Tax Evasion in Romania: Disproportionate of Punishment and Lack of Remedies

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Introduction

For more than 10 years now, Romanian legal literature has been concerned with the relationship between criminal and tax law, the violation of the *ne bis in idem* principle, and the inconsistency of coexisting regulations on the two incumbent proceedings — in tax matters and in criminal matters — when charges, duties, or taxes owed to the government budget are evaded.

Although codes have been modified in both fields and the Law on Preventing and Fighting Tax Evasion has been amended,[1] nothing relevant has happened, and the same confusing rules are largely being maintained.

However, significant increases have been provided for both the punishment of the tax evasion offense stipulated in Article 9 of Law Number 241/2005 (the most frequently violated piece of legislation) and the tax charges under Law Number 207/2015 on the Tax Procedure Code.

National Law

In Romania, tax evasion is punishable by imprisonment from two to eight years if the damage is up to EUR 100,000, from seven to thirteen years for damage up to EUR 500,000, and from nine to fifteen years if the damage exceeds EUR 500,000. Article 9 of Law Number 241/2005 reads as follows:

> "(1) The following acts committed in order to evade tax liabilities are tax evasion offenses and are punishable by 2 to 8 years in prison and the interdiction of certain rights:

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1 Law Number 50/2013 regarding the amendment of Law Number 241/2005 on Preventing and Fighting Tax Evasion.

a) hiding the asset or the taxable source;

b) omitting, in full or in part, to record, in the accounting or other legal documents, the commercial operations conducted or the revenues earned;

c) recording, in the accounting or other legal documents, expenses that do not rely on actual operations or recording other fictitious operations;

d) alteration, destruction or hiding accounting documents, memories of taxation machines or of tax electronic cash registers or of other data storage means;

e) keeping double accounting records, by using documents or other data storage means;

f) circumventing financial, tax or customs verifications by failure to disclose, fictitious disclosure or inaccurate disclosure in relation to the main or secondary offices of the verified persons;

g) substituting, damaging or transfer by the debtor or third parties of the assets which were seized in accordance with the Tax Procedure Code and the Criminal Procedure Code.

(2) If the acts provided at paragraph (1) caused damage in excess of EUR 100,000, in national currency equivalent, the minimum threshold and the maximum cap of the penalty provided by the law shall be increased by 5 years.

(3) If the acts provided at paragraph (1) caused damage in excess of EUR 500,000, in national currency equivalent, the minimum threshold and the maximum cap of the penalty provided by the law shall be increased by 7 years."

If the amounts claimed by the civil party in the criminal proceedings are paid before the first court hearing, the penalty brackets are reduced by half. In theory, this option is available to all, but in practice only wealthy persons can afford it since, according to the same law (Article 11 of Law Number 241/2005), provisional remedies (i.e., attachment or garnishment) are mandatory, which makes payments that would lead to the reduction of criminal liability impossible in most cases.

In tax evasion matters, the following charges are due: interest on late payment (0.02 per cent per day of delay) and the penalty for non-disclosure provided at Article 181 of the Tax Procedure Code. The latter consists in a one hundred per cent increase (in the event of tax evasion) of the penalty of 0.08 per cent per day of delay provided at Article 181(1), which results in an aggregate amount of ancillary obligations of approximately sixty-six per cent per year.

From the tax penalties listed above, the specific penalty for tax evasion is 29.2 per cent per year and is of a criminal nature.[2] European courts have extended the scope of "criminal charge" and "criminal penalty" to administrative and tax matters as well, and determined that the application of a surcharge (which is the equivalent of penalties for late payment/non-disclosure under the national law) on the tax liabilities owed by a taxpayer is of a criminal nature.

It follows that national legal regulations provide for several criminal penalties for tax evasion, namely:

(1) A penalty under tax evasion law that cannot be a fine, but only a sentence for imprisonment; and
(2) A penalty specific to the offense, in addition to the other tax penalties that a taxpayer who is not in breach of criminal law would also have to pay.

