# Measures for combating questionable tax optimisation schemes

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## 1. The introduction of a so-called "mini tax law abuse" for transactions whose "main" purpose is tax related

Art. 109 of the Finance Act for 2019 introduces a new so-called "mini tax law abuse" procedure, designed to enable tax authorities to exclude tax optimisation schemes which **principally** pursue a tax objective under Art. L. 64 **A** of the Tax Procedure Book (*Livre des procédures fiscales*, hereinafter referred to as "**LPF**"). This is not the first time that lawmakers have attempted to expand the "tax law abuse via abuse of law" (to be distinguished from the "tax law abuse via simulations", both of which are referred to in Art. L. 64 LPF), which up to now is defined by case law as a "scheme whose **exclusive** purpose is tax related" (i.e., a more restrictive interpretation). The first attempt in the Finance Act for 2014 had been struck down by the Constitutional Council (*Conseil constitutionnel*) because it violated both the principle of legality of offences and penalties and the principle according to which the law must be accessible and comprehensible (Cons. const. 29.12.2013, n° 2013-685). In particular, the Constitutional Council highlighted the high fines in case of infringement and ordered the legislator to use sufficiently precise guidelines and unambiguous wording.

Example: creation of a holding company abroad for business (e.g. market recognition) and tax reasons

Example: creation of a holding company abroad for the sole purpose of reducing taxes

The new mini tax law abuse procedure presents itself in a slightly different way, as Art. 64 LPF will remain unchanged. The new provision leads to a two-stage abuse of law mechanism. Tax authorities may now base any new assessment either on the existence of a scheme whose exclusive purpose is tax related (Article 64 LPF,



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with penalties of 40 % or 80 %) or on a scheme whose main purpose is tax related within the meaning of the new Article L. 64 A LPF, for which no specific penalties (other than the generally applicable ones – which can reach the same percentages but on other grounds) have yet been provided.

- A broad understanding of the concept of the tax law abuse via abuse of law:

The new Article 64 A LPF allows tax authorities to exclude acts whose principal objective is to avoid or reduce the normally applicable tax burden, by a deliberate literal application of specific legal provisions or decisions, resulting in outcomes which are contrary to their author's intention.

This provision is based directly on the existing definition of the tax law abuse found in Art. 64 LPF. Nevertheless, it deviates from it on two important points.

First, the general tax law abuse includes either legally fictitious situations or schemes whose exclusive purpose is tax related. However, the mini tax law abuse only corresponds to the latter alternative, namely the tax law abuse via abuse of law.

Second, the concepts of the "abuse of law" in the mini tax law and (general) tax law abuse only partly coincide with each other. In principle, two conditions must always be met simultaneously in order to constitute an "abuse of law", namely: (i) the literal application of the tax law but contrary to its purpose as originally intended by the legislature, which is an objective criterion, and the pursuit of a tax purpose, which is a subjective criterion. However, the requirement for an "exclusive" tax purpose in the general tax law abuse procedure is replaced by the requirement for only a "main" tax purpose.

Particular caution is required when applying the notion of a "main tax purpose". The Council of State (Conseil d'Etat) has already recognised an abuse of law in the case of a "non-negligible non-tax advantage but not remotely comparable to the tax advantage gained through the transaction" (CE 17.07.2013, n° 352.989). One possible interpretation of the "main tax purpose" could for instance be, if it

Or tax law abuse via simulations

Or tax law abuse via abuse of law



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would surpass 50 % of the overall advantage gained through the transaction. Notwithstanding the precedent, it is difficult to quantify non-tax motives (such as commercial or family motives). The taxpayer is also exposed to the risk of divergent interpretations by different courts as long as there is no uniform standard definition for the criterion of the "main tax purpose".

- A two-stage procedure to tackle abuse of law:

As in the general abuse of law procedure, disputes arising under the new mini tax law abuse procedure may, at the request of the taxpayer or the tax authorities, be submitted to the Committee for Tax Law Abuse (*Comité de l'abus de droit fiscal*, hereinafter "**CADF**") for an opinion. Another measure in the Finance Act for 2019 provides that if an affair is submitted the CADF, irrespective of the opinion it will give, the burden of the proof for the tax reassessment will remain with the tax authorities.

