

## Separation of Powers

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#### **1. Relationship between the Parliament and the Tax Authorities: The influence of the tax authorities on tax legislation**

##### 1.1. Does your Government have legislative competence on tax matters?

Mostly, no. According to art. 34 of the constitution of 1958, tax is in the legislative field (“Statutes shall determine the rules concerning (...) the base, rates and methods of collection of all types of taxes”), and “Parliament shall pass statutes” (art. 24). This rule is deeply rooted in the French constitutional history as it comes from the Declaration of human and civic rights of 1789, art. 14 (“All citizens have the right to ascertain, by themselves, or through their representatives, the need for a public tax, to consent to it freely, to watch over its use, and to determine its proportion, basis, collection and duration”), which is also of constitutional value.

Nevertheless, the Government may have legislative competence as a consequence of some specific procedures. The statutes passed by the Government are then called ordinances (“ordonnances”).

The most frequent ordinances are the ones of Art. 38 of the constitution, according to which Parliament may authorize the Government, in order to implement its programme and for a limited period, to take measures by ordinance that are normally the preserve of statute law. The enabling law sets a date for the Government to table before Parliament a bill to ratify the ordinances taken according to the enabling law. If the bill is not tabled at the set date, the ordinances lapse.

Other ordinances are (were) those of Art. 16 (full powers to the president of the Republic to remedy to a crisis threatening the independence of the Nation), Art. 47 (to bring into force a Finance bill on which Parliament would have failed to reach a decision within 70 days), and Art. 92 (provisional measures during the first months of the Constitution). Art. 92 has been repealed; Art. 47 was never used; and no tax ordinance were made during the sole application of the Art. 16, in 1961 – not an article to be frequently and lightly used.

Another key point is the scope of Art. 34. “base, rates and methods of collection” is quite wide, really, but the concept of “all type of taxes” does not covers :

- fees
- social security taxes/payroll taxes (Parliament is nevertheless involved through the discussion and vote of an annual Social security finance law)

##### 1.2. Does your Government draft tax bills proposals and present them to Parliament?

Yes, the greatest part of tax legislation is Government-drafted. In reality, the right of a parliamentarian to initiate tax laws is doubly restricted.

- Art. 40 of the Constitution prohibits bills or amendments introduced by Members of Parliament that would result in a diminution of public revenue. However, this article is construed as meaning a global diminution of public revenue, enabling to compensate in the same bill or amendment a diminution with an increase of another public revenue. Formally admissible, the proposition is discussed, even if the compensation is dropped along the way.

- Art. 48 of the constitution has for a long time reserved to the Government the determination of the priority agenda of the Houses, barring actually the possibility for a parliamentary bill to be discussed and passed. The constitutional reform of the 23<sup>rd</sup> of July, 2008, has modified this article and widened the access to its priority agenda for each House (two weeks every four weeks).

1.3. In case your answer to 1.1. and 1.2. is positive:

1.3.1 Does your Government usually exercise that competence?

Ordinances : seldom, but for codification purposes

Drafts : always, or nearly. Tax dispositions having a parliamentary bill as origin are indeed very rare, sometime as a part of a special topic law. The parliament initiative is reduced to amendments of Government drafts.

1.3.2 Does your Parliament passively accept the draft bills provided by tax authorities or does it discuss them in detail and introduce changes to them?

Before a general discussion, the draft bill is examined by a parliamentary committee (for tax bills, usually the Finances committees of the *Assemblée nationale* and the *Sénat*, which issue a report for the house to which it belongs. The description of the bill by the reports is usually precise and clear, but it is mainly a description. The general impression is that *rapporteurs* are heavily dependants of the information provided by the tax authorities. Discussions either in Committee or in the House are often quite disappointing with few in-depth commentaries and some broad (too broad) positions.

Nevertheless, changes may be introduced, but they fall most of the time in two categories :

- reformulation (*amendement rédactionnel*) of badly written drafts (not so infrequent, alas)

- special-interest amendments, often very precise, very technical, if not cryptic. Not to say the Government is *dupe*, but the discussion and arbitration are mainly made outside the Houses.

Actually, with the existence in the National Assembly of an absolute majority supporting the government, a parliamentary amendment is condemned to fail if expressly opposed by the Government (with few and notables exceptions).