In consideration of the above-mentioned scope of the punishment by imprisonment, the impossibility to apply a criminal fine, and the obligation to cumulatively apply tax penalties, whether or not criminal in nature, it is safe to say that in Romania anti-evasion regulations are highly repressive, if not the most repressive,[3] among the European States. In particular, focusing on prison sentences, the minimum bracket is higher than the maximum cap laid down by the legislation of many European States.

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2 In consideration of Article 4(1) of Protocol Number 7 to the Convention for the Protection of Human Rights and Natural Freedoms, titled "*Right not to be tried or punished twice*" and the case law of the European Court of Human Rights concerning the interpretation of such article, as well as according to Article 50 of the Charter of Fundamental Rights of the European Union, in light of the interpretations provided by the Court of Justice of the European Union: Judgment of the Court of Justice of the European Union of 26 February 2013 in Case C-617/10.

3 By contrast, maximum penalties for aggravated tax evasion are ten years in Austria, two years in Belgium, eight years in Denmark, ten years in Estonia, four years in Finland, seven years in France, ten years in Germany, ten years in Hungary, six years in the Netherlands, five years in Poland, five years in Portugal, twelve years in Slovakia, six years in Spain, and six years in Sweden. See https://www.oecd.org/ctp/exchange-of-tax-information/Voluntary-Disclosure-Programmes-2015.pdf.

The repressive picture is compounded by the mechanisms of aggravation of liability resulting from the entry into force of the new Criminal Code.[4] This aggravation may be direct or indirect. Direct aggravation are penalties applicable to concurrent offenses, e.g., when the offense is committed by an organized crime group. Indirect aggravation is the impossibility to lower punishments below the special thresholds due to the new rules on judicial individualization of punishments or limitation of the scope of measures other than imprisonment.

The recent case law of national courts in Romania is to the same effect. In most cases, particularly when tax evasion exceeds EUR 100,000, courts order very long prison sentences ranging from four or five years[5] to nine or 10 years.[6]

Administrative or judicial authorities are not chiefly interested in ensuring or applying specific mechanisms for effective reparation. On the contrary, they rather focus on establishing the payment obligation by enforcement orders, notices of assessment, or court sentences ordering the payment of the amounts due to the government budget according to tax legislation.

Defenses on the merits in the tax evasion cases usually filed before national courts are not very accessible. Most of the reasons for this follow from the freezing of administrative-tax proceedings for challenging the additional obligations established by what could be, in a broad sense, called tax audits, before the exercise of judicial control, i.e., suspension until the criminal case is solved.

The criminal courts' scope to resolve the tax issues on which the tax evasion offense is contingent is still uncertain from a legislative perspective: on the one hand, as tax proceedings are merely suspended and they are to be resumed after the end of the criminal trial and, on the other hand, the extension of subject matter jurisdiction provided in Article 52(1) of the Criminal Procedure Code is poorly defined by doctrine and case law.[7]

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4 Law Number 286/2009 on the new Criminal Code.

5 Bucharest Court of Appeal, 1st Criminal Division, Criminal Sentence Number 339/F/08.10.2014, which remained final under Criminal Decision Number 190/27.05.2015 of the High Court of Cassation and Justice.

6 Craiova Court of Appeal, Criminal Division, Decision Number 738/21.04.2017; Galati Court of Appeal, Criminal Division, Decision Number 1275/A/16.11.2015.

7 See Gornoviceanu — *Art. 52 NCPP. Chestiunile prealabile în procesul penal* (Article 52 of the New Civil Procedure Code. Preliminary matters in criminal proceedings), published online on Juridice.ro website.

This adds to the fact that no distinction is made between the abuse of tax law and the conduct described by criminal law. As a consequence, tax and judicial authorities tend to consider that any breach of a provision under tax law that leads to diminished or non-existent duties and taxes is an act or omission punishable under criminal law — "any tax matter is a criminal matter".

