whatever reason, during the community, may always be enforced against the common assets”. This means that a creditor may in principle recover community debts on all the assets of his or her debtor; thus, on his or her personal assets and on the community assets. The personal assets of the other spouse may however only be seized if there is joint liability (e.g. according to Art. 220 French Civil Code, see Question 9). There are some exception to the main rule of Art. 1423, there is: 1. a general limitation in case of fraudulent entente between the debtor spouse and the creditor, and 2.a. some more specific limitations concerning certain community assets (profits and earnings of the non-debtor spouse), or 2.b. certain types of debts.

1. General limitation to the recovery right of creditors in case of fraudulent entente between the debtor spouse and the creditor.

Payments of debts for which either spouse is obligated, for whatever reason, during the community, may always be enforced against the common assets, unless there was fraud of the debtor spouse and bad faith by the creditor, and saving compensation, if any, due to the community (Art. 1413 French Civil Code). The two conditions, fraud and bad faith, are cumulative. The question of whether the creditor may still recover his or her debts on the personal assets of his or her debtor is still debated.⁸⁰

2. Specific limitations to the recovery right of creditors.

a. Exclusion of the profits and earnings of the non-debtor spouse from the right of recovery of the creditors (Art. 1414 French Civil Code).

The profits and earnings of a spouse may be seized by the creditors of the other spouse only if the obligation was contracted for the upkeep of the household or the education of the children, in accordance with Art. 220 (Art. 1414 French Civil Code). In other words they may not be seized for any other kind of obligations contracted by the other spouse.

In most situations, profits and earnings are paid into a checking or deposit account which makes identifying them difficult. That is why Art. 1414 French Civil Code states *in fine*: “when the profits and earnings are paid into a checking or deposit account, they may be seized only under the conditions determined by decree”. Art. 48 of the decree of 31 July 1992 states that the creditors cannot seize what corresponds to a one month salary.

b. Specific limitations to the recovery right of creditors in case of loan or surety.

Each spouse may obligate only his or her personal assets and his or her income, by surety or loan, unless they have been contracted with the express consent of the other spouse, who, in that case, does not obligate his or her personal assets (Art. 1415 French Civil Code).

Consequently, the recovery right of the creditor will differ based on whether the other spouse consented.

i. The other spouse did not give his or her express consent.

In that case, the surety of the creditors is restricted to the income and personal assets of the debtor spouse. The ordinary common assets and the profits and earnings of the other spouse

⁷⁹ R. Cabrillac, *Droit Civil – Les régimes matrimoniaux*, Montchrestien, 2007, n°197.

⁸⁰ R. Cabrillac, *Droit Civil – Les régimes matrimoniaux*, Montchrestien, 2007, n°190.

are consequently protected. The income of the debtor spouse is comprised of his or her profits and earnings and the income of his or her personal assets. Here again, the creditor will be confronted with the difficulty of identifying the amount of money when it is pooled with ordinary common assets as for example on a bank account. This time however the French legislator did not provide rules for identifying the fixed amount the creditor could seize. Therefore his or her right depends on two conditions: the creditor will have to prove that the assets he or she wishes to seize constitute profits and earnings or income of the personal assets of the debtor and that these assets did not become ordinary common assets.

ii. The other spouse did give his or her consent.

If the other spouse consented, the creditor may seize common assets, but not in principle the personal assets of the other spouse. However, the characterization of the profits and earnings of the consenting spouse is not entirely clear. Even if the letter of the text of Art. 1415 French Civil code would lead to another conclusion, the majority of the authors consider that the earning and profits of the consenting spouse may not be seized.⁸¹

I.2. Administration of assets

34. How are personal assets administered?

Each spouse has the administration and enjoyment of his or her separate assets and may dispose of it freely (Art. 1428 French Civil Code). However in certain cases of maladministration or incapacity, the powers of a spouse over his or her personal assets may be transferred to his or her spouse (see Questions 41 and 42). A spouse may also mandate the administration of his or her personal assets to the other (see Question 36).

35. How are the community assets administered?

Following the main rule of Art. 1421 French Civil Code each spouse has, in principle, the power to individually administer and dispose of community assets. Each spouse must answer for faults he or she may have committed in the management (see Question 41). To be enforceable against the other spouse, the transactions must have been entered into without fraud (Art. 1421 para. 1 *in fine* French Civil Code). In case of conflict between two contradictory transactions of the spouse, the first transaction entered into will have priority.

However this main rule of concurrent administration is subject to some exceptions. Indeed, for some acts concerning some community assets the power of administration may belong only to one spouse and for others the consent of the other spouse may be needed.

1. Sole administration of community assets.

The spouse who exercises a separate profession has alone the power to perform acts of administration and disposition necessary for it (Art. 1421 para. 2 French Civil Code).

2. Joint administration of community assets.

One spouse may not, without the other, dispose *inter vivos*, gratuitously, of the community assets (Art. 1422 para. 1 French Civil Code). Nor may he or she, without the other, assign a common property to guarantee a third person's debt (Art. 1422 para. 2 French Civil Code). Neither may one spouse, without the other, alienate or encumber with real rights immovables, business assets and exploitations depending on the community, or non-negotiable securities and tangible movables whose alienation requires publication. And one spouse may not, without the other, receive the capital from such operations (Art. 1424 French Civil Code). Neither may one spouse, without the other, give or lease rural land or immovables for commercial, industrial or artistic use, belonging to the community (Art. 1425 French Civil Code). Neither may the spouses, separately, dispose of the rights whereby the

⁸¹ R. Cabrillac, *Droit Civil – Les régimes matrimoniaux*, Montchrestien, 2007, n°197.

lodging of the family is ensured, or of the pieces of furniture with which it is garnished (Art. 215 para. 3 French Civil Code). See Question 37.

Finally, neither spouse may make use of community property in order to make a contribution to a firm or acquire non-negotiable shares of a firm without the other spouse being informed thereof and proof of it being adduced in the instrument (Art. 1832-2 French Civil Code). This is not a real case of joint administration as the consent of the other spouse is not needed.

36. Can one spouse mandate the other to administer the community assets and /or his or her personal assets?

The general rule concerning mandates between spouses is stated by Art. 218 French Civil Code: "one spouse may give agency to the other to represent him or her in the exercise of powers which the matrimonial property regime attributes to him or her. The agency may, in all cases, be freely revoked". (See Question 13).

Art. 1431 French Civil Code expressly regulates the situation where a spouse mandates the other to administer his or her personal assets. The normal rules of agency are in principle applicable with some modifications. If the agency concerns the personal assets of a spouse, the agent spouse is dispensed from accounting for fruits, if the power of attorney does not expressly so require.

Art. 1432 French Civil Code regulates the situation of implied agency: when one of the spouses takes in hand the management of the separate property of the other, with the knowledge of the latter and without objection on the latter's part. This implied agency covers acts of administration and enjoyment, but not acts of disposition. Such spouse answers to the other for such management as an agent, being accountable, however, only for existing fruits. For those which he or she neglected to collect or consumed fraudulently, he or she may only be sued within a limitation of the last five years.

37. Are there important acts concerning personal assets or community assets (e.g. significant gifts, disposal of the matrimonial/family home or other immovable property) that require the consent of the other spouse?

Beside the protection of the matrimonial/family home and the household goods by Art. 215 para. 3 French Civil Code (see Questions 10 and 11), other acts concerning other important assets require the consent of both spouses. Joint administration is required on the one hand for some transactions free of charge and on the other for some transactions against payment.

1. Transactions free of charge.

One spouse may not, without the other, dispose *inter vivos*, gratuitously, of the community assets (Art. 1422 para. 1 French Civil Code). Nor may he or she, without the other, assign a common property to the guarantee of a third person's debt. (Art. 1422 para. 2 French Civil Code).

2. Transactions against payment.

Art. 1424 and 1425 list the assets and transactions that are subject to joint administration. The aim is the protection of valuable assets. Several categories of assets are included in this aim. The first category is immovables. The second category includes business assets (fonds de commerce) and exploitations (a farm, a handicraft enterprise, or a liberal enterprise), and the third category consists of non-negotiable securities (partnership share) and finally tangible movables whose alienation require publication (aircrafts, boats...)⁸²

a. Which acts are concerned?

⁸² R. Cabrillac, *Droit Civil – Les régimes matrimoniaux*, Montchrestien, 2007, n°223.

All kind of alienations are concerned; for example, sale, undertaking to sell, and transfer to a company. Also concerned are all acts that are encumbered with real rights, such as mortgages, servitudes, and usufructs (Art. 1424 French Civil Code). Leasing may also require the consent of the other spouse, but only if rural land and immovables for commercial, industrial or artistic use are concerned.

b. How should the consent take place?

Both spouses do not need to be present at the moment of the transaction. The consent can be given in advance, so long as the consent is specific and concerns a given transaction, as well as later on. The spouses are usually both considered to be parties to the transaction.

c. What happens if the other spouse is incapable of or not willing to give his or her consent?

Then Art. 217 French Civil Code will provide a solution: a spouse may be authorized by a court to enter into the transaction alone if the other spouse is not able to express his or her wish, or if his or her refusal is not justified by the interest of the family. A transaction entered into under the terms of a judicial authorization is effective against the spouse whose assistance or consent was lacking, without any personal obligation.

d. What if the transaction took place without the consent of the other spouse?

If one spouse exceeds his or her powers over community assets, the other, unless having ratified the act, may call for annulment of it. The action for annulment may be brought by the spouse for two years after the day when he had knowledge of the transaction, but never more than two years after the dissolution of the community (Art. 1427 French Civil Code).

38. Are there special rules for the administration of professional assets?

The spouse who exercises a separate profession has alone the power to perform acts of administration and the disposition necessary for it (Art. 1421 para. 2 French Civil Code).

