CHAPTER 5

Country analysis – France

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5.1 INTRODUCTION: *COHABITATION À LA FRANÇAISE?*

There is very little knowledge in the Netherlands of how economic private law and public law are enforced in France. In France too, however, scant information can be gleaned. There is little if any contact in the university community between criminal law and administrative law, partly because criminal law is part of private law. French academia is also characterised by its remoteness from practice. Moreover, the worlds of both administrative law enforcement and criminal law enforcement are very closed. There is no tradition of seeking the assistance of the universities either through consultancy or through contract research. And little is published by those engaged in the practice of enforcement. The closed and hierarchical nature of the organisations is undoubtedly responsible for this. The French Ministry of Justice has a small research unit of its own that specialises in criminal law and criminology (CESDIP). This unit is very active and of good quality, but is not specialised in research in the economic and financial field. It follows that there are few if any publications dealing either with the enforcement of tax law and customs law or with cooperation in administrative matters and in criminal matters. For this reason, not only was desk research undertaken in order to obtain an overview of French legislation and the relatively scanty literature and case law, but intensive use was also made of the expertise in the enforcement organisations through in-depth interviews (see list in the annex). It should be noted that both the administrative and the criminal law organisations showed interest in the research and cooperated constructively in making available their very valuable expertise.

In view of the unfamiliarity of the subject matter it is therefore necessary at the outset to make a number of general observations relating both to the substantive problem and to the enforcement authorities themselves. First of all, it should be emphasised that a sharp distinction still exists in France between the executive and judicial functions of government for historical reasons rooted in the Ancien Régime and the French Revolution. The experience of the omnipotence of the administrative authorities under the Ancien Régime resulted in a strict distinction between the executive (including the administrative courts) and the judicature. The role of the judicature is to guarantee individual liberties and serve as a true counterweight for the executive. The separation of powers (*séparation des pouvoirs*) is the model adopted in France, whereas the primary consideration in the Netherlands is that there should be cooperation between the different

powers or functions of government.[1] This explains why the members of the administrative inspectorates are not in principle designated as senior police officers (*officiers de police*), have no powers of investigation and do not therefore come under the direct authority of the Public Prosecution Service or the investigating judge. It also explains why many appeal procedures against decisions of administrative authorities belong to the jurisdiction of the civil courts rather than the administrative courts.[2]

It follows automatically from the first observation that no automatic cooperation exists in France between the administrative authorities, even those charged with enforcing private and public economic law, and the judicial authorities. Each of them has its own 'cap', its own procedures and its own culture. Not surprisingly, the problem of officials wearing two caps at once is relatively unknown in France. In recent years, however, real efforts have been made to improve communications between the administrative and judicial authorities and to make use of each other's expertise. Specialists in administrative enforcement have been seconded to the Ministry of Justice and specialised investigation units of the police (*police judiciaire);*[3] furthermore, the expertise of the administrative regulators is regularly called upon in the investigation and trial of criminal offences. This policy was continued in 1999 when 'financial pools' consisting of experts from the administrative authorities and from the private sector were created at the specialised criminal courts for economic and financial offences. Conversely, there has also been a trend towards seconding specialised police officers to the units of specialised regulators (inspection services). As far as the customs authorities are concerned, a bill was recently approved to charge certain customs officials with police functions for various customs offences, including the EU fraud problem, as defined in an exhaustive list.

Second, the first observation certainly does not mean that the enforcement powers of the administrative authorities are negligible, even though there are sectors of notorious weakness such as the agricultural area.[4] Undoubtedly the enforcement powers of the tax and customs authorities (which, according to the Dutch terminology, would therefore be regarded as supervision powers) are very wide-ranging. They include coercive measures in respect of things and persons. In order to protect the fundamental rights of citizens the highest judicial authorities have ruled that judicial authorisation is necessary for the most

1. W.J. Witteveen, *Evenwicht van machten* (Balance of powers), inaugural lecture, Zwolle, 1991.
2. Examples are the appeal procedures against the sanctions of the administrative Competition Authority or of the Stock Exchange Operations Committee (*Commission des Operations Boursières* – (COB) which is the regulatory authority for the stock exchange.
3. Translator's note: Unlike the French term 'police', the English term does not extend to administrative departments. It follows that the addition of an adjective to translate '*judiciaire*' is not only unnecessary but also positively misleading. The term 'police administrative' is translated as 'administrative authorities'.
4. The underdevelopment of inspection powers in this field is partially offset by the explicit powers of the customs authorities not only as regards the import and export of agricultural produce but also in relation to direct subsidies from the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section (see below).

extreme coercive measures, such as searches in business premises and private dwellings. Such authorisations are granted by the civil courts (in practice by the president of the specialised commercial chamber).

One final preliminary observation concerns the substantive field. As in all Member States of the EU, the financial interests of the EU do not form a separate legal category. Generally speaking, these interests comprise both customs duties and agricultural refunds at the external borders and part of the VAT revenues as well as direct subsidies under the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section.[5] The Member States are primarily responsible for collecting and disbursing these revenues.[6] We are confronted *de jure* and *de facto* in this connection with a panoply of organisations, legal rules, practices and cultures. The French customs authorities are a strong organisation and have a long tradition of regional and international cooperation. The French tax authorities have pronounced national interests in relation to the VAT problem. The main problem therefore occurs on the judicial side. This is why the Ministry of Justice has in recent years pursued a policy of providing direction for the judiciary and the prosecution service.

5.2 TAX, CUSTOMS AND AGRICULTURE: NATIONAL ANTI-FRAUD MEASURES

5.2.1 Formal sources of law: substantive legislation, enforcement legislation and case law

French tax law, customs law and agricultural law are special parts of public law. In accordance with the French and continental legal tradition, the law in question is formal, legalistic and written and is based on the Constitution, parliamentary statutes and all kinds of implementing rules such as public administrative rules (*règlements d'administration publique*), decrees of the Council of State (*décrets en Conseil d'État*), decrees (*décrets*), ministerial orders, circulars and interpretative instructions (*d'arrêtés ministériels, circulaires et instructions ministérielles interprétatives*).

Article 34 of the Constitution is the basic standard for the taxation laws passed by the legislature. Article 47 of the Constitution stipulates how these laws must be passed. The main basic laws are undoubtedly the Finance Act (*loi de finances*) and the Act containing various regulations of economic and fincial order (*loi portant diverses dispositions d'ordre économique et financière*) (DDOEF). The main tax provisions have been codi-

5. The GNP-based contribution is disregarded here since it has no direct enforcement repercussions either for citizens or for businesses.
6. As mentioned in the introduction the problem of the direct expenditure by the European institutions themselves is not a subject of this study, although problems of international cooperation in relation to the administrative and judicial authorities occur there too. See J.A.E. Vervaele, 'Towards an Independent European Agency to fight fraud and corruption in the EU?', *European Journal of Crime, Criminal Law and Criminal Justice* 1999, pp. 331-346.

fied since the 1950s. Since 1980 this codification has comprised the rather complex General Code of Taxes (*Code Général des Impôts* – CGI) and a modern Book of Tax Procedures (*Livre des procédures fiscales* – LPF). The CGI consists of two books containing almost two thousand articles in all. Book I (Livre I) contains the standards governing the levy of taxes (direct taxes and related taxes; company income taxes and related taxes; indirect taxes; registration duties and wealth tax; regional and local taxes). Book II (Livre II) contains the standards governing the collection of taxes, which include provisions on tax and criminal law sanctions. The annex to these books includes an overview of the tax legislation (décréts, arrêtés). It is noteworthy that the annexes are much more voluminous than the codes themselves. The provisions of the tax procedure are regulated in a separate Book, namely the Book of Tax Procedures (*Livre des Procédures Fiscales* – LPF), consisting of 286 articles, designated by the letter L. The LPF too has an annex containing legislation (*décrets, arrêtés*), designated by the letter R. Many but not all of the internal regulations of the tax authorities can be found in the Basic Documentation (*Documentation de base*) or in the Official Bulletin of the General Directorate of Taxes (*Bulletin officiel de la Direction générale des impôts*).

Unlike tax law, customs law is an exclusive power of the EU. Under the First Pillar of the EU Treaty substantive customs law has been largely harmonised and codified in the Community Customs Code (CCC).[7] As a result of the introduction of a common customs tariff at the external borders and the abolition of the customs levies in the customs union, the EC has acquired the exclusive power in respect of goods nomenclature, customs value, customs origin and customs procedures (putting into free circulation, inward and outward processing, customs transit, etc.), which are therefore regulated in detail in the CCC. However, customs enforcement (the *Contentieux*) has largely remained a national power, although Community customs law is having an increasing impact in this field too. The EU Treaty's Third Pillar contains rules influencing customs enforcement, in particular enforcement under the criminal law.[8]

In addition, there is an extensive network in the customs field of international conventions (WTO, CCC[9] and EU[10]) and bilateral treaties. As our study is, however, limited to the EU's financial interests and does not delve into other customs powers (drugs, arms, etc.), we can confine our attention to the EU problem.

The main French customs provisions have been included in a customs code, namely the Customs Code (*Code des Douanes* – CD),[11] consisting of two parts. The basic text of this Code refers back to a decree of 1948. Part I contains the codification proper, namely 470 articles. Part II contains the annexes (general administrative orders, ministerial rules, etc.).

7. Regulation 2913/92 of 12 October 1992, *OJ* 1992 L 203, supplemented by implementation Regulation 2454/93 of 2 July 1993, *OJ* 1993 L 253, as amended by Regulation 1427/97, *OJ* 1997, L 196.
8. See introduction.
9. Customs Cooperation Council.
10. I would refer in this connection to the numerous European conventions and the treaties between the EU and third countries in respect of customs cooperation.
11. Published by the *Journal Officiel de la République Française*, Paris,1994.

From the point of view of our subject matter there is little point in delving deeper into the French agricultural legislation since many enforcement powers are allocated to the customs authorities, and transnational cooperation in relation to the agricultural problem takes place through the customs instruments.

For the purpose of enforcement the French tax legislation combines a tax procedure and a criminal law procedure. The tax procedure consists of compounding, fines and remission (*remise* – a kind of tax amnesty); the criminal procedure involves criminal fines, sentences of imprisonment and non-punitive measures. This is not a *una via* system (either/or arrangement) but a cumulative, binary system (and/and). This is why there are enforcement functions for both the classical judicature (criminal law and civil law) and for the administrative courts. In practice, the tax authorities make use in the great majority of cases of their administrative power to impose penalties. Only serious tax fraud is prosecuted under the criminal law.

Unlike tax law French customs law has only one procedure, namely the criminal procedure. Administrative fines are unknown in French customs law. A distinction should be made in criminal law between tax sanctions (fine and confiscation[12]) and the classical penalties (loss of rights and sentence of imprisonment). Nonetheless, the customs authorities have a very important power of compounding, which renders the criminal law procedure almost completely redundant. In practice, only very serious customs fraud is prosecuted under the criminal law.

The Constitutional Council (*Conseil Constitutionnel*) and the European Court of Human Rights are important sources of case law. For a long time the judgments of the tax chambers of the Judicial Disputes Division (*Contentieux*) of the Council of State (*Conseil d'État*) played a leading role. Both French customs law and French tax law were often criticised in the past for their far-reaching powers, which were hard to reconcile with the notion of the rule of law. As a result of internal reforms following judgments of the Constitutional Council (for example in 1987) and judgments of the European Court of Human Rights, French customs law and tax law has been adapted to the principles of the rule of law.

