



Kingdom of the Netherlands



REPORT

Fiscal Amnesty - Issues and Problems of Harmonization with the Criminal Legislation

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The report entitled Fiscal Amnesty - Issues and Problems of Harmonization with the Criminal Legislation is prepared by the Albanian Institute of Science (AIS/Open Data Albania), as part of the implementation of the C1 - EU - NPA Project "*Improving the Debate on Policies and Accountability to Fulfill Rights Basic*", through the creation of the Negotiation Platform for Cluster 1 Albania. This report sheds light on some aspects and issues of harmonization and legal safeguards related to the proposed draft law on Fiscal and Criminal Amnesty of Entities that Make a Voluntary Declaration of Assets, a draft law initiative presented for Public Consultation on June 23rd, 2022, for Opinions and Recommendations expected to be submitted within July 23rd.

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The report is presented as part of the civil society initiatives, which aim to contribute to the country's European integration.

The Findings, Opinions or Recommendations expressed in this Report represent the views of the experts and those of AIS and do not necessarily reflect those of our partners or supporters of the C1-EU-NPA Project.



Brief introduction

The well-known expert George Gutman, working for the Internal Revenue Service (IRS) in USA has written that the amnesty, like a fire we ourselves lit to control massive forest blazes, is a potentially dangerous tool for the tax system. However, if used carefully, it can serve as a rejuvenator for revitalizing the tax system.

The biggest concern for the decision-making and then, the implementing authorities, when discussing whether to introduce an amnesty program, is the fact that honest taxpayers might lose their respect for the integrity of the country's tax system. Such integrity focuses on the system's image, effectiveness, efficiency and credibility. This poses the issue of a delicate balance for decision-making and implementation. On the one hand, the authorities want to make the fiscal amnesty as attractive as possible in order to attract as many irregular taxpayers as possible to participate in the amnesty. On the other hand, the same authorities do not want to make the program so attractive that regular taxpayers lose faith in the state, and even worse, regular taxpayers turn into non-regular taxpayers.

Harmonization with criminal legislation

In its jurisprudence, the Constitutional Court has stated that legal certainty itself, as an element of the rule of law, requires a law, as a whole or its special provisions, to be clear, well defined and easy to understand (*decision no. 9, date 26.02.2007 of the Constitutional Court*).

In order to correctly understand and apply the principle of legal certainty, it is required, on the one hand, that the law in a society provides certainty, clarity and continuity, so that individuals can direct their actions correctly and in accordance with it, and, on the other hand, the law itself is not static if it has to shape a concept. An incorrect regulation of the legal norm, which creates room for those implementing it to give it different meanings and which leads to consequences, does not correspond with the purpose, stability, reliability and effectiveness intended by the norm itself (*decisions No. 36, dated 15.10.2007; No. 10, dated 26.02.2015 of the Constitutional Court*).

The Constitutional Court has emphasized that the lack of harmonization of the provisions of a law with those of other laws may not in itself create unconstitutionality, but when the ambiguity creates such problems that lead to incorrect application of the legal provisions and violation of the rule of law principle and legal safeguards, then it cannot be accepted that these norms are in compliance with the spirit of the Constitution (*decision no. 14, date 22.05.2006 of the Constitutional Court; decision no. 60, date 16.09.2016*)

I. The draft law "On fiscal and criminal amnesty for entities that make a voluntary declaration of assets" stipulates that:

Article 2

The purpose of this law is:



d) to guarantee the non-initiation of administrative procedures and criminal proceedings against these subjects, by the relevant institutions, in relation to these assets.

Article 20
Effects of completing the voluntary declaration procedure

2. Beneficiary entities according to the provisions of this law, after being equipped with the certificate of completion of the voluntary declaration process, benefit from the following rights:

dh) Exemption from criminal prosecution and criminal proceedings, within the framework of the criminal law applicable in the Republic of Albania, for criminal offenses in the field of tax and customs, and with which such properties are directly or indirectly related, according to the conditions and provisions of this law;

Article 22
Conditions for granting amnesty from criminal prosecution

1. Beneficiary entities, to which the relevant certificate of completion of the voluntary declaration process is issued, are exempt from criminal prosecution for criminal offenses in the tax and customs field that are directly or indirectly related to the creation and ownership of the declared property, according to the conditions defined in this law, carried out until the date of entry into force of this law.

