

“NEW EXCHANGE OF INFORMATION VERSUS TAX SOLUTIONS OF EQUIVALENT EFFECT”

Czech Republic REPORT

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1. The sources of the exchange of information system in your country: just a collection...

The Czech Republic is one of the countries highly interested in international cooperation in tax matters and tax information exchange on high frequency. It regulates international cooperation on exchange of information by bilateral tax treaties following the OECD model (and UN model in some cases), TIEAs and the multilateral OECD Convention on Mutual Administrative Assistance in Tax Matters. Moreover the Czech Republic has concluded fourteen bilateral Memorandums of Understanding enabling close cooperation between tax offices as the simultaneous audits and/or automatic tax information exchange between the states.

The Czech Republic tends to conclude treaties containing the latest Article 26 of the OECD MTC including an automatic exchange of information. As the Czech Republic support higher frequency of tax information exchange there are not usually any limits applied to the information exchanged except the standard limits stated in the Article 26, paragraph 3 of the OECD MTC. Relating the Article 26, paragraph 1 and the OECD Commentary on Article 26, there should be mentioned the rule of “fishing expedition” exclusion which is fully respected by the tax authority and there have not been registered any attempts to use it although there is not a legally bounding clear definition stated the line between the group request and fishing expedition in the Czech Republic.

The Czech Republic applies the approach of powerful tax administration having access even to bank information within days according to the Article 57 of the Act No. 280/2009 Coll. Tax Administration Procedure Code on one hand and general strong tax secrecy on other hand. It means there are not any disputes about Article 26, paragraph 5, of the OECD MTC in the treaties signed by the Czech Republic and the Article 26, paragraph 5 granting the international tax information exchange covers bank information exchange as well.

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The Czech Republic does not include the Article 27 OECD Model Tax Conclusion in treaties as the purpose is replaced by the Act No. 471/2011 Coll. on Some Financial Debt Collection International Assistance which implemented the EU directive 2010/24/EU into the Czech law frame.

Moreover the Czech Republic follows the OECD Manual on automatic exchange of information approved by the OECD on Fiscal Affairs on 23rd January 2006 and its standards which were implemented into the Czech national law by the Act No. 164/2013 Coll. on Tax Administration International Assistance.

As the Czech Republic searches the opportunities to increase the frequency of international information exchange it signed the OECD Convention on Mutual Administrative Assistance in Tax Matters on 26 October 2012 without any limits or exemptions for now.

The Czech Republic is one of the countries involved in peer review of the Global Forum on Transparency and Exchange of Information for Tax Purposes. The Phase 1 was already closed in 2012 with some minority notes. One of the most critical notes relates the bearer shares availability. "Relevant entities are subject to comprehensive requirements under commercial, tax, anti-money laundering and accounting legislation to maintain and have available relevant ownership and bank information. Such information is generally available for EOI purposes. However, some gaps remain with regards to ownership information on foreign companies having their place of effective management in the Czech Republic. More significantly, there are insufficient mechanisms in place to ensure the availability of ownership information for bearer shares which are frequently issued by public limited companies. As a result, element A1 is not in place."³ On the other side the bearer shares will be abolished by the Act No. 134/2013 Coll. on Higher Transparency of Stock Companies since 1 January 2014. The Phase 2 of the peer review will start in the middle of 2014.

There is a continuously increasing number of Tax Information Exchange Agreements (TIEAs) signed by the Czech Republic and there is a lot of TIEAs pending. Up to November 2013 the Czech Republic has concluded and applied the TIEAs with the following countries: Man, Guernsey, BVI, Jersey, Bermudas and San Marino. The TIEA with the Cayman Islands will be valid since 1 January 2014. Other countries negotiated the TIEA with the Czech Republic and there are pending legal

³ OECD (2012), *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Czech Republic 2012: Phase 1: Legal and Regulatory Framework*, OECD Publishing. <http://dx.doi.org/10.1787/9789264168800-en>

approval steps for its validation as the TIEA concluded with Andorra, Bahamas, Monaco, Aruba, Sint Maarten, Belize, the Cooks Islands.