Depending on the enforcement instruments the procedures culminate in: (1) judgments of the administrative courts (*cours administrative d'appel*), in which connection the Council of State's role is confined to that of court of cassation; (2) judgments of the civil chambers of the regional court (*tribunal de grande instance*), from which appeal lies to the commercial chamber of the Court of Appeal (*Cour d'Appel*); and (3) judgments of the criminal law chambers of the regional court, from which appeal lies to the criminal chamber of the Court of Appeal. As the highest court for civil and criminal cases, the Court of Cassation (*Cour de Cassation*) has a dual function, namely as cassation court in criminal cases (*chambre criminelle*) and as tax court (*chambre commerciale*). Cassation cases relating to authorisations for coercive measures in the

12. The legal character of the penalties and of confiscation has been controversial. It is assumed in the case law that they are of a mixed character, namely civil and criminal. See *Cass. crim.* 26 February 1990, Rochard.

context of supervision are therefore dealt with by a mixed chamber consisting of representatives of the two civil chambers, the commercial chamber and the criminal chamber. The administrative disputes cases (*contentieux*) therefore have an administrative procedure (for direct taxes and VAT) and a civil law procedure (for excise duties and customs duties).

5.2.2 Structure of organisation

Tax authorities: 'Direction Générale des Impôts et ses services extérieurs' (DGI)

Until the reforms in the 1960s four autonomous directorates existed in the French Finance Ministry, namely the directorates for direct taxes, indirect taxes, registration duties and customs duties. These directorates were responsible for the levy of taxes and for inspection and for collection (with the exception of direct taxes). This structure had evolved historically in the first half of the 19th century. In addition, the Treasury (*Trésorerie*) had the duty of managing the debts and revenues of the State and collecting direct taxes.

In the 1960s the French tax system underwent a thorough reform. The sharp division between the autonomous departments had created particular problems in combating fraud. As a result of the reform, the compartmentalised structure was swept away, the partitions were removed and the tax authorities were integrated into the Directorate General of Taxes (*Direction Générale des Impôts* – DGI). However, the Customs Directorate remained a separate administrative unit. In addition, the Tax Legislation Service (*Service de législation fiscale*) was placed directly under the authority of the Minister. The reforms could not be carried to their logical conclusion in respect of collection. The collection of direct taxes in particular has remained the responsibility of the Trésorerie.

The DGI is one of the directorates that comes under the authority of the Budget Minister, whose powers are delegated to him by the Minister of Economics, Finance and Industry. The DGI is responsible for statistical studies, the levy of taxes and duties, inspection and supervision, settlement of disputes (*contentieux*) and collection. The DGI consists of three operational national directorates:

- National Directorate for the Verification of Tax Positions (*Direction nationale des vérifications des situations fiscales* – DNVS);
- National Directorate for National and International Verifications (*Direction des vérifications nationales et internationales* – DNVI);
- National Directorate of Fiscal Investigations (*Direction nationale d'enquêtes fiscales* – DNEF).

The DNVS has particular responsibility for verifying the tax affairs of natural persons, and the DNVI for verifying the tax affairs of legal entities and multinational companies. The DNEF is a central inspection unit which possesses special powers of supervision such as the 'L 16 b' (right to enter and seize – *droit de visite et saisie* – see below). This integration was implemented not only at central level but also at the level of the external services (*services extérieurs*). There are now 22 regional directorates (DR),

which are mainly responsible for inspection and supervision, and 109 departmental directorates, which are responsible for general administration and the settlement of disputes. The 109 departmental directorates (DSF) are in turn divided into 841 tax centres. Each tax centre also has a 'verification team'. These centres play a prominent role, particularly in relation to direct taxes. In the case of VAT and other indirect taxes, the centre of gravity lies more at the intermediate level, in other words that of the departmental directorates.

The operational structure of the DGI is headed by various central services. The service of most relevance to this study is the Fiscal Legislation Directorate (*Direction de législation fiscale*), in particular subdirectorate E and the Tax Inspection Subdirectorate (*Subdirectorate Contrôle Fiscale*), which comes directly under the Director-General. Department E1 of Subdirectorate E*[13] is responsible for the legislation and the follow-up in relation to the Member States of the Union and the OECD countries. Department CF3 of Subdirectorate CF* is responsible for all administrative cooperation in the context of the EU and with the OECD countries. It follows that CF3 is also responsible for the cooperation in relation to intra-Community transactions and VAT.[14] The tax attachés abroad are also accountable to CF3.

Nor did the Treasury (*Trésorerie*) escape unscathed in the reform process. It was converted into two new directorates: the Treasury Directorate (*Direction du Trésor*), responsible for the financial functions of the State, and the Directorate for Public Accounting/Bookkeeping (*Direction de la compatibilité publique*), responsible for collection and payment. The latter directorate has remained responsible for the collection of direct taxes. This directorate has three external services: *Trésorerie Paierie Génerale*, *Recette principale* and *Perception*. In practice, the *Perception* service is responsible for the collection of taxes and for retroactive assessments, for the imposition of penalties, the execution of coercive measures, for the settlement of disputes (*Contentieux*) and for applications for prosecution.

Customs authorities

Only exceptionally is attention paid to the organisational position of the customs authorities. Nonetheless, this aspect is of exceptional importance, not least because of their autonomy and far-reaching powers. In this connection, we shall concentrate on the tax functions of the customs authorities (i.e. not the economic functions) and in particular on the functions relating to EU finances (customs duties and VAT).

The customs authorities are historically responsible for customs duties, although it should be noted that such duties have evolved from a purely national affair into a purely

13. The asterisk means that the department head or a deputy was interviewed for the purpose of the study. For a list of the persons interviewed, see annex.
14. Regulation 218/92 on administrative cooperation in the field of indirect taxation, *OJ* 1992, L 24.

Community affair.[15] As far as VAT is concerned the situation is complicated. The customs authorities have exclusive power in collecting VAT and prosecuting VAT offences in connection with trade with third countries. As far as intra-Community VAT is concerned (EC ICT), the exclusive power lies with the tax authorities. Nonetheless, the customs authorities also have a power of investigation in this field, although the results have to be submitted by means of procès-verbal to the tax authorities for disposal. The customs authorities and the tax authorities share responsibility for excise duties. The customs authorities are in principle responsible, with the exception of the VAT associated with the excise duties for which the tax authorities are responsible.

As far as agriculture is concerned, the customs authorities are responsible for import duties and export refunds (external borders). The customs authorities also have various powers relating to internal agricultural subsidies in so far as they involve transnational aspects. All administrative assistance for agricultural matters is routed through the customs authorities, with the exception of assistance relating to scrutiny of the books of account (Council Regulation No. 4045/89),[16] which is provided by the Agency for the Coordination of Agricultural Finances (*Agence de Coordination des Finances Agricoles* – ACOFA).

The customs authorities consist of a central Customs Administration Directorate General at the Ministry of Economics, Finance and Industry and of regional and interregional customs services throughout the country. The Customs Administration Directorate General has six subdirectorates and a number of external services. Of particular relevance to our study are the National Directorate of Information and Customs Investigations (*Direction Nationale du Renseignement et des enquêtes douanières* – DNRED) and the Legal Affairs, Disputes and Anti-Fraud Subdirectorate (*d'Affaires Juridiques, Contentieuses et lutte contre la fraude*).

The DNRED has a service that is responsible for information and documentation (*Direction du Renseignement et de la Documentation* – DRD*) and a service responsible for inspection work (*Direction des Enquêtes douanières* – DED). The customs attachés abroad are also dependent on the DNRED. The information service of the DNRED – the DRD – is also responsible for the FNID, the French customs information system which is linked to SCENT. Under the DRD is also the subdivision responsible for mutual administrative assistance (*assistance mutuelle* – AM). This subdivision is known as *Assistance Administrative Internationale* – AAMI, and is thus the sister organisation of the Dutch DIC for the AM reports. The DRD is fully centralised in Paris.

The DED investigation service has various subject-related subdivisions and also a national network. The DED consists of a Paris unit and 14 regional subdivisions (*echelons* and *antennes*). The regional subdivisions outside Paris have the same powers, but are subject to territorial restrictions and restrictions on the importance of the case (up to 30,000 euros). The DNRED was established to meet the national and international need for a national, centralised service. As the section on powers will show below, customs officials did not until recently have any powers of investigation. Following a change in

15. However, 10% of the collection costs accrues to the national customs authorities.
16. *OJ* 1989, L 388.

the law, the customs authorities now have teams of police responsible for investigating certain offences. In cases where coercive measures are necessary, a warrant is required (unless the offender is caught in the act – *flagrant délit*) and a police officer must be present when the warrant is executed. The Public Prosecution Service must also be informed, although this may be done later. This is why police officers are seconded to DNRED. They have national powers and operate under the authority of the Public Prosecution Service. In addition, they play a prominent role when the services of DNRED are called upon in the context of letters rogatory. The customs officers themselves may only act as experts in connection with letters rogatory executed in France. As a result of the recent reform, however, customs officials themselves now have the power to investigate various offences. In these situations, the assistance of the seconded police is no longer strictly necessary.

The DNRED also has a service that is responsible for prosecution and collection and represents the customs authorities in legal cases in the Paris region. The regional subdivisions too have an *agence de poursuites* and are therefore *agents poursuivantes* within the limits of their powers. In the case of prosecutions, a binding recommendation must be obtained from the D2 Bureau of subdirectorate D of the customs authorities. If the green light is given, the complaint is lodged by DNRED with the Public Prosecution Service.

Subdirectorate D of the customs authorities is subdivided into three bureaus. Bureau D1 is responsible for Legal and Disputes Office (*Etudes juridiques et contentieuses**), Bureau D2 for Disputes Cases (*Affaires Contentieuses*), and Bureau D3 for the Control and Anti-Fraud Policy (*Politique de Contrôle et de la lutte contre la fraude*). Subdirectorate D2 is responsible for compounding in important cases (see below) and is called in where politically sensitive cases or cases involving corruption of customs officials are to be dealt with under the criminal law. All other cases are either compounded or prosecuted at the level of the operational customs units (regional, interregional or national by the DNRED). Subdirectorate D3 is in close contact both with the DNRED, particularly the administrative cooperation service (AAMI), and with the European Commission (Directorate-General Customs and Indirect Taxation and the Anti-Fraud Unit (OLAF)). D3 is responsible for negotiations on international instruments or instruments in the context of the First or Third Pillars.

Judicial Organisation

The functions of the Ministry of Justice are comparable to those of its Dutch counterpart. For the purposes of our study, the organisational units of particular importance are the Directorate of Criminal Affairs and Pardons (*Direction des Affaires Criminelles et des Grâces* – DACG) and the European and International Affairs Service (*Service des Affaires Européennes et Internationales* – SAEI). The DACG has three subdirectorates:

- Subdirectorate of General and International Criminal Law (*Sous-Direction du droit pénal général et international*); one of the units that comes under this subdirectorate is the Office of Mutual Assistance in International Criminal Matters and the Criminal

Conventions (*Bureau de l'Entraide répressive internationale et des Conventions pénales*);[17]
- Subdirectorate of General Criminal Matters and Pardons (*Sous-Direction des Affaires pénales générales et des Grâces*); one of the units that comes under this subdirectorate is the Police Office (*Bureau de la Police Judiciaire*);
- Subdirectorate of Economic and Financial Affairs and the Fight against Organised Crime (*Sous-Direction des Affaires économiques et financières et de la Lutte contre la Criminalité organisée*);

the bureaus of interest to us that come under these subdirectorates are:
- the Criminal Policy and Criminal Legislation in Economic, Financial, Fiscal and Social Matters Office (*Bureau de la Politique criminelle et de la Législation pénale en matière économique, financière, fiscale et sociale**);
- the Anti-Economic and Financial Fraud Office (*Bureau de la Lutte contre la Fraude économique et financière*);[18]
- the Anti-Organised Crime, Drug Trafficking and Money Laundering Office (*Office Bureau de la Lutte contre la Criminalité organisée, le trafic de stupéfiants et le blanchiment**).