Over the years, the exemption from criminal liability in the Albanian legislation was done through the adoption of special provisions in the Criminal Code (for those who are not subject to a final criminal court decision or registered criminal proceedings, which is the classic case of criminal amnesties). Thus, exemption from criminal liability in the Criminal Code over the years has been described in the following provisions:

Article 52/b
Exemption from punishment for crimes in the field of elections

A person who has committed one or more criminal offenses provided for in chapter X of this Code, who cooperates with, and assists the criminal prosecution bodies for the investigation, as well as for the identification of other persons, accomplices in the commission of the criminal offense or perpetrators of other related offenses, is exempt from punishment for the criminal offense committed by him.

Article 334/1

Regardless of Article 278, persons who, in accordance with the legislation in force, voluntarily hand over their weapons by 31.5.2005 are exempt from criminal prosecution for illegal possession of weapons and ammunition.

In any case, persons who have committed a criminal offense using weapons and military ammunition as a means for this purpose are not exempt from criminal prosecution for possession of weapons without a permit.



Persons who, after the entry into force of this law, declare that they do not possess fighting weapons and ammunition and who are found to have hidden weapons and ammunition from the checks carried out in support of the relevant provisions of the Code of Criminal Procedure, are not exempt from criminal prosecution.

The Constitutional Court has emphasized that the Criminal Code constitutes the most important law, which systematically includes criminal-juridical provisions. One of the main overarching principles in this Code is the principle of legality, which means the provision by law of criminal offenses and the non-punishment for a criminal offense that is not expressly provided as a crime or criminal misdemeanor. (*Decision no. 1, dated 12.01.2011*)

Despite the fact that the draft law in question is expected to be approved by three-fifths of all members of the Assembly, it is recommended that the exemption from criminal responsibility for the sake of "fiscal amnesty" be made through a separate article in the Criminal Code, considering the risk for such norms to lead to inflation regarding exemption from criminal liability, due to inaccuracies in formulation and implementation and the need to have all criminal offenses, both those leading to criminal liability and those exempt from criminal liability, in one unified text.

II. The draft law "On fiscal and criminal amnesty for entities that make a voluntary declaration of assets" stipulates that:

Article 22
Conditions for granting amnesty from criminal prosecution

2. *Beneficiary entities, to which the relevant certificate of completion of the voluntary declaration process has been issued, are exempt from criminal prosecution for criminal offenses in the tax and customs field that are directly or indirectly related to the creation and ownership of the declared property, according to the conditions defined in this law, carried out until the date of entry into force of this law.*

For the sake of the clarity of the legal text and to ensure an as accurate implementation in practice as possible, the draft law needs to clearly specify the provisions of the Criminal Code to which the exemption from the criminal liability applies. The draft law should also provide for cases when the criminal punishment for criminal offenses in the tax and customs field is attached to proceedings for a different criminal offense.

III. Article 287 of the Criminal Code stipulates that:

Article 287
Laundering the proceeds of a criminal offense or criminal activity

*Laundering the products of the criminal offense or criminal activity, through:
a) exchanging or transferring property, with the aim of hiding or covering its illegal origin, knowing that this property is the product of a criminal offense or criminal activity;*



b) concealing or covering up the true nature, source, location, availability, displacement, ownership or rights in relation to property, knowing that this property is the product of a criminal offense or criminal activity;
c) gaining ownership, possession or use of property, knowing at the moment of taking it over, that this property is a product of a criminal offense or criminal activity;
ç) performing financial actions or fragmented transactions to avoid reporting, according to the legislation for the prevention of money laundering;
d) investment in economic or financial activity of money or goods, knowing that they are products of criminal offenses or criminal activity;
shall be punished with imprisonment from five to ten years

The provisions of this article also apply when:

- a) a criminal offense, the products of which are laundered by a person who may not be taken as a defendant or who may not be punished;*
- b) criminal prosecution for the offense whose products are laundered has been prescribed or amnestied;*
- c) the person who performs the laundering of the products is the same as the person who committed the act, from which the products were derived;*
- ç) for the criminal offense, from which the products came, a criminal case has never been initiated or a sentence has not been given by a final criminal decision;*
- d) the criminal offense, the products of which are laundered, was committed by a person, regardless of his citizenship, outside the territory of the Republic of Albania and is simultaneously punishable both in the foreign country and in the Republic of Albania.*

Knowledge and intent, according to the first paragraph of this article, are deducted from objective factual circumstances.