The actors of tax evasion offenses are not strictly defined. More precisely, the tax offense actors are, from a formal perspective, different from those against whom criminal proceedings are conducted. The tax evasion law provides for taxpayers' acts representing offenses, and a public prosecution is usually filed against individuals who do not have the capacity of taxpayers, but of the taxpayer's *de facto* or *de jure* representatives or other such capacities.

Moreover, the taxpayer is subject to the tax proceedings filed for the same amounts, so an endless to-and-fro movement is set in motion on topics such as identifying the holder of the payment obligation and of the valid debt instrument (notice of assessment or criminal judgment), the taxpayer's legal standing in the criminal trial (perpetrator, accomplice, or party liable under civil law), and so on.

Finally, the general picture highlighted above raises serious issues, at least in terms of principles concerning the lawfulness of criminalization, proportionality of sentences, *ne bis in idem*, and open access to justice.

We will only address below issues concerning disproportionality of punishments, i.e., cumulative criminal penalties, and the lack of effective remedies to ensure the observance of the principle of proportionality.

Comparative Law

In General

As already mentioned, the minima and maxima for tax evasion penalties in Romania are among the highest in the world, according to a 2015 survey issued by the Organization for Economic Cooperation and Development. Romania places second only to Korea, where the penalty may be life imprisonment in cases where the degree of the offense is high.

No mechanisms are guaranteed for regulating tax status prior to commencement of criminal proceedings, or subsequently, so that a limitation of punishment apt to meet the requirements of the principle of proportionality might operate by waiving the public action, ending criminal proceedings and maintaining only the administrative penalties, or by applying a measure alternative to imprisonment.

Such procedures are in place in many European countries, although prison sentences provided by the law or ordered by the courts are significantly shorter than those in Romania.

France

French legislation provides for a varied system of penalties regarding acts of tax evasion. These may range from criminal penalties, such as imprisonment or fines, to administrative measures, in the form of surcharges and interest.

The main offense is tax fraud, referred to in Article 1741 of the French Tax Code.[8] The penalty, depending on the committed crime, may consist of five years in prison and a fine of EUR 500,000. More serious forms of tax evasion may lead to up to seven years in prison and a mandatory fine of up to EUR 3-million. The aforementioned provisions do not apply unless the amount of harm exceeds ten per cent of the taxed sum, or a net value of EUR 153. Additionally, an ancillary penalty consisting in a prohibition to exercise certain rights[9] may be applied.

Concurrently, the taxpayer will also be held liable under administrative law. Under Articles 1727 *et seq.* of the French Tax Code, penalties of 0.2 per cent of the monthly tax due may be applied as interest. This amount is reduced by half if payment has been made by the legal deadline. Other similar penalties are established by the subsequent Articles, either as fixed amounts or as a percentage of the tax due.

The nature of these measures has been under scrutiny in the French legal system. According to certain doctrine authors,[10] penalties applied by tax authorities usually have a preventative and punitive purpose.

The concurrent tax and criminal liability of a person has been a subject for debate in this legal system. The French Constitutional Court has decided[11] that:

> "[i]f the possibility of two proceedings being brought can lead to an accumulation of penalties, the principle of proportionality

8 See https://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=9D10C4ED12FCDD7053E90AAF7C32C21A.tplgfr32s_3?idArticle=LEGIARTI000037526294&cidTexte=LEGITEXT000006069577&dateTexte=20190409&categorieLien=id&oldAction=&nbResultRech=.

9 See https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006070719&idArticle=LEGIARTI000006417290&dateTexte=&categorieLien=cid.

10 "Surcharges and Penalties in Tax Law", at p. 4, Pr. Dr. Ludovic Ayrault, Pr. Dr. Alexandre Maitrot de la Motte.

11 See https://www.conseil-constitutionnel.fr/decision/2016/2016545QPC.htm.

> implies that in any event the overall amount of the sanctions which may be imposed does not exceed the highest amount of one of the sanctions incurred."