The Ministry of Justice is well aware of its responsibility with regard to the protection of the EU's financial interests. This is why a proactive policy has been conducted in recent years by the the Criminal Policy and Criminal Legislation in Economic, Financial, Fiscal and Social Matters Office. Liaison officers of the tax and customs authorities also work at the Bureau. In 1995 a first circular was sent to the judiciary and prosecutors concerning EU finances. The aim of the circular was to provide information about the various aspects of the EC finances and to encourage the criminal law enforcement bodies to cooperate more closely and more effectively with the police and administrative authorities. Since the Ministry of Justice does, after all, have a duty to notify Brussels of the measures it takes and the results it achieves, it wishes to demonstrate that combating EC fraud is accorded priority in practice. In a second circular dating from 1996, it provided a quantitative and qualitative appraisal of the results and explained the powers of the Commission and OLAF. The weak points that are disclosed are criminal law enforcement in respect of agricultural subsidies and subsidies from the Structural Fund.

17. The head of this bureau was approached for an interview, but informed us that he had no experience or knowledge of legal assistance in tax and customs matters and suggested that we contact the bureau specialised in these fields. The survey does indeed show that 90% of the customs cases are disposed of by compounding and that the number of tax cases heard by the criminal courts is very small. The Dutch liaison officer confirmed to us that he never dealt with taxable customs matters. Since it is the stated policy of the Ministry of Justice that large EC fraud cases should preferably be heard by the criminal courts, this will also have consequences for legal assistance in criminal cases.
18. This is mainly an operational bureau (*contentieux*). This aspect was also included in the interview with the the Criminal Policy and Criminal Legislation in Economic, Financial, Fiscal and Social Matters Office.

The Public Prosecution Service was also instructed to investigate with a view to criminal prosecution cases of the following types in particular:

- fraud that is of a national or transnational nature, if it is committed by organised networks or is the subject of investigation by the European Commission;
- fraud that is repeatedly committed by the same natural persons or legal entities, even if it concerns relatively small amounts;
- fraud involving corruption by officials of administrations or payment bodies.

The third circular of 1999 relates to units specialised in the investigation of economic and financial crime, known in France as *pôles économiques et financières dans certains jurisdictions spécialisées*.

The basic rules for the criminal law procedures have been recorded in France in the Code of Criminal Procedure (*Code de Procédure Pénale* – CPP), which is supplemented by: (1) public administrative rules (*règlements d'administration publique*); (2) decrees (*décrets*), and (3) orders (*arrétés*). They are designated as 'arts. R', 'arts. D' and 'arts A' respectively. There are also numerous guidelines (circulars) which emanate from the Ministry of Justice. Only some of them are public. The main ones are included in the CPP publication.[19]

First of all, a distinction should be made between the investigation jurisdiction (*juridictions d'instruction*) and the trial jurisdiction (*juridictions de jugement*). The former is confined to the investigating judge, namely the *juge d'instruction* and the court of indictment (*chambre d'accusation*). The power of the investigating judge (*juge d'instruction*) is twofold: he directs the preliminary judicial investigation and decides as *juge de liberté* on the admissibility of a number of coercive measures. The court of indictment is the appeal body. In the case of *crimes* the ruling of the *chambre* is actually obligatory and it decides on the formal notice of indictment for the assizes procedure. As far as the trial jurisdiction is concerned, we must make a distinction between courts of summary jurisdiction (*tribunal de police*), misdemeanours courts (*tribunal correctionnel*) and jury courts (*cour d'assises*). They are authorised to give judgments in respect of the three categories of offence recognised under French law, namely *contraventions*, *délits* and *crimes* (in ascending order of gravity).

Second, account should be taken in France of special rules of jurisdiction. For example, jurisdiction in respect of terrorist acts has been concentrated in the hands of the regional court (*tribunal de grande instance*) in Paris. And in the case of economic and financial crimes, it was decided in 1975 that special jurisdiction should be created for certain regional courts (see Article 704 et seq. CPP). These courts are now empowered to hear, among other things, a number of ordinary offences, tax offences, customs offences, stock exchange offences, competition offences, and offences concerning spatial planning. The classical jurisdiction and the specialised jurisdiction have competing powers. Both are therefore competent to try offences; jurisdiction is determined by the principal case. The aim of this arrangement is to ensure that the specialisation is combined as far as possible with a 'justice de proximité' and to avoid a situation in which the

19. Code de Procédure Pénale, Dalloz, 1999.

allocation of jurisdiction leads to a decrease in financial and economic cases at the first instance courts. The Public Prosecution Service and the investigating judge at the specialised courts have jurisdiction throughout the entire area of the Court of Appeal.

Nonetheless, the existence of specialised judiciary and prosecutors has not removed the problems. There are many complaints about the lack of resources and lack of expertise at these specialised courts. Decree 99-75, which amends Article 706 CPP, attempts to meet this criticism by providing for specialised assistance. In practice this means that specialised financial pools are established under which the Public Prosecution Service receives support from experts from the different authorities (tax, customs, financial regulators, competition authority, etc.) and from the private sector. The experts are accorded the position of specialised assistants. They do not have the powers of the police, and do not carry out judicial acts. They do, however, have access to the court file and are therefore covered by the duty of secrecy. They carry out their duties under the exclusive power of the judges and cannot receive or elicit instructions from third parties (or from their respective administrations).

5.2.3 Instruments: control, investigation and prosecution

Compliance obligations of market participants

The obligations of market participants are, generally speaking, comparable to those that apply under Dutch tax law or customs law. In the case of customs law, this is indeed to be expected in view of the far-reaching harmonisation in the context of the Community Customs Code (CCC). It is, however, striking that the French Customs Code (CD) includes specific provisions for customs powers in relation to agricultural subsidies under the European Agricultural Guidance and Guarantee Fund (EAGGF).

The compliance obligations can therefore be divided, for the sake of convenience, into primary obligations (orders to do or not to do something) and secondary compliance obligations (in support of compliance). The primary obligation is based on the tax return and the duty to comply with tax or customs rules in such a way that the tax debt or customs debt can be determined. Infringements result in a supplementary levy or in a claim for repayment (in the case of export refunds), possibly supplemented by fines of up to 80% of the debt or subsidy. The secondary compliance obligations to which taxpayers are subject are the duty to provide information, the duty to cooperate (cooperation in an on-the-spot investigation and cooperation in verification, etc.), and the duty to keep proper accounts and records. Infringement of these obligations results in a liability to tax fines and criminal sanctions (in the case of a repeated offence, to six months' imprisonment) in the case of tax law and criminal sanctions in the case of customs law. If the taxpayer refuses to cooperate in the 'droit de communication' of the customs authorities, the administration can exert pressure by imposing a periodic penalty payment ('astreinte') under Article 413bis. The person concerned is then directed to supply documents on pain of a penalty for each day's delay. The criminal sanctions for

failure to cooperate with the French customs authorities have attracted European attention as a result of the Funke case before the European Court of Human Rights.[20]

Tax procedure: inspection powers of the tax authorities[21]

The structure of the tax procedure is largely comparable to the tax legislation in other European countries. The levy procedure is based on the tax return. The tax authorities than assess the return and impose an assessment. In the absence of a return, the assessment is made ex officio. The inspection powers of the tax authorities are described in detail in the Book of Tax Procedures (*Livre des Procédures Fiscales*). The aim of the tax inspection powers is to check the correctness and reliability of the tax return. Much of the inspection work occurs *intra muros* (in other words at the office of the tax authorities) by thorough examination of the tax return and by comparison with other tax data.

The inspection powers of the tax authorities are not powers of investigation or judicial powers but supervisory powers. The officials of the tax authorities are not public prosecutors or assistant public prosecutors (i.e. not senior officers of the *police judiciaire* – OPJ) and may therefore not carry out investigative activities. Nonetheless, the tax authorities have far-reaching powers of supervision. As these powers include coercive measures in relation to both things and persons, provision was made in the 1980s, after sustained criticism, for a system of judicial authorisation for the use of certain means of coercion. A substantial body of case law has been developed in relation to these means of coercion and the rights of defence.

The powers of supervision can be divided into a number of important categories. They may be exercised only in relation to tax infringements.

Right of control (droit de controle)

The tax authorities have the right on the basis of Article L 10 LPF to ask the taxpayer for all necessary information, documentary evidence or clarification regarding the tax return (the request for information is known as a 'demande de renseignements, d'éclairissements, de justification'). The documentary proof may relate only to a number of fixed points which are important to the levy of tax. This information is not limited in time and the request may be repeated on various occasions. If the person concerned does not supply information or provides incomplete information, the tax authorities may impose the assessment ex officio.

20. ECHR, 25 February 1993, *Publ. ECHR*, series A, vol 251-A.
21. See J. Grosclaude & Ph. Marschessou, *Procédures Fiscales*, Dalloz, 1998; Revue française de finances publiques, Les sanctions fiscales, March 1999; B. Brachet, *Le Système fiscal français*, L.G.D.J., Paris, 1997; P. Serlooten, *La fiscalité française*, Dalloz, 1996; J. Bruron, *Droit pénal fiscal*, L.G.D.J., Paris, 1993 and C. Lopez, *Les pouvoirs d'investigation de l'administration fiscale en France et au Canada*, l'Harmattan, Paris, 1997.

Right of verification (droit de verification)

In principle, the verification involves checking the documents on the possession of the tax authorities against those in the possession of the taxpayer. The right of verification should be strictly distinguished from the 'droit de communication' in the context of a tax investigation since the legal safeguards differ from category to category. Historically, this right was limited to verification of the accounts (Article 13 LPF etc.) in the possession of the persons who had the duty to keep accounts. Now, the right to verification has been extended to all natural persons in the context of an investigation of their tax position (Article L 12 LPF). After checking the assessment and possibly requesting information for the purpose of verification, the tax authorities often proceed to the stage of verification in order to check their data (for example about banking transactions) against the data of the person concerned. Where the taxpayer does not cooperate, the tax authorities can always fall back on their right to obtain information. If there is a failure to comply with the duty to provide information, an assessment will be imposed ex officio. The process of verification is conducted with both sides present and either orally or in writing, and the tax return of the person concerned is checked against other documents (either his own documents or those of third parties). The person concerned must be notified in advance of the verification (Article 47 LPF) and has the right to be represented by legal counsel during the check. In addition, the person concerned must be informed about the result of the verification.

Right of inquiry (droit d'enquete)

In the context of intra-Community goods transport (EC ICT) and the VAT problem, both the tax authorities and the customs authorities have powers of inquiry (Article 80 LPF et seq.). The officials have access to businesses and can check goods and documents (customs investigators can also check vehicles and other means of transport). The documents can be inspected and copied. Persons may also be interviewed. The inquiry is concluded by the preparation of a procès-verbal.

This right of inquiry is exercised more actively than the right of access (*droit de communication*) (see below), but is less far-reaching than the right of entry (*droit de visite*) (see below). In addition, the right of inquiry is limited to the EC ICT problem in the context of the Sixth Directive on the harmonisation of the laws of the Member States relating to turnover taxes (77-388).[22]

Right of investigation (droit d'investigation)

A distinction should be made here between right of inspection (*droit de communication*) and right of entry (*droit de visite*). Under Article 81 et seq. LPF the tax authorities have the right to obtain access to all documents of importance to enforcement of the tax legislation (assessment, inspection, collection and imposition of sanctions) and to take

22. *OJ* 1977 L 145.

a copy of them (Article R 81-4 LPF). This right of inspection also means that the tax authorities have access to the premises and can inspect all books of account. This right should be distinguished from the right to claim delivery of documents. Under Articles 10, 16 and 85 LPF the tax authorities have the right to claim documents from the taxpayer, including documents relating to bank accounts. No notification is necessary in advance in order to exercise this right of inspection and claim. In addition, the person concerned has no right to a lawyer (although the presence of a lawyer is permitted). The right relates solely to documents that exist independently of the will of the person concerned (passive cooperation). It does not therefore involve an examination of the person concerned, and there is no question of adversarial debate. This right of inspection and claim to production of documents should therefore be distinguished from a search of premises and seizure (see below *droit de visite et de saisie*).

The definition of the persons subject to this right is not confined to the taxpayer, but includes third parties as well. In brief, three categories of people are involved:

- private enterprises, including providers of financial or legal services (stock exchanges, banks, insurance companies, accountants, attorneys and notaries etc.);
- government institutions and associated institutions – broadly defined (includes police);
- judicial authorities.

