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THE NATIONAL ASSEMBLY PROPOSES PICKING BERCY'S LOCK

Private Equity Private Clients Tax Law Real Estate and Construction | 31/05/18 | Philippe Lorentz

Set up after the parliamentary debates on the Act for Confidence in Political Life, the information commission on prosecution of tax offences provided its report [1] last May 23.After several hearings of the tax authorities, the judiciary and lawyers from civil society, the members of parliament recommend eliminating the "Bercy lock" by "giving the keys" to the public prosecutor, and they propose several changes in the criminal justice system for tax matters.Focus on this report's proposals.

Instituted in 1920 when the general misdemeanor of tax fraud was created [2], the "Bercy lock" procedure was then part of the tax authorities' monopoly over criminal prosecution.However, to limit the risk of abusive complaints by the tax authorities, the admissibility of these complaints were subsequently subject to a favorable opinion by the commission on tax offences ("CIF"), created in 1977 [3].The initial monopoly, therefore, had a second "lock" [4].

Since then, the tax authorities' complaint occurs after three steps:

1- An administrative selection of cases after a completed tax audit or in case of established presumptions of fraud [5].The criteria for transmission to the CIF are defined in a circular memorandum of May 22, 2014 [6], which gives the tax authorities significant assessment leeway.The tax authorities transmit to the CIF every year around 1,000 cases after completed tax audits, which represents (i) 2% of tax audit cases, (ii) 7% of cases subject to tax penalties, and (iii) 20% of cases for which taxes due and notified exceed €100,000.

2 - The CIF's opinion is not reasoned and cannot be appealed.This opinion is binding on the tax authorities.In 2017, 95% of the CIF's opinions were favorable.

3 - In case of a favorable opinion by the CIF, the tax authorities file a complaint with the competent public prosecutor, who has discretion as to whether it brings charges.

This procedure occurs in most cases after a tax audit and if the tax authorities wish in addition to have criminal sanctions applied.In addition, the scope of the "Bercy lock" is limited to only the tax offences defined by the French Tax Code (CGI) [7] and not to the tax offences under ordinary law, within the scope of the criminal code [8], even if they have a tax purpose.

Therefore, the "lock" procedure's purpose is not to allow the taxpayer, through governmental action, to avoid paying the income taxes and penalties due.On the contrary, the report points out that, "*the statistics of tax audits have never ceased increasing these past ten years, going from less than €12 billion in taxes and penalties notified in 2005 to more than €21 billion in 2015.*"

However, the debate crystalized around the "Bercy lock", which restricts the public prosecutor's ability to freely prosecute since he is aware only of cases the tax authorities submit to him for an assessment.This "Bercy lock" is in effect seen by some, and wrongly so, as a possibility to avoid payment of taxes.The legitimacy of the "Bercy lock" has weakened all the more since the emergence of well-known political-financial cases.

Therefore, it was the information commission's role to clarify this legal, political and moral debate to redefine the criteria for the administrative selection of cases that could be subject to criminal prosecution:this is the true "Bercy lock", as, in nearly all cases, the CIF issues a favorable opinion.

I - Modernization of procedures for selecting cases with criminal aspects

After a tax audit by the tax authorities, the fact-finding mission recommends, "*defining legal criteria [defined by Parliament] so as to constitute in an objective manner a pool of cases based on which it would be examined whether to criminally prosecute for tax fraud.*"

These cases would be chosen if, alternatively:

1 - the adjusted taxes are above a certain threshold [9] and were subject to penalties showing the intent to avoid paying the taxes;

2 - they are categorized as aggravated tax fraud [10], independently of the amount avoided;

3 - the taxpayer is a repeat tax fraud offender.

These objective criterias allow one to constitute a set of cases that may potentially be subject to criminal prosecution by the public prosecutor [11] after they are examined.

In this respect, the report contemplates two possibilities for handling cases:

> transmitting all the cases chosen to the ICF, whose powers would be increased.Accordingly, its opinion would be only consultative and the public prosecutor, to whom all the opinions have been referred, would subsequently decide whether or not to prosecute.However, the fact-finding mission points out that this possibility does not sufficiently involve the public prosecutor upstream, which is why the report recommends the second possibility.

> eliminating the CIF.Consequently, the cases would be directly jointly examined by the tax authorities and the public prosecutor, who would together decide which cases should be prosecuted.In case of disagreement, the public prosecutor's opinion would prevail.

In the hearings carried out by the information commission, several parties were in favor of keeping the CIF [12].Indeed, in the event the real "Bercy lock" were eliminated by implementing legal and objective criteria for administrative selection, the CIF would play a role as a regulator of the policy for the tax authorities' filing of complaints, thereby countering the risk of the tax authorities being partial.According to the persons questioned, its elimination would be perceived by taxpayers as a loss of a safeguard.Only Mrs. Eliane Houlette, Financial Public Prosecutor, took a position in favor of eliminating the CIF, as it is only the last "filter" and is not the heart of the "Bercy lock".

