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COMPARATIVE TAX LAW FOR THE INTERNATIONAL PRACTITIONER

Host Country Taxation of Tax-Motivated Transactions: The Economic Substance Doctrine

FACTS

The question presented for consideration is how does the Host Country deal with a transaction that is motivated almost exclusively by tax considerations, but that, in economic terms (leaving aside anticipated tax benefits), leaves the taxpayer in substantially the same position as it was prior to the transaction? There are many fact patterns that would fit this description (limited only by the taxpayer's ingenuity), and such fact patterns would vary from country to country. However, they would have in common the manipulation of the letter (or form) of the law to the detriment of its substantive intent.

QUESTIONS

A. Will the Host Country tax authorities respect the form of the transaction, which, on its face, satisfies each element of existing Host Country law, despite its lack of economic substance?

B. What are the pre-requisites for a transaction to be considered immune from challenge under Host Country's "economic substance," "anti-abuse," "abuse of law" or similar rules or doctrines? For example:

1. Is a subjective business purpose/motivation (as contrasted with a tax motivation) necessary?
2. Must there be a "substantive economic effect" as a result of implementing the plan?
3. Must there be a realistic expectation of pre-tax profit?
4. Are there other factors that Host Country would take into account in evaluating the substance of this transaction?

C. What is the tax result of a determination that a transaction lacks economic substance?

1. Are all losses (and gains) disregarded as if the transaction never occurred?
2. May some aspects of the transaction that produce real gains or losses be given effect?

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Contents

THE TAX MANAGEMENT INTERNATIONAL FORUM is designed to present a comparative study of typical internationa tax law problems by FORUM members who are distinguished practitioners in major industrial countries. Their scholarly discussions focus on the operational questions posed by a fact pattern under the statutory and decisional laws of their respective FORUM country, with practical recommendations whenever appropriate.

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THE FORUM

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Host Country FRANCE

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I. Introduction

The French tax treatment of a transaction depends primarily on its legal analysis. Unlike in some countries, the economic analysis of a transaction is not the prime factor in determining how the transaction should be treated for tax purposes, when it is clear how the transaction is to be classified from a legal point of view.

However, Article L 64 of the French Tax Procedure Code (LPF), which is generally referred to as the "abuse of law" (AOL) rule, allows the French tax administration (FTA) to challenge the tax treatment of a transaction when the real nature of that transaction has been disguised or the transaction has been entered into for the sole purpose of avoiding tax.

This paper first describes how and when the AOL rule can be implemented (see II., below). The paper then goes on to describe the situations in which taxpayers can avoid the application of the AOL rule (see III., below). Finally, it indicates what are the consequences of the AOL procedure when it is implemented (see IV., below).

II. Will the French tax authorities respect the form of a transaction that, on its face, satisfies each element of existing French law, despite its lack of economic substance?

The AOL rules have evolved over time (see A, below). Recourse to the AOL rule by the French tax authorities is subject to a specific procedure, which is governed by the law and aims to protect taxpayers against extensive use of the rule (see B, below).

A. Evolution and current status of the AOL rules in France

1. Evolution until 2006: from simulation to fraud by intent

The notion of "fraud by intent" is a general concept of French law that was first enunciated in a civil law context in the *Princesse de Beaufremont* case of 1878, which concerned the attempt of the princess to obtain a divorce by changing French nationality and getting divorced in another country, when divorce was not yet allowed in France.

In the tax area, an 1867 civil court decision,[1] which concerned registration duties, and several administrative court decisions between 1930 and 1935 already allowed for the possibility of reclassifying transactions in the case of simulation, but the AOL procedure was not officially enacted as a specific rule until 1925 in relation to registration duties and 1941 in relation to income tax, the rule being unified and codified in Article L 64 of the LPF.[2] Until 2008, this Article provided that:

"acts are non-enforceable against the French tax administration (below referred to as the FTA) when they conceal the true nature of a contract or agreement through clauses that:

- Result in lower registration duties or less duty on property transfers; or
- Disguise the realisation or transfer of income or profit; or
- Provide partial or full shelter from turnover taxes on operations carried out under a contract or agreement.

The FTA then has the right to rely on the true nature of the transaction."