Anyone who refuses to cooperate in the right of inspection risks facing an administrative fine. The maximum fine is initially FRF 10,000, but this can rise to FRF 20,000 if cooperation is still not forthcoming a month after the notice of default. The failure to cooperate may also be penalised by the courts by tax penalties of up to FRF 50,000 and, in the case of repeat offences, even by custodial sentences of up to six months.

Despite the name, right of entry (*droit de visite*) is much more than a right to enter premises. It is comparable to the Dutch variant of the right to enter and search premises (*perquisition*) and seize goods. Since the Second World War (ordinance of 30 June 1945) the competent authorities have had the right of entry and seizure in respect of business premises and dwellings where infringements of economic legislation are suspected.[23] The tax authorities made frequent use of this legislation as a basis for their activities, but were eventually restrained in the 1980s for abuse of power (*détournement de procédure*) by the highest judicial authorities (CE Plén, 11 February 1987, req. nE 40.565, Dr. fis. 1987, comm. 1985, concl. de Guillenschmidt; Crim., 2 June 1986, Revue de Jurisprudence Fiscale 1986, 694). The first statutory provision, which was contained in Article 89 of the Finance Act of 1984, created an autonomous tax power, subject to the reservation of judicial review. This was considered by the Constitutional Court to be contrary to the Constitution since the entry of a dwelling must be subject to supervision by a judicial authority. The legislator than provided in Article 94 of the Finance Act 1985 for a

23. For a detailed description of the evolution and legal framework of these powers, see H. Matsopoulu, *Les enquêtes de police* (Police investigations), Paris, 1996, p. 452 ff.

judicial mandate for the right of entry and seizure.[24] This is presently regulated in Article L 16 B LPF as regards direct taxes and VAT and in Article L 38 (2) as regards the other indirect taxes (such as excise duties on intra-Community trade in alcoholic beverages and tobacco). The difference is that under Article L 38 (2) no ordinance is necessary where a person is caught in the act of committing an offence (see also the Customs Handbook, at 2.3.3). But the competence under Article L 38 (2) is comparable to a power of entry or search. In addition, the legislator declared in 1986 (ordonnance nE 86-1243 of 1 December 1986) that the provisions of Article L 16 B LPF were also applicable to enforcement of the economic legislation and to the customs authorities (see below).

The right of entry (*droit de visite*) is subject to substantive and judicial restrictions. It may be exercised only if there are suspicions of fraud in the following cases (the list is exhaustive):

- buying/selling without invoices;
- using or delivering invoices without an economic operation;
- deliberately failing to include data in accounts as required by tax law or deliberately causing another to omit such data.

The court procedure is as follows. The tax authorities should address an application to the president of the regional court. The president or his deputy must examine the application in detail and provide factual and legal reasons for the court ruling. The entry is conducted under the authority of the president and there is a police officer present, in addition to the authorised officials of the tax authorities. If the person concerned is not present two witnesses are asked to attend. A procès-verbal is drawn up and signed by everyone present.

Appeal against the ruling of the president of the regional court lies to a mixed chamber consisting of judges of the civil chambers, the commercial chamber and the criminal chamber. However, the appeal does not stay the effect of the ruling. If the ruling is quashed, this results in the absolute nullity of the tax assessment or prosecution.

In short, the legislator has felt it necessary to provide that the far-reaching powers of supervision are subject to a power of civil law review in order to guarantee the legal protection of the taxpayer. Nonetheless, although a judicial authorisation is required for a search for tax purposes this does not detract from the legal nature of the powers of inspection. They are powers of inspection and not powers of investigation.

24. Cf. R. Ait Ihadadene, 'Le droit de visite exercé par l'administration fiscale' (The right of entry exercised by the tax authorities), *Revue de Science Criminelle et de Droit Pénal Comparé*, 1996, pp. 347-355.

Customs procedure: inspection powers of the customs authorities[25]

Until recently the customs authorities, like the tax authorities, did not have judicial powers of investigation. The CD did, however, provide for more far-reaching powers of supervision, which extended further than the powers of the tax authorities in a number of respects. As the result of a recent reform, the customs authorities too now have a power of investigation in respect of certain offences.

Right of investigation (droit d'investigation)

On the basis of Articles 64A and 65 CD, customs officials have an extensive right of inspection (*droit de communication*). Other government bodies, national and regional, cannot invoke their professional duty of secrecy in relation to the customs authorities. In addition, the customs officers not only have access to and can inspect the documents, but they may also seize them (*saisie*, Article 65 (5) CD).

The CD makes provision for four types of right of entry (*droit de visite*). They can be exercised nationwide, even in territorial waters, but only for the enforcement of the customs legislation (and not, therefore, for ordinary offences):

- with regard to goods (Article 60 CD);
- with regard to means of transport (Article 60 etc. CD);
- with regard to professional premises (Article 63 ter CD);
- with regard to places of permanent residence, whether professional premises or private homes (Articles 64 CD).

The procedure with regard to business premises or professional premises as provided for in Article 63 ter was introduced in the CD as result of an amendment to the law in 1996. Article 63 grants the customs authorities the power to enter business premises, examine goods, means of transport and documents, copy documents or seize documents under an administrative power (retenue de documents) and take samples. The Public Prosecution Service should be informed beforehand and can oppose any such action. Both the Public Prosecution Service and the person concerned receive a copy of the procès-verbal of the entry after its conclusion.

The authorisation of the civil court is required for the procedure under Articles 64 CD, unless the person concerned has been caught in the commission of the act (*flagrant délit*). In the latter case, no authorisation is required and there is no notification to the Public Prosecution Service. Where the 'droit de visite' is exercised under Articles 64 CD a police officer must always be present. Since police officers are seconded to the

25. See Codes des Douanes, Commenté et annoté par B. de Mordant de Massiac (Customs Code, with commentary and notes by B. de Mordant de Massiac), Litec, Paris, 1999; *Dossiers Pratiques* (Practical Cases) Francis Lefebvre, Douane. Réglementation communautaire et nationale, Paris, 1993, et C.J. Berr & H. Tremeau, 'Le droit douanier' (Customs Law), *Economica*, Paris, 1998 and V. Carpentier, *Guide pratique du Contentieux Douanier* (Practical Guide to Customs Disputes Procedure) Litec, Paris, 1996.

DNRED this is not a problem. One of the functions of the police officer is to monitor application of the professional duty of secrecy and observance of the rights of the defence, in accordance with Article 56 CPP.

The CD contains a separate section IV (Article 65 A-65 C) for the inspections in the context of the Common Agricultural Policy. Examples of such inspections are those carried out under the European Agricultural Guidance and Guarantee Fund (EAGGF), guarantee department or veterinary control department. The powers outlined above are applicable to these inspections (Article 65 B CD), with the exception of the 'droit de visite' in private homes. As result of Articles 65 A-65 C the customs authorities have the power to check the quantity, quality, packaging, origin, destination etc. of the agricultural goods in the case of intra-Community traffic too. Infringements of the EAGGF rules are classified as category 1 customs offences (Article 414 (1) CD).

Right of seizure (droit de saisie)

If the customs officials find that an infringement has occurred, they have the right to seize objects susceptible of confiscation (Article 323 (2) CD). This is recorded in a procès-verbal.

Right of detention (droit de retenue)

Under Article 323-3 CD (droit de retenue) the customs authorities have the power to detain people discovered in the act of committing serious offences. The aim of the arrest is to interview the person concerned or carry out additional acts of investigation. Since this is a deprivation of liberty, there are strict requirements governing legal protection. The Public Prosecution Service should be informed immediately. The maximum length of the detention is in principle 24 hours, but this period may be extended for a further 24 hours provided that the permission of the Public Prosecution Service is obtained. This deprivation of liberty must be recorded in a special register. If the person concerned is subsequently remanded in police custody ('garde à vue') for a period not exceeding 96 hours, the period of the original detention by the customs authorities is deducted from this. This does not, however, mean that the person concerned is entitled during the 'retenue douanière' to the rights to which he would be entitled under 'garde à vue' (e.g. the right to legal counsel after 28 hours' detention – Cass. crim. 1 March 1994, Barber: Bull. crim., n. 80 or the right to communicate with third parties).

The customs detention (*retenue douanière*) should be distinguished from the right of entry (*droit de visite*) under Article 60 CD. Article 60 does not relate to cases in which the suspect is caught in the act of committing the offence and also makes no provision for coercive measures. In addition, Article 323-3 is not applicable if the person concerned cooperates voluntarily and no coercive measures are applied (Cass. crim., 17 September 1991, Van Geider et Keser: RJD, n. 11201). Where persons are interviewed after being caught in the act of committing an offence, this does not necessarily imply application of customs detention (Cass. crim., 8 March 1993, Pacaud Nouel de Kerangue et autres), in a situation where the person concerned submits voluntarily to the questioning.

Reform

After long discussions a compromise has been reached between on the one hand the Ministry of the Interior, which is responsible for the ordinary police, and on the other the Ministries of Justice and Finance regarding the granting of powers of investigation to customs officers. The bill has now been approved by the National Assembly and the Senate and published in the Bulletin of Laws.[26]

The intention is that the customs authorities should be given OPJ responsibilities for certain well-defined subject matter that is listed exhaustively. The subject matter is limited to customs law, indirect taxes and forgery of branded goods. Subjects such as trafficking in cultural goods, arms trafficking, drug trafficking and money laundering (in so far as it relates to the three previous categories) are expressly excluded from these powers, although it should be noted that the customs authorities may form part of mixed inspections teams temporarily established under the control of the Public Prosecution Service or the investigating judge (JI). The customs authorities are charged with OPJ tasks (habilité de missions d'OPJ), which means that no police are designated to operate within the customs authority. In addition, the customs authorities do not have any rights to initiate judicial acts, since it was desired to avoid an accumulation of powers on the basis both of customs law and of the CPP. Either the customs authority lodges a complaint with the Public Prosecution Service on the basis of its information or its administrative investigation ('plainte', see CPP) or it reports the commission of a criminal offence (dénonciation, see CPP) to the Public Prosecution Service in respect of a criminal offence. In the case of a complaint, an 'action publique' is instituted and the Public Prosecution Service can either initiate an 'enquête préliminaire' or request the investigating judge for an 'information judiciaire'. The JI can then institute letters rogatory, under which he can request the assistance of any senior police officers who may be seconded to the customs authorities or of the customs officers themselves who are charged with the OPJ function. In the case of a 'dénonciation' the Public Prosecution Service refers the case to the police. The customs authorities responsible for carrying out an OPJ function are under the authority of the Public Prosecution Service.

For the sake of clarity two further comments should be made. First of all, the reform does not change the status of the police officers seconded to the customs authorities. They will continue to exist and work as in the past. Second, the customs authorities lose their right of prosecution ('agent poursuivante') under this new procedure. In such cases, only the Public Prosecution Service is authorised. It was desired to avoid a situation in which the Constitutional Court took exception to the fact that both far-reaching judicial powers and far-reaching powers of prosecution were invested in one and the same authority.

26. Loi no. 99-515 of 23 June 1999 renforçant l'efficacité de la procédure pénale, *JO* 24 June 1999, Art. 28.

Investigative powers of the judicial authorities[27]

In France the Public Prosecution Service has charge of judicial investigations and is assisted in this respect by police officers (*agents*) or senior police officers (*officiers*) of the *police judiciaire* (OPJ).[28] Under Article 15 CPP, the following persons may exercise the powers of the *police judiciaire*: the police officers and senior police officers of the *police judiciaire*, the officers of the seconded *police judiciaire* and the officials and other officers charged with this function. They are also empowered to carry out the preliminary investigation (*enquête préliminaire* – Articles 75-78 CPP). Those charged with the powers of the *police judiciaire* may carry out investigative measures either at the request of the Public Prosecution Service or of their own volition. They may also do this at the request of a investigating judge in the context of internal letters rogatory. Where a person is caught in the commission of an offence, which is broadly interpreted in France, those who are charged with the function of the *police judiciaire* have wider powers. It is noteworthy that the CPP does not contain any clear definition of what constitutes suspicion or reasonable suspicion. In the case of a number of investigative powers, for example the identity check referred to in Article 78-2 CPP, the expression used is 'an indication giving rise to a suspicion that'. The division between the officials of the administrative authorities (*police administrative*) and the police (*police judiciaire*) is wafer thin.