In addition to this limitation of liability, French law establishes a series of remedies and procedures to settle the tax dispute. This may entail certain judicial remedies,[12] the possibility of suspending the execution of provisional measures[13] imposed upon the taxpayer, or even instituting limitations to the tax authority's right to run enforcement procedures. The legislator seems to focus on protecting the individual and allowing for settlements on the taxes or surcharges due. The French Tax Procedure Code[14] provides for the possibility of settling upon tax penalties. Such settlement leads to the reduction of surcharges and interests so long as the taxpayer does not contest the amount to be paid.

Distancing themselves from the reprimanding culture surrounding tax penalties, French judges have consistently imposed fines or light prison sentences — in general, suspended sentences. As such, a heightened interest for rehabilitation may prove beneficial for the future control of tax fraud.

Belgium

Under the Belgian legal system, tax fraud is an offense referred to in Articles 70–74 of the 1992 VAT Code[15] and Articles 449 *et seq.* of the Royal Decree regarding Income Taxes.[16] Other related offenses are found in the Belgian Criminal Code, other codes, and specific pieces of legislation, such as the Association and Organization Act, labor laws, accounting laws, and others.

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12 See https://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=9D10C4ED12FCDD7053E90AAF7C32C21A.tplgfr32s_3?idArticle=LEGIARTI000025622397&cidTexte=LEGITEXT000006069583&dateTexte=20120401&categorieLien=id&oldAction=rechCodeArticle.

13 See https://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=9D10C4ED12FCDD7053E90AAF7C32C21A.tplgfr32s_3?idArticle=LEGIARTI000020052352&cidTexte=LEGITEXT000006069583&dateTexte=20190409&categorieLien=id&oldAction=.

14 See https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006069583&idArticle=LEGIARTI000006315526&dateTexte=&categorieLien=cid.

15 *Impôts sur les revenus 1992/Wetboek van inkomstenbelastingen 1992.*

16 *Arrêté Royal d'exécution du Code des Impôts sur les revenus 1992/Koninklijk Besluit Wetboek van inkomstenbelastingen 1992.*

The main penalties for acts of tax evasion are imprisonment from eight days to two years and a fine from EUR 250 to EUR 500,000. Surcharges may be applied in conjunction with criminal fines, up to a total amount of EUR 3-million. Under an amendment of 11 June 2013 to the Royal Decree regarding Income Taxes, certain aggravated forms of tax evasion have been incriminated. Whether a product of organized crime or not, punishments in accordance with Article 449(2) include a prison sentence ranging from eight days to five years, and a fine from EUR 250 to EUR 500,000.

Belgian law requires certain criteria to be met regarding the subjective element of the committed act. The perpetrator must act with intent, or as a result of serious misconduct. Negligence or ignorance does not lead to the criminal liability of the prosecuted person(s). The act or omission must also have a purpose, such as the intent of procuring a property benefit for oneself or for another, or to cause injury or damage to a competitor.

One of the particularities of Belgian law is the mandatory preliminary procedure that must precede any legal proceedings. As such, the Belgian tax authority must carry out a thorough tax audit, which is subject to an administrative appeal. This public prosecution can only modify the (un)disclosed tax liabilities due by means of a corrective procedure.

If this goes to trial, settlement procedures are in place. These may consist in obtaining a preliminary tax decision prior to a settlement, mediation on the taxes due, or soliciting (starting from 1 January 2014) the services of a public voluntary compliance program in collaboration with the tax authority or a public prosecutor.

As of 1 March 2016, a plea bargain agreement can be initiated between the defendant and the prosecutor. Under such agreement, the former admits to the indictment and the negotiated penalty. This procedure can only be applied if the imprisonment sentence does not exceed five years.

Italy

As is the case in France, Italian tax evasion penalties may be administrative or criminal in nature. The former may consist in penalties or surcharges, and the latter can lead to a prison sentence of up to six years. The monetary sanctions can amount to 240 per cent of taxes due, with a threshold of EUR 258. Additionally, certain prohibitions may be imposed, such as forbidding the perpetrator to participate in public

auctions, the inability to obtain licenses, or restricting the right to become a member of the executive staff, or an auditor.

