

France Boosts Tax Fraud Prosecution

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On October 23, 2018, the French Parliament enacted a law aimed at combatting fraud (the “Law”).¹ The most innovative provisions of the Law change key procedural aspects of tax law enforcement, which is likely to result in an increased number of criminal tax fraud prosecutions against both individuals and legal entities. The Law also addresses customs and social security frauds.

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Tax fraud prosecution: Open the floodgates. Under French criminal law, prosecutors—and under some circumstances, victims—have the power to decide whether to prosecute criminal offences. Since 1920, an exception has existed for tax fraud: Prosecution was subject to the prior filing of a complaint by the tax authorities, after assent of another administrative body known as the Tax Offence Commission.

This procedural framework—nicknamed the “Bercy lock,” from the name of the Paris neighborhood where the tax authorities are headquartered—has been under fire for years because of the discretionary and opaque power it gave to the executive branch over tax fraud prosecution. According to official figures, only about 1,000 out of the 15,000 suspicious cases typically encountered each year result in complaints being filed by tax authorities, casting a cloud of suspicion over the case-selection criteria.

While the Law does not break this “lock,” it should succeed in loosening it. Tax authorities will now be obligated to refer cases to prosecutors where (i) the tax reassessment is at least €100,000 (€50,000 for some public officials) and (ii) the tax authorities have applied a tax penalty because they believe the taxpayer has acted in bad faith. Below this threshold, tax authorities will still have the opportunity to file a complaint after assent of the Tax Offence Commission. Figures provided during the legislative process suggest that at least 2,000 tax fraud cases may now be referred to prosecutors annually, with 70 percent involving legal entities.

Ultimately, it remains up to prosecutors to bring criminal charges, but they have done so following 95 percent of tax fraud complaints received from the tax authorities. Taxpayers—especially companies—that may be suspected of tax fraud should therefore

¹ Law No 2018-898 of October 23, 2018, available at www.legifrance.gouv.fr/eli/loi/2018/10/23/2018-898/loi/texte.

be more prepared than ever to face criminal prosecution. This is particularly true given the increased cooperation between French authorities and those of other jurisdictions regarding this type of misconduct and the recent protection granted to whistleblowers reporting crimes. Generally, tax authorities may file complaints until the end of the sixth year following that of the suspected infringement.

Enhanced maximum penalties faced before criminal courts. Since 2012, individuals found guilty of tax fraud by a criminal court face a maximum sentence of five years' imprisonment and a €500,000 fine (€2.5 million for legal entities); under certain circumstances, enhanced sanctions may also apply. The Law provides that fines now may be set at up to twice the proceeds of the offence for individuals and up to 10 times for legal entities. The Law also provides for automatic posting of a public notice and dissemination of the criminal court's decision, unless the court orders otherwise.

French-style guilty plea and DPA extended to tax fraud cases. In order to help prosecutors manage the expected increase in the number of tax fraud cases, the Law provides additional procedural tools that were not previously available for this offence.

The scope of the French pre-trial guilty plea (known as "CRPC" for *comparution sur reconnaissance préalable de culpabilité*) is extended to tax fraud. This procedure can be initiated either by the prosecutor or at the request of the suspect. The suspect may agree to plead guilty in return for a more lenient sentence. If the suspect accepts the offer, the resolution needs to be approved by the court. If the suspect refuses the offer, or if the court does not approve the resolution, the case will be tried following the ordinary rules. While the CRPC procedure is available to both individuals and legal entities, legal entities charged with tax fraud should think twice before accepting such a resolution since it requires an admission of guilt and amounts to a criminal conviction.

The Law also extends the scope of the French-style deferred prosecution agreement (known as "CJIP" for *convention judiciaire d'intérêt public*) to tax fraud. Until now, this relatively new procedure has only been available to resolve cases of alleged corruption, influence peddling and the laundering of the proceeds of tax fraud.

The CJIP process remains unchanged: Prosecuting authorities may offer an agreement whereby a legal entity—but not an individual—agrees to a fine proportionate to the benefit derived through the misconduct, up to a limit of 30 percent of the entity's average annual turnover during the previous three years. The legal entity may also have to agree to implement an enhanced compliance program under the supervision of the French Anti-Corruption Agency for a period up to three years. However, it remains unclear whether the latter will apply to CJIPs entered into in cases of tax fraud and laundering of the proceeds of tax fraud. A CJIP may be finalized only with approval of a judge following a public hearing aimed at verifying that the statutory requirements for

entering into a CJIP have been met. Importantly, the legal entity does not have to acknowledge any guilt and the judge's approval order does not have the effect of a conviction.

Prosecuting authorities are likely to use CJIPs to provide an efficient response to the increased number of tax fraud cases involving legal entities that is expected in the wake of the Law. Moreover, the head of the French National Financial Prosecutor's office—which has jurisdiction over the most serious tax fraud criminal cases—champions the CJIP mechanism and was reported to be one of the key advocates for its extension to tax fraud.

Unfortunately, the Law does not address lingering questions about CJIPs, such as the criteria to be used by authorities in deciding whether to offer a legal entity the opportunity to enter into a CJIP and the degree to which self-reporting and other forms of cooperation are taken into account in the agreement. So far, the only available guidance on the circumstances under which a CJIP is likely to be offered remains a non-binding circular from the Ministry of Justice to prosecutors, dated January 31, 2018, stating that prosecutors may want to take into consideration (i) the antecedents of the company, (ii) whether it voluntarily disclosed the relevant facts and (iii) whether it cooperates with the investigation. Nevertheless, by paving the way for a much larger number of CJIPs, the new Law is likely to accelerate the use of CJIPs by prosecutors, which should in turn provide clarity to companies and their advisors considering available options in tax fraud cases.

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With a team of white collar lawyers based in Paris, we are well positioned to assist clients on these and other issues. Please do not hesitate to contact us with any questions.

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