Global Guide to Criminalization of Tax Offenses - France

International Guide on Criminalization of Tax Offenses

| Contents |
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| To generate table of contents, right-click here and select **Update Field.** |

# Last updated

April 2023

# 1. Please define provide details of criminal tax fraud offence in your jurisdiction

Criminal offences likely to be investigated by a prosecutor when it comes to a tax case include tax fraud and money laundering of tax fraud.

The criminal tax fraud offence is defined by Article 1741 of the French tax code ("**FTC**"), as the fact of fraudulently evading or attempting to evade the assessment or payment of all or part of taxes referred to in the FTC (which covers almost all taxes, in particular corporate income tax and related taxes, income tax and related taxes, turnover taxes, wealth tax, etc.).

The scope of the criminal tax fraud offence is very broad as it covers the following behaviours:

deliberately failing to file tax returns within the legal deadlines;

deliberately concealing sums subject to tax;

·organizing their own insolvency or obstructing, through other means, the collection of taxes; or

acting in any other fraudulent way.

The money laundering of tax fraud is defined as “*facilitating by any means the false justification of the origin of the property/assets or income of the perpetrator of a* [tax fraud offence] *which has brought him a direct or indirect benefit*”, and also covers “*the assistance in investing, concealing or converting the direct or indirect products of a* [tax fraud offence]”.

# 2. What are the typical trigger points that could lead to criminal investigations? Can the application of certain tax penalties trigger criminal proceedings?

The criminal tax fraud offence can only be investigated and prosecuted by the criminal authorities when the French tax authorities ("**FTA**") have lodged a criminal complaint or reported facts to the Public Prosecutor when compelled to do so.

Investigations from the FTA, potentially leading to criminal complaints, followed by criminal investigations for tax fraud (and / or for money laundering of tax fraud) can be triggered by any element discovered by the FTA as part of their tax audit power, indicating that a taxpayer may have deliberately evaded the assessment or payment of taxes.

Besides these subjective triggering points, the law provides for objective trigger points, which could lead to criminal investigations. Indeed, pursuant to Article L. 228 of the French Book of Tax Procedure (“**FBTP**”), the FTA are compelled to report to the Public Prosecutor the facts they examined as part of a tax audit which led to an amount of tax adjustments exceeding EUR 100,000 and to the application of certain tax penalties (see answer to question 3).

It shall be noted that, according to the FTA’s guidelines (BOI-CF-INF-40-10-10-15) this EUR 100,000 threshold is assessed with respect to:

one taxpayer only, even if this taxpayer belongs to a tax consolidated group for example;

each tax audit procedure faced by the taxpayer (i.e., if a tax audit led the FTA to issue several tax adjustments, the EUR 100,000 threshold would be assessed by adding up the amount of all the tax adjustments deriving from this tax audit even if they relate to different taxes and/or cover several fiscal years).

A complaint for tax fraud that the FTA is allowed to file at any moment against a taxpayer is not subject to a minimum amount of tax adjustment.

# 3. Can a certain amount of tax adjustment trigger criminal proceedings for tax fraud?

Pursuant to article L. 228 of the FBTP, the FTA are compelled to report to the Public Prosecutor the facts they examined as part of a tax audit which led to an amount of tax adjustments exceeding EUR 100,000 and to the application of one of the following tax penalties:

a) the 100% penalty (e.g., officio procedure in case of behaviour of the taxpayer preventing the FTA from conducting the tax audit);

b) the 80% penalties (e.g., for concealed activity, fraudulent behaviour or abuse of law); or

c) the 40% penalties (e.g., deliberate breach, failure to submit a tax return after the receipt of a formal notice), where the taxpayer has already been subject:

to the penalties listed at a), b) or c) in the context of a previous tax audit during the last six calendar years; or

to a complaint of the FTA further to a previous tax audit.

# 4. Is criminal intention a requirement, or can mere negligence be the basis of a criminal offence?

The constituent elements of the offence of tax fraud include both material and intentional requirements (*mens rea* and *actus reus*). Material element of tax fraud lies on the existence of a tax due under French tax rules and act(s) constituting an evasion or attempted evasion of the tax (see answer to Question 1 in this respect).

As for the criminal intent, the perpetrator must be motivated by a willful intent to commit the offence.

According to the case law of the French Supreme Court, intent is inferred from the defendant’s knowledge of his/her tax duties.

The French Supreme Court has a very strict approach of the knowledge of tax obligations with respect to directors of companies and generally consider that they have a duty to make inquiries regarding tax regulation  as it falls within the scope of the powers and expertise of a company’s directors to make sure the company complies with relevant applicable tax law and regulations and therefore rejects ignorance of law as a defense.