According to some studies,[17] between a quarter and a half of Italy's GDP is lost due to tax evasion. As such, the country's policy has been centered on settlement and the recovery of taxes due to the government budget. Consequently, criminal proceedings may be ended before they reach court if the tax debt is paid. In other cases, voluntary payment can lead to a mitigation of the prison sentence or the respective fine.

A settlement agreement between the parties concerned can also be concluded if the aggregate amount of taxes due has been fully established. The taxpayer is also liable to pay interest and a surcharge, which may vary between a tenth and a fifth of the evaded sum.

Italian law provides for a special procedure for contesting the amount of tax due in the case of calculation errors. This form of appeal may be used regardless of the stage of legal proceedings, and the right to action is not time-barred, even if the taxpayer has been sued.

Voluntary payment of the tax debt may be carried out within sixty days of reaching maturity. As a result, penalties imposed by various authorities will be reduced by one-third. Also, a third of the penalties may be paid and a complaint can be issued regarding the remaining amount.

A special settlement procedure, which cannot exceed ninety days, is also in place. The taxpayer and the tax authority must agree upon the taxes due, if the amount is higher than the amount that had been previously established. If the debtor wins, the penalties can be reduced by one-third. In other cases, legal proceedings are available if applied for within 150 days.

A special settlement procedure is also in place if taxes due do not exceed EUR 50,000. If an agreement is not reached, a lawsuit can be opened against any of the contracting parties. If the parties settle upon the disputed sums, the law mandates that all penalties are to be reduced to 40 per cent in first instance proceedings, or fifty per cent in appeals.

Plea bargaining is also part of Italian law and is provided for in Articles 444 *et seq.* of the Criminal Procedure Code. These procedures are applicable only if the prison penalties do not exceed five years. The defendant and the prosecutor agree upon the criminal punishments that are to be applied prior to the commencement of court proceedings. As a result, prison sentences and fines are reduced by one-third. According to Article 13 *bis*, Paragraph 2, of Legislative Decree Number 74/2000, plea

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17 See http://fiorio.economia.unimi.it/res/tax_ev.pdf.

bargaining can only apply to cases where the defendant has paid all due taxes and penalties beforehand.

The defendant can request, under Articles 438 *et seq.* of the Italian Criminal Procedure Code, that he or she be judged under a streamlined procedure. In this case, a decision can be made after preliminary hearings and is based on evidence gathered in the investigation stage. Other necessary pieces of evidence may be provided if they are required to reach a verdict. As a result, prison sentences and fines will be reduced by one-third if the defendant is found guilty.

Spain

In Spain, tax evasion is sanctioned under Articles 305 and 305 *bis* of the Criminal Code. Other tax-related offenses are subject to Article 183 of General Tax Law Number 58/2003. According to information gathered by the European Parliament,[18] Spanish law reprimands acts in this category whether they have been committed intentionally or by omission.

According to Article 305 of the Criminal Code, in order to convict someone for tax evasion, the evaded amount must exceed EUR 120,000. Individuals may be subject to a prison sentence of up to six years, and a mandatory fine of up to six times higher than the taxes due. A series of prohibitions can also be put into effect. This includes, but is not limited to, the inability to receive tax subsidies, or other tax privileges, for a period spanning from three to six years.

Paragraph 3 of the same Article states that the same penalties are to be applied if the acts have been committed against the Treasury of the European Union, if taxes due exceed EUR 50,000 per year. For amounts ranging from EUR 4,000 to EUR 50,000, prison sentences may vary from three months to one year with the mandatory application of a fine of up to three times higher than the taxes due.

Paragraph 6 adds a non-mandatory special mitigating circumstance that can lead to the reduction of the prison sentence if the debtor pays all its tax debts within two months of the issued court notice.