The Czech Republic has not concluded any agreements following the OECD Model Agreement for the Undertaking of Simultaneous Tax Examinations nevertheless it concluded fourteen “Memorandum of Understanding” which enables the automatic information exchange and Simultaneous Tax Examinations. The Czech Republic has concluded the Memorandum with the following states – the Slovak Republic, Hungary, Estonia, Denmark, Sweden, Lithuania, Latvia, Belgium, Canada, the Netherlands, Germany, Australia, Portugal and Spain. There are pending negotiations with the United States, Japan and Poland.

2. The administrative cooperation in tax matters under EU Law and its domestic implementation in your country: for good and evil

Please provide the state of art of your domestic legislation making reference to:

The Czech Republic follows the 2011/16/EU directive of 15 February 2011 on administrative cooperation in the field of taxation and the directive has been implemented into the Czech national law system by the Act No. 164/2013 Coll. on Tax Administration International Assistance which replaced the old Act No. 253/2000 Coll. Nevertheless the application of the new directive was slightly delayed as the new Act No. 164/2013 Coll. entered into force since May 2013.

The effective implementation of Article 8 of the 2011/16/EU directive into the Czech national law is represented by the Articles 18 and 19 of the Act No. 164/2013 Coll. on Tax Administration International Assistance which enable the direct cooperation, presence of one state tax officer in another state, joined audits and simultaneous controls.

“Since 2010 the international exchange of information has been provided in electronic forms through a secure communication channel, the so-called CCN mail. In 2011, there was a major administrative change in the area of exchange of information on request and spontaneous exchange of information, consisting in using centrally processed e-forms between the EU Tax Administrations.”⁴

The EU Commission Project on the Asset Recovery Office (ARO) for the creation of a centralized financial information data bank would be potentially welcomed by the Czech Republic as it can increase the chance to collect the taxes or missed profit of non-legal operations.

⁴ General Financial Directorate, Communication and International Relations Department. The Annual Report of the Czech Tax Administration 2011. Prague, 2012. ISBN 978-80-85045-41-3, p. 35

3. The collection and exchange of information under anti money laundering legislation: a real solution or just a new threat ?

Directives 2005/60/EC of 26 October 2005, and 2006/70/EC of 1 August 2006, on the prevention of the use of financial system for the purpose of money laundering and terrorist financing are implemented into the Czech national law by the Act No. 253/2008 Coll. on Anti Money Laundering and Anti Terrorism Financing Arrangements.

Information collected in line with the Act No. 253/2008 Coll. by the authorities of the Czech Republic must be handled accordingly the Article 33 of the Act No. 253/2008 Coll. stating, that collected information can be exchanged only if they are submitted in line with target of the Act No. 253/2008 Coll. and with foreigner partners of the same competence as the local Financial Intelligence Unit. The exchanged information must be used for administrative and criminal tax assessments based on the Article 32 of the Act No. 253/2008 in general. On the other hand the Czech Republic does not have any special provisions or cases relating definition or identification of natural persons defined as “beneficial owner”⁵ or “ultimate beneficial owner” and moreover the law of the Czech Republic does not recognize the relevant types of entities based on the Anglo-American law as trusts or partnerships.

The Czech Republic approach to international tax information exchange conforms to the individual’s right to privacy, as also stated in peer review report. “With the minor exception of prior notification in cases of a third party witness statement, there seem to be no rules on rights and safeguards which could unduly prevent or delay effective exchange of information. It is recommended that the exception from prior notification of a witness statement be specifically permitted where the notification is likely to unduly prevent effective exchange of information.”⁶

And there is a fresh judgment of the Supreme Administrative Court supporting the strong position of the tax administration based on the ECJ answer to reference for a preliminary ruling lodged by the Czech Supreme Administrative Court.⁷

⁵ The Czech Republic respects the OECD MTC Commentary explanation of the beneficial owner.

