

## New Penalty System for Tax Offenses Takes Effect

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# COUNTRY DIGEST

## New Penalty System for Tax Offenses Takes Effect

An act<sup>1</sup> that introduces an “*una via*” system for tax offenses and increases criminal penalties in tax matters was published in Belgium’s official gazette on October 22.

### *Una Via*

In 2009 the Belgian Parliament decided to investigate why tax evasion cases worth billions of euros in taxes petered out after protracted court proceedings. The parliamentary commission in charge of investigating major tax evasion cases concluded that the way the tax authorities and the public prosecutor’s office were working together to combat tax fraud was outdated. The commission made a number of recommendations to improve the fight against tax fraud. (For prior coverage, see *Doc 2009-14250* or *2009 WTD 120-5*.)

One of the findings was that many tax offenses committed “with fraudulent intent or with the intention to cause detriment” automatically lead to criminal prosecution. In such cases, both the tax authorities and the public prosecutor’s office have competence to prosecute: The tax authorities have their administrative procedure and administrative penalties, while at the same time, the public prosecutor can start a criminal procedure leading to criminal penalties. However, the public prosecutor’s office often has to put off its investigation until years later, after the administrative procedure is finalized. That dual system is completely inefficient, the commission said.

It recommended an *una via* system under which a committee of magistrates, police officers, and tax officials could decide at a much earlier stage how a tax fraud case would be handled — through the administrative procedure or the criminal procedure. Smaller tax fraud cases would be dealt with exclusively by the tax administration, while large tax fraud cases would be transferred to the public prosecutor’s office.

<sup>1</sup>Act of September 20, 2012.

The first proposal to introduce the *una via* system was proposed by members of Parliament (rather than by the government) but was shot down by the Council of State (Belgium’s supreme administrative court). The Court said the establishment of a mixed commission with magistrates and tax officials would have infringed the principle of separation of powers.

The system that was approved starts with the possibility of a consultation between the tax authorities and the public prosecutor’s office, at the initiative of either of them, in specific cases of tax fraud. During the consultation, the public prosecutor’s office and the tax authorities will decide whether the administrative or criminal route will be taken, and the prosecutor’s office can start criminal prosecution in tax fraud cases. The new law amended the Income Tax Code (ITC) to allow tax officers to give the public prosecutor’s office assistance.

However, if the public prosecutor’s office starts a criminal prosecution, the tax administration should abstain from continuing its own investigation. This *una via* principle is not clear in the text of the new law because the law does not impose the principle for the prosecution procedure, but only for the sanction. In other words, an administrative sanction cannot be imposed along with a criminal sanction in the same case.

The new law amended article 444 of the ITC and article 72 of the VAT Code to suspend a taxpayer’s liability for administrative sanctions in cases pursued by the public prosecutor’s office. If the prosecutor’s office decides to drop the charges in a case, the tax authorities can restore the suspended administrative sanctions.

If charges are brought before the criminal courts and the taxpayer is found not guilty of tax fraud, he will escape all sanctions, both criminal and administrative.

### The Right to Silence

The decision to transfer tax fraud cases to the public prosecutor’s office raises an interesting question for taxpayers.

During the administrative procedure, a taxpayer is required to cooperate with the tax authorities; he must

hand over all documents and records that are necessary to determine the amount of his taxable income and provide all information that is required to examine his fiscal situation. Failure to cooperate gives the tax authorities the right to issue an assessment *ex officio*, putting the burden of proof onto the taxpayer.

In a criminal procedure, the taxpayer has the right to remain silent and not to incriminate himself. It is generally accepted that this is implied in the right to a fair trial as guaranteed by articles 6 of the European Convention on Human Rights (ECHR) and 14 of the International Covenant on Civil and Political Rights (ICCPR).

So when can a taxpayer invoke his right to remain silent and stop cooperating with the tax authorities without risking any penalty?

A September 19 decision of the Liège Court of Appeal may give an indication. The court had to deal with the case of a taxpayer who had been questioned by the tax authorities about his income from undeclared accounts in Luxembourg bank KB Lux. The tax authorities had informed him that they suspected he had been committing tax evasion, and he invoked his right to remain silent.

The court confirmed that articles 6 ECHR and 14 ICCPR apply if a tax procedure can lead to a sanction resulting from a criminal procedure. The court defined a criminal procedure as an official notification by the competent authorities informing the taxpayer that he is accused of a criminal offense. If the infringement alleged by the tax authorities is proved, the taxpayer cannot invoke the right to remain silent, and if he refuses to cooperate, the tax authorities can impose administrative sanctions.

In the case decided by the Liège Court of Appeal, the taxpayer had been rightly accused of tax evasion that could lead to criminal prosecution or administra-

tive sanctions of a criminal nature. The court pointed out that any infringement of the ITC that has been committed “with fraudulent intent or with the intention to cause detriment” can lead to criminal prosecution, so any information the taxpayer provides about additional income from undeclared sources may lead to a criminal prosecution.

The court referred to the decision of the European Court of Human Rights in *Chambaz v. Switzerland* (April 5, 2012), in which the court held that the application of article 6 ECHR is not limited to cases in which a sanction for tax evasion is effectively imposed; it also applies when it cannot be proved in a tax procedure that such a sanction cannot be imposed (paragraph 40).

The Liège Court of Appeal concluded that the taxpayer’s refusal to provide the information requested was within his right to remain silent, as guaranteed by the provisions of international treaties that take precedence over domestic law, and in particular over article 316 ITC (about the right to ask for information). The taxpayer cannot be penalized by the tax authorities for exercising the right not to incriminate himself.

### Penalties

The maximum criminal penalty in a tax fraud case has been increased drastically, with a maximum of €500,000. This penalty applies to income tax, corporate income tax, VAT, registration duties, and various (indirect) taxes and levies, such as the stock exchange tax and the insurance premium tax. The same maximum is set for the refusal to appear or to testify as a witness in a tax case or for disregarding a prohibition against acting as a tax adviser or accountant. ◆

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