39. Is there a duty for one spouse to provide information to the other about the administration of the community assets?

The French Civil Code does not require a duty to inform. However some authors consider this informational duty to be intrinsically present as a condition to prevent contradictory transactions regarding the community (as both spouses have the power to administer common assets; see Question 35).⁸³

40. How are disputes between spouses concerning the administration of personal or community assets resolved?

For the question of incapacity of one spouse, see Question 42, and for the question of violation of the rules of administration and maladministration see Question 41. Besides these situations, disputes may arise when a spouse refuses to give his or her consent to a transaction where the rules on joint administration are applicable. If the refusal of a spouse is not justified by the interest of the family, Art. 217 French Civil Code allows the spouse to ask for judicial authorization to enter into the transaction alone (see Question 13).

41. What are the possible consequences when a spouse violates the rules governing the administration of personal and community assets? What are the possible consequences in other cases of maladministration of the assets?

1. Violation of the rules governing administration.

a. The general rule of Art. 220-1 French Civil Code.

⁸³ F.Terré and Ph. Simler, *Droit civil – Les régimes matrimoniaux*, Dalloz, 3rd ed., 2001, n°476.

Art. 220-1 French Civil Code applies irrespective of the single matrimonial property regime. If one of the spouses fails gravely in duties and thus places the interest of the family in peril, the “family causes judge” may prescribe any urgent measures that such interests require. The court can specifically forbid such spouse to make, without the consent of the other, acts disposing of his or her separate assets or those of the community, real or personal. He may also forbid the moving of separate property, except to specify those which he attributed to the personal use of one or the other of the spouses.

b. Violation of the rules governing the administration of community assets.

If one of the spouses exceeds his or her powers over community assets, the other, unless having ratified the act, may apply for annulment of it. An action for annulment may be brought by the spouse for two years after the day he learned of the transaction, but never more than two years after the dissolution of the community (Art. 1427 French Civil Code).

c. Violation of the rules governing the administration of personal assets.

If one spouse interferes in the management of the personal property of the other in contempt of an established objection, he or she is liable for all the consequences of such interference and accountable, without limitation, for all the fruits collected, failed to be collected or fraudulently consumed (Art. 1432 para. 3 French Civil Code).

2. Other cases of maladministration.

a. The general rule of Art. 220-1 French Civil Code.

Art. 220-1 French Civil Code also applies in cases of simple maladministration. If one of the spouses fails gravely in duties and thus places the interest of the family in peril, the “family causes judge” may prescribe any urgent measures which such interests require. The court can specifically forbid such spouse to make, without the consent of the other, acts disposing of his or her separate assets or those of the community, real or personal. He may also forbid the moving of separate property, except to specify those which he attributed to the personal use of one or the other of the spouses.

b. Maladministration of the community assets.

Several types of consequences are conceivable if a spouse's administration does not meet the required standards. He or she, could, according to the situation, i. be obliged to answer for his or her faults, ii. his or her transactions could not be enforceable against the other spouse, iii. his or her powers of administration could be transferred to the other spouse, and finally, iv. the other spouse may sue in court for separation of property .

i. Spouse has to answer for faults.

Each spouse has the power to individually administer community assets and to dispose of them, subject to answering for faults he or she may have committed in the management (Art. 1421 French Civil Code). The fault does not need to be gross but must be blatant.⁸⁴

ii. The transactions are not enforceable.

Art. 1421 French Civil Code states that transactions concerning the community assets entered into without fraud by a spouse are enforceable against the other. *A contrario* this means that in case of fraud the transactions will not be enforceable.⁸⁵

iii. Transfer of the power of administration to the other spouse.

If one spouse's management of the community reveals unfitness or fraud, the other spouse may judicially request to be substituted for him or her in the exercise of those powers. A spouse so entitled by the court has the same powers as did the spouse he or she replaces. He or she may thus, with the authorization of the court, enter into transactions for which his or her consent would have been required if a substitution had not taken place. The spouse

⁸⁴ A. Colomer, *Droit civil – Régimes matrimoniaux*, Litec, 12th ed., 2004, n°500.

⁸⁵ E.g. Cass. Com., 28.01.1992, *Bull. Com.* 1992. IV. n°36.

deprived of his or her powers may, later on, request their restitution by the court, through establishing that their transfer to the other spouse is no longer justified (Art. 1426 French Civil Code).

iv. Separation of property,

If through the disorder of the affairs, misadministration or misconduct of one spouse it appears that the upholding of the community places the interests of the other spouse in peril, the latter may sue for a separation of property (Art. 1443 French Civil Code).

c. Maladministration of the personal assets.

If one of the spouses places the interests of the family in peril, either by allowing his or her separate assets to waste or by dissipating or embezzling the income withdrawn from them, such spouse may, upon petition by the other spouse, be dispossessed of his or her rights of administration and enjoyment. Unless the appointment of a judicial administrator appears necessary, the judgment confers on the plaintiff spouse the power to administer the separate assets of the dispossessed spouse as well as to receive the fruits thereof, which must be applied to the marriage expenses and the excess used for the benefit of the community. Reckoning from the petition, the dispossessed spouse may dispose alone only of the bare ownership of his or her property. The dispossessed spouse may, later on, petition at law to re-enter into such rights, if it is established that the causes which had justified the dispossession no longer exist (Art. 1429 French Civil Code).

42. What are the possible consequences if a spouse is incapable of administering

a. His or her personal assets

If one of the spouses is, in an enduring way, unable to express his or her wish, such spouse may, upon petition by the other spouse, be dispossessed of his or her rights of administration and enjoyment. Unless the appointment of a judicial administrator appears necessary, the judgment confers on the plaintiff spouse the power to administer the separate assets of the dispossessed spouse as well as to receive the fruits thereof, which must be applied to the marriage expenses and the excess used for the benefit of the community. Reckoning from the petition, the dispossessed spouse may dispose alone only of the bare ownership of his or her property. The dispossessed spouse may, later on, petition at law to re-enter into such rights, if it is established that the causes which had justified the dispossession no longer exist (1429 French Civil Code).

b. Community assets.

If a spouse is incapable of administering the community assets, different solutions are conceivable, depending, among others things, on the kind of act of administration the spouse is incapable to undertake.

1. When one spouse is not able to express his or her wish and the consent of the other spouse is needed, the other spouse may be authorized by a court to enter into this transaction alone. A transaction entered into under the terms of a judicial authorization is effective against the spouse whose assistance or consent was lacking, without any personal obligation (Art. 217 French Civil Code).

2. More generally, if one of the spouses is unable to express his or her wish, the other can be enabled at law to *represent* him or her.

Two Articles of the French Civil Code deal with this situation. First Art. 219, which is applicable to all spouses irrespective of their matrimonial property regime, states that if one of the spouses is unable to express his or her wish, the other can be enabled at law to represent him or her, in general, or for certain particular acts, in the exercise of powers resulting from the matrimonial property regime, the conditions and the extent of such representation being fixed by the judge. In default of legal power, agency or enablement at

law, the acts done by one spouse in representation of the other take effect, with regard to the latter, according to the rules of quasi-contract (*gestion d'affaires*) (Art. 219 French Civil Code).

3. If the incapacity is of certain duration and the spouses are married under the legal regime of community of property, Art. 1426 may apply. This Article states that where one of the spouses is, in an enduring way, unable to express his or her wish, the other spouse may judicially request to be substituted for him or her in the exercise of those powers. A spouse so entitled by a court has the same powers as did the spouse he or she replaces; he or she may, with the authorization of the court, enter into transactions for which his or her consent would have been required if the substitution had not taken place. A spouse deprived of his or her powers may, later on, request their restitution by the court, through establishing that their transfer to the other spouse is no longer justified.

I.3. Distribution of assets upon dissolution

43. What are the grounds for the dissolution of the community property regime, e.g. change of property regime, separation, death of a spouse or divorce?

A community is dissolved:

- 1° By the death of one of the spouses;
- 2° By declared absence;
- 3° By divorce;
- 4° By judicial separation;
- 5° By separation of property;
- 6° By change of matrimonial property regime.

Art. 1441 French Civil Code.

44. What date is decisive for the dissolution of the community property? Distinguish between the different grounds mentioned under Q 43. At what date are the community assets determined and valued? Is the fact that the spouses are living apart before the dissolution of the marriage relevant?

The date decisive for the dissolution will vary according to the ground of dissolution. In case of dissolution by death or declared absence, it will be on the day of the death or of the transcription of the declaratory judgment of absence (Art. 128 French Civil Code). In case of divorce, it will depend on the ground for divorce. Where the divorce is granted by mutual consent, it is the date of the agreement that settles all the consequences of the divorce, unless the agreement otherwise provides. Where it is granted due to the principle of the breakdown of the marriage, for irretrievable breakdown of the marriage or for fault, it is the date of the *ordonnance de non-conciliation* (Art. 262-1 para. 1 French Civil Code). In case of separation of property, the judgment extends retroactively back, effective to the day of the application (Art. 1445 para. 2 French Civil Code). These are also the dates at which the community assets are determined and valued.

But one or the other of the spouses may petition, if there is occasion, that, in their mutual relations, the effect of the dissolution be postponed to the date they ceased to cohabit and collaborate (Art. 1442 para. 2 French Civil Code).

45. What happens if community assets have been used for investments in the personal property? What happens if personal assets have been used for investments in the community property? Is there any right to compensation? If so is this a nominal compensation or is it based on the accrual in value?

The main rules regarding compensation are stipulated by Art. 1433 French Civil Code (Compensation to the community) and 1437 French Civil Code (Compensation to the personal assets). The community owes compensation to the owner spouse any time it has

drawn benefit from personal assets. It is so notably when it has received severalty funds, or those coming from the sale of personal assets, without there having been an investment or re-investment made thereof (Art. 1433 French Civil Code). The personal assets owe compensation to the community whenever a sum is taken from the community, either to acquit debts or charges personal to one of the spouses, such as the price or part of the price of personal property or the purchase of land servitudes; or for the recovery, preservation or enhancement of his or her personal assets; and generally whenever one of the spouses draws a personal benefit from assets of the community (Art. 1437 French Civil Code).

