

JURIDICAL INSTITUTE OF “FISCAL REPENTANT”

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Abstract

The contribution deals with the French juridical institute of “fiscal repentant” in the context of the fight against tax evasions. The implementation of new organs and the system of sanctions are related to the mentioned juridical institute. The contribution is conceived interdisciplinary, it deals with issues of the French financial criminal law, as a part of the section of the French public finances. The contribution does not forget to mention one of the most infamous cases related to international tax evasions, so-called Panama Papers and the role of the presented French juridical institute of “fiscal repentant” in this case. Finally, the contribution contains a comparison between the French juridical institute of “fiscal repentant” and the juridical institute of effective penitence under the Czech penal code. The aim of the contribution is to confirm or disprove the hypothesis that the French juridical institute of “fiscal repentant” could be implemented into the Czech legal system. The analytical, comparative, as well as descriptive methods, were used in this paper, too.

Keywords

Fiscal repentant; tax law; tax evasions; tax amnesty

JEL Classification: D63, K34, K42

1 Introduction

France – or rather the French National Assembly as the lower chamber of the French Parliament – has adopted a number of laws designed to combat tax evasion

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since 2012. These laws strengthen the powers of both the French financial, or customs, administration, as well as the police and the judicial system. The laws further strengthen collaboration between fiscal administration bodies and judicial bodies, as they increase the transparency of enforcement measures imposed by the fiscal administration. At the same time, sanctions against those who commit tax evasion have been consistently becoming increasingly stringent since 2012. All these measures are intended to strengthen the implementation of French public budgets. In the first 18 months alone (since the beginning of 2012), the government has adopted sixty new measures to curtail tax evasion in the area of financial crime.

The initial laws extending the powers of², or the “tax police”, introduced a new provision on aggravating circumstances, applicable to the most serious cases of tax fraud, or provisions Authorizing investigators to use “special investigative techniques”. The various punishments include a prison sentence of up to seven years. A new institute of “fiscal repentant” was introduced: it involves, aside from the permanent obligation to pay the tax owed, more lenient pecuniary sanctions, provided that the taxpayer itself invokes the institute. This paper is dedicated precisely to this potentially inspiring institute which *de facto* constitutes a type of tax amnesty.

The aim of this paper is to introduce this juridical institute, including the context of the reasons for its introduction and its outcome which may be encountered by our entrepreneurs focusing on francophone countries in the pursuit of their business. The hypothesis of the paper is defined as “whether the French juridical institute of “fiscal repentant” could be implemented into the Czech legal system”. The solution of this hypothesis including arguments is contained in the discussion of the contribution.

The analytical, comparative and descriptive methods were used to write this paper. French articles from reputed French periodicals focusing on economics and law (e. g. *Les Echos*) were used as sources for this paper. Among a lot of writings dealing with French tax law, it is necessary to mention for example the writing by Prof. Michel Bouvier (2016). Prof. Michel Bouvier is one of the most well-known and the most respected French experts on the French public finances. Finally, the current

2 The National Department for Tax Crime Prosecution (*fr. brigade nationale de répression de la délinquance fiscale*, BNRDF), is an investigatory unit under the central directorate of the criminal police of the French Ministry of Interior. It was established pursuant to Directive 2010-1318 of 4 November 2010, and unlike the French tax administration which is bound by bilateral agreements between countries, which impose certain restrictions although they permit exchange of information with foreign tax administrations, BNRDF, together with other departments of criminal police, can investigate (under the supervision of a judge) tax evasion, cooperate with criminal police of foreign states, and is not subject to limitations applicable to bodies of tax administration under the above-referenced agreements. In the course of its activities, it can use tools such as interrogation, seizure of assets, house searches, police custody, phone tapping, and file charges.

data published by the Court of auditors (i.e. fr. *Cour des Comptes*) were used as a source of statistics used in the presented paper.

2 Current Situation

In a addition to their “traditional” statutory duty in the form of annual filing of tax returns,³ French taxpayers, if they have an account abroad, are also obliged under the law to disclose such “foreign”accounts to the French fiscal administration, and have other statutory duties in this context.