II - Proposals for changes in criminal justice system for tax matters

The information commission proposes to diversify the procedures for prosecuting tax fraud since, under current law, the only means of prosecution available to the public prosecutor is before the criminal court and, if applicable, after the opening of a judicial inquiry.

The report, therefore, recommends extending the procedure for an arraignment with a plea bargain[13] ("CRPC") to tax fraud, as suggests the bill on fighting against fraud adopted in the Council of Ministers last March 28, and which will be examined in June by the Senate [14].

This means of prosecution would ensure a quicker and more effective criminal response in cases of simple tax fraud recognized by the taxpayer as soon as the situation has been formalized.

Similarly, the report asks the legislature to extend the possibility of concluding judicial agreements in the public interest ("CJIP") to tax fraud.As a reminder, created by the Sapin II Act [15], the CJIP is a settlement agreement concluded between the public prosecutor and only legal entities charged with certain ethics offences.It may provide for the payment of a fine in the public interest [16], the implementation of a compliance program and/or the obligation to compensate the harm caused to possible victims in exchange for putting an end to prosecution [17].

According to the report's authors, this means of prosecution would be, "*particularly [adapted] to cases of collusion in tax fraud committed by legal entities, when the legal entity's management teams have changed and have taken measures so that fraud does not reoccur.*"Similarly, as legal entities are more sensitive to risks to their reputation [18], this would undoubtedly motivate them to pay a fine in the public interest in exchange for an end to prosecution.

Lastly, the report proposes automatic transmission of tax fraud reports from the Tracfin unit to the national financial public prosecutor in order to improve detection of tax offences.

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This report's proposals, which drew a broad consensus in the parliamentary fact-finding mission, could be integrated in part into the bill on fighting against fraud in its examination in June by the Senate and when the National Assembly resumes work.

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[1] http://www2.assemblee-nationale.fr/documents/notice/15/rap-info/i0982/(index)/rapports-information

[2] Cf. Article 112 of the Act of June 25, 1920, enacting the creation of new tax resources.

[3] Cf. Article 1 of Act no. 77-1453 of December 29, 1977, granting procedural safeguards to taxpayers in tax and customs matters.

[4] Cf. Article L. 228 of the French Book of Tax Procedures.

[5] In this case, the matter can be directly referred to the CIF, even without a tax control, in the event that, "*presumptions establishing fraud [have been] brought to light in an investigation, audit or any other management or accounting activity*" (Cf. BOI-CF-INF-40-10-10-30-20150618, §50).

[6] Cf. circular memorandum on fighting against tax fraud of May 22, 2014.

[7] I.e., the general misdemeanor of tax fraud (Article 1741 of the French Tax Code, the misdemeanors treated as tax fraud (Article 1743) and the special tax fraud misdemeanors (Articles 1771 to 1783 B, 1810 to 1821, 1837 to 1839 and 1840 O to 1840 Q CGI).

[8] I.e., the misdemeanor of embezzlement of VAT (Article 313-1 of the French Criminal Code) and the misdemeanor of laundering of tax fraud (Article 324-1 of the French Criminal Code).

[9] The threshold of €100,000 of taxes notified is mentioned:the number of cases to be examined, therefore, would be around 5,000.

[10] The aggravating circumstances of tax fraud are defined in paragraph 2 of Article 1741 of the French Tax Code; in particular, this concerns, conspiracy, the interposition of natural persons or legal entities, the use of accounts abroad or forged documents.

[11] In certain cases, it is possible that the public prosecutor cannot prosecute due to the applicable criminal statute-of-limitations rules (Cf. our article on this subject) or the identification of the perpetrator.

[12] In particular, the representatives of the National Conference of Public Prosecutors, the public prosecutor with the French Supreme Court and lawyers questioned.

[13] This means of prosecution avoids a trial for a person who recognizes the charges against him.The sentence proposed by the public prosecutor, however, must be approved by a court (Cf. Articles 495-7 to 495-16 of the French Code of Criminal Procedure).

[14] http://www.senat.fr/leg/pjl17-385.html

[15] Cf. Article 22 of Act no. 2016-1691 of December 9, 2016, on transparency, the fight against corruption and the modernization of public life.

[16] The amount of the fine in the public interest is proportionate to the benefits of the undeclared amounts, within a limit of 30% of the average annual turnover calculated over the last three turnovers known on the date on which such undeclared amounts are reported, and the payment of such amount may be made over one year.

[17] Cf. our previous article on this subject.

[18] The CJIP concluded is published on the website of the French Anti-Corruption Agency.