Tools to Combat Economic-Financial Crimes in French Criminal Justice System

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SUMMARY

The present article provides an overview of the operational models deployed by a number of agencies and bodies in France, with a focus on investigating and prosecuting economic-financial crimes. In addition to the police and the criminal procedure, we study France Public Prosecutor's Office, which is in charge of tracking major economic and financial crimes.

The traditional method of combating financial crimes, such as money laundering, is to use prescriptive legislation. A new idea is that risky concepts may be applied to understanding the phenomenon of economic crime and devising strategies to minimize them. As noted by the European Commission, the range of crimes at the national level under which the “protection of the financial interests of the European Union” could fall is broad and varied across the Member States. In France, an economic crime is said to include any offense involving fraud, misconduct in or misuse of information related to a financial market. The term “to include” means that financial crime can be interpreted

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widely to include a range of offenses. These include, but not limited to, fraud, bribery and corruption, insider dealing market abuse and, money laundering.

This article offers a detailed overview of the rules regarding criminal investigations into financial-economic crimes in the French Legal system. These rules have turned out to be fundamental to the effective protection of France and the European Union's financial interests. Further, this study is enriched with cross-sectional essays that deal with more general issues, such as data protection and the future of investigations, preventing, combating and punishing economic crimes.

Keywords: Combating Economic and Financial Crimes, Prevention, Financial Conduct Authority, France Public Prosecutor's Office, French Criminal Law.

INTRODUCTION

The globalization of economic crime related to the development of information technology and communication has created new opportunities for offenders at national and international levels, threatening economic stability, political and social companies, and serving as an obstacle to the country's development and economic growth. These offenses are defined by the French magistrate Jean-Claude Marin as "*all illegal activities whose essential characteristics are that they take place in the context of economic activity, develop in structured organizations, private or public, do not resort to violence or force and that they require knowledge and knowledge specific to the business community, resulting in an ever greater need for specialization of the bodies responsible for prosecutions and investigations*[3]". The new opportunities created

[3] François-Xavier Dulin, Le rôle du parquet dans le choix de la sanction des infractions économiques et financière, Aj pénal, 2019, Paris, p.3.

by the business have been seized by offenders, who have significantly more complex apprehension of this new criminal phenomenon. This complexity has led to many difficulties for the state to effectively enforce the rules of criminal law as economic and financial offenses are often hidden, concealed or even imperceptible to the authorities. Then in the absence of sufficient evidence, the relaxation is then obvious for these offenders "in white collar". Es D deficiencies have been observed in handling cases in economic and financial matters of great complexity. Fraudulent practices used by criminals are becoming more sophisticated and extend over the whole territory and more frequently outside France via the Internet. This led French legislator to put in place various mechanisms to ensure effective repressions of these offenses. The first manifestation of the reaction of the legislator is the law of 6 August 1975, which resulted in establishing specialized courts in economic and financial matters whose territorial jurisdiction was expanded.

Since that time, the idea which governing the adoption of further reforms in this area has been the specialization of actors responsible for the repression of economic and financial offenses. The specialization of magistrates allows them to have a better knowledge of both the repressive texts to be applied and the fraudulent techniques used by criminals (I). This specialization was accompanied by a reinforcement of the technical and legal means at the disposal of the investigators, with the aim of identifying and effectively repressing these offenses (II). However, some shortcomings have been noted in practice (III).

I. THE SPECIALIZATION OF CRIMINAL JUSTICE

A) Specialization of criminal courts

The specialization of criminal justice has led the French legislature to specialize certain jurisdictions and judicial actors.

In the jurisdictional organization of the 1970s, the specialized jurisdictions created by the law of 6 August 1975 appeared to be very innovative. However, two temperaments are to be noted. First, this law had not created a new category of jurisdiction but was only awarded a skill, within the jurisdiction of each court of appeal, to one or more courts. Then, it had not created a compulsory jurisdiction of these specialized courts, because their jurisdiction was only secondary to that of ordinary courts.

This specialization movement continued as the legislator reformed. But as it proved to be effective, this specialization may have seemed an unnecessary complexity. The law of 6 December 2013, therefore, came to revise the rules of division of powers between the ordinary courts and the competent courts in economic and financial matters. One is on the fight against tax evasion and the large economic and financial crime, while the other establishes a financial attorney Republic. This specialized prosecutor's function setting in motion public action against perpetrators offenses that are NOMIC and financial only and their prosecution in the criminal courts. From now on, in economic and financial issues, several jurisdictions coexist. Ordinary law jurisdictions still have a role to play, but are often competing with each other, either by the Paris court (and the financial prosecutor), which is a ordinary law jurisdiction with special powers, or by interregional jurisdictions (JIRS). There are also two economic and financial centers in the courts of Bastia and Nanterre, but they are not addressed during this presentation, because of their secondary nature and intimate link to the local context.