The new provision on the mini tax law abuse does not provide specific penalties, if the tax authorities wish to reassess a scheme whose main purpose is tax related. Article 1729, b of the General Tax Code (*Code general des impôts*, hereinafter "**CGI**"), which provides 40 % or 80 % penalties in the event of an abuse of law within the meaning of Article 64 of the LPF, has not (for the time being) been adapted to make it possible to also apply these specific penalties to schemes whose main purpose is tax related.

However, the tax authorities still have the option of imposing other penalties if necessary, such as an 80 % penalty for "fraudulent manoeuvres" or a 40 % penalty for "intentional deficiencies" (Art. 1729, a and c CGI). The tax authorities must be able to justify the application of those penalties independently of the existence of any abuse of law (according to parliamentary notes made while the law was still a bill and which state that the "proposed regime (…) should not automatically trigger tax penalties").

- Coming into force:

This measure is in principle applicable to tax reassessments notified as from January 1, 2021 for acts carried out as from January 1, 2020.

This body issues an opinion on the merits of the implementation of the tax law abuse procedure. However, the opinion is in principle non-binding.



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## 2. The opinion of the Committee for Tax Law Abuse, in principle, no longer has any influence on the allocation of the burden of proof

Art. 202 of the Finance Act for 2019 changes the rules with respect to the burden of proof if an affair is submitted to the CADF.

When the taxpayer contests the tax authorities' reassessments through the abuse of law procedure (Art. L. 64 LPF), the dispute may be brought before the CADF at the request of either the taxpayer or the tax authorities.

The Finance Act for 2019 has extended the possibility to present matters to the CADF for reassessments with respect to acts (as of 1 January 2020) whose main purpose is tax related (Art. L. 64 A LPF).

Until the reform of the Finance Act, tax authorities bore the burden of proof as per Art. L. 64, 3 LPF if their initial findings deviated from the subsequent opinion of the CADF. Conversely, if the tax authorities' initial findings and the CADF's subsequent opinion were the same, the taxpayer carried the burden of proof. Finally, if the CADF was not consulted at all, the burden of proof was also borne by the tax authorities.

The change of the burden of the proof between the tax authorities and the taxpayer when the CADF is consulted was made so that the Finance Act would be aligned with the provision of Art. L. 192 LPF concerning submissions to the Commission on Direct and Sales Taxes (Commission des impôts directs et des taxes sur le chiffre d'affaires). Art. L. 64, 3 LPF was therefore repealed and other provisions adapted accordingly.

As a result, should a taxpayer lodge a claim against a tax reassessment, in principle, the tax authorities bear the burden of proof, irrespective of the CADF's opinion.

However, as an exception, the burden of proof is reversed and placed on the taxpayer in case of:

- gross irregularities occurring in the accounting, if the tax amount has been assessed in accordance with the



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CADF's opinion (otherwise the tax authorities will continue to be bear the burden of proof),

- the absence of any form of accounting.

Pursuant to Article 202(V) of the Finance Act for 2019, the amended provisions will apply to tax reassessments notified as of January 1, 2019.

## Key Points

**The Finance Act for 2019 has introduced new provisions concerning the tax law abuse proceedings.**

**From now on, a new procedure, known as "mini tax law abuse", extends the possibilities for challenging schemes which pursue a *main* tax purpose, whereas in the common procedure schemes which pursue an *exclusive* tax purpose can be challenged. This new provision should caution taxpayers, particularly in the absence of a uniform definition of the "*main* tax purpose" and hence a risk of different interpretations by various courts.**

**In addition, the Finance Act for 2019 amended the rules of the burden of the proof after the opinion of the Committee for Tax Law Abuse has been given, generalising the principle that the burden of proof remains in principle borne by the tax authorities.**



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