Thus, whenever community assets have been used for investments in personal property or *vice versa* personal assets have been used for investments in community assets, a compensation right rises. In these cases the compensation is variable (Art. 1469 para. 3 French Civil Code) and the calculation is the same for both situations. A distinction must be made between the situation where there is an increase in value and the situation where there is a shortfall.

The main rule regarding the calculation of investment compensation is the one of the double maximum: compensation is, in general, equal to the smallest of the two sums represented by expenditures made and benefits subsisting. Several elements will have an influence on the calculation of the amount of the compensation: is the asset still present in the beneficial category of assets or has it been disposed of? In the latter case, has the asset been replaced by another?

1. Compensation in case of increase in value.

One category of assets consists of those that have contributed to the *acquisition* of an asset belonging to another category of assets. If the asset is *still present* in the beneficial category of assets, and the contributing category of assets has been the entire price of acquisition, the amount of the compensation is equivalent to the actual value of the asset (taking into account the state of the asset at the moment of acquisition). When the contributing category of assets only paid a part of the price, the compensation corresponds to a part of the value of the asset on the day the compensation is evaluated, corresponding to the part of the price of acquisition paid by the contributing patrimony.

Another category of assets consists of those that have contributed to the acquisition of an asset belonging to another category of assets and the *asset has been disposed of*. In this case the amount of the compensation is equivalent of the value of the asset on the day of the alienation (Art. 1469 para. 3 French Civil Code). If a new asset has been substituted for the asset alienated, the benefit is evaluated on such new asset (Art. 1469 para. 3 *in fine* French Civil Code).

One more category of assets consists of those that have contributed to the *preservation or enhancement* of an asset belonging to another category of assets. To calculate the amount of the compensation, the value on the day of the dissolution of the asset with the enhancements should be compared to the value of the same asset without the enhancements.

2. Compensation in case of shortfall.

The contributing category of asset must endure situations where there is no increase in value. There is, however, an exception if the expenditure was necessary. In that case the compensation may not be less than the expenditure (Art. 1469 para. 2 French Civil Code).

For each spouse, an account of the reimbursement which the community owes to him or her and of the reimbursement which he or she owes to the community, shall be established (Art. 1468 French Civil Code). Where, after the balance is made, the account presents a residue in favour of the community, the spouse shall return the amount thereof to the common stock. Where it presents a residue in favour of a spouse, the latter has the option either to require

payment or to appropriate community property assets up to the amount due (Art. 1470 French Civil Code).

46. What happens if community assets have been used for payment of personal debts? What happens if personal assets have been used for payment of community debts? Is there a rule of compensation? And if so, how is compensation calculated?

When community assets have been used for payment of personal property or personal assets have been used for payment of community assets, a compensation right arises. These are the cases of ordinary compensations regulated by Art. 1469 para. 1 French Civil Code.

The basic principle of the calculation is, again, the one of the double maximum: compensation is, in general, equal to the smallest of the two sums represented by expenditures made and benefits subsisting (Art. 1469 para. 1 French Civil Code). In this situation of payment of a debt belonging to another category of assets, the subsisting profit will be equal to the expenditure made. So if the community paid a personal debts of 500 €, the community is entitled to a compensation of 500 €.

For each spouse, an account of the reimbursement which the community owes to him or her and of the reimbursement which he or she owes to the community, shall be established (Art. 1468 French Civil Code). Where, after the balance is made, the account presents a residue in favour of the community, the spouse shall return the amount thereof to the common stock. Where it presents a residue in favour of a spouse, the latter has the option either to require payment or to appropriate community assets up to the amount due (Art. 1470 French Civil Code).

47. What is the priority order between compensation rights and community debts?

There is no priority order between compensation rights, and compensation rights do not confer on the spouse who enforces them any right to be preferred to creditors of the community, except the preference resulting, if any, from a legal mortgage (Art. 1474 French Civil Code).

48. How are community assets administered after dissolution but before division?

A distinction must be made between the default regime of indivision and the conventional regime of indivision.

The default regime of undivided property (indivision) (Art. 815- 815-18 French Civil Code).

Since the Act of 23 June 2006, the rules on the administration of undivided property have been become more flexible. As before 2006, each undivided owner may use and enjoy undivided property in accordance with its purpose, to the extent compatible with the rights of the other undivided owners and with the effect of the acts lawfully made in the course of the undivided ownership (Art. 815-9 French Civil Code). As before 2006, any undivided owner may take the necessary steps for the preservation of the undivided property, but in 2006 the words 'even if there are not urgent' have been added. He or she may use for that purpose funds of the undivided property which he holds, and he is deemed to have the free disposal of them with regards to third parties. Before 2006, acts of administration and disposition required the consent of all the undivided co-owners, since 2006 the co-owners which own at least 2/3 of the undivided property can fulfil certain acts of administration (Art. 815-3 French Civil Code). These acts are enforceable against the other undivided co-owners if they have been informed about them. This new rule, however, does not have any impact on the situation of spouses as they both own 1/2 of the undivided property.

The consent of all the undivided co-owners is required for all acts of disposition and acts of administration which exceed the normal exploitation of the undivided assets (Art. 815-3 para. 6 French Civil Code).

As the joint administration may be unwieldy, several solutions are provided for which have much in common with the rules regarding the situation of joint administration during the life-time of the community. Firstly, spouses can decide to give general agency of administration (Art. 815-3 para. 2 French Civil Code). Special agency is however needed for acts of administration which exceed the normal exploitation of the undivided assets (Art. 815-3 para. 6 French Civil Code). Also, where one spouse takes up the administration of the undivided property, with the knowledge of the spouse and nevertheless without opposition on his or her part, he or she is deemed to have received an implied authority, covering acts of administration, but not acts of disposition or conclusion or renewal of contracts (Art. 815-3 para. 7 French Civil Code).

Where one of the undivided owners is unable to express his intention, another may be judicially entitled to represent him, in a general manner or for some particular transactions, the terms and extent of that representation being fixed by the judge (Art. 815-4 French Civil Code). Failing statutory power, contractual authority or judicial entitlement, the acts undertaken by an undivided owner on behalf of another are effective with regard to the latter under the rules of management of another's business (Art. 815-4 para. 2 French Civil Code). An undivided owner may be judicially authorized to do alone an act for which the consent of an undivided co-owner would be required, where the refusal of the latter imperils the common interest (Art. 815-5 French Civil Code). The president of the *tribunal de grande instance* may prescribe or authorize all urgent measures which the common interest requires (Art. 815-6 French Civil Code).

The conventional regime of indivision (Art. 1873-1 à 1873-18 French Civil Code).

The main purpose of this kind of arrangement is to organise the administration of the undivided property, however this possibility is rarely used. According to Art. 1873-5 French Civil Code, "the undivided co-owners may appoint one or several managers, chosen from among themselves or not".

49. Briefly explain the general rules governing the division of the community assets.

In principle, the community assets will be divided in two equal shares. (Art. 1475 para. 1 French Civil Code). However, a spouse who diverts or conceals any assets of the community will be deprived of his or her share in the community (Art. 1477 para. 1 French Civil Code). In the same way, a spouse who knowingly conceals the existence of a common debt shall take charge of it definitively (Art. 1477 para. 2 French Civil Code). The division itself takes place according to the rules established in the Title "Successions" with respect to partitions between coheirs (Art. 1476 para. 1 French Civil Code).

50. How are the community debts settled?

Most of the time, the debts are settled before the partition of the assets. Notaries public are used to determine the total debts and to subtract them from the credits in order to partition the disposal assets. Again a distinction will be made between the question of recovery and the question of contribution to the debts.

1. The question of the recovery of community debts.

Creditors who might have levied execution on the undivided property before there was undivided ownership can recover their debts on the undivided assets before partition. They may, in addition, conduct attachment or seizure and sale of the undivided property (Art. 815-

17 French Civil Code). The same rule applies to the creditors whose claims result from the preservation or management of the undivided property (Art. 815-17 French Civil Code).⁸⁶

However, the recovery right of the creditors varies according to whether the spouse sued is the one by whose name the debt entered into the community. Each spouse may be sued for the totality of existing debts that *entered into the community in his or her name* (Art. 1482 French Civil Code). The extent of assets creditors may seize will, however, vary depending on when the recovery takes place. When the recovery is after dissolution but before partition, creditors may seize the personal assets of their debtor and the entire community of the then undivided assets. After partition, they can, aside from the personal assets, only seize the share of the community.

One spouse may only be sued for half of the debts which had *entered into the community in the name of the other spouse* (Art. 1483 para. 1 French Civil Code). Thus, contrary to the main rule applicable during the life time of the default regime of community of property, the personal assets of the spouse of the initial debtor are no longer protected. However, after the partition he or she may use his or her *bénéfice d'émolument*. After the partition, excepting the case of concealment, he or she is only held up to the amount of his or her emolument, provided that there was an inventory, with the duty of rendering an accounting both for the contents of such inventory and for what he or she received through the partition, as well as for the community debts already acquitted (Art. 1483 para. 2 French Civil Code).

2. The question of contribution to debts between different categories of assets.

The main rule is set by Art. 1485 para. 1 French Civil Code: Each one of the spouses contributes by halves to the debts of the community for which compensation is not due. And in consequence, the spouse who has paid beyond the portion to which he or she was held, has, against the other, recourse for the excess (Art. 1487 French Civil Code).

Spouses may enter into an agreement about their contribution to the community debts.

51. Do the spouses have preferential rights over the matrimonial/family home and/or the household's assets?

According to Art. 1476 French Civil Code, the partition of the community, in everything concerning its procedures, maintenance of joint ownership and preferential allotment, auction of property, effects of partition, guaranty and compensations, is subject to all the rules which are established in the Title "Successions" for partitions between coheirs. However, for communities dissolved by divorce, judicial separation or property separation, preferential allotment is never a right, and it may always be decided that compensation possibly due will be payable in cash (Art. 1476 para. 2 French Civil Code).