First, the prosecutor of the Republic Financial, located in Paris, has national jurisdiction for the prosecution of all fractions in economic and financial issues committed in France. Regarding insider trading and the offense of manipulation of courts, this jurisdiction is exclusive[4] , that is to say, that this specialized prosecutor, as well as the Paris court, shall have exclusive jurisdiction over the prosecution, investigation and adjudication of these offenses. For the perpetrators of tax offenses of small scale, the prosecutor of the financial Republic can continue only if the tax authorities have filed a complaint before[5] . Finally, for all other offenses in economic and financial issues, the competency of the public prosecutor is concurrent with that of other jurisdictions. This will concern, for example, the crimes of breach of probity, unlawful influence on votes, tax fraud (value added tax), since they are highly complex[6], as well as bribery or trading in influence involving a public official of a foreign state or an international organization, fraudulent evasion of the establishment or payment of the tax, as well as, that of laundering these criminal offenses[7].

In the event of competition between the public prosecutor (and the Paris court) and the other prosecutors (or courts) concerning the prosecution or the judgment of an infringement, a mechanism of divestment is provided for by the code of procedure criminal. The decision to divest can be appealed, which is processed quickly by the higher court (in a few days).

Then, in addition to this financial prosecutor, there are specialized interregional jurisdictions (JIRS). They were created by the law of 9th March 2004 and replaced the first specialized jurisdictions created by the 1975

[4] Code of Criminal Procedure, Article 705-1.
[5] Book of Tax Procedures, Article L. 228.
[6] The "great complexity" is assessed in particular with regard to the number of perpetrators, accomplices or victims of the offense and the geographical jurisdiction on which they extend.
[7] Code of Criminal Procedure, Article 705.

law. There are eight of them in France and siege in Bordeaux, Fort-de-France, Lille, Lyon, Marseille, Nancy, Paris, and Rennes[8]. They are responsible for most of the criminal offenses in economic and financial matters, provided they are of "Great Complexity"[9]. Some people prosecuted before these specialized courts have attempted to have the proceedings annulled on the ground that the case in question did not have the character of "great complexity". However, this argument is doomed to failure because in a pragmatic concern to secure procedures, the Court of Cassation (the highest court in France) ruled that the parties could not challenge the character of "great complexity" before the judge[10]. In fact, the assessment of this condition is the sole responsibility of the judicial authority and cannot be contested by the parties.

The jurisdiction of these specialized interregional jurisdictions extends to several courts of appeal. Specialized magistrates are assigned and they benefit from the technical support of certain assistants. The National School of the Judiciary (ENM) has set up specific training courses in the form of practical internships in specialized interregional jurisdictions or deepening knowledge in criminal economic and financial law. Otherwise, the assessment of the skills of the magistrates who have to deal with criminal procedures in economic and financial issues is often casuistic, depending on the training and experience of each one.

B) Specialization of judicial actors

Handling the improvements of dossiers of great complexity in economic and financial issues went through the provision of the jurisdictions of new means, in particular human. In response to an old and recurring demand of the

[8] PRADEL (J.) et DALLEST (J.), La criminalité organisée : droit français, droit international et droit comparé, LexisNexis, Paris, 2012, p. 187
[9] Code of Criminal Procedure, Article 704.
[10] Court of Cassation, Criminal Division, 26 June 2001, No. 00-86.526.

practice, the law of July 2, 1998 came to create the function of specialized assistants whose role is to assist in their task which is the specialized magistrates. These specialized assistants are usually appointed officials who have particular expertise in certain areas. These areas can be legal (e.g. monetary and financial law, or tax law) or technical (e.g. accounting,). They have full access to the file and may attend the interrogations, the search, and all investigative actions organized by magistrates. Their study is a precious help to the day for the judicial authority. However, they have no jurisdictional power. Prior to the exercise of their activity, the specialized assistants lend oath. Given the complexity of the files and the significant workload of the training firms in particular, the use of the service of these specialized assistants is frequent.

The specialization of the French criminal justice system makes it possible to implement specific tools designed to reinforce repressive efficiency.