Thus, a mere negligence of directors regarding tax obligations can characterize a criminal intent and be the basis of the offence of tax fraud. A mere negligence could also characterize a criminal intent with respect to the offence of money laundering of tax fraud.

# 5. Does the spontaneous filing of an amended tax return (either through a self-disclosure mechanism or not) have an impact on the initiation of criminal proceedings? Is full payment of tax required?

Pursuant to Article L. 228 of the FBTP, the automatic reporting of the facts to the Public Prosecutor does not apply to taxpayers who have spontaneously filed accurate amended tax returns (which are accompanied by the full payment of the related taxes).

In this respect, the FTA’s guidelines (BOI-CF-INF-40-10-10-15) pertaining to the automatic reporting specify that such filing of an amended tax return is not deemed spontaneous when it is made when a tax audit is ongoing or when the taxpayer has received a tax audit notice or is subject to an administrative or judicial investigation procedure. It should be noted that some regularisation procedures could apply to a taxpayer after the launch of a tax audit, subject to certain conditions such as, in particular, the good faith of the taxpayer.

At all events, except in case of automatic reporting to the Public Prosecutor, the full payment of the tax adjustments could be a mitigating factor to reduce the risk of criminal complaint from the FTA.

# 6. Can the prosecutor, on their own initiative, prosecute the tax fraud offence?

In addition to the possibility of the FTA filing complaints for tax fraud (only after getting a favorable binding opinion of the committee on tax offences in cases of non-aggravated tax fraud), Law No 2018-898 on the fight against fraud, dated 23 October 2018 (notably codified into Article L. 228 and seq. of the FBTP, provides that the FTA are compelled to report facts to the Public Prosecutor where certain specific conditions regarding the amount of tax adjustments and the application of tax penalties are met (see answers to questions 2 and 3) at the time where the tax collection notice is issued.

Once the FTA have filed a complaint for tax fraud or have reported facts to the Public Prosecutor, the latter is entitled to prosecute or not for the offence of tax fraud, at their sole discretion if they believe that characterized presumptions of tax fraud exist.

Pursuant to Article L. 228 C of the FBTP, if the FTA have filed a criminal complaint for tax fraud or reported facts to the Public Prosecutor regarding a taxpayer, the Public Prosecutor can extend criminal charges to other taxes and other years without the need for a further criminal complaint or reporting for those years from the FTA.

It shall be noted that contrary to the offence of tax fraud, the offence of money laundering of tax fraud can be prosecuted by the Public Prosecutor on their own initiative or following a complaint filed by third-persons (e.g., complaint filed by the workers council of a company with respect to the calculation of the employee profit-sharing).

# 7. What is the statute of limitation period applicable to the tax offences in your country?

The FTA can file a complaint for tax fraud within the end of the sixth year after the alleged tax fraud was committed.

The statute of limitation period of money laundering of tax fraud is six years and can be extended to 12 years maximum in case the offence of money laundering of tax fraud would be considered as concealed.

# 8. When does the statute of limitation period start to run e.g., filing of a tax declaration, failure to pay tax by deadline, tax assessment as a result of a tax audit, etc.?

According to the French Supreme Court case-law, in principle, the starting point of the statute of limitation period for tax fraud differs from the general starting point of the statute of limitation applying to other offences and starts running on December 31 of the year during which the tax returns were or should have been filed (instead of on the day where the offence has been committed).

This starting point of the statute of limitation period for tax fraud applies to complaints filed by the FTA. There are, however, uncertainties as to its application in case of automatic reporting of the facts by the FTA to the Public Prosecutor. In absence of clear case-law on this point, it could be considered that the general starting point should also apply to cases that are automatically reported. Therefore, the starting point of the statute of limitation period would be the day where tax fraud has been committed (i.e., the statutory due date of the tax return when no return was filed and the actual filing date when the "wrong" tax return was filed).

Regarding money laundering of tax fraud, the general rule is that the limitation period begins to run six years from the date of the last constituent elements of the offence took place (e.g., the date when the sums deriving from a tax fraud are laundered, which could be characterized by a mere wire transfer on a bank account).

Specific calculation principles apply to concealed criminal offences, for which the limitation period only starts running once the offence has been or could have been discovered. In case the offence of money laundering of tax fraud would be considered as concealed, the statute of limitation period would in any event be limited to 12 years from the day the offence was committed.

# 9. What criminal sentences [e.g., custodial, criminal fines or others ] may be incurred in case of a conviction for tax offenses in your jurisdiction?