Initially, the application of the AOL procedure was mainly limited to pure simulation, which was considered by some commentators[3] to be a concept distinct from that of *"fraus legis."* Pursuant to that approach, the administrative courts admitted the AOL procedure in cases dealing with the three traditional forms of civil "simulation:"

1. A purely fictitious act: here, the simulation is intended to lend credence to a legal operation that does not actually exist (for example, a false invoice or a false lease[4]);
2. A disguised act: in this situation, the nature or the content of the ostensible act is contradicted by a secret agreement (for example, a donation of shares disguised as a sale to avoid registration duties or a sale of assets disguised as a sale of shares); and
3. The interposition of persons: this last form of simulation features an apparent party to the act (the "figurehead") and a hidden beneficial owner (or debtor).[5]

Under this initial approach, the question that had to be determined was whether the legal position was masking a different economic reality.[6]

In 1981, the scope of the AOL procedure, as defined by Article L64 of the LPF, was extended by case law in a landmark decision[7] that introduced the "purpose test." In this decision, the Administrative Supreme Court ruled that, as well as in cases involving fictitious acts, the FTA may implement the AOL procedure if it can prove that the transactions concerned have no other purpose than avoiding or reducing the tax burden to which the taxpayer would normally have been subject in view of its situation and activities. Subsequent decisions have confirmed that, under this purpose test, the AOL procedure can be implemented to counter non-fictitious acts that are exclusively tax-driven.

With this decision, the Supreme Administrative Court introduced a new interpretation of the AOL close to the concept of *"fraus legis"* or "fraud by intent," thus potentially considerably extending the scope of the procedure. However, since 1981 the Administrative Supreme Court has taken a restrictive approach to the purpose test and confirmed, in many cases, that the AOL procedure is not intended to prevent taxpayers from choosing the most favourable legal framework, but only to punish tax evasion.[8] Besides, addressing the validity of the purpose test in connection with favourable tax provisions, the High Court has refined its approach by ruling that, in these situations, there is an abuse of law only if the taxpayer applies the favourable tax provisions in such circumstances that the objective that the legislator had assigned to them is not fulfilled.[9]

2. 2006: finalised definition of AOL

In the 2006 *Janfin* case,[10] the French High court had to decide whether the wording of Article L64 of the LPF (see II.A.1., above) allowed it to be applied to a transaction involving the use of a tax credit (*avoir fiscal*). This gave rise to a question of interpretation in relation to Article L64, the wording of which (again, see II.A.1., above) did not expressly authorise its application in the context of matters relating to the computation of corporate tax, but only in the context of matters relating to the computation of the taxable basis for corporate tax purposes (so excluding situations involving the use of tax credits). The High Court decided that Article L 64 could not be read broadly and, therefore, could not be applied to a situation that was not within the scope of the provision. However, the Court indicated that the general *"fraus legis"* principle could also apply in the tax area, in circumstances that were outside the scope of the narrower definition of Article L64.

In addition, this decision was important because it saw the Court introducing a new "subjective" criterion in the definition of fraud to the law, when it referred to the intention of the legislator in creating the tax rule that the taxpayer is seeking to apply, in order to align the French approach in this context with the criteria adopted in European case law (see below). The new criterion did not dramatically change the overall approach (in fact, the purpose of a "derogatory tax regime" (i.e., a tax regime that differs from the normal tax regime) had already been taken into consideration by the High Court in the 1981 case referred to above), but, as will be seen in the next section, it has been interpreted in a way favourable to taxpayers (see the comments on *Axa* in II.A.3., below).

Even though they were subject to different procedures at that time, as the High Court later confirmed,[11] the definition of AOL and the wider concept of fraud to the law were identical *Janfin*, however, gave rise to a procedural problem because there were situations in which the concept of fraud to the law could be applied, but not the narrower AOL tax procedure, that were not subject to the specific AOL procedure, which involves specific penalties and guarantees (as, described in II.B., below). The tax law was therefore modified so that the new refined and EU-compatible AOL definition would apply to all situations in which a tax issue was involved.