The draft law "On fiscal and criminal amnesty of entities that make a voluntary declaration of assets" does not specify its relationship with the implementation of Article 287 of the Criminal Code. Despite the fact that it states that the persons who are subject to its implementation are exempt from criminal liability for acts/proceedings initiated in the field of taxes, taxation or customs, they may still not be fiscally amnestied, because they are still criminally liable for having violated Article 287 of the Criminal Code. Article 287 of the Criminal Code applies the same way even if, for instance, a person who has committed tax evasion in the field of customs may not be punished precisely because of the criminal amnesty provided for in the draft law.

IV. The draft law "On fiscal and criminal amnesty for entities that make a voluntary declaration of assets" stipulates that:

Article 4
Implementation of other legal provisions

1. *The provisions of the legislation in the tax and customs field, which foresee the powers of the public administration bodies responsible for supervising the implementation of the legislation in the field, including the responsibility for the initiation of administrative procedures, during the implementation of this law, are applied in accordance with this law.*



2. *The provisions of this law do not apply to assets that are included in the scope of the implementation of law no. 10192, dated 3.12.2009, "On preventing and fighting organized crime and trafficking through preventive measures against assets", as amended.*

3. *The provisions of law no. 20/2020, "On the termination of transitional ownership processes in the Republic of Albania" prevail the provisions of this law.*

Regarding the definitions made in Article 4 of the draft law:

- the meaning and application of the definition made in point 1 of article 4 is unclear. Thus, it is impossible to think of a concrete situation, where the definition given in point 1 of Article 4 would make sense. The draft law published on the official website for public consultation does not contain any Explanatory Reports or an Impact Assessment Report, which is a mandatory requirement for the implementation of the Decision of Council of Ministers "On the approval of the Rules of Procedure of the Council of Ministers".

- once this fiscal amnesty is approved and for 9 months of its duration, a person is not in the scope of implementation of law no. 10192, dated 03.12.2009, "On preventing and combating organized crime and trafficking through preventive measures against property", amended. At the same time, these same people benefit from the "Fiscal Amnesty" and legalize their assets, or part thereof, and, let's say, in four years they become subject to law no. 10192, dated 3.12.2009. In this case, the above-mentioned law may not apply to assets already amnestied by law, due to the principle of legal safeguards. As long as such assets are considered and recognized by the state as legal, they may not be subject to legal measures of seizure or confiscation according to this law for being illegally created. Law no. 10192, dated 03.12.2009, "On the prevention and suppression of organized crime and trafficking through preventive measures against property", otherwise known as the Anti-Mafia law, is, according to the Italian Constitutional Court and the Court of Strasbourg, not a law of criminal nature, but rather a civil law. Therefore, with such property created in violation of the law being considered civilly legal after this amnesty, its legality may no longer be questioned from the perspective of the Antimafia law. In this case, it is the principle of legal safeguards that prevails. At the same time, the provision in point 2 of article 4 will not be applicable in practice, because the property in question will, for example, legally enter the civil circulation and it may not be seized from a third party that may have acquired it according to a legal action of the Civil Code, while the transaction was legal at the time.

- In point 3 of article 4, the wording "prevails" is unclear. On the other hand, a law approved by a simple majority may not prevail in implementation over a law that is approved by a qualified majority of the Assembly. It is rather laws qualified by a qualified majority that should prevail in implementation and laws approved by a simple majority should simply be in harmony with them.

V. The fact that the European Commission has recently raised serious concerns about the current draft law on fiscal amnesty should not be overlooked. According to the European Commission, the law in question would weaken Albania's anti-money laundering controls, while doing little to increase the tax administration's ability to improve future compliance with tax requirements. Because non-tax residents, including Albanians living in the EU or the Western Balkans, fall within its scope and are



required to import cash in order to benefit from the amnesty, the current draft of the law raises serious concerns for EU member states and other partners, as well as a substantial reputational risk for Albania.