Spouses do not really have a preferential right over the matrimonial home and the household's assets, but may request a preferential allotment of the ownership or right to lease of the premises that actually serves as his or her habitation; where he or she resided at the time of the dissolution (Art. 831-2 para. 1 sub 1 French Civil Code). The preferential allotment is optional; the court will assess the appropriateness of the attribution according to the interests of both spouses.

⁸⁶ Personal creditors of an undivided owner may not attach or seize the latter's share in undivided property, whether movable or immovable.

They have, however, the power to instigate partition in the name of their debtor or to intervene in a partition instigated by him. See Cass. Civ. 2, 15.01.1999, D. 1999. IR. 281; *RTDCiv.* 2000. 167, obs. Perrot. The undivided co-owners may stop the course of the action for partition by discharging the obligation in the name and on behalf of the debtor. Those who exercise that power shall be reimbursed by deduction from the undivided property (Art. 815-17 para. 2 and 3 French Civil Code).

Art. 1751 French Civil Code will also play a role. As said before, (see Question 10) the right to a lease of premises, without professional or commercial character, which is actually used for the dwelling of the two spouses, is considered to belong to both spouses. In case of divorce or judicial separation, that right may be allotted by the court, taking account of the social and familial interests concerned, to one of the spouses, saving reimbursement or to the other spouse. In case of death, the surviving spouse co-lessee has an exclusive right on it, except where he or she expressly renounces it.

See also Question 6.

52. Do the spouses have preferential rights over other assets?

According to Art. 1476 French Civil Code, the partition of the community, in everything concerning its procedures, maintenance of joint ownership and preferential allotment, auction of property, effects of partition, guaranty and compensations, is subject to all the rules which are established in the Title "Successions" for partitions between coheirs. However, for communities dissolved by divorce, judicial separation or property separation, preferential allotment is never as of right, and it may always be decided that compensation possibly due will be payable in cash (Art. 1476 para. 2 French Civil Code).

1. Preferential rights established in the Title "Successions" (Art. 831-834 French Civil Code).

There are quite a few Articles providing for preferential rights. Following is a short list of the assets concerned:

- any agricultural, commercial, industrial or craft exploitation, or an undivided portion of it, even formed in part from a property of which he was already owner or co-owner in whose development the spouse actually participates or participated (Art. 831 para. 1 French Civil Code). If there is occasion, the request for preferential allotment may bear on shares of the capital, without prejudice to the application of the statutory provisions or of articles of association on the continuation of a partnership with the surviving spouse (Art. 831 para. 2 French Civil Code);
- ownership or right to lease of the premises used for professional purposes which actually serve for the exercise of the spouse's occupation and of the furniture for professional purposes which garnishes the premises (Art. 831-2 sub 2° French Civil Code);
- movable assets necessary for the holding of a rural property farmed by the deceased as tenant farmer or sharecropper where the lease continues for the profit of the applicant or where a new lease is granted to the latter (Art. 831-2 sub 3° French Civil Code);
- a spouse may request preferential allotment of all or part of immovable property or rights for agricultural purposes, with a view to establishing an agricultural land grouping (Art. 832-1 French Civil Code).

2. Preferential rights proper to the distribution of community assets.

Beside the preferential rights established in the Title "Successions", the French Civil Code provides for some other preferential rights proper to the distribution of community assets. This is the case of Art. 1475 para. 2 French Civil Code: if a building of the community is an annex of another building belonging the personal assets of one of the spouses, or if it is contiguous to such building, the owner spouse has the option of having it allotted to him or her by imputation against his or her share or by compensation, according to the value of property on the day when allotment is asked. The same applies also to certain assets, created or acquired during the existence of the community and are usually considered as belonging to the community only as far as their value is concerned, because of their attachment to the person of one of the spouses. The French Civil Code did not provide for a preferential right of attribution for those assets, but it's obvious. This is the case of a public office, goodwill, partnership shares etc.

53. To what extent, if at all, does the division of community property affect the attribution of maintenance?

The division of community property will have an influence on the allowance of a *prestation compensatoire*. Art. 270 French Civil Code allows the judge to order one spouse to pay maintenance (*prestation compensatoire*) in case there is a disparity between the spouses' standards of living. And yet, the spouses' standards of living will be influenced by the division of the community of property. So, if the rules of matrimonial property law lead to a similar financial situation between the spouses, there will not be any disparity which has to be compensated, and no *prestation compensatoire* has to be paid. The *prestation compensatoire* will be fixed according to the spouses' needs and financial capacity. Art. 271 French Civil Code gives a list of criteria the judge shall take into account; one of them is "the spouses' assets, as a capital sum and as income, after the liquidation of the matrimonial property regime".

54. To what extent, if at all, does the division of community property affect the pension rights and claims of one or both spouses?

The division of community property does not affect the pension rights and claims.

55. Can the general rules of division (above Q 49) be set aside or adjusted, e.g. by agreement between the spouses or by the competent authority?

The spouses may set aside or adjust the general rules of division into their marital agreement. The judge, however, does not really have the power to set aside the general rules but in case of divorce he or she has the possibility to allow a *prestation compensatoire* which makes it possible, in a way, to depart from the normal division rules (Art. 270 French Civil Code).⁸⁷

56. Are there besides the rules of succession specific rules for the division of community assets if one of the spouses dies? If so, describe briefly.

There are not specific rules for division if the community is dissolved by the death of one spouse. But in practice, it often happens that if the spouses have children, the indivision is maintained and the division only takes place after the death of the surviving spouse, enabling the latter to benefit from all the revenues of all the assets (separate assets of the first deceased spouse and community assets).⁸⁸

⁸⁷ See F. Ferrand, "French Report concerning the CEFL Questionnaire on Grounds for Divorce and Maintenance Between Former Spouses". <http://www.law.uu.nl/priv/cefl>.

⁸⁸ Ph. Malaurie and L. Aynès, *Les régimes matrimoniaux*, Defrénois, 2nd ed., 2007, n° 529.

IV. Separation of property

IV.1. Categories of assets

129. Describe the system. Indicate the different categories of assets involved.

In the regime of separation of property, there are no common assets but only personal assets of the wife and personal assets of the husband. Each spouse keeps in principle the administration, enjoyment and free disposition of his or her personal assets and remains solely responsible for his or her own debts.

130. What assets comprise the separate property of the spouses?

The separate property of the spouses is comprised in principle of all the assets they brought into the marriage and all the assets they acquired later on, whatever their origin. If one spouse acquires an asset with means belonging to the other spouse, this will at the most give rise to some financial claims between the spouses but will not challenge the ownership of the asset.

131. Can spouses acquire assets jointly? If so, what rules apply?

Art. 1538 para. 3 French Civil Code stated that "Property of which neither of the spouses can prove an exclusive ownership is considered to belong to them jointly, to each one by halves". Consequently, assets will quite often be held as joint property because spouses are not able to prove that the asset belongs to the separate property of one of them (see Question 134). Moreover, spouses often acquire assets jointly (e.g. the family/matrimonial home). In both of those cases of joint property, the normal rules of joint property (*indivision*) will apply (Art. 815 to 815-17 French Civil Code). One should also not forget Art. 1751 para. 1 French Civil Code. This Article also applies to separation of property: the right to a lease of premises, without professional or commercial character, which is actually used for the dwelling of two spouses, is considered to belong to both spouses (see Question 10).

132. Is substitution of assets (e.g. barter agreement) governed by specific rules? Distinguish where necessary between movables and immovables.

The substitution of assets is not governed by specific rules.

133. What is the position of pension rights and claims and insurance rights?

No specific legislation.

134. How is the ownership of the assets proved as between the spouses? Are there rebuttable presumptions?

With respect both to the other spouse and to third parties, a spouse may prove by any means that he or she has the exclusive ownership of an asset.

The presumptions of ownership established in the ante-nuptial agreement take effect with respect to third parties, as well as in the relations between spouses, unless otherwise agreed. Counterproof is as of right, and may be made by any means appropriate to establish that the property does not belong to the spouse designated by the presumption, or even, where it belongs to him or her, that it was acquired through a gratuitous transfer from the other spouse.

Property of which neither of the spouses can prove an exclusive ownership is considered to belong to them jointly, to each one by halves (Art. 1538 French Civil Code).

135. How is the ownership of the assets proved as against third parties? Are there rebuttable presumptions?

With respect both to the other spouse and to third parties, a spouse may prove by any means that he or she has the exclusive ownership of an asset. The proof of the ownership of an asset generally follows from the title of acquisition. Such a title, however, is seldom drawn up where movables are concerned. In that case, the traditional means of proof is possession. However, the possession of an asset by a spouse may be ambiguous due to the fact that he or she lives together with the other spouse, then proof by testimony or even presumption (invoice in the name of the spouse) is possible. Property of which neither of the spouses can prove an exclusive ownership is considered to belong to them jointly, to each one by halves (Art. 1538 French Civil Code).

Spouses may also draw up clauses of presumption of ownership in their marital agreement. As stated by Art. 1538 para. 2 French Civil Code: "The presumptions of ownership established in the ante-nuptial agreement take effect with respect to third parties, as well as in the relations between spouses, unless otherwise agreed. Counter proof is as of right, and may be made by any means appropriate to establish that the property does not belong to the spouse designated by the presumption, or even, where it belongs to him or her, that it was acquired through a gratuitous transfer from the other spouse".

136. Which debts are personal debts?

All debts are in principle personal debts as stated by Art. 1536 para. 2 French Civil Code. Each of them remains a solely held debt arising from his or her person, before or during marriage.

137. Which debts are joint debts?

Spouses may always decide to contract debts jointly. Besides that, spouses jointly hold the debts contracted for the household or the education of children (Art. 1536 para. 2 and Art. 220 French Civil Code, see Question 9).

138. On which assets can the creditor recover personal debts?

Payments of debts may always be enforced against the assets of the debtor.

139. On which assets can the creditor recover joint debts?

In case of joint debts, payments may be enforced against the assets of both spouses.