5.2.4 Extrajudicial disposal

Extrajudicial disposal in tax cases

French tax law provides three ways of disposing of cases out of court: compounding, imposition of administrative fines and remission.

The compounding of tax claims, as regulated in Article LPF 247 et seq., is a mutual contract that excludes further disputes. The power of compounding is subject to Article 2044 et seq. of the French Civil Code. The decision not to prosecute is an administrative decision, but the offer of a compound is a form of civil law contract. Nonetheless, a compound bears a strong resemblance to a criminal law decision, because it serves to extinguish the *action publique* as regards both the tax aspect and the criminal law aspect.[29] The tax authorities have the power to enter into a compound in respect of the levy of tax, tax fines and the criminal law aspects of tax claims, even if a judicial investigation is already under way in respect of the offences or the case is before the courts. No compound is possible after a final judgment. Only in the case of indirect taxes (Article LPF 249) is the consent of the Public Prosecution Service required during the judicial investigation. Where a compound is accepted, it extinguishes all further actions.

27. See J. Pradel, *Procédure Pénale*, Editions Cujas, Paris, 1997.
28. See footnote 3.
29. See *Cass.crim.*, 10 October 1962, Alexandre: *Bull.crim*, n. 270, 26 November 1964, Salmon: *Bull.crim* n. 314, 12 February 1990, Bourquin: *Bull.crim*. n. 72.

The decision on a compound is taken by the departmental director in cases of up to FRF 750,000, by the regional director in cases of up to FRF 1,100,000, by the director general in cases of up to FRF 1,750,000 and by the Minister in all other cases. In the latter two cases a recommendation of the Committee of Fiscal, Customs and Exchange Control Disputes (*Comité du Contentieux fiscal, douanier et des changes*) is required. Provision has been made for an objection and appeal procedure in compounding cases (before the administrative court). In practice, these procedures are of only limited importance.

The tax authorities can fix the levy of tax and make collections, possibly increased by administrative fines. The fines may be imposed in the case of a failure to make a tax return, tax returns made in bad faith, and fradulent activities (*manoeuvres frauduleuses*) (Articles 1725-1740 nonies). The tax authorities have far-reaching discretionary powers for this purpose. If desired, they can reduce a fine in the case of bona fide taxpayers. The CGI also contains a number of provisions governing cases where taxpayers show remorse or wish to make amends.

Remission (*remise*) is comparable to a tax amnesty and constitutes a unilateral act and may relate to part or all of the taxes and/or fines. Remission is possible only for direct taxes.

As regards the possibilities of appeal it should be emphasised that there are no specialised tax courts in France. The jurisdictions are of a dual structure, which is due to the division between administrative courts (*jurisdiction administrative*) and the ordinary courts (*jurisdiction judiciaire*) during the French Revolution. Both civil and criminal jurisdiction are covered by the term administration of justice. Redress is possible against the imposition of administrative fines. Article L 190 et seq. LPF and Article R 196 LPF et seq. provide for a traditional objection procedure.

The appeal procedure can briefly be described as follows (Article L 199 LPF). For the majority of taxes, namely the direct taxes, appeal lies to the administrative court (Article L 199 LPF). The Council of State acts as the court of cassation in this connection. In the case of indirect taxes appeal lies to the civil courts, namely the regional court, which has the same status and powers as an administrative court. Appeal in cassation also lies to the commercial court of the Court of Cassation.

It should be noted in this connection that the case law of the European Court of Human Rights in respect of Article 6 of the European Convention on Human Rights (see, inter alia, the European Court of Human Rights, 24 February 1994, Bendenoun case)[30] applies in full in France. French case law underlines the fact that punitive tax fines can be imposed by the tax authorities in accordance with Article 6 (*Arrêt du Conseil d'État, Sect. Avis, 31 March 1995, nE 164008, Méric: Droit Fiscal 1995.1006; Revue de la Jurisprudence Fiscale 1995.623, concl. Arrighi de Casanova*), but that they belong to the category of criminal charge (*accusation en matière pénale*), together with the guarantees applicable under Article 6. The Council of State has therefore accepted that the principle of retroactive effect of the most favourable criminal provision is also applicable to punitive tax sanctions in the case of infringements that occur before the entry into effect of the provision concerned, provided that there is not yet a final judicial decision

30. ECHR, 24 February, *Publ. ECHR*, series A, vol. 284.

(*Arrêt du Conseil d'État, Sect. Avis, 5 April 1996, nE 176611: Droit Fiscal 1996.765, concl. Arrighi de Casanova*). At the same time, the Constitutional Court has decided that punitive tax profits cannot be imposed with retroactive effect (*223 Décisions de la Cour Constitutionelle, 29 December 1986*).

Extrajudicial disposal in customs cases

French customs law has a markedly criminal law tinge. The CD provides only sporadically for administrative law sanctions. For example, Article 87-3 CD provides for the cancellation of the licence of a customs forwarder and Article 433 CD provides for the exclusion from certain favourable customs procedures. A system of administrative fines does not exist in French customs law. However, it should be noted that negotiations are being conducted at Community level for the adoption of a regulation prescribing administrative fines. The French government authorities and customs authorities have hardly been in the vanguard of pressure for its adoption.

French customs law has an extensive system for compounding. The same principles are applicable as those described above in relation to compounds in tax matters. The power to enter into compounds is regulated in Article 350 et seq. CD and is elaborated in Decree 78-1297 of 28 December 1978, as amended by Decree 94-412 of 17 May 1994.[31] The power is vested in: (1) the Minister for the Budget in the case of *délits* that involve evasion of duties in excess of FRF 3 million or in the case of prohibited goods having a value in excess of FRF 6 million; (2) in the director general of the customs authorities in the case of *délits* that involve evasion of customs duties in excess of FRF 600,000 or in the case of prohibited goods having a value in excess of FRF 1.5 million; and (3) in the regional and inter-regional directors in the case of *contraventions* and *délits* that involve evasion of customs duties of less than FRF 600,000 or in the case of prohibited goods having a value of less than FRF 1.5 million, and in other specific cases. Owing to a reform in 1977, the power to enter into compounds is subject to certain legal restrictions. As long as no prosecution (*action publique*) has started, compounding is a discretionary power of the customs authorities, although a non-binding recommendation must be sought from the Committee of Fiscal, Customs and Exchange Control Disputes (*Comité du contentieux fiscal, douanier et des changes*) before the power is exercised (Article 460 CD). In practice, it is only the important cases that are referred individually (i.e. cases at the level of the director general). In the event of non-performance of the compound agreement, the customs authorities can take civil proceedings, including collection by the exercise of distress under Article 345 CD. Between 80% and 90% of all customs cases are disposed of by compounding. Only a few very serious customs fraud cases come before the criminal courts.

Once a prosecution (*action publique*) has been started (Article 350 (b) CD), either by the Public Prosecution Service or by the customs authorities, compounding is possible only with the consent of the Public Prosecution Service (if tax and criminal law sanctions can

31. Part II CD p. 284.

be imposed) or of the president of the court having jurisdiction (if only tax sanctions can be imposed). After a judgment has become final, the tax sanctions can no longer be the subject of compounding (Article 350 (c) CD).

Provision for remission (*remise*) is also made in French customs law. It is a unilateral act by the customs authorities and can relate to part or all of the tax sanctions. This form of pardon or remission can be granted after the final judgment if there are special circumstances (relating to the economic situation of the debtor). A recommendation of the president of the court which has imposed the tax sanctions is required in the case of a remission (Article 390bis CD).

5.2.5 Judicial disposal

Criminal law disposal in tax cases

In addition to the tax fines, the CGI too also contains criminal law penalties (Articles 1741-1756 septies). Article 1741 CGI is the general tax fraud provision, which imposes criminal sanctions of up to five years' imprisonment and even ten years in the case of repeat offences within the five years. Moreover, the CGI contains specific criminal provisions containing lower sanctions. In the case of tax fraud, the ordinary criminal provisions too are important. The main articles are Article 313 (deceit – *escroquerie*) and Article 441 (forgery of documents – *faux en écritures*). No *lex specialis* rule applies between the CGI and ordinary criminal law.

The tax authorities have the monopoly of prosecution, but do not have the right to prosecute. This means that only the tax authorities can decide whether or not to bring criminal proceedings. In practice, the tax authorities try to have criminal proceedings instituted in 1,000 major fraud cases each year. This is done by the filing of a complaint with the Public Prosecution Service. The tax authorities must, however, obtain a recommendation in advance from the Tax Offences Committee (*Commission des Infractions Fiscales* – CIF) (Article L 228 LPF), on pain of its application being declared inadmissible. The CIF is presided over by a member of the Council of State and consists of members of the Council of State and members of the Audit Council. The tax authorities are discharged from their duty of secrecy in relation to the CIF (Article L 137 LPF).

If the case is referred to the judicial authorities for prosecution of the criminal tax offences, the case is transferred in full to the judicial authorities. This does not prevent the tax authorities from continuing to take action in respect of the same file under administrative proceedings, with a view to the tax levy and the imposition of any tax fines.

Criminal tax cases are heard by the criminal court (part of the TGI), and appeal lies to the criminal chamber of the Court of Appeal and in cassation to the criminal chamber of the Court of Cassation. Naturally, the Code of Criminal Procedure (*Code de Procédure Pénale* – CPP) applies to criminal prosecutions.

Criminal law disposal in customs cases

The CD makes a distinction between misdemeanours (*délits*) and regulatory offences (*contraventions*) (Article 408).[32] Unlike the Criminal Code ('Code Pénal') no felonies (*crimes*) are included in the CD. In addition, the definitions of *délits* and *contraventions* do not run in parallel with those in the Criminal Code. In the CD *délits* are defined as criminal offences carrying a sentence of imprisonment and *contraventions* as criminal offences carrying only financial sanctions. There is only one exception to this, namely *contraventions* of the fifth category, which can be punished by a term of imprisonment not exceeding one month. It is also noteworthy that the distinction between *délits* and *contraventions* is based not so much on the existence of intent but on the nature of the goods. For example, the smuggling of prohibited goods or goods that are subject to heavy customs levies constitutes a *délit*, whereas the smuggling of other goods is a *contravention*. The *délits* of the former category can, generally speaking, be classified as either smuggling (*contrebande*) and related offences or import/export without declaration (*importations* or *exportations sans déclaration*) and related offences. Article 414, in conjunction with Article 417, defines the term *délit contrebande* as the import or export of prohibited goods or of goods subject to a high levy other than through the customs offices and in contravention of the legislation. Article 423 defines import or export without declaration as being the declaration to the customs office of prohibited goods or of goods subject to a high levy, but without the correct declaration (no declaration, incomplete declaration or incorrect declaration). All infringements of Article 56 A bis CD, being infringements of the EAGGF subsidy rules, are treated the same as import or export without declaration and are therefore covered by this category of *délits*. There are four classes/categories of *contraventions*. Since these relate to acts not covered by *délits*, they do not concern prohibited goods or goods subject to a high levy.

The sanctions for *contraventions* range from fines of FRF 20,000 (first category) to a combination of fines, confiscation and loss of rights (third category) and even to a combination of fines, confiscation and minor terms of imprisonment (fifth category).

The sanctions for *délits* consist of fines of up to twice the amount of the tax evasion, confiscation, loss of rights and prison sentences of up to three years. Only in the case of a *délit* consisting of cross-border money laundering (a *délit* of the second category) does the term of imprisonment rise to ten years.