The general offence of tax fraud is broadly defined by Article 1741 of the FTC and is punishable by up to five years' imprisonment and a fine up to EUR 500,000, which may be increased to an amount equal to twice the proceeds of the offence. The level of penalties can be increased up to five times the above-mentioned amounts for legal entities, which could therefore represent up to EUR 2,500,000 or up to ten times the proceeds of the offence.

The maximum penalties could be increased to seven years’ imprisonment and to EUR 3,000,000 or twice the proceeds of the offence (for legal entities to EUR 15,000,000 or 10 times the proceeds of the offence) where the acts were committed by an organized group or under specified circumstances.

The level of these maximum penalties may be lowered by a judge. Under certain circumstances, these criminal penalties could be added to the tax penalties imposed by the tax judge.

It shall be noted that the offence of money laundering of tax fraud is punishable by three years’ imprisonment and a fine of a maximum of EUR 375 000 or up to half the value of the funds laundered. The level of penalties can be increased up to five time the above-mentioned amounts for legal entities, which could represent a maximum of EUR 1,875,000 or up to 2.5 times the value of the funds laundered.

The maximum penalties could be increased to ten years’ imprisonment and to EUR 750,000 or half the value of the funds laundered (for legal entities to EUR 3,750,000 or 2.5 times the value of the funds laundered) when money laundering is considered as aggravated, i.e., where the acts were committed by an organized group or habitually or by using the facilities offered by the exercise of a professional activity.

In the event of a criminal conviction, the following additional sentences may be incurred:

the display and publication of the conviction decision;

individuals convicted for any of the offences mentioned above may be deprived of civic, civil and family rights;

individuals convicted for any of the offences mentioned above may be prohibited from some occupations and direction functions, permanently or for a limited time;

in case of conviction for money laundering, any asset or funds set in France belonging to individuals or companies convicted (even if not the object or proceeds of the offence) can be forfeited.

Other additional sentences specific to legal entities for money laundering may apply:

legal entities may be placed under judicial supervision for up to five years;

they may be prohibited for up to five years or permanently from tendering their shares in a public offer or from listing their securities on a regulated market;

they may be excluded from public tenders, permanently or for up to five years.

It should be noted that all sentences mentioned above may apply to the perpetrator of the offence, but also to the accomplices, if any.

# 10. Can having a compliance or risk mitigation program in place mitigate criminal liability for a Company in your jurisdiction?

In the tax field, following Law No. 2018-727 for a state at the service of a trustworthy society ("ESSOC") of August 10, 2018, a tax compliance and risk mitigation program is in place for large and medium-sized companies, which have, as part of this program, the possibility to enter into a tax partnership with the FTA, under certain conditions and subject to FTA's approval, in order to improve their legal and tax security and to facilitate investment and the conduct of business in general, by minimizing some of the tax uncertainty that they face.

From a theoretical standpoint, participating to this program does not mitigate criminal liability as it does not prevent the FTA to issue  tax reassessments and/or to file criminal complaints but, from a practical standpoint, this shows the willingness of taxpayers to cooperate, to act transparently vis-à-vis the FTA and disclose information to the FTA on a voluntary basis. Accordingly, this program could mitigate criminal liability for taxpayer in France as it could be used as an evidence to demonstrate that the taxpayer did not intent to commit a tax offence.

# 11. Is there a formal or informal program allowing individuals or entities to self-disclose criminal conduct and block prosecution? If not, does such a disclosure mitigate the likelihood of prosecution or reduce the potential sentence and fines?

The FTA have set up in 2019, a disclosure program (SMEC, which stands for *Service de Mise en Conformité Fiscale*) which allows, under certain conditions, companies and their executives to bring spontaneously their tax situation into compliance.

This service is open for a limited list of situations, which include, notably, the following:

tax anomalies discovered, before or after the takeover, by the new owners and transferees of a company;

unreported activity in France, constitutive of a permanent establishment;

abusive or illegal tax schemes falling into a list published by the government or including a foreign entity;

operations that may fall within the scope of the 80% tax penalty (e.g., for concealed activity or fraudulent behaviour) or the 40% penalty for deliberate breach and concerning large companies;

operations for which the request for tax compliance highlights difficulties, either in quantifying the amount of the adjustments, or in appraising the periods over which the FTA's right of tax correction is exercised, or difficulties in processing due to the number of taxpayers involved in the same operation.

The companies or executives that are subject to an ongoing tax audit, have received a tax audit notice or are subject to an administrative or judicial investigation procedure, are excluded from the scope of the tax compliance service.