⁶ OECD (2012), *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Czech Republic 2012: Phase 1: Legal and Regulatory Framework*, OECD Publishing. <http://dx.doi.org/10.1787/9789264168800-en>

⁷ Case C-276/12 Sabou v. Financial Authority

The ECJ stated as follows: “European Union law, as it results in particular from Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums, as amended by Council Directive 2006/98/EC of 20 November 2006, and the fundamental right to be heard, must be interpreted as not conferring on a taxpayer of a Member State either the right to be informed of a request for assistance from that Member State addressed to another Member State, in particular in order to verify the information provided by that taxpayer in his income tax return, or the right to take part in formulating the request addressed to the requested Member State, or the right to take part in examinations of witnesses organized by the requested Member State. Directive 77/799, as amended by Directive 2006/98, does not govern the question of the circumstances in which the taxpayer may challenge the accuracy of the information conveyed by the requested Member State, and it does not impose any particular obligation with regard to the content of the information conveyed.”⁸

4. The exchange of information system in practice: numbers please...

The Czech Republic reacts pretty quickly to requests of other states and the average period of time to reply is 6 months. Moreover the Czech tax administration satisfies within the 6 months period vast majority of requests.

There is a new potential of information acquisition as there is not any experience with requested and requesting information under newly signed TIEAs. There are being prepared first two requests by the Czech Republic at the end of 2013.

The number of requested and requesting information is monitored jointly regardless the information exchange proceeded under directive 77/799/EEC (2011/16/EU) or under the Article 26 of tax treaties concluded.

“The international exchange of information is based on three basic forms: exchange of information on request, providing information spontaneously (spontaneous exchange of information) and automatic (regular) exchange of information. The Czech Tax Administration fully utilizes all the mentioned forms. In 2011, there were 1,177 documents registered in total.”⁹

“The Czech Republic received in total 349 requests from abroad and sent a total of 221 requests on providing information or providing tax information spontaneously. The greatest volume of cooperation remains with the Federal Republic of Germany and the Slovak Republic. The exchange of

⁸ <http://www.nssoud.cz/Predbezne-otazky-podane-NSS/art/533?menu=254>

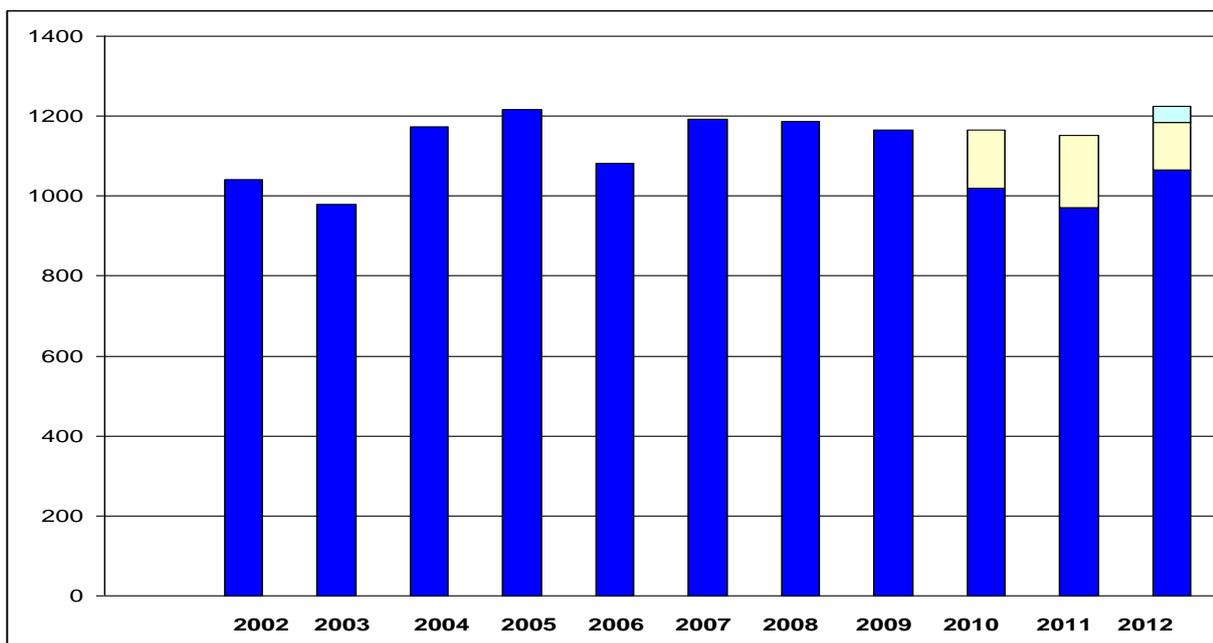
⁹ General Financial Directorate, Communication and International Relations Department. The Annual Report of the Czech Tax Administration 2011. Prague, 2012. ISBN 978-80-85045-41-3, p. 35