However, in practice, many taxpayers would not disclose their foreign accounts, and the French fiscal administration was frequently unable to learn of the accounts of such French taxpayers in a reliable manner. As a result, the system of French public budgets would lose several hundred million euros every year. However, it needs to be noted that this is not an exclusively French phenomenon but a phenomenon, the essence, and impacts of which are of a global nature. This was also the reason why in 2014, the Organization for Economic Co-operation and Development created a standard for automatic exchange of financial account information.

3 “Fiscal Repentant” in Practice

The practical implementation of this multilateral agreement on automatic exchange of financial account information is in progress. Not only France but also the Czech Republic and Slovakia have acceded to the agreement already. Thanks to the agreement, the French fiscal administration (to the full extent since 2018) will be able to obtain facts until then withheld by some of the French taxpayers. It is precisely the existence and actual enforceability of this multilateral agreement that is the key motivation for French taxpayers to reconsider their behavior voluntarily and to start complying with obligations imposed on them under French law (i.e. disclosure of their foreign accounts and the related payment of applicable public levies) for real. Although under the law, the payer does not need to be represented by an attorney in the process of “regularization” of the tax status, it is definitely recommendable to seek legal assistance. The procedure to be followed by the taxpayer is not easy, and includes *inter alia* the following:

- provision of information on accounts abroad;
- provision of a declaration on the origin of funds;

3 This statutory obligation will become a matter of the past as of 1 January 2018, due to a tax reform involving a switch to withholding tax.

- provision of information on income derived;
- an affidavit made in addition to the above.

Since the introduction of the “fiscal repentant” institute in 2013, more than 50,000 applications have been filed by French taxpayers, and the French fiscal administration had to process those. Therefore, in connection with the introduction of the institute, Department for the Processing of Voluntary Disclosures (fr. *Service de traitement des déclarations rectificatives*, in short STDR), operating throughout France, was set up. Although the French fiscal administration worked literally at full tilt, it was still unable to deal with the onslaught of these (at the time, still coming) taxpayers who suddenly started reporting themselves frantically, and the French fiscal administration was compelled to extend its department and staffing as a result. In the course of two years, the number of STDR’s staff was increased by nearly a third.

The expansion of tax administration in this area was also motivated by the statute of limitations (or, to be more precise, by a term of preclusion), which, although it is a term of ten years, commenced running upon the filing of the fiscal repentant’s application. While the legalization of the tax situation of the fiscal repentant’s results in the obligation to pay all enforceable taxes (in particular income tax, property tax, and inheritance tax), as well as fines assessed, these “tax sinners” will avoid criminal prosecution they would otherwise be faced with. It can thus be noted that this institute, or rather, this procedure helps to “right” a society which has thus far been distorting the freedom of movement, or rather, which has been interpreting same (in a broader sense of the word) overly extensively in the context of the French legal order.

The French fiscal administration, or the law, distinguishes two categories of “fiscal repentants”: taxpayers engaging in fraud actively, and taxpayers engaging in fraud passively. The passive ones “only” benefit from accounts previously established abroad (they had established the account while working or living abroad, inherited it or received same as a gift). This group of taxpayers is subject, in addition, to the obligation to pay the concealed tax, to a sanction: originally, 15%, and since 2016, 2% of the concealed, and thus unpaid, taxes.

French taxpayers actively involved in fraud were persons who had actively organized their tax evasion and transferred untaxed amounts to their foreign accounts. These were threatened with a sanction of 30%, and now 35% of the amount of concealed tax (the higher rate applied to tax regularization applications filed after 16 September 2016).

Although in 2016, the sanctions applicable to French taxpayers engaged in fraud who voluntarily invoked the fiscal repentant institute were increased, even the higher sanctions are still much lower than sanctions to be imposed on taxpayers engaged in fraud who have kept quiet thus far and who will be detected by the French fiscal administration. These other taxpayers engaged in fraud who will be caught and convicted of a violation of the law are faced with a sanction of up to 80% of the total amount of taxes concealed, and may further be faced with criminal prosecution. Criminal prosecution of such taxpayer may ultimately result in a prison sentence of up to seven years in extreme cases. This more stringent approach, adopted at the initiative of the French finance minister Bercy, reflects a decision of the Constitutional Council of July 2015 (Constitutional Council: 2016/554). The relevant decision prohibited, or found to be anti-constitutional, a provision pursuant to which taxpayers could be given a fixed fine of 5% of the amount deposited in an undisclosed account abroad, where there was over EUR 50,000 in the account. In its decision, the Constitutional Council described the sanction as “manifestly disproportionate to the gravity of the situation”. The newly increased sanctions thus ought to compensate this deficit in income, and was reflected in the 2017 state budget.