The situation is a bit different for local tax laws, because the majority/opposition dividing line is less clear in that case and, more important, that a large majority of parliamentarians are also in responsibility at the local level (mayor, president of *département* or *région*), with a personal experience of local taxes and its problems or consequences. In that area, and especially before the Senate, the Government may have seen its tax drafts challenged.

1.4. How does the literature in your country and your domestic Courts interpret the situation as you described it in 1.3. ?

The authors are unanimous, after having described the parliamentary competence deriving from the legality principle, to define it as “only formal” (*purement formel*). The vote of the Parliament is necessary, but it has a very weak power to modify a draft (and certainly not to initiate it) which is a product of a political and technical process exterior to the Houses. The practice is not restricted to the tax questions, but the symptoms are here more acute.

As long as the legality principle is formally respected, the domestic courts have not their say. In fact, they do abide to the legality principle by scrutinizing the parliamentary documents, when in doubt about the meaning of the law, in the search of the “legislator’s intent” (*intention du législateur*) even if they are aware (and the *Conseil d’Etat*, which also is a council of the Government in the legislative process is in a good situation to have such an awareness) of the frailty of such an intention.

## 2. The meaning of legal indeterminacy in tax matters

2.1. Is your domestic tax legislation vague, when defining the tax object, tax subject and/or tax base, leaving a large margin for discretion, or, is it, on the contrary, very detailed, avoiding indeterminate concepts?

French tax legislation is not very detailed, with regard to general definitions or usual concepts. Rarely, does the legislator feel the need to define the terms he uses. The tax legislation is maybe a bit more precise when it creates tax exemptions, to prevent loopholes, naturally, and, in some occurrences, an excessively restrictive interpretation from the tax administration.

2.2. How do you/does the literature in your country evaluate the use of both techniques in tax legislation?

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2.3. Are there independent domestic Courts obliged to control the constitutionality of tax legislation?

Yes, the Constitutional Council (*Conseil constitutionnel*), if the voted (but not yet promulgated) law is referred to it, will control the constitutionality of the tax law.

A recent constitutional reform (July 2008) has introduced the possibility of a control of constitutionality of yet-promulgated laws, through the possibility to raise an exception of unconstitutionality. Administrative supreme court (*Conseil d'Etat*) and judiciary supreme court (*Cour de cassation*) will assess the opportunity to refer the case to the Constitutional Council, which shall rule.

2.4. Is legal indeterminacy considered to be unconstitutional/ has a tax rule ever been declared unconstitutional due to legal indeterminacy?

Yes, legal indeterminacy is unconstitutional when Parliament may be considered as having not determined the rules it is supposed to, according to art. 34 of the Constitution (for tax law : base, rates and methods of collection of taxes). An act has already been ruled as unconstitutional on these grounds of negative incompetency (*incompétence négative*) (see Cons. Const., 67-31 DC, 83-162 DC...). Tax laws are regularly challenged on this ground (see Cons. const. 2005-513 DC, 2004-511 DC, 2003-488 DC) and, in one instance, have already been ruled unconstitutional (Cons. const., 98-405 DC, § 57-59).

### **3. The consequences of legal indeterminacy in tax matters**

3.1. In case of legal indeterminacy not considered to be unconstitutional, who has the final word regarding the interpretation of the rule – the tax authorities or the domestic Courts?

The final word regarding the interpretation of the rule belongs to the domestic courts. Depending on which tax is challenged, the administrative or the judiciary supreme court (see nevertheless 3.4 for the peculiar situation of Art. L. 80 A of the LPF). The situation is different if the problem is the completion of the rule. An administrative regulation completing the law, if neither illegal nor unconstitutional (and that will be appreciated by the judge) is a rule that the judge must apply.

3.2. Is there a constitutional basis for either the tax authorities or the domestic Courts having the final word on interpretation of indeterminate legal rules?

This is not really a question, as the administration is most of the time a defendant before the tax judge, who has chronologically the last word. If tax authorities would enact a special regulation to bring their point, the tax judge would still refuse to apply it as illegal (according to his interpretation of the law). The problem exists when tax authorities use the legislator to win the day (see point 4), and this may be against the principle of separation of the powers, as referred to in article 16 of the DDHC and against the principle of the independence of the judicial authority (art. 64 of the constitution).

### 3.3. Is legal indeterminacy normally fulfilled by regulations, administrative rulings and/or case law?

Administrative rulings, with the meaning of general statement of practice, have a large place in the French tax system, and are the first mean to fulfill legal indeterminacy. Mostly, they are general instructions of the tax administration towards its agents (*directives, instructions*), but they can also take the form of government's answers to a parliamentary question, a very useful way for the legal practice to obtain an administrative statement.