Under this program, taxpayers may benefit from a partial relief in the application of penalties and interest subject to the filing of accurate amended tax returns (which are accompanied by the full payment of the related taxes).

When a tax situation falling into the scope of the SMEC is brought into compliance under this program, the automatic reporting of the facts to the Public Prosecutor does not apply (see answer to question #5 in this respect).

In addition to this self-disclosure program, there is also the “right to make mistakes” (*droit à l’erreur*) procedure, which allows taxpayers to spontaneously amend their tax return subject to the submission of the initial tax return within the legal deadline and the good faith of the taxpayer.

As for the SMEC, the automatic reporting of the facts by the FTA to the Public Prosecutor does not apply when a regularisation is made as part of the “right to make mistakes” procedure subject to the condition that such regularisation is made spontaneously prior to any action from the FTA.

However, for both of these self-disclosure programs, the FTA still have the possibility of filing a complaint for tax fraud to the Public Prosecutor, although unlikely to happen in practice given the behaviour of taxpayers who spontaneously brought their tax situation into compliance and also in order to keep the incentive effect of these programs, unless the compliance approach aimed at deceiving the FTA.

At all events, the regularisation of a tax situation on a spontaneous basis and outside the scope of these self-disclosure programs where not applicable, and the full payment of the related taxes, could be taken into account to mitigate the risk of a complaint from the FTA and the likelihood of prosecution by the Public Prosecutor for criminal tax fraud offence, or regarding the potential sentence and fines.

It shall be noted that none of the procedures described above have an impact on the possibility, for the Public Prosecutor to prosecute offences other than tax fraud, such as the offence of money laundering of tax fraud.

# 12. Once the criminal proceeding has been initiated is there an impact in terms of liability in case of full payment of a tax assessment issued by the tax authorities (first-time offender rule)?

A full payment of a tax assessment (even with interest and penalties), cannot prevent or stop criminal investigation/prosecution. However, the full payment of a tax assessment is among the elements taken into account by the judge when deciding the level of penalties incurred in case of a conviction for the offence of tax fraud.

# 13. Does criminal prosecution of a tax offence have an impact on the tax authorities' statute of limitation period?

Pursuant to Article L. 187 of the FBTP, when the FTA filed a complaint against a taxpayer for tax fraud, they can proceed with tax audits and tax adjustments for two years exceeding the standard statute of limitations. This extension of statute of limitation is applicable to the perpetrators, their accomplices and, if any, to the persons on whose behalf the fraud was committed.

Pursuant to Article L. 188 B of the FBTP, when the FTA filed a complaint for tax fraud within the statute of limitation period, which has led to the opening of a judicial investigation for tax fraud in the case of a specific behavior of the taxpayer (e.g., use of foreign accounts, use of artificial or fictitious tax domicile/residency abroad, use of false identity or forged documents, interposition of foreign individuals or entities), the omissions or deficiencies in taxation relating to the period covered by the statute of limitation can, even if this period has expired, be challenged by the FTA until the end of the year following the decision which puts an end to the procedure and, at the latest, until the end of the 10th year following the year in respect of which the taxation is due.

Pursuant to Article L.188 C of the FBTP, even if the statute of limitation expired, omissions or deficiencies in taxation revealed by a legal proceeding can be challenged by the FTA until the end of the year following the year of the decision that closed the proceeding and, at the latest, until the end of the 10th year following the year in respect of which the taxation is due.

# 14 Can the tax authorities assess and collect underpaid taxes even if the case becomes criminal

Tax and criminal proceedings are independent.

Thus, the FTA have the power to audit, reassess and collect underpaid taxes, independently of separate criminal proceedings that might be conducted against a taxpayer.

While the initiation of criminal proceedings has in principle no impact on tax proceedings, it may have an impact on the amount of tax penalties collected by the FTA as the combination of tax penalties and criminal penalties applied for tax fraud is limited pursuant to the French constitutional proportionality principle: the overall amount of penalties potentially applied shall not exceed the highest amount of one of the penalty incurred. In addition, although tax and criminal proceedings are independent, based on the principles deriving from the case-law of the French Constitutional court, if taxpayers are subject to both tax and criminal procedures for the same behavior (and on the same legal basis), the FTA is not able to collect underpaid taxes on these taxpayers if they were definitively acquitted by the criminal court in the first place.