Article L64 of the LPF now provides that: *"In order to restore their true character, the Administration has the right to ignore, as not binding, acts that constitute an abuse of law, either because these acts are fictitious, or because, by seeking the benefit of a literal application of the law or decisions contrary to the objectives pursued by their author, they cannot have been inspired by any other motivation than avoiding or reducing the tax burden that the person would have normally borne in view of his/her situation or his/her real activities."*[12]

3. Important cases on AOL

Since 2004, there have been a number of court decisions that have focused on the application of AOL rules, particularly in the financial area. Although there was some fear in 2006 and 2007 that the AOL could become a weapon to which the FTA might frequently and easily resort, it appears that the judiciary wishes to restrict the scope of its application to situations in which there is evident fraud. Some of the important AOL cases of the last 15 years can be summarised as follows:

- *Gras Savoye* and *SAMO*[13] concerned "Turbo funds," i.e., mutual funds in which investments were made shortly before coupon date so as to benefit from favorable official FTA guidelines that allowed tax credits available at year end on income received by such fund to be attributed in the same amount to all investors existing on the coupon payment date as if they owned shares in the funds at year end. Such funds were used to multiply artificially the tax credits available to new entrants in the funds. The High Court decided that the AOL could not be applied on the grounds that applying a favorable guideline can never be abusive if the taxpayer respects the wording of the guideline. This was regarded by some (or, rather, many) commentators as a very tolerant viewpoint, implying that the AOL had an extremely narrow scope of application, but later case law has shown that the High Court is not so tolerant in all situations.

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- *Pléiade*,[14] decided in 2004, and *Sagal*,[15] decided in 2005, concerned situations in which various companies jointly invested in an exempt Luxembourg holding company, the purpose of which was to convert taxable interest into non-taxable dividends. The Court agreed with the FTA that the structure, the purpose of which was to benefit from the participation exemption while at the same time avoiding the application of the French controlled foreign company (CFC) rules, was abusive.
- *Janfin*, which was decided in 2006 and is referred to above, concerned dividend stripping transactions involving dividend payments on shares of dormant companies effected within a group of affiliated companies. Each dividend payment had been tailored in order to match exactly the amount of the subsequent capital loss on the sale of shares. Furthermore, the transfers of the portfolio allowed the initial buyer to offset its corporate income tax liability generated by previous capital gains. The High Court decided that the AOL rule as worded at that time did not apply to tax credits and that, although the general *"fraus legis"* concept could have been applied, it was not applicable in practice, because the FTA had failed to invoke it.
- *Bank of Scotland*, decided in 2006,[16] concerned the sale of a usufruct with respect to French shares by a US corporation to a UK bank, which gave rise to the refund of a French tax credit and a lower rate of withholding tax on dividends under the France-U.K. tax treaty than under the France-U.S. tax treaty. The High Court decided that the FTA could characterise the sale agreement in accordance with its true nature and refuse the benefit of the France-United Kingdom tax treaty without having to follow the AOL procedure, by relying on the more general fraud to the law principle applicable to treaty shopping, which was not at that stage included in the scope of Article L 64 of the LPF as regards matters relating to tax credits.
- In *Axa*, which again concerned transactions in stocks dividends on which attracted a tax credit, the Court gave an example of how it will apply the new subjective test that looks to the "intention" of the legislator and denied the application of the AOL. *Axa* is discussed further in III.C., below.
- Cases concerning registration duties are heard by the Civil High Court (*Cour de Cassation*) rather than the Administrative High Court (*Conseil d'Etat*). Historically, the civil courts have taken a restrictive approach when addressing AOL issues, although some 2006 and 2007 decisions seemed to signal a significant move in the direction of a broader approach in favor of the FTA.[17] Hopefully, the changes in the law will help to align the positions of the two High Courts.

B. The compulsory AOL procedure

If the FTA is able to establish that there is AOL, the taxpayer concerned suffers very significant financial consequences (see IV., below). This is why the law provides strict procedural guarantees to taxpayers, although the procedure can work against the taxpayer. The main features of the procedure are as follows:

- Implementation of the procedure by a tax inspector requires control and formal approval of the reassessment notice by the local head of the FTA (*inspecteur divisionnaire*).
- The burden of the proof lies with the FTA, which must prove that the prerequisites for the AOL procedure have been satisfied. In practice, however, the burden of proof is shared with the taxpayer in so far as the taxpayer must establish that there were reasons other than tax reasons for entering into the transaction concerned.
- In the case of a disagreement as regards the proposed reassessment, either the taxpayer or the FTA can submit the case to a dedicated national committee. This committee comprises representatives of the administration, a law professor, a lawyer, a notary and an accountant. Although its opinions are not binding on the parties, an opinion of the committee ruling against the taxpayer transfers the burden of proof to the taxpayer for the rest of the procedure before the courts. The opinions issued by the committee are published annually.