II. THE SEARCH FOR REPRESSIVE EFFICIENCY

A) Expanded investigative means

The Code of Criminal Procedure (CCP) devotes a whole chapter to the broad powers of investigation conferred on police officers and magistrates in economic and financial issues. These means of the investigation come from those used in organized crime. Until the law of 6 December 2013, only certain offenses could give rise to this extension of investigative powers. Since the law of 6 December 2013, the legislature has considerably extended, or even generalized, certain special powers have been provided for organized crime in economic and financial crime. This extension has been justified because this

delinquency has been considerably organized, complex and internationalized in recent years. However, not all investigative acts are possible for all economic and financial offenses. Indeed, the legislator wished to make a gradation of these means of investigation according to the type of offense concerned.

In general, the investigative powers conferred on investigators in economic and financial matters are exorbitant, since they are also used in the fight against organized crime. As such, investigators can conduct physical surveillance, which can be conducted throughout the national territory, and infiltration (delinquent networks, for example). Infiltration is the surveillance of people suspected of committing a crime by posing them as one of their co-perpetrators, accomplices or concealers. Investigators will then be authorized to tapping phones, sounding or fixing images in certain places or vehicles, as well as collecting computer data[11]. These powers are in particular provided for the offenses of banking or tax evasion, which can be difficult to establish by traditional means. In addition, during a judicial inquiry, the judge of liberty and detention, may in order to guarantee the payment of the fines incurred as well as, if necessary, the compensation of the victims, order provisional measures on the property, movable or immovable, divided or undivided, of the Charged Person.

The law of 6 December 2013 on the fight against tax evasion and the large economic and financial crimes also provided, in the interests of effective law enforcement, the possibility of ordering a placement in custody for offenses of art economic and financial under the same conditions as in the case of organized crime, i.e. for a maximum of 96 hours and with possible postponement of the intervention of the lawyer for a maximum of 48 hours in the event of particular circumstances justifying it[12]. However, the French

[11] POTASZKIN (T.), L'éclatement de la procédure pénale ; Vers un nouvel ordre procédural pénale, Lextenso, Paris, 2014, p. 181.
[12] Ibid.

Constitutional Council has ruled these provisions contrary to the Constitution. It has in fact held that some of the offenses, such as bribery, trading in influence and tax and customs fraud, are offenses which are not in themselves capable of impairing the security, the dignity or the life of people. It, therefore, considers that the use of custody according to special terms constitute a disproportionate interference with fundamental rights of people to the aim pursued by the legislature[13]. Thus, the legislator has the possibility of conferring investigative powers on investigators, provided that this does not violate the fundamental rights of suspects.

B) A shift in the burden of proof

The law of 6 November 2013 resulted in performing a shift in the burden of proof regarding money laundering. In fact, under French law, money laundering is the facilitation, by any means, of the false justification of the origin of the property or the income of the offender who has given him a direct or indirect profit. Money laundering also means providing assistance to a placement, concealment or conversion of the direct or indirect proceeds of an offense. However, this offense is extremely difficult to prove, since it is necessary for the public prosecutor to provide evidence of the criminal origin of the laundered funds. Hence, the interest of the new article 324-1-1 of the penal code, does provide that property or income is presumed to be the direct or indirect result of a crime or offense where the material, legal or financial conditions of the investment, concealment or conversion transaction cannot have any other justification than to conceal the origin or beneficial owner of these goods or revenues. Thus, since certain disturbing elements on the origin of the funds are brought by the prosecuting party, it is then up to the person

[13] Constitutional Counsel, 4 December 2013, No. 2013-679 DC.

prosecuted to demonstrate the lawfulness of their origin. This adjustment of the burden of proof will thus make it possible to reinforce the effectiveness of the repression of the offense of money laundering.

C) Towards a "contractualization" of criminal law

Since the French authorities wish to avoid impunity for the perpetrators of offenses, the legislator has developed alternative measures to criminal prosecution as such. The implementation of these alternatives is entrusted to the public prosecutor.

On the one hand, as long as the public action has not been set in motion, the public prosecutor may propose, directly or through an authorized person, a criminal composition to a natural person who acknowledges having committed one or more offenses punishable by a fine or imprisonment of up to five years. This criminal composition may consist in the payment of a fine, in the delivery of property to the State, or in the obligation not to leave French territory for a maximum period of six months. In some cases, the criminal composition will have to be homologated by a judge of the seat. In any case, if the penal composition is fully executed by the offender, the prosecution is extinguished.

