

The 50% fine for lack of invoicing finally censured

The French Constitutional Council has just censured the provisions of article 1737, I, 3° of the French Tax Code (FTC) [1] on the failure to issue an invoice [2].

For the record, these provisions impose a tax fine of 50% of the amount of the transaction on a supplier liable for French VAT for not issuing an invoice. If the supplier provides, within thirty days of the formal notice sent by the French tax authorities, proof that the transaction has nevertheless been properly accounted for, the fine incurred is reduced to 5% of the amount of the transaction.

On the substance, the Constitutional Council ruled that the contested **provisions disregarded the principle of proportionality of penalties**, by being able to give rise to a penalty that is manifestly disproportionate with regard to the seriousness of the breach observed, as well as to the advantage that may have been gained from it.

With regard to the effects of the decision of unconstitutionality, the Constitutional Council indicated that the date of the repeal of the contested provisions should be postponed to December 31, 2021. The measures taken before this date in application of the provisions declared contrary to the Constitution cannot be challenged on the basis of this unconstitutionality. In other words, no claim can be accepted on this basis.

In practice, the VAT increases can be very small in relation to the amount of the fine, even when the fine is reduced to 5%.

Prior to this decision, Arsene had already had the opportunity to successfully defend the argument of disproportionality in the context of tax audits and the oral and contradictory debate.

This decision will be the occasion for the legislator to secure the taxpayer's guarantees by providing for a ceiling as well as a rate that can be modulated according to the seriousness of the offence.

To be continued!

Our VAT team is at your disposal for any clarification you may require on the scope of this decision.

Nathalie Habibou, Partner

[1] In their wording resulting from order n° 2005-1512 of December 7, 2005 relating to simplification measures in tax matters and to the harmonization and adjustment of the penalty system

[2] Decision n° 2021-908 QPC of May 26, 2021