Article 370 CD provides for a rule on repeated offences: the sanctions are doubled if a new customs offences is committed within a period of five years following a compound or a conviction for a *délit* or *contravention*.

In addition, Article 377bis provides that the imposition of tax penalties under customs law does not prevent payment of the evaded customs duties (subsequent collection or repayment). In short, the customs fines are aggregated with the customs debt.

32. The terms misdemeanour, felony and regulatory offence are attempts to indicate the relationship between the French terms. As they are not precise translations, the French terms are used elsewhere.

Article 356 et seq. CD regulates the jurisdictional powers. The CD grants an exclusive power to the criminal courts. The proceedings relating to administrative offences (*contentieux répressif*) are therefore central. The court of summary jurisdiction (*tribunal de police*) tries *contraventions*, and the criminal court tries *délits*. The civil courts have jurisdiction to try offences in connection with customs levies (collection or retroactive assessment, use of distress warrants (*contrainte*)). Nonetheless, the administrative courts too have a number of powers such as review of the lawfulness of administrative decisions (e.g. assessment of the legality of a seizure or of a indefinite confiscation when criminal proceedings are dropped) or the assessment of professional errors in the exercise of an office.

Unlike tax law, the only sanctions available under customs law are of a criminal law nature. For the purpose of criminal proceedings (*action publique*) a distinction is made between the procedure relating to criminal tax sanctions (i.e. customs fine and confiscation) and the procedure relating to non-tax criminal sanctions, namely loss of rights and sentences of imprisonment. As regards the tax offence aspect, the decision rests fully with the customs authorities; the procedure is completely separate from the procedure for the non-tax criminal sanction. This means that the customs authorities assess the expediency of the tax proceedings under the criminal law at any stage of the judicial procedure. It also means that the criminal court can be requested to impose a customs fine under criminal law without the Public Prosecution Service having instituted criminal proceedings. By contrast, the decision on proceedings for terms of imprisonment and/or loss of rights is taken solely by the Public Prosecution Service. The customs authorities are not, therefore, a civil party to the criminal proceedings, but are a special prosecution service for the tax aspects. However, where the Public Prosecution Service brings criminal proceedings it can take into account the tax interests as an accessory charge if an infringement is subject to both sentences of imprisonment and tax sanctions (i.e. in the case of *délits* and in the case of *contraventions* of the fifth category) or if a *contravention*, for which no sentences of imprisonment are provided, is connected with a *délit*, and they are therefore prosecuted together. Conversely, the customs authorities can apply to be joined in the criminal proceedings with a view to inclusion of the tax aspects, even if the prosecution by the Public Prosecution Service is limited to ordinary offences.

5.2.6 *Una via* and cumulation

In tax cases

The *una via* principle or another form of anti-cumulation or the *non bis in idem* principle (Article 14 (7) International Covenant on Civil and Political Rights; Article 4, Protocol no. 7, European Convention on Human Rights) is not applicable. It was therefore held by both the highest administrative court and the highest criminal court that the maximum tax fines (up to 80%) can be aggregated with the criminal tax sanctions. See *Arrêt du Conseil d'État, Avis, 4 April 1997, nE 183658, Jammet: Recueil Dalloz. 1997. Informations Rapides du Recueil Dalloz. 125; Droit Fiscal 1997.660, concl. Loloum; Revue de Jurisprudence Fiscale 1997.469 – Arrêt de la chambre criminelle de la Cour de Cassation. 20 June 1996, nE 94-85 796: Recueil Dalloz 1997.249, note Tixier et Lamulle;*

Droit Fiscal 1997, 427, obs. Schiele. Nonetheless, both the judicial authorities must ensure that the principle of proportionality of sanctions, as guaranteed under the Constitution, is safeguarded (*237 Décisions de la Cour Constitutionelle, 30 December 1987; 97-395 Décisions de la Cour Constitutionelle*, 30 December 1997). The Constitutional Court has also held that Article 8 of the Universal Declaration of Human Rights is applicable to punitive tax sanctions. The Constitutional Court held in 1983 (*164 Décisions de la Cour Constitutionelle, 29 December 1983*) that the aggregated sanctions may not exceed the highest sentence. Both the administrative court and the criminal court must take account of this in determining the sentence or sanction.

In customs cases

It would seem logical to think that in customs cases the problem of anti-cumulation does not in fact occur since all possible sanctions, both the purely criminal law sanctions and the tax sanctions under criminal law are part and parcel of the same criminal proceedings. In the case of a single act that fulfils the conditions required to constitute various customs offences but is nonetheless treated as a single offence going to the presence of a unifying factor (*concours idéal*), Article 439-1 CD provides for non-cumulation by specifying that the offence carries the highest sentence. Where various customs offences are dealt with in the same proceedings ('concours réel') the pecuniary sanctions are aggregated and the non-cumulation rule applies to the prison sentence (Article 132-3 NCP), provided that the heaviest sentence is imposed (Article 439-2 CD). Where customs offences and ordinary offences coincide, the courts have decided[33] that the pecuniary sanctions should be aggregated since they are in the nature of compensation under civil law. The prison sentences are not aggregated (Article 123-3 *Code Pénal*) and the heaviest sentence is imposed. Article 440 CD also provides that in the event of prosecution for ordinary offences such as smuggling, corruption, rebellion and insults the procedure and conviction should be in accordance with ordinary criminal law, although this does not detract from the pecuniary tax sanctions under the CD.

5.2.7 Duty of secrecy – disclosure of information between tax authorities, customs authorities and judicial authorities

The disclosure of information between the administrative authorities and also between the administrative and judicial authorities is an extremely complex legal jumble in France. During the study of the tax procedure, the customs procedure and the law of criminal procedure and during the interviews, the importance of the theme and the lack of adequate regulation became increasingly clear. The demand for the provision of information and the relationship between this demand and the various duties of secrecy is important in itself, but is also becoming increasingly important because one and the same case may give rise both to a tax dispute (with a view to a levy, compound or penalty) and a criminal law case.

33. Cass.crim., 29 February 1956, *Bull.crim*. no. 210.

From judicial authorities to tax authorities

The disclosure of documents in the criminal proceedings to third parties is regulated in Article R 156 CPP:

> 'En matière criminelle, correctionelle ou de police, aucune expédition autre que celle des arrêts, jugements, ordonnances pénales définitifs et titres exécutoires ne peut être délivrée à un tiers sans une autorisation du procureur de la République ou du procureur général, selon le cas, notamment en ce qui concerne les pièces d'une enquête terminée par une décision de classement sans suite (...) Dans le cas prévus au présent article (...) si l'autorisation n'est pas accordée, le magistrat compétent pour la donner doit notifier sa décision en la forme administrative et faire connaître les motifs du refus'.

In short, only the Public Prosecution Service can rule on the expediency of exchanging data on the basis of Article R. 156 CPP. Requests by authorities to the investigating judge or to the courts are invalid. This provision must naturally be read in the light of Article 11 CPP, which concerns the secrecy of the investigation and the preliminary judicial investigation: *'Sauf dans les cas où la loi en dispose autrement et sans préjudice des droits de la défense, la procédure au cours de l'enquête et de l'instruction est secrète (...)'*. The rule is that the preliminary judicial investigation in secret and any infringement of this is an offence in accordance with the following provisions of the NCP:

> Article 226-13 NCP: 'La révélation d'une information à caractère secret par une personne qui en est dépositaire soit par état ou par profession, soit en raison d'une fonction ou d'une mission temporaire, est punie d'un an d'emprisonnement et de 100 000 f d'amende'.
>
> Article 226-14 NCP: 'L'article 226-13 n'est pas applicable dans les cas où la loi impose ou autorise la révélation du secret (...)'

Article 58 CPPP also contains sentences for violation of the duty of secrecy:

> 'Sous réserve des nécessités des enquêtes, toute communication ou toute divulgation sans l'autorisation de la personne mise en examen ou de ses ayants droit ou du signataire ou du destinataire d'un document provenant d'une perquisition à une personne non qualifiée par la loi pour en prendre connaissance est punie d'une amende de 30 000 F et d'un emprisonnement de deux ans'.

It follows that the disclosure of information without the permission of the arrested person or of persons whose premises have been searched is, in principle, not possible unless this is necessary for the investigation. On this basis the Public Prosecution Service can therefore relay information obtained from an arrest or search of premises to the authorities.

Exceptions to the duty of secrecy in the preliminary judicial investigation are therefore possible on a statutory basis and in so far as the rights of the defence are respected. Despite the strict principle of secrecy, special legislation provides for a good many exceptions to it. In the tax and customs field, for example, Articles L 82 C, L 101

LPF, R 100-1 LPF and 343bis CD revised for exceptions to Article 11 CPP. The exceptions can be classified as follows:

(a) optional and at the initiative of the Public Prosecution Service

Article 82 C LPF reads as follows:

> 'À l'occasion de toute instance devant les juridictions civiles ou criminelles, le ministère public **peut** communiquer les dossiers à l'administrations de finances';

(b) compulsory duty of notification by the Public Prosecution Service in the case of tax fraud or customs fraud

Article 101 LPF reads as follows:

> 'L'autorité judiciaire **doit** communiquer à l'administration des finances toute indication qu'elle peut recueillir, de nature à fait présumer une fraude commise en matière fiscale ou une manoeuvre quelconque ayant eu pour objet ou ayant eu pour résultat de frauder ou de compromettre un impôt, qu'il s'agisse d'une instance civile ou commerciale ou d'une information criminelle ou correctionnelle même terminée par un non-lieu'.

Art. 343bis CD reads as follows:

> 'Qu'il s'agisse d'une instance civile ou commerciale ou d'une information même terminée par un non-lieu, l'autorité judiciaire **doit** donner connaissance au service des douanes de toutes indications qu'elle peut receuiller de nature à faire présumer une fraude commise en matière douanière ou une manoeuvre quelconque ayant eu pour objet ou ayant eu pur résultat d'enfreindre les dispositions soit législatives, soit réglementaires de rattachant à l'application du Code des douanes'.

The obligatory notification therefore applies even in a case where proceedings are discontinued ('non-lieu').

(c) inspection by the tax authorities at the court registry.

Article R 100-1 LPF reads as follows:

> 'Pendant les quinze jours qui suivent la date à laquelle est rendue une décision, de quelque nature qu'elle soit, par une juridiction civile, administrative, consulaire, prud'homale ou militaire, les pièces restant déposées au greffe où elles sont à la disposition de l'administration des finances. Ce délai est réduit à dix jours en matière correctionelle'.

Clearly, these three exceptions do not cover the entire range of cases in which the judicial authorities provide information to the administrative authorities. Article 82 C LPF is limited to the provision of information in cases pending before the court and Article 101 LPF and 343bis CD are limited to fraud. Article R 100-1 LPF is limited to the provision of information after a court judgment. This is why the scope of the optional

or compulsory provision of information by the judicial authorities to the administrative authorities has remained a subject of debate. The relationship between Article 11 CPP and Article 165 CPP is unclear. Moreover, it should be noted that although Article 11 NCP provides for a duty of secrecy in respect of the investigation, this cannot be raised as a defence against the Public Prosecution Service. It follows that the Public Prosecution Service can provide information even during a criminal investigation and without any specific statutory provision being necessary. On the basis of the magic formula 'all the necessary acts' (*tous les actes nécessaires*) in Article 41 CPP (*'Le procureur de la République procède ou fait procéder à tous les actes nécessaires à la recherche et à la pursuite des infractions à la loi pénale (...)'*) the prosecutor can communicate documents from the court file to the administrative authorities. The Court of Cassation has developed a body of case law over the years on the basis of the notion of 'shared secret' (*secret partagé*) (Cass.Com. 15/11/1961; Cass.Crim. 11/3/1964; Cass. Com. 29/1/1968 and Cass. Crim. 16/3/1981). The Court of Cassation has taking a fairly flexible position, as a result of which it is possible to communicate judicial information to other authorities provided that there is a relationship between the disclosure of information and the duties of the prosecutor (as, for example, the bankruptcy procedure before the commercial court, see COM. 15/11/1961, JCP 1962, II 12636 and COM . 29/1/1968, bull.civ. IV no. 45), or of the disciplinary proceedings of the professional body of attorneys-at-law. No information may be communicated from the court file when only civil interests are in dispute. However, it is sufficient that there is a public interest in the information and that the Public Prosecution Service plays a role in this. It is not necessary that the Public Prosecution Service should also be a party to the non-judicial proceedings.