IV.2. Administration of assets

140. How are assets administered?

In principle, spouses administer their assets independently one from each other (Art. 1536 para. 2 French Civil Code). Three types of exceptions are however possible, in which case the assets will be administered jointly. First of all, the rules of the primary regime will apply. Consequently, spouses may not, separately, dispose of the rights whereby the lodging of the family is ensured, or of the pieces of furniture with which it is garnished (Art. 215 para. 3 French Civil Code). See Question 10. Art. 220-1 para. 2 French Civil Code may also play a role. Indeed, if one spouse fails gravely in duties and thus places the interest of the family in peril, the "family causes judge" can forbid such spouse to make, without the consent of the other, acts of disposing of his or her separate assets. He may also forbid the moving of separate property, except those which he attributed to the personal use of one or the other of the spouses. Other rules of the French Commercial Code (Art. L. 121-6) or the French Rural Code (Art. L. 321-1) may also play a role.

The second type of exception concerns the situation where spouses own assets in undivided property (*indivision*). In that case, the administration of the assets will be governed by the rules on joint property and Art. 815 et seq. French Civil Code will apply. Since the Act of 23 June 2006, the rules on administration of the undivided property have become more flexible. As before 2006, each undivided owner may use and enjoy undivided property in accordance with its purpose, to the extent compatible with the rights of the other undivided owners and with the effect of the acts lawfully made in the course of the undivided ownership (Art. 815-9 French Civil Code). As before 2006, any undivided owner may take the necessary steps for the preservation of the undivided property, but in 2006 the words 'even if there are not urgent' have been added. He or she may use for that purpose funds of the undivided property which he holds, and he is deemed to have the free disposal of them with regards to third parties. Before 2006, acts of administration and disposition required the consent of all the undivided co-owners. Since 2006, the co-owners which own at least 2/3 of the undivided property can fulfil certain acts of administration (Art. 815-3 French Civil Code). This does however not have any impact of the situation of spouses. These acts are enforceable against the other undivided co-owners if they have been informed about them.

The consent of all the undivided co-owners is required for all acts of disposition and acts of administration that exceed the normal exploitation of the undivided assets (Art. 815-3 para. 6 French Civil Code).

As the joint administration may be unwieldy, several solutions are provided for that have much in common with the rules regarding the situation of joint administration during the life-time of the community. First spouses can decide to give general agency of administration (Art. 815-3 para. 2 French Civil Code). Special agency is however needed for acts of administration that exceed the normal exploitation of the undivided assets (Art. 815-3 para. 6 French Civil Code). Also, where one spouse takes up the administration of the undivided property, with the knowledge of the spouse and nevertheless without opposition on his or her part, he or she is deemed to have received an implied authority, covering acts of administration, but not acts of disposition or conclusion or renewal of contracts (Art. 815-3 para. 7 French Civil Code).

Where one of the undivided owners is unable to express his intention, another may be judicially entitled to represent him, in a general manner or for some particular transactions, the terms and extent of that representation being fixed by the judge (Art. 815-4 French Civil Code). Failing statutory power, contractual authority or judicial entitlement, the acts done by a undivided owner on behalf of another are effective with regard to the latter under the rules of management of another's business (Art. 815-4 para. 2 French Civil Code). An undivided owner may be judicially authorized to do alone an act for which the consent of an undivided co-owner would be required, where the refusal of the latter imperils the common interest (Art. 815-5 French Civil Code). The president of the *tribunal de grande instance* may prescribe or authorize all urgent measures which the common interest requires (Art. 815-6 French Civil Code).

The third type of exception concerns the situation where one spouse may entrust the other with the administration of his or her assets. In that case, the rules of agency apply. The agent spouse is, however, exempted from accounting for the fruits, if the power of attorney does not expressly oblige him or her to do so (Art. 1539 French Civil Code). One spouse may also take over the administration of the assets of the other spouse. If it is with the knowledge of the other spouse and without objection, he or she is considered to have an implied agency, covering acts of administration and management, but not acts of disposition. The spouse who takes over the administration answers for such management to the other as an agent. There is nevertheless accountability only for existing fruits; for those whose collection was neglected or which were fraudulently consumed, there may be investigation only within the limit of the last five years (Art. 1540 para. 1 and 2 French Civil Code)

141. Can one spouse mandate the other to administer the assets?

The general rule concerning mandates between spouses is stated by Art. 218 French Civil Code: one spouse may give agency to the other to represent him or her in the exercise of powers which the matrimonial property regime attributes to him or her. The agency may, in all cases, be freely revoked. (See Question 13).

The question of mandates is also expressly regulated for spouses married under separation of property. As stated by Art. 1539 French Civil Code, one spouse may entrust the other with the administration of his or her assets. In that case, the rules of agency shall apply. The agent spouse is however exempted from accounting for the fruits if the power of attorney does not expressly oblige him or her to do so. One spouse may also take over the administration of the assets of the other spouse. If it is with the knowledge of the other spouse and nevertheless without objection, he or she is considered to have an implied agency covering acts of administration and management, but not acts of disposition. The spouse who takes over the administration answers for such management to the other as an agent. There is nevertheless accountability only for existing fruits; for those whose collection was neglected or which were fraudulently consumed, there may be investigation only within the limit of the last five years (Art. 1540 para. 1 and 2 French Civil Code).

142. Are there important acts concerning assets (e.g. significant gifts, disposal of the matrimonial/family home or other immovable property) that require the consent of the other spouse?

Spouses may not, separately, dispose of the rights whereby the lodging of the family is ensured, or of the pieces of furniture with which it is garnished (Art. 215 para. 3 French Civil Code). See Question 10.

Art. 1751 French Civil Code will also play a role. As said before, (see Question 10) the right to a lease of premises, without professional or commercial character, which is actually used for the dwelling of the two spouses, is considered to belong to both spouses. In case of divorce or judicial separation, that right may be allotted by the court, accounting for the social and family interests concerned, to one of the spouses, saving reimbursement, or to the other spouse. In case of death, the surviving spouse co-lessee has an exclusive right to it unless he or she expressly renounces it.

143. Are there special rules for the administration of professional assets?

No.

144. Is there a duty for one spouse to provide information to the other about the administration of the assets?

No.

145. How are disputes between the spouses concerning the administration of assets resolved?

1. One spouse fails gravely in duties and thus puts the interest of the family in peril. If one of the spouses fails gravely in duties and thus put the interest of the family in peril, the family causes judge may prescribe any urgent measures which such interests require. He can specifically forbid such spouse to make, without the consent of the other, acts disposing of his or her separate assets or those of the community, real or personal. He may also forbid the moving of separate property, except those which he attributed to the personal use of one or the other of the spouses (Art. 220-1 French Civil Code).

2. One spouse refuses to give his or her consent.

Disputes may arise when a spouse refuses to give his or her consent to a transaction where the rules on joint administration are applicable (See Questions 140 and 142). In that case Art. 217 French Civil Code will give a spouse the possibility to go to court and to ask for judicial authorization to individually enter into the transaction if the refusal of the other spouse is not justified by the interest of the family.

146. What are the possible consequences when a spouse violates the rules governing the administration of assets? What are the possible consequences in other cases of maladministration of the assets?

1. Violation of the rules governing the administration of personal assets.

Where one of the spouses has interfered in the management of the other's property in contempt of an established opposition, he or she is responsible for all the consequences of that interference, and accountable without limitation for all the fruits which he or she has collected, failed to collect or fraudulently consumed (Art. 1540 para. 3 French Civil Code).

2. Other cases of maladministration: One spouse fails gravely in duties and thus places the interest of the family in peril.

If one of the spouses fails gravely in duties and thus places the interest of the family in peril, the family causes judge may prescribe any urgent measures that such interests require. The court can specifically forbid such spouse to make, without the consent of the other, acts disposing of his or her separate assets or those of the community, real or personal. The judge may also forbid the moving of separate property, except those which were attributed to the personal use of one or the other of the spouses (Art. 220-1 French Civil Code).

147. What are the possible consequences if a spouse is incapable of administering the assets?

If one of the spouses is unable to express his or her wish, the other can be enabled by law to represent him or her, in general, or for certain particular acts, in the exercise of powers resulting from the matrimonial property regime, the conditions and the extent of such representation being fixed by the judge. In default of legal power, agency or enablement at law, the acts done by one spouse in representation of the other take effect, with regard to the latter, according to the rules of quasi-contract (*gestion d'affaires*) (Art. 219 French Civil Code).

IV.3. Distribution of assets upon dissolution

148. What are the grounds for the dissolution of the matrimonial property regime, e.g. change of property regime, death of a spouse or divorce?

As spouses are married under separation of property there is, strictly speaking, no matrimonial property regime to dissolve. This might explain why the grounds for the dissolution of this type of matrimonial property regime are not mentioned anywhere in the French Civil Code. However the grounds must be the same as in case of dissolution of the default regime of community of property. The regime is dissolved:

- 1° By the death of one of the spouses;
- 2° By declared absence;
- 3° By divorce;
- 4° By judicial separation;
- 5° By change of matrimonial property regime.

149. What date is decisive for the dissolution of the matrimonial property regime? Distinguish between the different grounds mentioned under Q 148.

Not relevant.

150. What are the consequences of the dissolution of the matrimonial property regime regarding the separate or joint property of the spouses?

1. The separate property.

Strictly speaking, the dissolution of the separation of property should not have any consequences regarding the separate property of the spouses. In theory, each spouse should have kept the ownership of his or her assets, have administered them independently and paid his or her debts with his or her separate property. But in reality, things may have happened quite differently. Spouses may have acquired assets jointly or not been able to prove that the assets belong to them separately (see below), or transfer may have taken place between the two separate properties of the spouses (see Question 153). This may generate the need to liquidate the regime of separation of property.