Individual statement of practice, even if promoted by the tax authorities, have not really set in the french practice, but in some matters.

Case law is also of great importance to limit legal indeterminacy. The administrative law being mainly case law, the administrative courts of justice have a wide experience of building a legal system on case law, and most of the founding concepts of tax law are now based on case law.

### 3.4. Are administrative rulings binding to the taxpayer and/or the Courts?

They are not binding to the taxpayer, providing he is ready to ascertain his rights in court. They are only, for him, an interpretation of the law, but the judge may decide that this interpretation is against the law.

The situation is different for the administration.

According to article L. 80 A of LPF (general statement of practice) or art. L 80 B (individual statement of practice), the tax authorities cannot pursue a tax adjustment if the taxpayer has applied the interpretation of the law that the administration had provided, either through a published general statement of practice or through a written individual ruling. Those articles have a legal value and they are binding on the courts, even if the interpretation of the administration happens to be illegal or even unconstitutional.

## **4. Relationship between the Tax Administration and the Domestic Tax Courts:**

### 4.1. Do your domestic Courts control application of tax law by your Tax Administration?

Yes, through case law : taxpayers may challenge the act of taxation. They may also challenge a regulation as being illegal, if they have an interest to act (to be a taxpayer concerned by the regulation or to belong to the same circle of interest that such a taxpayer) and if the regulation is deemed to be imperative (what frequently are not mere statements of practice).

### 4.2. Do your domestic Courts, in their case law, take into account rulings and binding information emerging from your Tax Administration?

No, in theory : they are only interpretations of the rule and are considered as not having a normative value (a peculiar situation being when the court, in order to apply Art. L. 80 A or B LPF, is bound to take into account the administrative statement to verify if the taxpayer has effectively followed the interpretation of the law given by the administration). In reality, judges keep an eye on the administrative statements of practice if only to know if the case in point is a general practice or not.

### 4.3. Does your Tax Administration take into account the domestic courts case law and/or the ECJ case law when applying the law?

Yes, most of the time (with a publication of the case law in the internal documents of the administration, a convenient way also for the administration to limit the scope that the application of the new case law will receive). However, in some cases, where financial stakes are high, the tax administration may choose to ignore case law, waiting either a reversal by a higher court, or a modification of the legislation by Parliament.

4.4. Is there a principle of reciprocal observation of the interpretation of tax law by the Tax Administration and domestic Courts?

No.

4.5. Is your Tax Administration legally bound to the decisions of supreme courts and/or the ECJ?

Yes. The refusal to apply the decision would make the State liable to penalties. A retroactive modification of the legislation to modify the outcome would be ruled as unconstitutional as a violation of the authority of a decided case (*atteinte à l'autorité de la chose jugée*) (see Cons. const. 86-223 DC).

4.6. Does your Tax Administration circumvent your domestic courts' case law?

Yes, sometimes, either by modifying the law before that a definitive decision is given in the case by the supreme court (i.e., after the decision by the court of appeal) or by modifying the law for the future to counter a specific case-law (ex : the corrected finance law for 2004 (31 december 2004) reintroduced the principle of the intangibility of the first non-barred opening balance-sheet, principle which the Conseil d'Etat had just given up (CE, 7 july 2004, n° 230169, min. c/ SARL. Ghesquière Équipement)).

## **5. Relationship between different legal sources (legal pluralism):**

5.1. How do your Parliament, Tax Administration and Courts react before the different legal sources in tax matters (tax treaties and other treaties, EC Treaty, secondary law and soft law)?

Parliament does not seem to anticipate tax evolutions at an international level. It ratifies conventions, transposes directives, and is very little concerned by soft-law. The situation is very different with the Tax Administration, which has an old tradition of international cooperation and tax conventions. The courts have been long very cautious with conventional law, notably EU law, but for 20 years, or so, they have accepted international law, mainly EC treaty and ECHR, as a full legal source, meaning that they have accepted that it always prevail over the law, and according to the interpretation of an international judge (ECJ, ECHR).

5.2. How is the hierarchy of different tax legal sources recognized by the constitution and the different domestic powers (Parliament, Tax Administration and Courts)?