4 “Fiscal Repentant” and the Panama Papers

One of the most interesting issues in the last three years was the case of the Panama Papers. In this case, it would be interesting to make a comparison between French taxpayers and Czech taxpayers, or more precisely the role of the French juridical institute of “fiscal repentant” in this infamous issue.

First of all, it is important to mention in this comparison the huge difference in the number of inhabitants of France and the Czech Republic. In 2016, France had almost 67 million inhabitants, while the Czech Republic had 10,5 million inhabitants in the same year. It means that France had (and still has) 6 times more inhabitants than the Czech Republic. If we focus on the number of persons figuring in the Panama Papers list we can find there 272 Czech persons and 1 284 French persons.⁴ At the first sight, these values nearly correspond with the ratio of the number of inhabitants in France to the number of inhabitants in the Czech Republic (it means 6 times more inhabitants in France than in the Czech Republic). But in fact, only 560 French taxpayers of the mentioned total number of French taxpayers (i.e. 1 284 in total) have begun checked by French authorities. Another 724 French tax payers also used bank accounts abroad, but they were already known to French fiscal administration,

4 It could be mentioned for a better illustration that in the Panama papers list there are for example 600 persons from Denmark or 108 persons from Iceland.

who created in 2013 already mentioned STDR. These French taxpayers made use of the opportunity of the juridical institute of “fiscal repentant” and they made a request to the STDR to regularize of their tax situation. Thanks to the utilization of this tax amnesty *sui generis* these French taxpayers not only saved public funds for their revealing and after that their prosecution but also helped to give concealed taxes back to the state budget sooner.

In other words, more than a half of all French taxpayers concealing their funds abroad voluntarily made use of this tax amnesty and regularized their tax situation (settled owed taxes and paid milder pecuniary sanctions). Thanks to this tax amnesty France reduced the number of fraudsters who are prosecuted nowadays. France gained its public funds quickly, efficiently and “cheaply”. This is the best sign of the importance, success, and usefulness of this tax amnesty. In this context, it could be noted that at the beginning of November 2017 we could notice another similar case – the Paradise Papers.⁵ The essence of Paradise Papers is the same as the essence of Panama Papers. A lot of among others famous persons or companies of the world figured on the list of entities linked to tax evasions into tax heavens. Although the Paradise Papers case is later than the Panama Papers case, French entities figuring in the Paradise Papers list could make use of the juridical institute of “fiscal repentant” just as French entities figuring in the Panama Papers list. The deadline for self-reporting to the French fiscal administration (the STDR) is the end of 2018.

5 Tax Amnesty or Institute of Effective Penitence?

It can be noted in this context that this type of tax amnesty does not equal the Institute of effective penitence under Czech criminal law for at least three main reasons.

The first reason is that the effective penitence is the Institute for fraudsters who have already been revealed by the state authority. When the fraudster is charged, he can use the Institute of the effective penitence for the extinction of his penal liability. On the other hand the Institute of “fiscal repentant” consist in self-reporting to the French fiscal administration for the purpose of the regularizing personal fiscal situation at the moment when fraudsters are not yet known to the French fiscal administration.

The second reason why the Institute of effective penitence is different from the Institute of “fiscal repentant” is the fact of diverse course and termination of their

⁵ The Paradise Papers are a set of 13.4 million confidential electronic documents relating to offshore investments including more than 120,000 people and companies.

procedure. When the accused (the taxpayer) decides to make use of the Institute of effective penitence during the penal procedure it means that the penal procedure has already begun and the accused (the taxpayer) pays the sum of money which he has to pay. Afterward, the penal court pronounces the decision not to prosecute. On the other hand in the case where a taxpayer uses the juridical institute of “fiscal repentant”, none of the procedures have taken place before. The particular fiscal procedure begins at the moment when the taxpayer applies for the regularization of his fiscal situation. In this case, the fiscal procedure lasts until the taxpayer pays allowed taxes and sanctions.