2. Joint property.

The assets spouses acquire jointly or of which they are not able to prove separate ownership (Art. 1538 para. 3 French Civil Code), must be distributed between them. Art. 1542 states that "After the dissolution of a marriage by the decease of one of the spouses, the partition of undivided property between spouses with property separation, for everything concerning its forms, the maintenance of joint ownership and priority allotment, the effects of partition, guaranty and net balances, is subject to all the rules which are established in the Title "Successions" for partitions among coheirs. The same rules will also apply after divorce or judicial separation. However in those cases, priority allotment is never as a matter of law. It may always be decided that the total of a net balance possibly due will be payable in cash".

151. How are assets determined and valued? Are e.g. premarital assets and debts, assets acquired by gift, will or inheritance and debts related those assets, the increase in value of the spouses' property and debts related to that property, pension rights and claims and insurance rights taken into account?

Not relevant.

152. What are the relevant dates for the determination and valuation of assets? E.g. is the fact that the spouses are living apart before the dissolution of the marriage relevant?

Not relevant.

153. What happens if one spouse's assets are used for investments in the other spouse's assets? Is there any right to compensation? If so is this a nominal compensation or is it based on the accrual in value?

When one spouse's assets are used for investment in the other spouse's assets (e.g. when a spouse put up the money for the acquisition of a separate asset of his or her spouse), compensation should be paid. As stated by Art. 1543, the rules of Art. 1479 shall apply to the claims which one spouse may have to enforce against the other. For the calculation of the compensation, para. 2 of Art. 1479 refers to Art. 1469 para. 3: Reimbursement shall be, in general, equal to the smallest of the two sums which the expenditures made and benefits subsisting. For more information on the calculation of the compensation see Question 45.

154. What happens if one spouse's assets have been used for payment of a debt of the other spouse? Is there a rule of compensation? And if so, how is compensation calculated?

When one spouse's assets have been used for payment of a debt of the other spouse, compensation will have to take place. As stated by Art. 1543, the rules of Art. 1479 shall apply to the claims which one spouse may have to enforce against the other. For the calculation of the compensation, para. 2 of Art. 1479 refers to Art. 1469 para. 3: reimbursement shall be, in general, equal to the smallest of the two sums which the expenditures made and benefits subsisting. For more information on the calculation of the compensation see Question 45.

155. Do the spouses have preferential rights over the matrimonial/family home and/or the household's assets?

1. In case of death of one spouse.

a. Preferential rights.

When the matrimonial/family home is held as joint property and the matrimonial property regime is dissolved by the death of one spouse, the surviving spouse may have a preferential right over it, according to the rules established in the Title "Successions". Indeed as stated by Art. 1542, "after the dissolution of a marriage by the decease of one of the spouses, the partition of undivided property between spouses with property separation, for everything concerning its forms, the maintenance of joint ownership and priority allotment, the effects of partition, guaranty and net balances, is subject to all the rules which are established in the Title Successions for partitions among coheirs".

When the matrimonial property regime is dissolved by divorce or judicial separation the same rules will apply. However, in those cases priority allotment is never as a matter of law. It may always be decided that the total of a net balance possibly due will be payable in cash (Art. 1542 para. 2 French Civil Code).

According to the rules on successions, spouses do not really have a preferential right over the matrimonial home and the household's assets, but may request a preferential allotment of the ownership or right to lease of the premises which actually serves him or her as habitation; where he or she resided at the time of the dissolution (Art. 831-2 para. 1 sub 1 French Civil Code). The preferential allotment is optional; the court will assess the appropriateness of the attribution according to the interests of both spouses.

b. Temporary Rights to Lodging and Rights for Life to Lodging.

In case of death the surviving spouse has a right of gratuitous enjoyment (Art. 763 French Civil Code) and a right of habitation and a right to use of the furniture (Art. 764 French Civil Code).

i. Right of gratuitous enjoyment.

Where, at the time of the death a spouse entitled to inherit actually occupies, as his or her main habitation, a lodging belonging to the spouses or fully depending upon the succession, he or she has by operation of law, for one year, the gratuitous enjoyment of that lodging, as well as of the furniture with which it is fitted included in the succession. Where his or her habitation was secured through a lease, or through a dwelling which was owned for his undivided part by the deceased, the rents thereof or the occupation allowance shall be repaid to him or her during the year, as the payments proceed. These rights are deemed direct effects of the marriage and not rights of inheritance. This Article is mandatory; the deceased may thus not set the right aside by bequeathing the lodging to another person (Art. 763 French Civil Code).

Save an intent to the contrary expressed by the deceased in the way provided for in Art. 971 (in other words, a last will by notarial act), a spouse entitled to inherit who actually occupied, at the time of the death, as his or her main habitation, a lodging belonging to the spouses or fully depending upon the succession, has on this lodging, until his or her death, a right of habitation and a right of use on the furniture with which it is fitted, included in the

succession. Those rights of habitation and of use are exercised subject to the conditions provided for in Art. 627, 631, 634 and 635 French Civil Code. The spouse, the other heirs, or one of them may insist on an inventory of the movables and a statement of the immovable subjected to the rights of use and of habitation being drawn up. Notwithstanding Articles 631 and 634, where it results from the situation of the spouse that the lodging subject to the right of habitation is no longer adapted to his or her needs, the spouse or his or her representative may lease it for an use other than commercial or rural in order to provide necessary means for new conditions of dwelling (Art. 764 French Civil Code). Contrary to the right of enjoyment of Art. 763, the right which results from Art. 764 is a right for life. Subject to Art. 765 French Civil Code, the value of that right conferred to the surviving spouse shall be charged to the succession rights of the surviving spouse, which means that it shall be deducted from his succession portion.

Art. 1752 French Civil Code may also play a role. As said before, (see Question 10) the right to a lease of premises, without professional or commercial character, which is actually used for the dwelling of the two spouses, is considered to belong to both spouses. And in case of death of one of the spouses, the surviving spouse co-lessee has an exclusive right to it, except where he or she expressly renounces it.

2. In case of divorce or judicial separation.

In case of divorce or judicial separation Art. 1751 French Civil Code will also be applicable. As said before, (see above and Question 10) the right to a lease of premises is considered to belong to both spouses. In case of divorce or judicial separation, that right may be allotted by the court, accounting for the social and family interests concerned, to one of the spouses, saving reimbursement, or to the other spouse.

156. Do the spouses have preferential rights over other assets?

When the assets are held in joint property and the matrimonial property regime is dissolved by the death of one spouse, the surviving spouse may have a preferential right over them according to the rules established in the Title "Successions". Indeed as stated by Art. 1542, "after the dissolution of a marriage by the decease of one of the spouses, the partition of undivided property between spouses with property separation, for everything concerning its forms, the maintenance of joint ownership and priority allotment, the effects of partition, guaranty and net balances, is subject to all the rules which are established in the Title Successions for partitions among coheirs".

When the matrimonial property regime is dissolved by divorce or judicial separation the same rules will apply. However, in those cases priority allotment is never as a matter of law. It may always be decided that the total of a net balance possibly due will be payable in cash (Art. 1542 para. 2 French Civil Code).

In the Title "*Successions*", there are quite a few Articles providing for preferential rights. Hereby a short list of the assets concerned:

- any agricultural, commercial, industrial or craft exploitation, or undivided portion of it, even formed in part from a property of which he was already owner or co-owner in whose development he actually participates or participated (Art. 831 para. 1 French Civil Code). If there is occasion, the request for preferential allotment may bear on shares of the capital, without prejudice to the application of the statutory provisions or of articles of association on the continuation of a partnership with the surviving spouse (Art. 831 para. 2 French Civil Code);
- ownership or right to lease of the premises used for professional purposes which actually serve for the exercise of his or her occupation and of the furniture for professional purposes which garnishes the premises (Art. 831-2 sub 2° French Civil Code);

- movable assets necessary for the holding of a rural property farmed by the deceased as tenant farmer or sharecropper where the lease continues for the profit of the applicant or where a new lease is granted to the latter (Art. 831-2 sub 3° French Civil Code);
- a spouse may request preferential allotment of all or part of immovable property or rights for agricultural purposes, with a view to establishing an agricultural land grouping (Art. 832-1 French Civil Code).

157. To what extent, if at all, does the dissolution of the matrimonial property regime affect the attribution of maintenance?

The dissolution of the matrimonial property regime may have an influence on the allowance of a *prestation compensatoire*. Art. 270 French Civil Code allows the judge to order one spouse to pay maintenance (*prestation compensatoire*) in case there is a disparity between the spouses' standards of living. And yet, the spouses' standards of living will be influenced by the division of the community of property. Therefore, if the rules of matrimonial property law lead to a similar financial situation between the spouses, there will not be any disparity which has to be compensated, and no *prestation compensatoire* has to be paid. The *prestation compensatoire* will be fixed according to the spouses' needs and financial capacity. Art. 271 French Civil Code gives a list of criteria the judge shall take into account; one of them is "the spouses' assets, as a capital sum and as income, after the liquidation of the matrimonial property regime".

158. To what extent, if at all, does the dissolution of the matrimonial property regime affect the pension rights and claims of one or both spouses?

The dissolution of the matrimonial property regime does not affect the pension rights and claims of one or both spouses.

159. Can the general rules (above Q 150) be set aside or adjusted, e.g. by agreement between the spouses or by the competent authority?

During the marriage, one spouse may have contributed without getting paid to the profession of his or her spouse. In that case the French judges have accepted, for some time already, the possibility of a claim *de in rem verso*. One spouse may get compensation if his or her activity exceeds his or her obligation to contribute to the costs and expenses of the family household (see Question 8) and has generated at the same time an impoverishment of the contributing spouse (because he or she did not get paid for his or her work) and an enrichment of the other one. The allocation of a compensation may also be based on the assumption of the existence of a *de facto* partnership (*société créée de fait*, Art. 1873 French Civil Code) between the spouses.⁸⁹

160. Are there besides the rules of succession specific rules applicable if one of the spouses dies?

No.

D. MARITAL AGREEMENTS

191. Are future spouses permitted to make a pre-nuptial agreement regulating their property relationship? If so, is it binding? Or if it is not binding, does it have any effect?