However, the force of *res judicata* belonging to the rulings of criminal courts that have become final is imposed on the tax courts but only (i) when it comes to the material establishment of the facts mentioned in the criminal ruling and (ii) subject to the condition that those facts are taken into account in the grounds of that ruling. On the other hand, the same authority cannot be attached to the grounds of a ruling of acquittal based on the circumstance that the alleged facts are not established or that there is doubt as to their reality. Accordingly in this latter case, the FTA is entitled to collect taxes even though the taxpayer was not found guilty as part of the criminal proceedings.

# 15. Is it possible to reach a tax/criminal settlement with the tax authorities/public prosecutor/judge?

With respect to tax settlements with the FTA, several  settlements could potentially be contemplated:

Tax settlements provided for by Article L. 247 of the FBTP: such settlements allow the FTA to grant, at the taxpayer’s request, a partial relief of late-payment interest and/or tax penalties, when these penalties, and, if any, the taxes to which they apply, are not definitely applied.

The scope of such tax settlements is limited as it excludes taxes and certain fines or penalties. Also, no tax settlement can be contemplated when the taxpayer uses delaying tactics in order to affect the proper conduct of the tax audit.

Global settlements: such settlements are not provided for or framed by the law and result from a note from the FTA dated June 20, 2004. They enable the FTA to reach a tax settlement with the taxpayer on taxes, late-payment interest and penalties and can be concluded at any time of the procedure. Global settlements are generally contemplated in cases where there is doubt on the application of the law (e.g., difficulties in establishing with sufficient accuracy the quantum of the tax adjustments or real legal uncertainty such as absence of case-law or unclear case-law).

With respect to criminal settlement, in the event of prosecution/investigation, two criminal settlement proceedings could potentially be contemplated under French law (both applicable for the offences of tax fraud and the money laundering of tax fraud):

**The CRPC**: a settlement close to plea bargaining agreements, which is referred to as "*comparution sur reconnaissance préalable de culpabilité*" (CRPC). The CRPC requires that the defendant pleads guilty to the charges. It applies to both individuals and companies but only for certain offences. Once the Public Prosecutor and the defendant reach an agreement, the defendant is brought before the president of the first instance tribunal to confirm such agreement.

**The CJIP**: a settlement close to a deferred prosecution agreement ("*Convention Judiciaire d'intérêt Public*", CJIP) which allows entities (i.e., not individuals) to avoid a criminal conviction by:

paying a fine proportionate to the gains derived from the company’s wrongdoing, which total cannot exceed 30% of the company’s annual turnover, and;

in certain cases, implementing a compliance monitorship for a period up to three years.

Unlike  the CRPC, the defendant is not required to plead guilty to the charges. The CJIP must be approved by a judge, and if so, the prosecution office issues a press release. The CJIP, the approval order issued by the judge and the press release are published.

# 16. Who can be prosecuted: just individuals/directors or also companies?

Both - Corporates and Individuals

Both companies and individuals (employees/legal or *de facto* representatives/directors/managers) could be subject to criminal investigation/prosecution for tax fraud or money laundering offences.

# 17. Can foreign employees/directors be prosecuted?

Legal entities may be prosecuted, for the offences committed on their account by their organs or representatives. Said criminal liability does not exclude the criminal liability of individuals who are perpetrators or accomplices to the same act.

Therefore, representatives of a company, who can be directors but also employees or any individual, in the event they are considered as representatives of the company and involved in the commission of the offence, even in the absence of a delegation of power, could be prosecuted.

Criminal charges could also be filed against any individual considered as involved in the fraudulent acts, even if not employed by the taxpayer company (for example, directors or employees of a subsidiary).

The fact that an individual would be a foreigner or not French resident does not exclude the possibility of prosecutions against him/her.

# 18. In case of an employee / director being prosecuted in connection with the lack of payment of Company's taxes, is the Company liable for the amounts claimed to such individual?

There is a joint and several liability between employee / director and the Company for the payment of Company's evaded taxes (and the related interests and penalties), in case of this employee / director has been subject to a final conviction for tax fraud in relation to these evaded taxes.

# 19. Have you seen an increase of criminal prosecution for tax offenses over the last five years in your jurisdiction? If so, in relation to what topics?

As timelines of tax and criminal procedures are relatively long, we are at an early stage of the implementation of Law No 2018-898 on the fight against fraud, dated 23 October 2018 creating an automatic reporting of the most serious cases of tax fraud.

Nevertheless, over the last five years, the number of cases of tax fraud submitted by the FTA to the Public Prosecutor, which may potentially lead to criminal prosecution, have significantly increased between 2018 and 2022, with a total of 6 941 cases submitted to the Public Prosecutor between 2018 and 2022 and 1 373 cases automatically reported by the FTA in 2022.

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