The last reason, or rather the third difference between the juridical institute of “fiscal repentant” and the Institute of effective penitence under Czech criminal law resides in the breadth of concerning subject. On the one hand, the French tax amnesty only concerns to concealed taxes, on the other hand, the Institute of effective penitence under Czech criminal law relates to not only unpaid taxes but also unpaid social insurance payments or other unpaid similar obligatory payments.⁶ For these reasons, it is not possible to confuse these different juridical institutes, although they seem to be similar at the first sight.

6 Discussion

According to the latest statistics, French taxpayers have filed more than 50,000 applications for tax regularization, and nearly EUR 27 billion, currently located abroad and until then not disclosed in any way and, literally, “stepped out of the dark”. According to prognoses, this amount will not increase significantly *pro futuro*; nonetheless, less than 25,000 cases have been processed so far. Of this amount, the French state has to date extracted over EUR 8 billion (EUR 110 million in the course of 2013, EUR 1.9 billion in 2014, EUR 2.6 billion at the end of 2015, EUR 2.7 billion in 2016, EUR 1.2 billion in 2017). 91% of those funds were located in Switzerland, the balance in countries such as Luxembourg, Hong Kong, Singapore, Andorra, Monaco, USA, and England.

Although the amount “rescued” is considerable, the organization *Solidary Public Finance* reiterated that tax fraud costs the Republic of France between 60 and 80 billion euro in lost profits. The five biggest, or most serious, cases which involved supranational companies and amounted to EUR 3.3 billion included the giants Apple and Google. While Google agreed on a solution of its situation in England with the British fiscal administration in the spring of 2015, *de facto* by

6 For example premiums for pension savings, social security contributions, the contribution to the state employment policy, health insurance premiums.

circumventing English law, the French fiscal administration was contrary to that strict in its application of the law to Google and did not admit any agreements, relief or exemptions. Apple was a little less “lucky” in that; it had to pay outstanding tax not only in France (once again, due to a strict application of the law) but also to the government of Ireland, due to a decision of the European Commission. Pursuant to the decision, Apple had to pay EUR 13 billion for extensive unauthorized tax relief.

Regarding the hypothesis defined in the abstract (whether *the French juridical institute of “fiscal repentant” could be implemented into the Czech legal system*), or rather in the introduction of the paper, it is necessary to base on the crucial fact that the Czech Republic has already acceded to the multilateral agreement on automatic exchange of financial account information as France has already done. That is the most important prerequisite for the successful and effective implementation of this tax amnesty in the Czech Republic. If there is no instrument like the automatic exchange of financial account information, it does not worth implementing the tax amnesty like the juridical institute of “fiscal repentant” into the Czech legal system because for one thing a fiscal administration does not get a chance to learn about bank accounts located abroad which means that a fiscal administration cannot claim concealed taxes and for another taxpayers are not motivated to uncover their classified funds or more precisely to pay concealed taxes. The biggest motivation for French taxpayers who were concealing their funds from the French fiscal administration is the opportunity to avoid criminal prosecution, or rather up to seven years imprisonment. Taxpayers who do not pay taxes in accordance with the Czech legal order are liable to the prison sentence up to three years (or even up to ten years if the amount of reduced taxes is higher than 5 million crowns) whereas in France there is a threat of imprisonment up to seven years, if the taxpayer is found guilty. In my point of view the sentences are quite similar to each other in both countries, therefore it could be concluded that the legislature’s approach is similar.

Moreover, the regular collecting of public funds should be the major objective of public interest with regard to making budget full. The Czech Republic – or rather the Czech previous cabinet (2014 – 2017) has proved this fact during the last three years when the electronic registration of sales or VAT control statements were implemented into the Czech tax legal system. These mentioned measures have helped to return several billions of Czech crowns into the Czech state budget. After the autumn elections in 2017, the Czech general public can expect a continuation of these measures or an implementation of other measures.

