Executive Summary

On 24 October 2018, the French Anti-Fraud Act¹ (loi relative à la lutte contre la fraude, the Act) was published in the Official Journal (O.J.) (Journal Officiel). The Act was designed to strengthen the measures to fight against taxpayers' failure to comply with their tax and social duties.

This Alert provides an overview of the Act.

Detailed discussion

**Strengthening the criminal legal arsenal**

Removal of the “Bercy lock”

Until now, prosecutions alleging tax fraud have been based on the filing of a complaint by the tax authorities after obtaining a favorable opinion from the tax offenses commission (verrou de Bercy). The Act puts an end to this requirement by providing for cases in which the tax administration must forward the file to the public prosecutor, the latter, however, remains free to instigate legal proceedings or not. The case must be moved forward:

- Where the amount of duties avoided exceeds €100,000 and the tax administration applied:
− The 100% penalty for opposition to control
− The 80% penalty provided for concealed activity, fraudulent practices or abuse of law, non-declaration of foreign accounts, life insurance or trusts or for smugglers
− The 40% penalty for deliberate breach, abuse of law or failure to file a tax return after a formal notice to pay if during the six previous calendar years, the taxpayer had, during a previous audit, one of the 40%, 80% or 100% penalties listed above or had been the subject of a complaint from the tax administration for tax fraud
¬ Where the amount of duties avoided exceeds €50,000 and the tax administration has applied one of the 40%, 80% or 100% penalties and that the taxpayer is bound by an obligation of transparency with the High Authority for the Transparency of Public Life (Haute Autorité pour la transparence de la vie publique)

In other cases, the prosecution of tax fraud will remain subject to a claim by the tax authorities after obtaining the favorable opinion of the tax offenses commission.

Removal of the Bercy lock applies to tax audits for which a tax reassessment notice has been sent from the date of publication of the law.

Strengthening of criminal penalties for tax fraud
While the maximum amount of the penalties for the offenses of tax fraud and aggravated tax fraud are set by law at €500,000 and €3,000,000, respectively, Article 23 of the Act raises the maximum to twice the income derived from the commission of the offenses. Pursuant to the provisions of Article 131-38 of the French Criminal Code (FCC), the fine could be up to 10 times the income derived from the offense if the person prosecuted is a legal person.

In addition, the Act makes it mandatory to impose the additional penalty of posting and disseminating the decision in the event of a sentence for tax fraud, subject to a well-founded decision taking into account the circumstances of the offense and the personality of the offender.

In the absence of any specific provision, these provisions will enter into force the day after the publication of the text in the OJ and will apply to offenses committed on or after that date.

Extension of the scope of the procedure for the appearance on a prior plea of guilty and of the judicial agreement in the public interest
The Act extends to tax fraud the procedure for pleading guilty. Introduced in 2004 in Articles 495-7 and following of the French Code of Criminal Procedure (FCCP), this procedure makes it possible to avoid a trial for a person who acknowledges the facts that are alleged against him/her and accepts the penalties proposed by the public prosecutor.

The law also provides legal persons with the possibility of concluding a judicial convention in the public interest in the event of tax fraud. Until then, it was reserved for cases of corruption, influence peddling, money laundering, laundering of tax fraud and related offences.

Introduced in 2016 in Articles 41-1-2 and 180-2 of the FCCP, the judicial convention in the public interest allows a legal entity to conclude a legal transaction enabling it to avoid criminal proceedings, in return for the payment of penalties and its submission to an anti-corruption compliance program under the supervision of a monitor. The agreement is also published on the website of the French Anti-Corruption Agency (Agence française anticorruption).

The conclusion of such an agreement, which does not imply an admission of guilt on the part of the legal person, does not, however, prevent the opening of criminal proceedings against natural persons in the management of such entities.

In the absence of any specific provision, this provision will enter into force the day after the publication of the text in the OJ.

Creation of a tax police
A dedicated unit, known as the “tax police,” will be set up within the Ministry in charge of Action and Public Accounts (Ministère en charge de l’Action et des Comptes Publics). This service will be composed of agents under the authority of a magistrate and may be referred to by the National Financial Prosecutor’s Office (Parquet national financier) in the event of cases requiring a high level of tax expertise, with substantial budgetary implications.

The new service will in fact be composed of the current National Judicial Customs Service (Service national de la douane judiciaire), which will evolve to include judicial tax officers in addition to judicial customs officers.

The Minister for Action and Public Accounts announced that a first class of agents, all from the General Direction of Public Finance, will be hired and trained at the National Customs School in Tourcoing in the first half of 2019.

Strengthening the administrative arsenal
Name and shame
The tax administration may now decide to publish, provided that it obtains the favorable opinion of the tax offenses commission, the tax penalties applied to legal persons
for breaches of their tax duties of a particularly serious nature (fraudulent acts or abuse of law and an evaded duty of at least €50,000). The publication is made on the tax administration’s website for a maximum period of one year. Challenging penalties will suspend publication or allow for its withdrawal.

In view of the “quasi-criminal” nature of such an additional penalty, it should only be applicable to acts committed after its entry into force, i.e., the day after the publication of the law in the OJ.

Penalties for tax intermediaries
A tax fine is created to punish the intentional supply of a service that directly enabled a taxpayer to commit an abuse of law, to carry out fraudulent activities, to conceal his activity or to omit to declare amounts relating to a trust or life insurance accounts or contracts held abroad, under conditions that led to an 80% increase in the recalled rights ordered by the tax authorities.