Spanish law also provides for certain extenuating circumstances if the defendant collaborates with the authorities and leads to identifying the participants in the crime or establishing the aggregate real amount of taxes due. Moreover, Article 308 *bis* of the Criminal Code states that the

18 See http://www.europarl.europa.eu/cmsdata/124716/Spain per cent20fiche.pdf.

prison sentence may be suspended if the defendant has paid all his tax liabilities or has returned all unlawfully obtained subsidies.

Germany

In German law, basic forms of tax evasion carry a prison sentence of up to five years. Punishments for aggravated tax offenses are capped at ten years in prison.

Distinguishing between administrative and criminal penalties is less of a burden in German legislation. Administrative penalties are defined in Articles 3 and 4 of the Federal Tax Code[19] and can comprise interest, surcharges, tax fines, additional costs, or import and export taxes. The law calls them "auxiliary means of tax payment". They do not have the legal character of taxes, but rather that of monetary sanctions, which can be applied to tax liabilities. Regardless, these measures are not to be considered ancillary.

Interest is provided for by legislation in other categories, and surcharges are not included in either of the aforementioned.

German legislators have broadened the approach to tax evasion control by providing for multiple means to achieve the preventative and punitive functions of the law. For example, Articles 134 and 138 of the Civil Code provide that contracts that aim at evading tax liabilities are null and void. Article 35(1) of the German Commerce and Industry Bill provides that companies can be dissolved if their directors or founding members are insolvent from a tax perspective.

The application of the *ne bis in idem* principle has been a subject of debate among German legislators and judges. This rule is stated at Article 103(3) of the Federal Constitution and forbids the punishment of a single act twice. The principle only applies in criminal law, not to tax sanctions, regardless if their intended purpose was to prevent or to punish.

However, other non-constitutional pieces of legislation provide for the same principle, such as Article 56(4), or Articles 84 and 85 of the German Misdemeanor Code. Article 13(6) of the German Administrative Code seems to settle the issue, stating that "means of coercion can be repeatedly applied, increased, or changed until the obligations are fulfilled". This might be an attempt of the legislator to institute a principle of proportionality between the unlawful act and its corresponding consequence.

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19 See https://www.gesetze-im-internet.de/englisch_ao/englisch_ao.html#p2615.

European Parliament Survey

Finally, a European Parliament survey of 2017 on the ability of Member States to fight tax crimes[20] found that all Member States apply punishment frameworks based on deterrent measures in the form of high fines and possible imprisonment, either as a single penalty, or with non-repressive compliance schemes.

Regarding the punitive measures put in place, the most common instrument is the monetary penalty usually applied by the tax authority to the taxpayer in the form of an additional amount of money pro rata to the unpaid tax. These measures place additional costs on the taxpayer for failing to comply with certain tax obligations, although this does not necessarily involve a "criminal" behavior under national law.

Criminal penalties, on the other hand, often involve either imprisonment (Cyprus was exemplified with penalties of up to 15 years, but in connection with money laundering offenses) or high fines (up to EUR 1,250,000 in Luxembourg).

It has also been noted that most of the tax systems (9 out of 16) described by the Member States in their answers (Romania did not provide any data) encompass two types of penalties — administrative and criminal, but the distinction between administrative and criminal penalties is not clear from the submitted data. A dual system is in place, according to the study, in Bulgaria, Cyprus, the Czech Republic, France, Italy, Luxembourg, Portugal, Slovenia, and the United Kingdom, and to some extent in Estonia; it is sometimes unclear whether such dual types of penalties are complementary or conflicting.

Since administrative tax penalties may respond to the same basic purposes as criminal penalties (retribution and rehabilitation), attention was called to the risk of violating the *ne bis in idem* principle regarding the simultaneous application of the Tax Code and the Criminal Code if the State applied criminal and tax penalties for the same offenses.