In my point of view, conditions and prerequisites for the implementation of the juridical institute of fiscal repentant in the Czech legal system are satisfied. In other words, there is no significant reason why the mentioned juridical institute could not be implemented into the Czech legal system. While there is no doubt that this form

of tax amnesty is interesting, the question also is whether it is sufficiently effective. Its effectiveness is related to the time that the French fiscal administration has to concentrate on the processing of these cases. And as already mentioned before, there is a statute of limitations period of 10 years. However, this period is not the key aspect playing the primary role in these cases. However, the primary role is the fact that according to hitherto experience and prognoses, the remaining (and more demanding) cases will take 3 to 5 years, while STDR, according to minister Bercy, will cease operating in 2018 already.

It is not unlikely that a more effective solution might be inspired by a different, but also French, tax amnesty. The tax amnesty boasts a rich past because it was introduced by general Charles de Gaulle in 1958. It involved one⁷ of the “national loans” bearing the name of A. Pinay – Emprunt Pinay.⁸ Its principle was very simple – property could be “legalized” through a fixed tax (around 5% at the time) if invested into the national loan. France was able to repay its entire debt to the International Monetary Fund as a result.

7 Conclusions

The above description of this type of the French tax amnesty gives rise to the question whether the fiscal repentant institute or perhaps a modified form of tax amnesty, could serve as an inspiration in the enhanced fight against tax evasion in this country in the future. Such legal tool, with the way the applicable sanctions (whether pecuniary or other) is set up at present, could be incorporated into the national legal order because just like France, the Czech and Slovak Republics have also acceded to the multilateral agreement on automatic exchange of financial account information.

If the relevant legislative changes were made, it would be only a matter of time before local taxpayers who have been “rather relaxed” about their tax obligations would start invoking the amnesty voluntarily, contributing their taxes voluntarily to the national public budgets. France is an excellent example illustrating the actual fight against tax evasion, as well as an example showing that tangible results can be attained over a relatively short period of time.

7 national loans have played a relatively important and traditional role in France. A loan of 30 million, approved by the National Assembly in 1789, i.e., during the reign of Louis XVI, can be seen as one of the first loans of this kind. The Republic of France used these loans at war times to stabilize public finance and to carry out government projects at times of peace.

8 A loan approved in 1952 by Antoine Pinay, Prime Minister of the IV The French Republic at the time. The loan was guaranteed by gold, bore interest at 3.5%, as compared to the 7-8% traditional at the time. Interest was exempt from income and inheritance tax. The loan was subscribed in the amount of 428 billion.

Thus the presented contribution should be the interesting inspiration for (not only) national legislators how to make collecting owed taxes more efficient, quick and inexpensive. The paper also serves as the specialized view of the current situation in the branch of the French tax law and shows to readers new and interesting juridical institute from abroad.

Here we may conclude that the aim of the paper has been fulfilled. The point and the role of the juridical institute of “fiscal repentant” were introduced in the paper. There were presented and discussed and complemented by statistics and experience with this tax amnesty in France.

The contribution showed the significance of the French juridical institute of “fiscal repentant” in one of the most infamous cases in the contemporary world – the Panama Papers. Within the comparison the paper showed the influence of this tax amnesty on the amount of the taxpayers who had their bank accounts abroad and who made use of the opportunity of the juridical institute of “fiscal repentant” and they made a request to the STDR to regularize of their tax situation.

The paper also presented the comparison between the French juridical institute of “fiscal repentant” and the juridical institute of effective penitence under the Czech penal law because these institutes could seem similar at the first sight. In the paper, there were two principal reasons given why it is necessary to distinguish between these institutes.

The hypothesis, which was defined in the abstract, or rather in the introduction of the paper as the “French juridical institute of «fiscal repentant» could be implemented into the Czech legal system”, was confirmed. As already mentioned, since the Czech Republic has already acceded to the multilateral agreement on automatic exchange of financial account information, the most important prerequisite for the successful and efficient implementation into the national legal system is satisfied.

With regard to the public interest of each country which (besides other things) focus on making the public budgets full, the implementation of such a tax amnesty into the legal order is to each state’s profit.

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