It can therefore be said that in tax and customs matters only the Public Prosecution Service can decide whether the information from the court file can be communicated to the tax authorities. This decision is taken on the grounds of expediency. The Public Prosecution Service is empowered to do this only if there is a relationship between the information and the duties of the prosecutor. Only in the case of tax fraud is the prosecutor under an obligation to communicate the data.

Between administrative authorities and from tax authorities to judicial authorities

Here too the basic principle is that the administrative authorities are under a duty of secrecy by virtue of their profession or office. Article L 103 LPF expressly provides that all those involved in determining, checking or collecting taxes are under an obligation of secrecy. Breach of this duty is an offence under Articles 226-13 and 226-14 CP. Naturally, however, there are also numerous exceptions to this rule. It is not, therefore, an absolute duty of secrecy such as that binding on a lawyer, but is a duty of secrecy pertaining to the office. The exceptions relate both to the communication between the administrative authorities (internal) and to communication with the judicial authorities (external).

In discussing the inspection powers of the tax authorities we have seen that the 'droit de communication' also extends to the public authorities. On the basis of Article L 83 LPF the authorities under public law and the public sector businesses are obliged to provide information. They may not invoke their official or professional duty of secrecy

as against the tax authorities. The same provision is made for the customs authorities in Articles 64 A and 65 CD.

In addition, the 1999 Finance Act (no. 98-1266 of 30 December 1998, JO 31 December 1998) introduced a new article L 83 A into the law of tax procedure: *'Les agents de la direction générale des impôts et de la direction générale des douanes et droits indirects peuvent se communiquer spontanément tous les renseignements et documents receuillis dans le cadre de leurs missions respectives'*. On this basis, therefore, information can be freely exchanged between the tax authorities and customs authorities. Since the Finance Act adds a new paragraph to Article L 80 J, under which the tax authorities can take part in customs inspections, the information is therefore available in any event. *'Ils peuvent se faire assister lors de ces contrôles par des agents de la direction générale des impôts'*.

Section II of Chapter III LPF, which concerns official and professional duties of secrecy, provides for a long series of exceptions to the principle. Article L 113 LPF states that the duty of secrecy does not apply between the tax authorities and other public bodies (authorities under public law), in any event in relation to information connected with the purpose of their function (Article R 113-1 LPF). The recipients of the information are, however, obliged to respect their professional duty of secrecy, failing which they will be in breach of Articles 226-13 and 226-14 CP. Articles L 115-139 A LPF regulate in detail which authorities can obtain information from the tax authorities of the customs authorities and specify the nature of the information and the purposes for which it may be obtained.

Articles L 140-147 B LPF deal specifically with the exceptions that benefit the judicial authorities (Public Prosecution Service and the investigating judge) and the courts and thus regulate the external communication with the judicial authorities. The provisions are in broad outline the same for the tax authorities and the customs authorities. The key provision is Article L 141 LPF: *'Conformément à l'article 132-22 du Code Pénal, le procureur de la République, le juge d'instruction ou le tribunal saisi peuvent obtenir de l'administration la communication des renseignements utiles de nature financière ou fiscale, sans que puisse être opposée l'obligation au secret'*.

There are also a good many possibilities for the Public Prosecution Service, the investigating judge and the senior police officers to gain access to the files held by the administrative authorities. Provisions of both the CPP and the LPF are relevant in this connection. For a complete overview, it is therefore necessary to study and compare the two sets of procedure rules.

First of all, the administrative authorities have a duty in a number of cases to report offences to the judicial authorities (*dénonciation*). Article 212 LPF et seq. provide that the officials of the administrative authorities should for this purpose draw up a procès-verbal in accordance with Article 429 CPP. At the same time, the administrative authorities can file a complaint (*plainte*) with the investigating judge and joy in the proceedings as a civil party (Article L 232 LPF). In this case, Article L 142 LPF is applicable and the officials' professional duty of secrecy is waived: *'Lorsqu'une plainte régulière a été portée par l'administration contre un redevable et qu'une information a été ouverte, les agents de l'administration sont déliés du secret professionel vis-à-vis du juge d'instruc-*

tion qui les interroge sur les faits faisant l'objet de la plainte'. The investigating judge has access to the file kept by the administrative authorities and can interview the officials. In addition, he can in any event address letters rogatory to the tax or customs authorities on the basis of Article 151 CP: *'Le juge d'instruction peut requérir par commission rogatoire tout juge de son tribunal, tout juge d'instruction ou tout officier de police judiciaire, qui en avise dans ce cas le procureur de la République, de procéder aux actes d'information qu'il estime nécessaires dans le lieu où chacun d'eux est territorialement compétent'*. Officials of the tax or customs authorities who are in receipt of a letter of request can be obliged to appear as witnesses and to give evidence on oath. This obligation can be enforced under the criminal law (Article 153 CPP). In addition, the investigating judge has wide powers under Article 81 CPP to obtain information.

We should also not forget that under Articles 81 and 151-152 CPP the investigating judge has wide powers owing to the use of such phrases as 'all information which he deems useful' and, in the context of letters rogatory, 'to collect all information that he deems necessary': *'Le juge d'instruction procède, conformément à la loi, à tous les actes d'information qu'il juge utiles à la manifestation de la vérité (...)'*. The investigating judge can delegate the collection of information (tous les actes d'information) and the letters rogatory to the senior police officers.

Finally, Article L 143 LPF provides that the ordinary criminal courts (in addition to the administrative and civil courts) can direct the tax authorities and the parties to the proceedings to produce all tax documents that can be of use in the proceedings: *'Les juridictions de l'ordre judiciaire ou de l'ordre administratif devant lesquelles a été engagé une action tendant à obtenir une condamnation pécuniaire peuvent ordonner à l'administration des impôts et aux personnes parties à l'instance, de leur communiquer, en vue de leur versement aux débats, tous les documents d'ordre fiscal dont la production est utile à la solution du litige'*.

5.2.8 Rules of evidence: means of evidence, evidential value and use of evidence

The French Code of Criminal Procedure does not contain a separate part dealing with the collection or use of evidence. In brief, the power to collect evidence is vested in the police, the Public Prosecution Service and all judicial authorities involved in the case. The rules of evidence in French criminal law are based on the following principles: evidence must be collected in a lawful manner (for example, no illegal, pro-active collection of evidence), no strict system of rules governing the means of evidence, and the judge must be inwardly convinced (Article 427 CPP). Nonetheless, the law does prescribe the value of evidence in a number of cases. For example, Articles L 213 and 214 LPF provide that the officials of the tax authorities have the power to draw up a procès-verbal within the meaning of Article 429 CPP. The procès-verbal has evidential value unless evidence to the contrary is adduced (Article L 238 LPF). As far as the customs problem is concerned, the evidential value of a procès-verbal is regulated in Articles 336 and 337 CD. If the procès-verbal is drawn up by a single official, it serves as proof until the contrary has been proved. If it has been drawn up by two officials, it serves as proof until the substantive facts recorded in it are shown to be false; however, the procès-verbal serves as proof until evidence to the contrary is adduced in the form

of confessions and statements. A procès-verbal that is drawn up after on-the-spot inspections also serves as proof until the substantive facts recorded in it are shown to be false. Moreover, Article 342 CD provides that all *délits* and *contraventions* can be proved by all means available in law. It is explicitly stated in this connection that: *'À cet effet, il pourra être valablement fait état, à titre de preuve, des renseignements, certificats, procès-verbaux et autres documents fournis ou établis par les autorités des pays étrangers'*. This provision should naturally be read in the light of the conventions on mutual administrative assistance and of Community standards in this connection. In addition, account should be taken of the fact that many customs decisions on the basis of the CCC have legal effect throughout the entire customs union and that, under Article 250 CCC, information obtained from inspections carried out by foreign officials is accorded the same evidential value as that obtained by French officials. In short, the evidence obtained from 'horizontal' administrative assistance and even from 'vertical' administrative assistance can be used in judicial proceedings. As a result of the rules governing the provision of information (see below) between the administrative and judicial authorities, there need be no problem in using the information in criminal cases.

The French system also proceeds on the assumption that the criminal law procedure and the tax procedure under administrative law are autonomous (Raimbault, RF fin. publ., 1995, nE 51, p. 113). This means, among other things, that they are subject to different rules of evidence (*Arrêt de la chambre criminelle de la Cour de Cassation, 18 November 1976: Bulletin officiel de la Direction Générale des Impôts 13 N-15-77*) and that the decision of the administrative court does not constitute res judicata (chose jugée) before the criminal court (*Arrêt de la chambre criminelle de la Cour de Cassation 25 February 1991: Revue de la Jurisprudence Fiscale 1991.1020*). Nonetheless, the criminal court accepts that decisions may be null and void if they are based on a violation of a guarantee essential to the rights of the defence, for example a violation of Article 47 of the *Livre des Procédures Fiscales* relating to the assistance of legal counsel during a verification procedure (*Arrêt de la chambre criminelle de la Cour de Cassation 4 December 1978, Venutolo: Bulletin des arrêts de la chambre criminelle de la Cour de Cassation nE 340; Arrêt de la chambre criminelle de la Cour de Cassation 23 November 1992, NE 90-86 657 Revue de la Jurisprudence Fiscale 1993.290*), on condition that these violations were challenged in good time, namely before the case was heard on the merits (*Arrêt de la chambre criminelle de la Cour de Cassation 19 September 1994, nE 93-85 641: Droit Fiscal 1995.1848, note Tixier et Lamulle*). In other respects, the nullity of the verification procedure does not affect the criminal proceedings (*Arrêt de la chambre criminelle de la Cour de Cassation one October 1984: Bulletin des arrêts de la chambre criminelle de la Cour de Cassation nE 278; Revue de la Jurisprudence Fiscale 1985.1489. 1 October 1979 Bulletin des arrêts de la chambre criminelle de la Cour de Cassation nE 264*).

The following should be observed about the relationship between the criminal proceedings and the customs proceedings. All customs infringements can be proved by all means of evidence. But the means of evidence that may be assessed by the criminal courts may not infringe the procedural rules, nor may they constitute a violation of the

rights of the defence (Cass.crim 3 April 1991) or have been obtained by fraudulent procedures (Cass.crim 18 October 1991).

5.3 TAXATION, CUSTOMS AND AGRICULTURE: TRANSNATIONAL ANTI-FRAUD MEASURES

This section deals with the legal provisions governing mutual administrative assistance and legal assistance in criminal cases under French law. As this subject is to a large extent governed by the same rules that apply to national anti-fraud measures, attention will be paid here only to the specific points not dealt with above, i.e. the points dealing solely with transnational cooperation. This also shows that an outline of transnational cooperation without information about the structure and operation of the national anti-fraud measures is pointless. Questions that arise in this connection concern the legal basis, organisational structure, powers and legal protection.

5.3.1 Horizontal transnational anti-fraud measures

Mutual administrative assistance in relation to tax, customs and agriculture

Neither statute law nor delegated law in France contains any general regulation of mutual administrative assistance in tax matters. However, Articles L 114 and L 114A LPF do provide a legal basis for the exchange of data based on conventions and Community law respectively. The legal basis is formulated as an exception to the professional duty of secrecy provided for in Articles 226-13 and 226-14 of the Criminal Procedure Code and included in Article L 103 LPF. These are authorisation provisions:

> Article L 114 LPF: 'L'administration des impôts peut échanger des renseignements avec les administrations financières des territoires d'outre-mer et autres collectivités territoriales de la République française relevant d'un régime fiscal spécifique ainsi qu'avec les États ayant conclu avec la France une convention d'assistance réciproque en matière d'impôts pour les échanges de renseignements avec l'administration française.'
>
> Article L 114 A LPF: 'Sous réserve de réciprocité, les administrations financières peuvent communiquer aux administrations des États membres de la Communauté Européenne des renseignements pour l'établissement et le recouvrement des impôts sur le revenu et sur la fortune ainsi que de la taxe sur la valeur ajoutée. Un décret en Conseil d'État précise les conditions d'application du présent article.'