Lack of Remedies — Draft Laws

It is quite apparent that Romania has not implemented any effective compliance programs, or clearly defined in its legislation the abuse of

20 Available in English at the following address: http://www.europarl.europa.eu/RegData/etudes/STUD/2017/603257/EPRS_STU(2017)603257_EN.pdf. Available in French at the following address: http://www.europarl.europa.eu/RegData/etudes/STUD/2017/603257/EPRS_STU (2017)603257_FR.pdf.

tax law as distinguished from the tax evasion offense, or taken any specific measures to comply with the *ne bis in idem* principle and the proportionality of punishments in the case of cumulative criminal penalties applicable to breaches of tax rules.

The consequences can be seen both in the low rate of collection of evaded amounts and in the high costs of the administrative or legal proceedings that must be pursued against the accused.

At an individual level, the accused cannot apply the legal provisions aimed at overcoming the disproportion of punishments, since the mere reduction of the penalty brackets to half (according to the current wording of Article 10 of Law Number 241/2005) ensures proportionality only in theory. In fact, a prison sentence ranging from four and a half years to seven and a half years, for example, cannot be considered a mild sanction adjustable by reference to the fact that the offender was also applied other administrative or criminal penalties consisting in the payment of certain amounts.

A recent draft law[21] seeks to amend the analyzed regulation, proposing the end of the public action as a result of the payment of tax debts, under different circumstances, depending on the stage of the criminal proceedings.

Thus, if a tax evasion offense is committed under Article 8 (i.e., offenses concerning improper VAT refunds, repayments, or compensations) and Article 9 of Law Number 241/2005 and if, during criminal prosecution or trial, before the first court hearing, the defendant covers in full the damage caused by the offense, increased by 20 per cent of the tax base, plus interest and penalties, a waiver of prosecution may be ordered once.

If the first court hearing has already taken place, but judicial investigations have not yet been completed, and the defendant fully covers the damage caused as a result of the offense, increased by twenty per cent of the tax base, plus interest and penalties, the court may order, only once, the application of a criminal fine.

If payment is not made, but the court judgment determines the defendant’s obligation to cover, within one year since the service of the sentence, the damage caused by the offense, increased by twenty per cent of the tax base, plus interest and benefits, the court may order, only once, the suspension of the execution of the punishment under probation.

21 See http://www.cdep.ro/pls/proiecte/docs/2018/pr354_18__1_.pdf .

Where the convicted person does not cover the ordered amount within the required timeframe, he/she must serve the initial prison sentence that had been suspended.

If the large amount of the damage justifies such measure, the court may order that the amounts provided under the other paragraphs be covered within one to three years, subject to the same penalty, i.e., that the offender would serve the initial prison sentence that had been suspended.

The provisions of Article 10 should apply to all defendants that have jointly committed one of the offenses provided by Articles 8 and 9, regardless of whether the payment of the damage was made only by one or some of them. The draft law was criticized on grounds that it:

(1) Allegedly eliminates the dissuasive effect of punishments with the consequence of encouraging criminal offenses;
(2) Introduces concepts which are not provided for by the criminal law and/or criminal procedure law, i.e., the twenty per cent of the tax base sanction and the change of the suspended sentence into a prison sentence; and
(3) Breaches the constitutional principles of equality before the law and independence of the judge, and is defective in terms of legislative technique.

This legislative proposal was meant as a remedy, comparable to those existing in other European States, to eliminate the disproportionality of punishments provided by national law in tax evasion matters. The aim was to satisfy the public interest of efficiently collecting taxes and legal charges, while preserving the deterrent nature of essentially monetary penalties consisting in substantially increased payment obligations.

However, the Constitutional Court of Romania granted the objection of unconstitutionality by its Decision Number 147 of 13 March 2019[22] for reasons related to non-observance of legislative technique standards, without opining on the other grounds of unconstitutionality.

It remains to be seen whether the Romanian legislative authorities will initiate a new similar law project, this time observing the norms of legislative technique.

22 Published in the Romanian Official Monitor Number 338 of 3 May 2019.