On the other hand, the law of December 9, 2016 created the public interest judiciary agreement (CJIP). The conclusion of a CJIP involves the payment to the Public Treasury of a public interest fine, the amount of which is calculated in a proportionate manner to the benefits from the deficiencies found, within a limit of 30% of the average annual turnover recorded during last three years. The amount of the sanction is certainly limited, though the ceiling is still very high. The idea is to ensure effective repression of the offense by encouraging companies to conclude such an agreement rather than undergo a

lengthy trial whose outcome will be uncertain, both for them and for the public prosecutor. Originally planned for corruption, trading in influence and the laundering of tax fraud, this convention has been allowed for tax evasion since autumn 2018.

These two possibilities offered to the Prosecutor of the Republic, who is the prosecutor, give him very great power. The intention of the legislator was thus to encourage large fraudulent companies to cooperate with the authorities when an offense is committed by providing them with a lesser penalty than that incurred if there was a trial. These possibilities lead French law towards a contractualization of criminal law in economic and financial matters, to the extent that the agreement of the author of the facts is necessary to implement them.

III. THE DISADVANTAGES OF THE CURRENT SYSTEM

A) A sense of impunity

Economic and financial offenses are often difficult to detect and prosecute. The convictions of the perpetrators of such offenses obviously exist, but some escape conviction because of the lack of evidence. This could give rise to a feeling of impunity in public opinion. Indeed, there seems to be a two-speed justice. The first is very fast, severe, and concerns many offenses "daily ". These offenses are simple and the evidentiary issues rarely arise as the facts often appear blatant. The second concerns economic and financial offenses where judicial time is much longer, because the nature of these offenses requires a thorough investigation and important means of investigation. The question of proof arises almost systematically. And the number of relaxes, because of lack

of evidence or due to a defect in the procedure, is automatically larger. As a result, public opinion generally thinks that offenders “in white collar” are less severely punished than ordinary offenders. Moreover, since these people are often very well integrated into society, stiff prison sentences are rarely pronounced, which amplifies this feeling. But this difference of fact between ordinary and economic and financial offenses is due to the very specific nature of these offenses, which are very difficult to prove and therefore to pursue.

Moreover, many prosecutions are initiated not only by the public prosecutor but also by anti-corruption associations. In fact, article 2-23 of the Code of Criminal Procedure provides for the possibility that associations approved and declared for at least five years to become civil parties, and thus to set in motion public action. Here again, this state of affairs reinforces the idea that the public authorities are not doing enough to combat economic and financial infringements. However, this possibility should be seen as an effective and dissuasive tool for combating economic and financial crime.

B) A sometimes inappropriate penology

The main deficiency of the current system is the penology that is not necessarily always adapted to the reality of the offense. Indeed, while the penalties have been aggravated by the reforms in recent decades, the development of the contractualization of criminal law has the effect of punishing the perpetrators of offenses fairly weakly. For example, some large corporations who commit economic and financial offenses may be tempted to pay for the contingent amount they may have to pay to the state to avoid a criminal trial. This possibility obviously does not concern small businesses or natural persons. However, the risk does exist for large companies.

And this is all the truer in France, at present, it is impossible for the civil judge to pronounce punitive damages against the author of an offense in reparation of the damage caused. Only the harm actually suffered as such is reparable.

BIBLIOGRAPHY

1. *Alain Blanchot, Infraction en matière économique et financière.- Poursuite, 2018, Paris.*
2. *Chantal Cutajar, Le volet répressif de la loi sur la lutte contre la fraude fiscale et la grande délinquance financière, AJ pénal, 2013, Strasbourg.*
3. *Evelyne Bonis–garçon, Infraction en matière économique et financière, 2014, Bordeaux.*
4. *François-Xavier Dulin, le rôle du parquet dans le choix de la sanction des infractions économiques et financière, Aj pénal, 2019, Paris.*
5. *Jean PRADEL et Jean DALLEST, La criminalité organisée : droit français, droit international et droit comparé, LexisNexis, Paris, 2012*
6. *Marie-Anne Frison-Roche, la justice pénale face à la délinquance économique et financière, Dalloz, 2001, Paris.*
7. *Nouveaux enjeux de la délinquance économique et financière, Archives de politique criminelle N 39, A. pedone, 2017, Paris.*
8. *Tatiana Potaszkin, L'éclatement de la procédure pénale ; Vers un nouvel ordre procédural pénale, Lextenso, Paris, 2014.*
9. *Book of Tax Procedures, Article L. 228.*
10. *Code of Criminal Procedure, Article 705-1, Article 704, Article 705.*
11. *Court of Cassation, Criminal Division, 26 June 2001, No. 00-86.526.*
12. *Constitutional Counsel, 4 December 2013, No. 2013-679 DC.*