If the FTA does not observe the above procedure, because either it fails to obtain the appropriate certificate from the local head of the FTA, or it fails to prompt the taxpayer to submit the case to the committee, the AOL procedure is regarded as null and void. This can occur when the FTA attempts to recharacterise the legal nature of a transaction, but fails to invoke Article L 64 of the LPF (in what are known as "hidden AOL" situations) and therefore does not follow the procedure. However, the administration does not have to apply the AOL procedure when the point at issue is the existence of a transaction for which the taxpayer has provided no justification, or where a situation is incorrectly characterised by the taxpayer.

It is clear, however, that there is a grey area between those situations in which the AOL evidently applies and those in which it does not. (When a tax inspector recharacterises a transaction, is it because its original characterisation was erroneous or because that characterisation was concealing a different transaction to avoid tax?) It can, thus, be tempting for taxpayers to argue that the FTA is implicitly invoking the AOL in circumstances in which it fails to follow the procedure.

III. What are the pre-requisites for a transaction to be considered immune from challenge under France's "economic substance," "anti-abuse," "abuse of law" or similar rules or doctrines?

The following sections look at the factors that may have to be considered when challenging the AOL rule:

A. The existence of tax fraud under "local" rules

Attempting to reduce one's tax liability is not, of itself, fraud. Taxpayers with a choice of various ways in which to achieve their legal or operational objectives are not obliged to select the most tax-expensive way.[18] The European Court of Justice (ECJ) has also confirmed that minimising one's tax burden does not, of itself, constitute fraud (see *Cadbury Schweppes*, of which more below).

The notion of fraud presupposes that there has been effective evasion with respect to the tax that the taxpayer would normally have been subject to in view of its situation and activities. This must necessarily be the case with respect to the tax paid in the "local state," i.e., here, France. Again this has been confirmed by the ECJ in a number of cases, most recently in *Cadbury Schweppes*.[19]

According to *Cadbury Schweppes*, the AOL and other anti-avoidance rules (for example, CFC rules) should not apply in an EU context if the taxpayer has created a structure that gives rise to a lower tax liability but the tax concerned was not avoided in the country applying the anti-avoidance rule (which, for example, raises the question of the application of CFC rules where shares are owned indirectly, through a foreign holding company that is not itself a CFC. The question can also be raised in a non-EU context, depending on whether anti-avoidance rules should be read restrictively or whether they can also be regarded as applying in situations in which no effective evasion in the country applying them has occurred).

The 2007 French *Pharmacie de Chalonges*[20] decision also confirmed that the AOL cannot apply when the transaction concerned, though entered into only for tax purposes, had no effective tax consequences, in view of the fact that it "corrected" the effect of another transaction, thus leaving the taxpayer with the same tax liability as it would have had originally.

B. The existence of reasons other than tax reasons

The AOL will not apply when the taxpayer can show that there are reasons for entering into a transaction other than tax reasons. Do the tax reasons have to be "exclusive" or "essential" if the AOL is to apply? In other words, is it sufficient to prevent the AOL from applying that there are other reasons than tax reasons, or is the court required to consider and compare the relative importance of the tax and non-tax reasons? This remains an open debate — a number of ECJ cases initially suggested that the criterion would be that the purpose of a transaction must be "exclusively" to avoid tax.[21] Later ECJ case law states that the purpose of a transaction must "essentially" concern tax.[22]

While it is difficult at this stage to predict what will be the interpretation of the French courts, this is largely a question of semantics, because it will be each judge's subjective opinion on a case-by-case basis that will determine whether a transaction is considered to be fraud (and each judge will therefore disregard those elements that he views as not material).[23]

C. The subjective condition: purpose of the law test

In accordance with the 2006 *Janfin* decision and the new wording of Article L 64 of the LPF, when a taxpayer relies on a literal interpretation of a law to obtain a tax benefit, the AOL will apply if that interpretation is contrary to the intention of the legislator.

However, this new criterion, which is regarded as the "subjective" part of the definition, could prove more difficult to apply than might initially appear. Benefiting from a favourable tax regime cannot, of course, be abusive when it is the intention of the law to provide such a benefit in a defined economic situation. In more ambiguous situations, where the FTA would challenge the provision of a benefit under the law on the grounds of the AOL, the courts will have to look to the intention of the legislator to determine whether he intended to cover the taxpayer's particular situation.

