CLIFFORD CHANCE

PARIS WCC and TAX practices

FIRST TWO SETTLEMENTS ON TAX FRAUD IN FRANCE

Initially reserved to corruption and money laundering matters, out-of-court settlements in tax fraud cases were introduced by law n° 2018-898 of 23 October 2018 which aimed at fighting tax fraud (the "**Law on Tax Fraud**"). Two settlements taking the form of a *convention judiciaire d'intérêt public* ("**CJIP**"), the French equivalent to the *Deferred Prosecution Agreement* ("**DPA**") have since then been approved by French Courts.

Carmignac Gestion agreed to pay a EUR 30 million public interest fine on 28 June 2019 on top of the EUR 21 million in additional taxes already paid to the French tax authorities in the context of the settlement of the tax aspects. Within less than three months later, two entities of the Google group (Google France SARL and Google Ireland Ltd) agreed to pay an aggregated EUR 500 million public interest fine on 12 September 2019. Before this settlement, Google France SARL had already agreed to pay to the French tax authorities an amount of EUR 465 million in additional taxes, relating penalties and late payment interest.

It is possible that the sensitivity regarding tax fraud issues and the related offences, along with the negative reputational effect of a conviction, will incentivise companies to settle tax fraud matters via CJIP. This could make the CJIP an important tool for enforcement authorities (tax authorities, prosecutors) in tax fraud matters.

Uncertainties still remain, especially with regards to the tax authorities' approach to damages. While no damages were claimed in the Carmignac and Google CJIPs thanks to pre-existing tax settlements, the tax authorities are not technically barred from filing such claims.

Key issues

- First settlements on tax fraud with the payment of significant public interest fines (i.e. EUR 30 million and 500 million)
- These public interest fines were added to the tax reassessment and penalties
- Payment of the additional taxes and penalties to the French tax authorities refrained them from asking for damages in the context of the CJIP
- The Carmignac CJIP is silent on cooperation, self-reporting and other pre-conditions set by the recent Guidelines on CJIP published by enforcement authorities (See our Client Briefing "**First guidelines on CJIP**"). It however acknowledges the tax settlement
- The Google CJIP acknowledges Google's cooperation to the criminal enquiry, as well as its agreement to settle its tax liabilities.

FACTUAL BACKGROUND

Carmignac

The criminal side of the case was initiated by a complaint filed by the French tax authorities, following the tax audit of Carmignac Gestion, which resulted in a tax reassessment relating to the period 2010 – 2011.

The investigation concluded that Carmignac Gestion used an abusive scheme in order to reduce French taxes that would have otherwise applied, involving the interposition of Luxembourg companies benefitting from a favourable tax treatment in Luxembourg via tax rulings. The total tax savings achieved over the period 2010-2014 were assessed at EUR 11.14 million. These facts were likely to have qualified as (aggravated) tax fraud.

The description of the facts provided in the CJIP is short. This is not surprizing as most of the discussions regarding the nature of the fraud must have already taken place with the tax authorities. Carmignac Gestion's management denied any fraudulent intention, and explained that it "*pursued an economic purpose*".

Google

Following once again a complaint from the French tax authorities, the *parquet national financier* held that Google France SARL has unduly reduced its taxable basis in France, by invoicing a very low fee to Google Ireland Ltd in consideration of the services provided to that company.

The amount of French corporate income tax avoided has been assessed at EUR 189.53 million for the period 2011-2016. These actions were also likely to be qualified as aggravated tax fraud. In parallel, Google France SARL settled the tax aspect of the dispute with the French tax authorities and agreed to pay additional taxes, relating penalties and late payment interest amounting to EUR 465 million (including EUR 56.86 million of penalties).

CALCULATION OF THE FINE

In both cases, the corporate entities provided their turnovers for the purposes of assessing the maximum public interest fine, i.e. 30% of the average turnover of the last three years. The penalties paid to the tax authorities in the context of the tax settlement were deducted from the theoretical maximum fines in order to comply with the rules relating to the aggregated application of tax and criminal sanctions to the same offense.

Taking the Google CJIP as an example, the EUR 500 million public interest fine that has been applied can be broken down in three parts:

i. an amount corresponding to the taxes avoided for the period 2011-2016 (regardless of the settlement of the tax aspect of the dispute), i.e. EUR 189.53 million;

ii. an amount corresponding to the financial loss deemed to be suffered by Google France SARL as a result of not benefitting from the cash that should have been paid by Google Ireland Ltd, i.e. EUR 13.11 million; and

iii. an amount corresponding to punitive penalties, taking into account the significance of taxes avoided and the period during which the scheme has lasted, i.e. EUR 297.36 million.

Among the applied mitigating factors (and justifying the application of an EUR 500 million fine vs. the theoretical maximum amounting to EUR 8 billion for Google Ireland Ltd and EUR 103 million for Google France SARL), one may quote the fact that a settlement had been reached with the French tax authorities for the tax aspects, as well as the cooperation of the entities with the criminal investigation (this element has also been taken into account for the Carmignac case).

The two Google entities were held jointly and severally liable for the payment of the public interest fine.

Since a settlement was reached with the French tax authorities for the payment of taxes, no specific damages were asked for by the French tax authorities.

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