⁸⁹ See e.g. Cass. Civ. I, 4.11.1987, *Gaz. Pal.* 1988.2.631, obs. Massip.

The freedom of the spouses consists in the possibility of choosing between the default matrimonial property regime or a conventional regime and in case of preference for a conventional regime, in the freedom to determine the clauses of that regime. In the latter case, the freedom of spouses may consist in the simple adoption of one of the regimes expressly regulated by the French Civil Code (Art. 1393 para. 1 French Civil Code), in the combination of several of those regimes or in the elaboration of a specific regime, which may be inspired by historical or foreign examples.⁹⁰ The freedom is however not without limits. Art. 1387 states the clauses may not be contrary to public morals, spouses may also derogate neither to the duties and rights which result for them from marriage (especially in the frame of the *régime primaire impératif*, see Question 7), nor to the rules of parental authority, statutory administration and guardianship (Art. 1388 French Civil Code), and the freedom goes without prejudice to gratuitous transfers which may take place according to the forms and in the cases provided for by this Code, spouses may not make any agreement or waiver whose object would be to change the statutory order of successions (Art. 1389 French Civil Code, some liberalities are however expressly permitted by law).

Pre-nuptial agreements are binding.

192. Are spouses permitted to make a post-nuptial agreement regulating or changing their property relationship? If so, is it binding? Or if it is not binding, does it have any effect?

During the marriage, spouses are not permitted to freely modify their matrimonial property regime by simple agreement (Art. 1396 para. 3 French Civil Code). Several requirements must be fulfilled. Consequently one may say that French law knows a form of slightly controlled mutability. (Art. 1397 French Civil Code).

1. Substantive requirements.

First of all, the modification is only possible after two years of application of a matrimonial property regime. Secondly, both spouses need to agree. Thirdly, the considered amendment (or entire change) must be made in the interest of the family (Art. 1397 para. 1 French Civil Code). The amendment or entire change should also not be fraudulent against the rights of third parties, especially creditors.

2. Formal requirements.

Since the Act of 23 June 2006 (entered into force on the 1st of January 2007), the modification of the matrimonial property regime takes place as a rule by notarial instrument but the need of a judgment of approval (*jugement d'homologation*) remains in some cases.

a. Modification by notarial instrument.

In absence of under aged children and of any opposition, the modification ensues from a notarial instrument. The notarial instrument must contain the liquidation of the modified regime (Art. 1397 para. 1 French Civil Code). Certain persons must be informed about the considered modification and may consequently oppose it.

i. Information.

All persons who were parties to the modified agreement and children of age of the spouses must be personally informed of the considered modification (Art. 1397 para. 2 French Civil Code).

The creditors are informed of the considered modification by the publication of a notice in a newspaper entitled to publish legal notices in the district or *département* of the domicile of the spouses (Art. 1397 para. 3 French Civil Code).

⁹⁰ R. Cabrillac, *Droit Civil – Les régimes matrimoniaux*, Montchrestien, 2007, n°117.

Once the required persons are informed and in the absence of any opposition within the allotted time (see below), the mention of the modification of the matrimonial property regime on the marriage act is requested by the notary. About the requirements of the request, see Art. 1300-2 French Code of Civil Procedure.

ii. Opposition.

The persons who were parties to the modified agreement and children of age of the spouses may oppose within three months of being informed. Creditors may oppose within three months of the publication. The opposition must notify the notary public who established the instrument. The notary public must then inform the spouses (Art. 1300-1 French Code of Civil Procedure). The opposition must be motivated.⁹¹ The consequence of the opposition is to restore the obligation of judicial approval. Creditors which do not wish to oppose may still contest the modification at the requirements established for the exercise of a revocatory action (*action paulienne*), e.g. in situation of fraud (Art. 1387 para. 8 French Civil Code).

2. Modification by judicial approval.

In presence of any under-aged children the notarial instrument must be submitted to the approval of the court of the domicile of the spouses (Art. 1397 para. 5 French Civil Code). The same applies in case of opposition. About the procedure, see Art. 1300 to 1304 French Code of Civil Procedure. The homologation of a change of a matrimonial property regime belongs to non-contentious matters (*procédure gracieuse*, Art. 1301 French Code of Civil Procedure).

193. What formal requirements must the pre- and/or post-nuptial agreement fulfil to be valid as between the spouses?

1. Pre-nuptial agreement.

All matrimonial agreements shall be drawn up in an instrument before a notary public, in the presence and with the simultaneous consent of all the persons who are parties thereto or of their agents. At the time of the signature of the agreement, the notary public shall deliver to the parties a certificate on unstamped paper and without costs, stating his name and place of residence, the names, first names, occupations and residences of the future spouses, as well as the date of the ante-nuptial agreement. That certificate shall state that it must be lodged with the officer of civil status before the celebration of the marriage. Where the record of marriage mentions that an ante-nuptial agreement was not made, the spouses shall be, with regard to third parties, deemed married under the regime of general law, unless, in the transactions entered into with those third parties, they have declared that they made an ante-nuptial agreement. (Art. 1394 French Civil Code).

2. Post-nuptial agreement.

Since the Act of 23 June 2006 (entered into force on the 1st of January 2007), the modification of the matrimonial property regime takes place as a rule by notarial instrument but the need of a judgment of approval remains in some cases.

a. Modification by notarial instrument.

In absence of under-aged children and of any opposition, the modification ensues from a notarial instrument. The notarial instrument must contain the liquidation of the modified regime (Art. 1397 para. 1 French Civil Code). Certain persons must be informed about the considered modification and may consequently oppose it.

i. Information.

All persons who were parties to the modified agreement and children of age of the spouses must be informed personally of the considered modification (Art. 1397 para. 2 French Civil Code).

⁹¹ R. Cabrillac, *Droit Civil – Les régimes matrimoniaux*, Montchrestien, 2007, n°126-2.

The creditors are informed of the considered modification by the publication of a notice in a newspaper entitled to publish legal notices in the district or *département* of the domicile of the spouses (Art. 1397 para. 3 French Civil Code).

Once the required persons informed and in the absence of any opposition within the allotted time (see below), the mention of the modification of the matrimonial property regime on the marriage certificate is requested by the notary. About the requirements of the request, see Art. 1300-2 French Code of Civil Procedure.

ii. Opposition.

The persons who were parties to the modified agreement and children of age of the spouses may oppose within three months of their information. Creditors may oppose within three months of the publication. The notary who established the instrument must be notified of the opposition. The notary public must then inform the spouses (Art. 1300-1 French Code of Civil Procedure). The opposition must be motivated.⁹² The consequence of the opposition is to restore the obligation of judicial approval. Creditors who do not wish to oppose may still contest the modification at the requirements established for the exercise of an revocatory action (*action paulienne*), e.g. in situation of fraud (Art. 1387 para. 8 French Civil Code).

2. Modification by judicial approval.

In the presence of any under-aged children, the notarial instrument must be submitted to the approval of the court of the domicile of the spouses (Art. 1397 para. 5 French Civil Code). The same applies in case of opposition. About the procedure, see Art. 1300 to 1304 French Code of Civil Procedure. The homologation of a change of a matrimonial property regime belongs to non-contentious matters (*procédure gracieuse*, Art. 1301 French Code of Civil Procedure).

194. What formal requirements must the pre- and/or post-nuptial agreement fulfil to be valid in relation to a third party? Is there a system of registration of pre- and/or post-nuptial agreements? If so describe briefly the system and its effect.

1. Pre-nuptial.

The publicity of the pre-nuptial agreement is mentioned on the civil status. After the signature of the marital agreement, the notary public drafts a certificate which indicates his or her name and the date of the contract. The spouses give this certificate to the registrar at the time of the wedding, which is mentioned on the marriage certificate. Then the agreement is opposable to third persons. However, if the spouse forgot to mention their marital agreement to the registrar, their marital agreement is nonetheless effective against third parties if, in the transactions entered into with them, the spouses have declared that they have made such an agreement.

2. Post-nuptial.

The modification is opposable to third parties three months after the mention of the modification of the matrimonial property regime on the marriage certificate. However, even in the absence of such mention, the change of matrimonial property regime is nonetheless effective against third parties if, in the transactions entered into with them, the spouses declared that they had amended their matrimonial property regime (Art. 1397 para. 6 French Civil Code). For immovable property the land registration may also need to be changed.

195. Is full disclosure of the spouses' assets and debts necessary for the making of a pre- and/or post-nuptial agreement?

No.

⁹² R. Cabrillac, *Droit Civil – Les régimes matrimoniaux*, Montchrestien, 2007, n°126-2.

196. If the agreement has to be made before an official (e.g. a notary), is that official obliged to inform the spouses about the content and the consequences of the pre- and/or post-marital agreement? If so, what happens if the official does not fulfil his or her obligation?

The notary has a duty to advise and inform, and its professional responsibility can be engaged in case of fault.

197. Provide statistical data, if available, regarding the making of pre- and/or post-nuptial agreements.

In France, 16% of spouses make a pre-nuptial agreement, 3% a post-nuptial one, so 19 % in total. 89% of all spouses are married under the default regime of community. 7,4% of spouses who make a marital agreement choose the default community regime or an regime akin to the default one. 6,3 % choose the separation of property and 3,3% the universal community.⁹³

198. May spouses through pre- and/or post-nuptial agreements only choose, where applicable, a statutory matrimonial property regime and/or do they have the freedom to modify such a regime or even create their own regime?

The freedom of spouses consists in the possibility to choose between the default regime of matrimonial property or a conventional regime and in case of preference for a conventional regime, in the freedom to determine the clauses of that regime. In the latter case, the freedom of spouses may consist in the simple adoption of one of the regimes expressly regulated by the French Civil Code (Art. 1393 para. 1 French Civil Code), in the combination of several of those regimes or in the elaboration of a specific regime, which may be inspired by historical or foreign examples.⁹⁴ The freedom is however not without limits. Art. 1387 states the clauses may not be contrary to public morals, spouses may also derogate neither the duties and rights which result for them from marriage (*régime primaire impératif*, see Question 7), nor the rules of parental authority, statutory administration and guardianship (Art. 1388 French Civil Code) and the freedom goes without prejudice to gratuitous transfers which may take place according to the forms and in the cases provided for by this Code, spouses may not make any agreement or waiver whose object would be to change the statutory order of successions (Art. 1389 French Civil Code, some liberalities are however expressly permitted by law).