The French High Court recently had occasion to rule on this issue. In *Axa*,[24] the Court confirmed that transactions over the coupon date involving French stock, dividends on which attracted the *avoir fiscal* (i.e., the tax credit attached to French dividends), that allowed the taxpayer to transfer the tax credit to the purchaser of the stock, or lending transactions having the same effect, were not abusive, because the intention of the law was to avoid double taxation by granting a tax credit, which is a means of payment of tax. Nothing in the law or the *travaux préparatoires* require any more than that the taxpayer should be the legal owner of the stock at the time of the payment of the coupon. The High Court, therefore, considered that the second "subjective" element required by the new AOL definition was not present and the AOL could not apply.

In *Axa*, the Court had to analyse what was the intention of the law of July 12, 1965 creating the *avoir fiscal*. Unfortunately, it is far from certain that such a teleological explanation will be available with respect to all laws. In many situations, where there is little literature on the process by which the law concerned was implemented, the judge will have to determine himself, based on what little material he is able to obtain, what he believes the intentions of the legislator were, which would be even more subjective. *Axa* seems to suggest that, if the *travaux préparatoires* are vague or silent as to the objective of the law with respect to the situation at issue and do not confirm that what the taxpayer is trying to achieve is contrary to the legislator's intention, then the second element of the AOL definition is absent.

This state of affairs obviously favours taxpayers, who must hope that, when having registered discussions at the parliament during the *travaux préparatoires*, members of parliament will refrain from ambiguous discussions or from raising issues without answers, which could subsequently gain the force of law.

D. The EU principles: freedom of establishment

The ECJ has ruled in a number of cases that national rules cannot restrict freedom of movement or freedom of establishment within the EU, freedoms which are protected by Article 43 of the EC treaty, and that restrictions on these freedoms cannot be justified by the need to remove the potential threat of tax avoidance.[25] In *Cadbury Schweppes*,[26] the ECJ also condemned over-extensive anti-avoidance rules (specifically, the UK CFC rules) applying to situations other than qualifying fraud in the country concerned. In an EU context, anti-avoidance rules, such as CFC rules, are contrary to the principle of freedom of

establishment and can be applied only if the State applying them can show that the scope of the rules is limited in its application to situations in which a taxpayer enters into a transaction for the sole purpose of avoiding tax due in that State.

The French High Court indicated in its 2005 *Sagal* decision[27] (see also above) that, in accordance with this ECJ case law, the French AOL can be implemented in an EU context to the extent it applies to transactions whose only purpose is to avoid French tax.

E. Prior rulings

France does not have the kinds of compulsory disclosure rules that exist in the United States and the United Kingdom, although discussions are on-going on this subject. The French legislation does, however, contain a safe-harbour provision (Article L 64 B of the LPF), which provides that the AOL procedure does not apply when the taxpayer has requested and obtained a preliminary ruling from the central tax authorities before entering into a transaction. In the absence of a reply to a ruling request after the expiry of a six month period, the FTA cannot invoke the AOL. In practice, however, the ruling procedure has not much been used by taxpayers, who tend to make their own analyses. This is consistent with the fact that case law only allows the AOL to be applied in relatively obvious situations, where the taxpayer can easily guess what is likely to be the FTA's response.

IV. What is the tax result of a determination that a transaction lacks economic substance?

In situations in which a taxpayer has created an apparent situation and has disguised the real situation or has entered into a secret transaction, the FTA can decide to accept the apparent situation and does not have to invoke AOL.

If the FTA successfully applies the AOL procedure, the challenged transaction, if it is fictitious, is totally ignored, or, in other situations, is treated according to its effective substance.

AOL is sanctioned by a specific tax penalty equal to 80 percent of the amount of tax reassessed, plus late payment penalties.[28] The 2008 law, however, reduced the penalty to 40 percent when there is no proof that the taxpayer was primarily responsible for initiating the abusive transaction or was its main beneficiary. It is the FTA's responsibility to prove that the 80 percent penalty is applicable and that the taxpayer should not benefit from the lower 40 percent penalty. All parties to the contract, agreement or action concerned are jointly and severally liable with the taxpayer for the payment of the tax and penalties.