According to Art. 55 of the Constitution, treaties or agreements shall prevail over Acts of Parliament. But domestic powers are compelled to consider that constitution prevail over treaties or agreements. Some problems may consequently arise in the event of a conflict between a international norm and a constitutional norm (the subtlety is that the participation of the Republic is also a constitutional principle (art. 88-1), so the conflict will be resolved in favour of the European norm, but for the hypothesis of a violation of the constitutional identity of France (!) (Cons. const. 2006-540 DC)).

5.3. Does the taxpayer have access to different legal remedies that assure him/her effective protection of his/her rights granted by tax treaties, EC law and domestic law, or are those legal remedies in fact limited to protection of rights granted by domestic law?

The French reality is that a taxpayer is better protected by international law than by domestic law, i.e. constitution. The reason is that the national courts, until now (the introduction in the constitution of the possibility of a constitutional challenge of an act of parliament after its publication may change the situation), have refused to control the constitutionality of an act of parliament, depriving the taxpayer of the possibility to ascertain his constitutional rights. On the contrary, before the domestic courts, the international law prevails over the act of parliament. Taxpayers have therefore

widely used EC treaties or European Convention on Human Rights (to which they have a direct access) to protect their rights. Even if the taxpayer contest a regulation (whose constitutionality may be controlled by the administrative court), the court will first verify if the rights put forward exist or not in EC law (the solution is probably valid for the whole of international law), and only in the hypothesis of a lack of protection will prefer a constitutional remedy (CE, 8 février 2007, Société Arcelor Atlantique)

## II

Please answer the following questionnaire, which aims at confirming your answers in I

### 1. Relationship between the Parliament and the Tax Authorities: The influence of the tax authorities on tax legislation

1.1. Does your Parliament control tax authorities in an efficient way? yes – **no**

1.2. Do tax authorities influence tax legislation to a major degree? **yes** – no

1.3. Does your Parliament

- a) usually accept the bills provided by tax authorities? **yes** - no
- b) refuse the bills provided by tax authorities? **never** - sometimes - often
- c) improve the bills provided by tax authorities? never - **sometimes** - often

1.4. Is your Parliament able to discuss the bills thoroughly? **yes** - no

1.5. Is there sufficient knowledge of tax law in Parliament? yes - **no**

1.6. Are tax rules often so vague, that tax authorities have to fill the gaps themselves by administrative regulations? never - **sometimes** - often

1.7. Have tax authorities the competence to typify and fill out the legal gaps without control by the Parliament? never - **sometimes** - often

### 2. Relationship between the Parliament and the Domestic Tax Courts

2.1. Are there independent (Tax) Courts in your country entitled to control legislation? **yes**

2.2. If “yes”, do they control tax legislation: 0 **ex ante** or 0 ex post (maybe soon) ?

2.3. Are Courts competent to clarify whether a specific written tax rule is compatible with constitutional standards? yes - **no**

2.4. If a high Court is convinced that a specific tax law violates constitutional standards, is the court in this case allowed to ignore the law? yes - **no**

### 3. Relationship between the Tax Administration and the Domestic Tax Courts

3. 1. Are there independent (Tax) Courts in your country, obliged to control your Tax Administration? **yes**

3.2. Are your domestic Courts bound to administrative regulations/orders/rulings, which are issued by tax authorities? **yes – no (save art. L80 A and B LPF)**

If "no", do the courts follow them in fact? **never - sometimes – often - very often**

3.3. Are first instance Court decisions on a tax case, normally accepted by the Tax Administration (i.e. do they not try to appeal against the decision)? **never - sometimes - often - very often**

Please report statistics if available!

3.4. Is a final judicial decision on a single tax case, followed by the Tax Administration not only in this case but also in all other similar cases? **never - sometimes - often - very often**

3.5. How does the Tax Administration react when it is convinced that the final judicial decision is wrong or not "acceptable" because, e.g., it is too expensive for the public?

a) Does it accept the (from their point of view) wrong decision? **never - sometimes - often - very often**

b) Does it try in another similar case to convince the Court to decide in a different way?  
**never - sometimes - often - very often**

c) Does it try to influence the Parliament to change the law? **never - sometimes - often - very often**

d) Does it make sure that the Internal Revenue Service will not follow this decision in similar cases?  
**never - sometimes - often - very often**

e) Does it try "to hide" such a decision, e.g., not publishing the decision with the result that the Internal Revenue Service does not know this decision? **never - sometimes - often - very often**

If possible, please add statistics to the answers!