These two framework provisions are elaborated in Articles R 114 A-1 to R 114 1-5. First of all, Articles R 114 A-1 and A-2 define a number of exceptions to the cooperation rule. The exchange of information is made dependent on equivalent obligations of secrecy abroad. In addition, no information may be exchanged which concerns commercial, industrial or professional secrets or which could jeopardise the security or public order of France. Nor may any information be exchanged which could not be used in France for the assessment or collection of taxes or which could not be obtained in the requesting country on the basis of its legislation or rules of proper administration.

In the customs field the CD does not even contain a separate section on international cooperation or mutual administrative assistance. Nonetheless, the CD does contain a few specific provisions. For example, Article 63ter of the CD expressly provides – in connection with the right of the customs authorities to enter business premises (*droit de visite*) – that the power can be used to grant requests in the context of mutual administrative assistance: *'Pour l'application des dispositions relatives à l'assistance mutuelle entre les autorités administratives des États membres de la Communauté européenne en matière de réglementation douanière ou agricole, les agents de douanes sont autorisés a mettre en oeuvres les dispositions du présent article pour le contrôle des opérations douanières ou agricoles réalisées dans les autres États membres de la Communauté européenne'*.

In addition, Article 65 (6-7) CD provides that:

> '6. L'administration des douanes est autorisée, sous réserve de réciprocité, à fournir aux autorités qualifiées des pays étrangers tous renseignements, certificats, procès-verbaux et autres documents susceptibles d'établir la violation des lois et règlements applicables à l'entrée ou à la sortie de leur territoire;
> 7. Pour l'application des dispositions relatives à l'assistance mutuelle entre les autorités administratives des États membres de la Communauté européenne en matière de réglementation douanière ou agricole, les agents des douanes sont autorisés à mettre en oeuvre les dispositions du présent article pour le contrôle des opérations douanières ou agricoles réalisées dans les autres États membres.'

Finally, Article 65 B CD provides that:

> 'L'administration des douanes peut mettre en oeuvre les dispositions prévues par les articles 60, 61, 63 ter and 65 afin d'assurer le respect des prescriptions spéciales applicables aux échanges de certaines marchandises communautaires avec les autres États membres de la Communauté européenne. La liste des marchandises visées à l'alinéa précédent est fixée par arrêté du ministre chargé des douanes'.

All powers are therefore available in relation to goods transport, with the exception of the right to enter and search private homes. An example is mutual administrative assistance relating to enforcement in the field of animal medicines, exotic flora and fauna, and plants and animals that are subject to veterinary control, etc. This is hardly fortunate in terms of the overall system of the legislation. In the context of two essential powers, namely the right of inspection (*droit de communication*) and the right of entry (*droit de visite*), a basis is thus created for mutual administrative assistance and at the same time for a specific function in using these powers in granting a request from abroad. A noteworthy feature of the latter is that Article 64 CD, in particular the right to enter and search private homes, does not provide for the execution of foreign requests. It should therefore be concluded that this can be effected only through legal assistance in criminal matters (international letters rogatory). It is also noteworthy that customs law contains no exceptions to the cooperation. Only the exceptions included in Community customs regulations are therefore applicable.

Department CF 3 of the tax inspection subdirectorate CF is responsible for all administrative cooperation in the context of the EU and with the OECD countries. CF3 is therefore also responsible for the cooperation in relation to intra-Community transactions and VAT (Regulation 218/92). The tax attachés abroad too come under the responsibility of CF3. Two guidelines have been made for the relevant officials at CF3: one specifically for the VAT problem and one for tax cooperation in general. In addition, CF3/DGI has produced two brochures on and VAT and tax cooperation in general, which provide further explanation of the AM (*the Guide d'Assistance Administrative Internationale* and the *Guide d'Assistance Administrative en matière de TVA*). Both the guidelines and the brochures are strictly secret; they are not a source of law and may not be communicated on any grounds whatever to third parties, even to counterpart organisations abroad that receive or provide the assistance.

The subdivision responsible for mutual administrative assistance – the AAMI – comes under the Directorate of Information and Documentation (*Direction du Renseignement et de la Documentation* – DRD) of the National Directorate of Information and Customs Investigations (*Direction Nationale du Renseignement et des Enquêtes Douanières* – DNRED). The customs attachés abroad are also dependent on the DNRED.

It is striking that the French law of tax procedure does not contain any specific rules on the use of the national powers of inspection for the purpose of executing foreign requests. It may be concluded from this that all the normal powers of inspection provided for in the LPF are available for the execution of requests.

The above discussion of the legal bases for the customs cooperation has shown that the CD expressly indicates what powers can be used to execute mutual administrative assistance. It is evident from this that only the right to enter and search private homes is excluded. The other powers of inspection, including seizure, are available.

The information obtained can be used in France in accordance with the rules contained in Article L 103 LPF et seq. This means that the secrecy rules and the exceptions to them, as described above in 5.2.7, are applicable. Neither the guidelines nor the brochures concerning tax cooperation contain any information about the division between mutual administrative assistance and legal assistance in criminal matters. Nor do they contain any interpretation of the applicable articles. Only if the requested State imposes strict conditions on the exchange of data is France required to respect this. France may also exchange the obtained information with third States, on condition that it has obtained the consent of the State that supplied the information.

Nor are there any specific rules on legal protection, for example a rule that an interested party must be informed (previously or subsequently) or has a right of objection or appeal. There are also no specific rules in France concerning the admissibility of evidence or the evidential value of information obtained from abroad.

Mention should, however, be made in this connection of Article 80 C LPF:

> 'L'intervention, auprès d'un contribuable, sur le territoire national, d'un agent d'une administration fiscale d'un pays étranger, rend nuls et de nul effet le redressement ainsi que toute poursuite fondée sur celui-ci'.

This article provides that the intervention in French territory of a foreign tax official results in the nullity of the levy and of the prosecution in France. This article was included in the LPF as a result of an initiative by Le Pen and is thus known in tax circles as the 'Le Pen article'.

Bilateral conventions

France has bilateral conventions for the avoidance of double taxation with the countries included in our survey (England and Wales Kingdom, Germany and the Netherlands). These conventions also contain provisions governing mutual administrative assistance. The Convention with Germany dates from 1959, but was supplemented in 1969 and 1989. Article 22 regulates the principle of mutual administrative assistance for the levy and collection of taxes. All data which the two States have in their possession for the purposes of the Convention and for combating tax evasion (*evasion fiscale*) or which they obtained on the basis of their internal legislation are exchanged by the responsible authorities. This means that the available inspection powers can be used for this exchange. The authorities concerned should respect the duty of secrecy and may not disclose these data to third parties. The two States may not exchange data which they would not have been able to obtain on the basis of their own tax legislation or if the exchange would involve violation of an industrial, commercial or professional secret. Exchange is also not possible if it would constitute a violation of the rules relating to business decisions or the principle of proper administration. Exchange is also excluded if this would jeopardise the general interests of the requested State.

The Convention with United Kingdom (including Northern Ireland) dates from 1968 and was supplemented in 1971, 1973, 1986 and 1987. Article 27 regulates the principle of mutual administrative assistance for the purposes of the Convention and for combating fraud or tax evasion. Here too the duty of secrecy applies, although it is expressly provided that the provision of information to courts and administrative bodies is possible for the purpose of prosecution. The exceptions are in principle comparable to the previous Convention, although reference is made here not to the 'general interests' of the State but to public policy (*ordre public*).

The Convention with the Netherlands dates from 1973. Article 28 contains the principle of mutual administrative assistance for the purpose of the Convention and for combating tax fraud. Here too the duty of secrecy applies. No specific clause has been included regarding the provision of information to judicial authorities. The exceptions are identical to those of the Convention with the United Kingdom. It follows that the Convention with the Netherlands contains no specific rules on the use of powers or on legal protection.

Only the Convention with United Kingdom contains a specific clause on the provision of information to judicial authorities.

Legal assistance in criminal matters

Until recently French criminal law was riddled with gaps concerning international criminal law. Unlike the French Civil Code, which regulates letters rogatory in Articles

733-748, the law of criminal procedure contains no adequate and watertight system for letters rogatory. Only a French statute of 1927 in connection with extradition contained a number of provisions governing international legal assistance, like the CPP. While the survey was being carried out, however, a recent bill to enhance the efficiency of the law of criminal procedure took effect.[34] As a result, a new title (title X), entitled 'Provisions relating to mutual assistance in criminal matters' (*Dispositions relatives à l'entraide judiciaire internationale*), has been added to Book IV of the CPP. Article 694 CPP provides that requests for mutual assistance in criminal matters will be executed in accordance with the provisions of the CPP concerning investigations, preliminary judicial investigations and trials. Where means of coercion can be used only after the authorisation of the French investigating judge has been obtained, such authorisation is still required in cases where the means of coercion can can be requested only by means of letters rogatory. The provisions relating to the trial apply if a public and defended hearing is necessary. It is also noteworthy that Schengen has been introduced into the French CPP. Direct requests for legal assistance on the basis of Article 53 of the Convention applying the Schengen Agreement are dealt with by the relevant principal prosecutor at the court that designates the requisite judicial authorities (Article 695). In the case of an urgent procedure the principal prosecutor is the designated person to communicate the documents to the requesting authority. He has been authorised in Article 691 to act on behalf of the Minister of Justice for this purpose. Article 696-1 also explicitly provides that the requesting judicial authorities can approach the French judicial authorities directly in cases of urgency in order to arrange for the execution of a request for assistance. Nonetheless, the French legislator has kept its options open (politically speaking) since Article 696-2 defines the exceptions:

> 'Les autorités judiciaires saisies d'une demande d'entraide judiciaire en matière pénale internationale dont elles estiment que la mise à exécution pourrait être de nature à porter atteinte à la sécurité, à l'ordre public ou à d'autres intérêts essentiels de la Nation, prennent les dispositions nécessaires pour permettre aux autorités compétentes d'apprécier à lui réserver'.

In short, if national security, public policy (*ordre public*) or other essential interests of the nation are at issue, the judicial authorities must request the responsible authorities (i.e. the political authorities) to exercise their discretion.

These new provisions are very limited and rudimentary compared with those of other countries, including the Netherlands. What is important, however, is that the classical provisions of the Code of Criminal Procedure are fully applicable and that the procedures followed in the case of requests for legal assistance do not differ. The Code of Criminal Procedure itself does not contain any reference whatever to mutual administrative assistance. However, the French Ministry of Justice is currently working on a circular dealing with this subject.

34. Loi no. 99-515 of 23 June 1999, renforçant l'efficacité de la procédure pénale, article 30, *JO*, 24 June 1999.

France is therefore by no means leading the way in developing international mutual assistance in criminal matters. Nonetheless, France is a party to the European Convention on Mutual Assistance in Criminal Matters and to the Protocol and also has a bilateral Convention with Germany to supplement the European Convention on Mutual Assistance.

5.3.2 Vertical transnational cooperation

As far as the vertical cooperation with the European Commission is concerned, we would note that neither the law of tax procedure nor the law of customs procedure contain any references to it. The subject matter is governed solely by the applicable Community law. It appeared from the interviews that the AAMI at the customs authorities in particular have good contacts with OLAF. OLAF has also held coordination meetings with, for example, the French judicial authorities. The French Ministry of Justice and the French Ministry of Foreign Affairs tend to take a disapproving view of contacts between OLAF and the national judicial authorities. So much so, indeed, that if the latter nonetheless have consultations with OLAF, they are always accompanied by a representative of the Ministry of Justice.