Apart from these tax penalties, the FTA can also prosecute the taxpayer on a personal basis for a criminal offence, which can generate additional penalties, up to a maximum amount of EUR 37,500 and up to five years' imprisonment.[29] The penalty can be increased to EUR 75,000 in certain specified cases of fraud (the conducting of transactions without invoices or the obtaining of undue refunds) or even EUR 100,000 in the case of recidivism, and up to 10 years' imprisonment. Accomplices can also be pursued. The offending persons can also lose their civil rights and rights of citizenship.

V. Conclusion

The FTA has always stated that AOL procedure can only be used to challenge the genuineness of legal actions in exceptional circumstances.[30] However, the possibility that the AOL affords of challenging the overall tax treatment of a transaction can be very tempting to tax inspectors, especially because of the high level of penalties involved when use of the AOL procedure is sanctioned by a judge. The AOL creates a "double or nothing" dilemma for taxpayers, who must either face the high pressure of negotiating a reassessment so as to reduce penalties, or take the risk that the tax cost maybe doubled if AOL is confirmed by the courts.

Except where an agreement is reached between the FTA and the taxpayer, this procedure largely relies on the level of control effected by the courts, which have the difficult task of adjudicating the objective of fighting or discouraging tax avoidance, without creating systemic doubt for taxpayers as to how transactions will be treated for tax purposes. This puts both great power and great responsibility in the hands of judges and the procedure has been the subject of severe criticism on the grounds that it can create a climate of systemic uncertainty and insecurity, which is both harmful for business and contrary to the general principles of freedom. In practice, however, the experience has been that the Courts have exercised a high level of restraint as regards this procedure and it continues to be applied only in relatively rare cases.

There has probably been tax avoidance since the first tax was introduced — it is certainly not a purely modern problem, but it is, and will doubtless remain a very sensitive one, hinging as it does on the equilibrium between the desires of the administration and those of the citizens. The criticism of the rather subjective nature of the French AOL procedure invites a comparison with more specific anti-avoidance provisions, which also aim to prevent tax avoidance either by defining objectively the situations that are within and outside the law, or by "deeming" fraud to exist in certain circumstances (for example, CFC rules and deemed distributions rules). The specific provision approach forces the tax administration to rule in advance on all possible situations of economic life in laws and regulations, by creating rules with exceptions, exceptions to exceptions, etc, to prevent all possibilities of fraud or avoidance. The problem is that it is very difficult — indeed, probably technically impossible — to prevent all fraud and avoidance in this way. The approach is also open to criticism because the complicated deeming rules required apply to all taxpayers and not only to the minority they concern, which can often create significant difficulties for genuine transactions where no avoidance is involved.

The AOL procedure is less than perfect and its relatively imprecise definition creates uncertainty in some

situations but the subjective nature resulting from the power allowed to the judge, gives it, like avoidance itself, a "human" character that allows it to adapt to the effective circumstances.

It could be asked whether the implementation of a general AOL procedure precludes the need for more specific anti-avoidance rules or at least reduces the number of such rules that are required, by acknowledging the fact that the law cannot organise everything and that abuses of the law should be subject to the discretion of the courts. Systematically combining both the general AOL rule and specific ant-avoidance rules would certainly create a "belt and braces" situation for the administration to the detriment of the principles of freedom.

NOTES

[1] Cass. civ. 20 août 1867 : D.P. 1867, 1, 337, cité par Stéphane Verclytte,Abus de droit et garanties des contribuables ayant appliqué la doctrine administrative : le triomphe de la sécurité juridique, RJF May 1998, p. 367, Sous Avis CE April 8, 1998, no 192539, Ass., *Sté de distribution de chaleur de Meudon et Orléans* (SAMO).

[2] These provisions first appeared in a Law of July 13, 1925, which provided a 200 percent penalty in the case of an abuse of law concerning registration duties and in a Law of Jan. 13, 1941 (which also introduced the first French thin-capitalisation rules), concerning income tax. The Law of Dec. 27, 1963 unified the provisions of these two laws in a single Article.

[3] See Maurice Cozian, «La gestion fiscale de l'entreprise», *Revue de Jurisprudence Fiscale* 5 (1980), p.202; Stéphane Verclytte «Abus de droit et garantie des contribuables ayant appliqué la doctrine administrative: le triomphe de la sécurité juridique» *Revue de Jurisprudence Fiscale* 5 1998), p.359 and RJF 02 1993 p 106.