199. If spouses can modify through pre- and/or post-nuptial agreements a statutory regime or create their own regime, can those modifications be made to:

a. Categories of assets

Spouses can modify the rules of the default of community concerning the categories of assets. Some modifications are expressly regulated by the French Civil Code but spouses also are free to agree on other kind of modifications. The French Civil Code expressly describes two types of modifications concerning the category of assets which fall into the community. The first type of modification expressly describes consists in the community of movables and acquisitions (Art. 1498-1501 French Civil Code) and the second type in the universal community of property (Art. 1526 French Civil Code).

1. The community of movables and acquisitions.

This community contains, besides the assets comprising the community according to the rules of the default regime, movable property of which the spouse had ownership or possession on the day of the marriage or which has fallen to them afterwards through succession or gift unless the donor or testator has stipulated the contrary. Nevertheless, movable property

⁹³ A. Barthez et A. Laferrère, "Contrats de mariage et régimes matrimoniaux", *Économie et Statistique* 1996, p. 127-144.

⁹⁴ R. Cabrillac, *Droit Civil – Les régimes matrimoniaux*, Montchrestien, 2007, n°117.

which would have been part of the category of personal assets by nature by virtue of Art. 1404 when acquired during the community, will remain personal (Art. 1498 French Civil Code). On the question of assets personal by nature see Question 22.

Movable property acquired after the conclusion of the contract but before the marriage has been celebrated will be merged with the community unless some clause of the contract states otherwise.

As there is a correlation between the assets and the debts, some parts of the pre-marital debts and the debts burdened with succession or gifts will be merged into the community of property. The fraction of debts which the community bears is proportional to the assets it received according to Art. 1498. Those debts are the final responsibility of the community (Art. 1500 French Civil Code).

However, the division of the debts prior to the marriage or the burdening successions and gifts may not prejudice creditors. In consequence, the creditors maintain, in all cases, their right to seize assets which previously constituted their pledge. They may also enforce their payment against the whole of the community if the movables of their debtor are merged into the community and can no longer be identified according to the rules of Art. 1402. (Art. 1501 French Civil Code). On the question of proof of personal assets see Questions 28 and 29.

2. The universal community.

Spouses may establish by marital agreement a universal community of their property, both personal and real, present and future. However, property declared by Art. 1404 to be personal in nature does not fall into such community except by stipulation to the contrary (on the question of assets personal by nature see Question 22). A universal community definitively bears all the debts of the spouses, present and future (Art. 1526 French Civil Code).

b. Administration of assets

Spouses can modify the default administration of assets rules of community. Some modifications are expressly regulated by the French Civil Code but spouses also are free to agree on other types of modifications. The French Civil Code expressly regulates the possibility of agreeing to jointly administer the community. In such a case, the instruments of disposition and administration of common assets are to be made under the joint signature of both spouses, and they carry as a matter of law solidarity of obligations. Instruments preserving rights from extinction may be made separately by each spouse. (Art. 1503 French Civil Code).

c. Distribution of assets

Spouses can modify the default distribution of community assets rules. Some modifications are expressly regulated by the French Civil Code, but spouses also are free to agree to other types of modifications.

Two different types of modification can be distinguished. First, the spouses may agree upon a clause of levy (*clause de prélèvement*) allowing one of them the power to appropriate a certain common asset (on condition of indemnity or without). They may also agree to depart from the normal distribution rule that states that the community shall be divided by half. When a modification generates an advantage to one spouse, it is called a matrimonial advantage (*avantage matrimonial*) which is subject to a specific system. This system is defined by Art. 1527 French Civil Code and its most important element is that matrimonial benefits should not, in principle, and notwithstanding the fact that they grant an advantage to one of the spouses, be considered as gifts.

Nevertheless, in some situations they may be considered as gifts; for instance, when children from "another bed" are present. In that case, any agreement that results in one spouse obtaining more than the share regulated by Art. 1098 in the Title "Gifts Inter Vivos and

Testaments" (the so called disposable part of the estate) is ineffective for any excess portion obtained (Art. 1527 para. 2 French Civil Code). However, since the Act of 23 June 2006, these children may renounce to their rights to ask for a reduction of the matrimonial benefit, in which case they will obtain some other rights (Art. 1527 para. 3 French Civil Code).

Most of these advantages are supposed to apply in case of dissolution by death. What happens if the community is dissolved by divorce, e.g. during the lifetime of both spouses? Then, the new Art. 265 French Civil Code will apply.⁹⁵ This Article makes a difference based on whether the matrimonial advantages take effect during the marriage or at the time of dissolution. The matrimonial advantages that take effect during the marriage are not affected by divorce. Those matrimonial advantages that take effect at the time of dissolution of the matrimonial property regime or at the death of one spouse are revoked by operation of law in cases of divorce, unless the spouse who granted them otherwise decides. This decision must be established by the judge at the time the divorce is decreed, and shall render the upheld advantage or transfer irrevocable. Now that the system of matrimonial advantages has been set out, the different types of clauses which may change the normal rules of distribution and are expressly regulated by the French Civil Code will be exposed. First, we will look into the clauses on levy and then on the clauses which more generally modify the distribution.

1. Clauses on levy (*clause de prélèvement*).

The spouses may stipulate that the survivor of them, or one of them if he or she survives, or even one of them in all cases of dissolution of the community, will have the option of levying certain common assets, with the responsibility of accounting thereon to the community according to the assets' value at the day of partition, if it is not otherwise agreed (Art. 1511 French Civil Code). This clause is then called a *clause on levy on condition of indemnity (clause de prélèvement moyennant indemnité)*. The contract of marriage may fix the basis of evaluation and the modalities of the payment of a possible net balance. Account being taken of such clauses and in default of agreement between the parties, the value of the assets will be fixed by the court (Art. 1512 French Civil Code). The option of levying lapses if the benefiting spouse does not exercise it through notification to the other spouse or his or her heirs within a period of one month, counting from the day when the latter summons him or her to take part. Such summoning may not itself take place before the expiration of the period provided in the Title succession for making inventory and deliberating (Art. 1513 French Civil Code). Levying is an operation of partition: property levied is imputed against the share of the beneficiary spouse; if its value exceeds such share, it gives rise to the deposit of the net balance. The spouses may agree that the indemnity due by the maker of a levy will be imputed subsidiary against his or her rights in the succession of the predeceased spouse (Art. 1514 French Civil Code).

This kind of clause is generally agreed upon to allow the surviving spouse to be able to carry on with his or her occupation by obtaining the ownership of the asset necessary to it. As it is often used to pass on a business (*fonds de commerce*) this clause also carries the name "commercial clause".⁹⁶

Spouses may also agree in their marital agreement that the survivor of the spouses, or one of them if he or she survives, will be authorized to levy on the community before any partition, either a certain sum or certain property in kind or a certain quantity of a determined kind of property (Art. 1515 French Civil Code) and this without any indemnity (*clause préciput*).

2. Clauses which modify the distribution.

These types of clauses modify the distribution by attributing a bigger share of the community to one of the spouses (Art. 1520 French Civil Code). They are often called matrimonial benefits (*avantages matrimoniaux*), which means that they are not considered as gifts, either as to substance or as to form, but simply as agreements relating to marriage and between

⁹⁵ Act n°2004-439 of 26.05.2004.

⁹⁶ R. Cabrillac, *Droit Civil - Les régimes matrimoniaux*, Montchrestien, 2007, n°235.

partners (Art. 1525 French Civil Code). They do not, however, unless otherwise stipulated, prevent the heirs of the predeceased spouse from taking back the assets and capital fallen into the community in the name of the decedent, that is to say the assets present at the time of the beginning of the community or later acquired through succession, gift or legacy. (Art. 1525 para. 2 French Civil Code).

i. Spouses may agree upon a *clause of unequal shares*, which makes it possible to depart from the rule of separation into two equal shares. The liability of the debts will then also be reduced or increased proportionate to the share of the assets (Art. 1521 French Civil Code). The agreement is void if it obliges the spouse whose share has been reduced (or his or her heirs) to bear a larger share in the debts, or if it dispenses them from bearing a share in the debts equal to that they take in the assets (Art. 1521 French Civil Code).

ii. The spouses may also agree upon a *clause of allotment of the entire community*. This kind of clause makes it possible to attribute the entire community to one spouse in case the community is dissolved by the death of the other spouse. The spouse who thus retains the entire community is consequently obliged to pay all its debts. The clause may also stipulate that the surviving spouse will have, in addition to his or her half, the usufruct of the decedent spouse's share. In that case, the survivor shall contribute to the debts, as to the usufruct, according to the rules of Art. 612. (Art. 1524 French Civil Code). The spouse who thus retains the entire community is consequently obliged to pay all its debts. The clause of allotment of the entire community is often combined with the agreement of a universal community.

d. Depend upon the ground of dissolution of the marriage?

Even if this kind of modification is not expressly regulated by the French Civil Code, spouses may adopt an alternative regime that is conditional to the ground of dissolution: death or divorce. This is, for example, possible with the clause of recapture of a universal community, often called "elsassien clause" (*clause alsacienne*), which allows spouses the ability to take back their pre-marital assets if they divorce.

200. Are there typical contractual clauses used in practice to modify essential elements of the matrimonial property regime, where applicable, or to achieve a certain result, e.g. that certain rights are excluded only upon divorce but not on death of a spouse?

No information.

201. Can the competent authority override, modify or set aside pre- and/or post-nuptial agreements on account of unfairness or any other ground?

No.