The amount of the fine will be equal to 50% of the income derived from the service, but may not be less than €10,000.

A similar system is also being created for social security contributions.

This system applies to services provided as from the day after the publication of the Act.

New reporting requirements for collaborative economy platforms
The new text clarifies the existing provisions of the FTC that set out the reporting requirements to be met by collaborative platforms.

In this respect, the platforms will have to comply with the following obligations, under penalty of a fixed fine of up to €50,000:

- To provide, for each transaction, honest, clear and transparent information on the tax and social obligations of the users who carry out commercial transactions through it
- To provide an electronic link to the tax administrations’ websites to enable them to comply, if necessary, with these obligations

Each year, they must also, under threat of a penalty of 5% of the undeclared amounts:

- Send to the users of the platform a statement of the operations carried out as well as various information concerning both the operations and the operator

- Send to the tax authorities a document summarizing all this information for all users

The scope of the requirement to transmit to the tax administration excludes income earned by taxpayers in respect of certain transactions that are generally tax exempt (sale of movable property/carpooling) as long as the total amount per user does not exceed a certain amount to be fixed by decree.

If the platform is not required, in these cases, to automatically transmit the information to the tax administration, the latter may nevertheless become aware of it as part of the exercise of its right of communication.

These obligations would apply to income received from the date of entry into force of the Order, which will specify the content of the information to be transmitted to both users and the tax administration, or, at the latest, from 1 July 2019.

Finally, as from 1 January 2020, the Act establishes a system of joint and several liability for online platforms for the payment of Value Added Tax (VAT) due by sellers and service providers who carry on their business through them.

This system will be applicable to platforms that have not justified having carried out sufficient due diligence (measures allowing the user to regularize his situation, or even exclusion of the user) after two formal notices issued by the tax administration.

Adjustment of the tax flagrancy procedure
Governed by Article L. 16-0 BA of the French Code of Fiscal Procedures (FCFP) (Livre des procedures fiscales), the tax flagrancy procedure may, for the time being, only be applied in circumstances likely to threaten the collection of a tax debt and against taxpayers engaged in a professional activity for which at least one of the following facts had been observed:

- Exercise of a hidden activity
- Carrying out an illegal activity falling within the scope of Article 1649 quater-0 B bis of the FTC, such as drug trafficking, counterfeit money, or weapons trafficking
- Issuing or recording fictitious invoices or invoices relating to the supply of goods or services in respect of which VAT cannot be deducted (carousel fraud in particular)
- Repetition of non-recorded purchases, sales or services or fraudulent use of permissive accounting or cash software, where these facts are likely to deprive the accounting records of probative value
• Breach of social legislation on undeclared employment
• Repeated failure to submit the monthly VAT return

The Act extends this procedure to cases of failure to submit a return for the main taxes due or collected by a taxpayer engaged in a professional activity: income tax, corporate tax, VAT and withholding tax.

In addition, the conditions under which administrative officials issue a report of flagrancy will be loosened.

New right for the tax administration to enter into transactions when considering criminal prosecution

The Act provides for the elimination of the interdiction for the tax administration to conclude a transaction pursuant to Article L. 247 of the LPF when it intends to initiate criminal proceedings against a taxpayer. The tax administration will thus be able to compromise on the amount of the penalties even if the public prosecutor would have implemented the public action, or that the CIF would have been seized.

Tightening of the provisions relating to States with preferential taxation and non-cooperative territories

Lowering of the tax threshold leading to the application of the qualification of State with privileged taxation

Until now, under Article 238 A of the FTC, States or territories with a preferential tax regime have been defined as States or territories in which the level of taxation was more than half that of income or profits tax in France. This qualification triggers the application of several anti-base erosion devices such as those provided for in article 123a, 209B or 155A of the FTC.

Pursuant to Article 32 of the Act, this qualification will apply as from 1 January 2020, as soon as the level of taxation is less than 60% of the tax that would be due in France.

Expansion of the NCCT list

The Act provides for the addition to the list of Non-Cooperative Countries and Territories (NCCT) provided for in Article 238-0 A of the FTC, of the jurisdictions that appear on the European Union’s (EU’s) blacklist.

It will now be necessary to make a distinction between:

• States for which all the provisions apply: Botswana, Brunei, Guatemala, Marshall Islands, Nauru, Niue, Panama (list according to French criteria)
• States for which only certain probatory measures will apply: Guam, Namibia, Samoa, American Samoa, Trinidad and Tobago and the United States Virgin Islands (EU blacklist)

Directive on the declaration of tax planning schemes: empowerment of the Government to transpose the directive by ordinance

The Act empowers the Government to transpose by ordinance the 2018/822 Directive of 25 May 2018 providing for an obligation to report a tax enhancement scheme, which must be implemented before 31 December 2019.

As a reminder, the Directive provides that the reporting requirement applies retroactively to schemes whose first stage has been completed between the date of entry into force of the Directive on 25 June 2018 and 31 December 2019. These declarations must be made before 31 August 2020.¹²
Endnotes
2. Article 1732 of the FTC.
3. Article 1728, 1, c of the FTC.
4. Article 1729 b and c of the FTC.
5. Article 1729-0 A of the FTC.
6. Article 1758.
7. Article 1729, a et b of the FTC.
8. Article 1728, 1, b of the FTC.
9. Article 1741 of the FTC.
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EYG no. 011636-18Gbl
1508-1600216 NY
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