VI. Fiscal and criminal amnesty should be based on the most successful experiences of other countries and adapted to the Albanian context. Such a tax and criminal amnesty would be difficult to implement because the definition of assets includes elements such as real estate in Albania and abroad, cash held in local or foreign currency, digital currency, valuable items of gold or precious stones, etc. (Article 3) and it is difficult for them to guarantee that:

- they do not derive from criminal activities;
- are declared by their actual owner (beneficiary); and
- result from income that does not belong to a tax period that is either still subject to a tax return or subject to a tax audit that has already been carried out.

It is unclear to banks and the public how the law "On the prevention of money laundering and financing of terrorism" will be applied in the context of this amnesty. There is a clear risk that the draft law will create room for tax evasion and money laundering coming from abroad. Meanwhile, local and foreign businesses have publicly expressed their concern about unfair competition from those who have illegally created assets and/or kept them out of the system until now.

VII. Article 20, point 3 of the draft law stipulates that: "every provision of this law will be interpreted in favor of the beneficiary entities". This wording is very broad and leaves room for many consequences. While the principle of presumption of innocence towards the defendant is a fundamental principle of the rule of law, in this case it risks the exclusion from criminal prosecution of the subject who has committed another criminal offense provided for in the Criminal Code.

VIII. In order for this amnesty law to be credible and enforceable – and not to risk losing taxpayers' faith and obedience to the law – its content must be combined with increased enforcement against taxpayers who are in violation of the law. This comes at a time when we have not yet managed to build a professional tax administration, which would block the possibility of money laundering and corruption.



Conclusions

The qualification of the draft law "On fiscal and criminal amnesty of entities that make a voluntary declaration of assets" as a normative act provided for in article 81, point 2, letter "ë" of the Constitution, and its approval by three-fifths of all members of the Assembly is right. Meanwhile, a number of countries, both developing and those with a consolidated economy and democracy, have approved fiscal amnesties several times over the years. The case of Albania should benefit from better standards in this aspect and at the same time from the lessons learned from the implementation of fiscal amnesties in these countries.

Being that the approval of the draft law "On fiscal and criminal amnesty of entities that make a voluntary declaration of assets" requires a qualified majority of 3/5 of all members of the Assembly, it is recommended that such fiscal amnesty and legal framework be drafted by a specialized body with a broad political composition such as the Commission for Legal Affairs and Public Administration (or the Commission for Economy and Finance or both). The Commission should adopt a legal framework within which the amnesty should be extended in the form of a decision that expresses the broadest possible political consensus possible.

A decision of the Standing Parliamentary Committee should list the issues to be regulated by such fiscal and criminal amnesty, its scope and subjects, the amnesty enforcement bodies, and other main modalities of the structure of a law. **Afterwards, it should be the duty of technical experts to translate such political will into a legal and normative technical language.** Clearly, with the process taking place in the Assembly, the necessary transparency and the wide participation of interest groups, well-known economists, academics, etc. would be ensured. In this way, both the legal framework and structure, and the drafting process would benefit from consultations and inclusiveness.

A law, however qualitative in its content, cannot achieve the desired effects in the absence of the broadest political will possible in the Assembly. Likewise, even if full political will is achieved, the desired effects will not yet be achieved if there is a lack of a coherent, complete and accurate legal basis for fiscal and criminal amnesty.



To sum it up:

- Albania is neither the first, nor the last country to adopt a special law on fiscal and criminal amnesty, including granting immunity from criminal prosecution and defining subjects that are not included in the scope of its application.
- With such law being approved by 3/5 of all members of the Assembly, it is necessary to ensure a broad political consensus, which is the premise for the correct and complete implementation of the law once it enters into force. Therefore, building on what has already been done, the preparation and approval of such draft law should now move to a standing Commission of the Assembly.
- The draft law needs to be reviewed in its entirety, reflecting the concerns raised so far publicly, and ensuring such law is in line with the criminal, tax legislation, etc.
- The draft law to be approved must be in the same spirit and experience of other countries that have already adopted laws on fiscal and criminal amnesty, and must also contain solutions for a series of lessons learned or problems faced in implementation by the respective countries.