[4] See CE Nov. 10, 1993, No. 62445, *Gianoli*.

[5] CE Feb. 20, 1974, No. 83270.

[6] CE Feb. 23, 1979 No. 6688, *Gamon*.

[7] CE, Plenary session, June 10, 1981 No. 19079.

[8] CE March 2, 1987, No. 51846.

[9] CE, Plenary session, Feb. 3, 1984, No. 38230. However, according to some commentators, the Supreme Administrative Court was applying the "simulation" concept in this case (see G. Goulard, Opinion "Fonds Turbo: abus de droit et garantie contre les changements de doctrine", *Revue de Jurisprudence Fiscale* 5 (1998), p.378).

[10] CE Sept. 27, 2006 no. 260050 sect., *Sté Janfin*: RJF 12/06 no. 1583.

[11] CE March 5, 2007 no. 284457, 8e et 3e s.-s., *Selarl Pharmacie de Chalonges* : RJF 5/07

[12] New Art. L64 provides that «*Afin d'en restituer le véritable caractère, l'administration est en droit d'écarter, comme ne lui étant pas opposables, les actes constitutifs d'un abus de droit, soit que ces actes ont un caractère fictif, soit que, recherchant le bénéfice d'une application littérale des textes ou de décisions à l'encontre des objectifs poursuivis par leurs auteurs, ils n'ont pu être inspirés par aucun autre motif que celui d'éluder ou d'atténuer les charges fiscales que l'intéressé, si ces actes n'avaient pas été passés ou réalisés, aurait normalement supportées eu égard à sa situation ou à ses activités réelles*»

[13] CE April 8, 1998, no. 189179, Ass., *Sté Gras Savoye*.

[14] CE Feb. 18, 2004 no. 247729, 8e et 3e s.-s., min. c/ *Sté Pléiade*: RJF 5/04 no. 510.

[15] CE May 18, 2005 no. 267087, 8e et 3e s.-s., min. c/*Sté Sagal*: RJF 8-9/05 no. 910.

[16] CE Dec. 29, 2006 no. 283314, 3e et 8e s.-s., min. c/ *Sté Bank of Scotland*.

[17] Cass. Com Oct. 31, 2006 n 1174 *SténAudit sud est* RJF é/07 n 40 and *SténDistribution Casino France* Dec. 5, 2007.

[18] CE June 16, 1976 no. 95513, 7e et 9e s.-s. : RJF 9/76 no. 399).

[19] CJCE Sept. 12, 2006 aff 196/04 RJF 2006 no. 1644.

[20] CE March 5, 2007 *Pharmacie des Chalonges*, Droit Fiscal, May 18, 2007 no. 522.

[21] CJCE 21-2-2006 aff. 255/02, *Halifax plc*, CJCE 22-5-2008 no. 162/07, *Ampliscientica Srl*.

[22] CJCE 21-2-2008 aff. 425n06, *Part Service Srl*.

[23] Maurice Cozian, a renowned French professor of tax law, has stated that "AOL is one of a number of « soft » legal concepts, such as good faith, morality, or the family's interest. It is all a question of situation and circumstances, we are in casuistry" (« l'abus de droit relève [. . .] de ce que l'on appelle les « concepts mous », au même titre que la bonne foi, les bonnes moeurs ou encore l'intérêt de la famille. Tout est question de contexte et de circonstances ; on est en pleine casuistique »).

[24] CE Sept. 7, 2009 no. 305586, 8e et 3e s.-s., min. c/ *SA Axa*, see also *Société Henri Goldfab*, which concerned transactions over the coupon date between related parties, with the same conclusion.

[25] CJCE Jan. 28, 1986 aff. 270/83, Commission c/ France: RJF 11/86 n° 1020; CJCE July 16, 1998 aff. 264/96 plén., ICI : RJF 11/98 no.1382 point 26.

[26] CJCE Sept. 12, 2006 aff 196/04,*Cadbury Schweppes*: RJF 2006 n 1644.

[27] CE May 18, 2005 no. 267087, 8e et 3e s.-s., min. c/ *Sté Sagal*.

[28] In practice, the penalties thus applied usually amount to 100 percent of the tax reassessed. Initially, they amounted to 200 percent of the tax reassessed.

[29] Article 1741 of FTC

[30] Administrative written directive 31st October 1941; Statement of practice No. 13 L-153 § 4