

## The Independence of Tax Judges in France

### – Summary –

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France, a civil law country, has a judicial system which presents the originality to be dual. On the one hand, the judiciary order, which deals with private litigation, is composed of judiciary judges and submitted to the authority of the *Cour de cassation*. On the other hand, the administrative order hears all cases related to administrative decisions, upon which the Council of State (*Conseil d'Etat*) has the last say.

It is that second order which, for the main part, handles tax litigation. Cases related to income tax, corporate tax or value added tax are exclusively referred to that order. And if the disputes related to a number of other taxes, such as excise taxes, wealth tax or transfer duties, are submitted to the judiciary order, the latter interferes only marginally as regards the number of decisions taken as well as their impact.

It shall therefore only be dealt hereby with the independence of tax judges belonging to the administrative order. These judges can be appointed to three types of courts: to one of the forty-two administrative courts which decide in first instance (*tribunaux administratifs*), to one of the eight administrative courts of appeal (*cours administratives d'appel*) which give a second ruling on cases, or to the Council of State which acts as the supreme administrative court.

For those three degrees of courts, the question of the independence of tax judges arises, as regards a great number of points, in the same terms. But for the judges who are appointed to the Council of State, and who form a civil service corps separate from the one made of other administrative judges, it has some specificities which result from the particular ties that body has with the executive. Those specificities will be underlined each time it shall be necessary.

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For judges in general, and for tax judges in particular, the question of independence refers first to the relations kept with the Government: it is a matter of knowing how the separation of powers is ensured in effect.

The principle of an independent administrative justice is not expressly written in the French law. But in 1987, the French constitutional court (*Conseil constitutionnel*) decided this principle had a constitutional value. And since 2008, the Council of State has been mentioned in the Constitution as the supreme administrative court.

In practice, the requirement of independence of administrative judges has been achieved through the rules relating to their recruitment, career and promotion. First of all, administrative judges are mainly recruited through competitive examinations. That recruitment method allows to select individuals who, *a priori*, do not have any special link with the executive. However, within the Council of State, a number of recruitments are left up to the President of the Republic. For judges at the start of their career, these assignments left to the free choice of the executive account for one quarter of the workforce, and for judges entering their mid-career, for one third.

All judges enjoy security of tenure: they cannot be removed before retirement. The rule is written for judges appointed to administrative courts and administrative courts of appeal; it is customary for the members of the Council of State. None of them can be assigned to a new position without their prior express consent, even though the intended transfer should be considered as a promotion.

Within the Council of State, the Vice-President, the President of the Judicial Section and his deputies are assigned by the President of the Republic.

But the strong culture of independence, in practice, precludes any possibility to exert pressure on individual judges in the processing of cases. If the Government may be led to express an opinion on a case, it is because it is party to it.

In tax matters, it is almost always the case, so that the question of judicial independence has to be related, more generally, to that of independence from the parties to the proceedings.

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The judge has no contact with the parties to the cases that are referred to him otherwise than through the written submissions that are addressed to him.

On each case, the judge must ask himself whether he might be placed in a potential conflict of interest situation. That requirement is particularly critical within the Council of State. Indeed, some of the judges sitting there in the Judicial Section may also belong to one of the five Administrative Advice Sections which assist the

Government in preparing and writing his laws and decrees. Furthermore, the members of the Council of State are authorized to carry out legal consultations for the benefit of public persons. And a great number of them sit in some administrative committees which may be led to deliver opinions on cases, for example when fraud or abuse of rights is at stake.

To ensure the independence and the impartiality of the formations to which cases are referred, the members of the Council of State have been recently submitted to a public declaration of interests, on which they have to mention the name of the public persons they have worked for or have been working for, as well as the type of activity carried out. This declaration is not made public. Besides, judges must withdraw when they are exposed to a potential risk of conflict of interest or when they have been led to deal with the case at bar in another frame.

In the French conception, the requirement of judicial independence from the parties shall not preclude that contacts may occur, on a given case, when doctrinal or theoretical issues are at stake, with some lawyers, some professors or some other qualified personalities.

The rules of administrative procedure have recently expressly allowed the judge to do so with the *amicus curiae* procedure. The consultation made on this basis is then brought into the proceedings to be debated. But some informal contacts may also occur occasionally without the *amicus curiae* procedure to be implemented.

It is particularly true in tax matters insofar as French tax judges are interested in sharing with legal practitioners their practical experience of tax litigation. As a counterpart, those practitioners appreciate to get tax case law explained to them by judges. Those contacts are also consistent with the inquisitorial system that has come to prevail in France, in which the judge, who is in charge of the investigation of the case, can search by himself, in addition to the elements that the parties bring to him, some evidence with the view to form his own opinion.