information with the Federal Republic of Germany became specific due to various modes of sending relevant requests, i.e. at the central level directly between the central authorities, via the so-called direct exchange of information between competent state authorities. Also, in 2011 there was a great territorial variety in the exchange of information, observed for the first time in 2008.”¹⁰

“The international assistance in recovery of certain financial claims further broadens and increases particularly the number of foreign requests for information. The number of international requests for information compared to the previous year grew by 35 %, in case of requests for recovery it was by 7 %. The major number of new requests came for neighbouring countries – Slovakia (75) and Germany (73), followed by Austria, Great Britain and Belgium.”¹¹

“Per request of tax subjects in the area of transfer pricing a decision on binding consideration of the method applied in transfer prices between related entities is being issued. It serves as a proof for taxpayers that transfer prices between related parties, as settled by them, will be accepted by the tax administrator. During the six-year period of time when subjects could ask for the binding consideration there were 98 requests submitted, of which 49 were approved, 23 rejected, 8 revoked and 18 are in the process of revision. In 2011, there were 17 requests submitted.”¹²

Table 1: Total frequency of tax information exchange expressed by amount of file numbers



¹⁰ General Financial Directorate, Communication and International Relations Department. The Annual Report of the Czech Tax Administration 2011. Prague, 2012. ISBN 978-80-85045-41-3, p. 36

¹¹ General Financial Directorate, Communication and International Relations Department. The Annual Report of the Czech Tax Administration 2011. Prague, 2012. ISBN 978-80-85045-41-3, p. 36

¹² General Financial Directorate, Communication and International Relations Department. The Annual Report of the Czech Tax Administration 2011. Prague, 2012. ISBN 978-80-85045-41-3, p. 36

Source: General Financial Directorate Statistics,
 Online: http://cds.mfcr.cz/cps/rde/xchg/cds/xsl/mezinarodni_spoluprace_6530.html?year=0, 15 November, 2013

The above mentioned Table 1 shows the total amount of tax information exchange. The non-official rough estimations of tax administration say the new request coming from the EU countries could vary between 150 – 200 requests last years of the total amount of 400 new requests every year. The number above 1200 records includes the cases of information exchange which started the previous years but still pending.¹³ The amount of requests sent to the EU countries per year should be at the same level of 150 – 200 requests of the total 400 new requests per year.

Table 2: Statistics analysis on the automatic exchange of information under the EU savings directive

*(the **first row** shows the number of received records, the **second row** means the number of sent records and the **third row** shows the tax income per year received by the Czech Republic due to the EU savings directive in millions CZK).*

2005	2006	2007	2008	2009	2010	2011
28 268	38 979	50 000	40 000	36 000	42 438	35 500
85 096	58 621	115 221	85 174	73 683	68 605	68 075
25,4	81,4	93,5	129,6	79,8	63,8	96,2

Source: Tax Administration Internal Statistics

Table 3: Amount of interests received by the Czech Republic per year according to the EU savings directive (row 1) and the estimation of deposits allocated on anonymous accounts abroad (row 2) in millions CZK

¹³ Non published rough estimation of Czech tax administration.

2005	2006	2007	2008	2009	2010	2011
2 973,1	2 540,1	2 815,0	2 549,0	2 054,9	1 380,6	2 232,7
99 103,7	84 667,2	93 841,6	101 960,0	84 718,5	83 665,2	131 107,3

Source: Tax Administration Internal Statistics

According to the Articles 22 a 23 of the Act No. 164/2013 Coll. on Tax Administration International Assistance can submit information to other Tax Administrations of the third countries only in case the source state of information have agreed and there are not any evidences of avoiding this rule.

5. The new era of the automatic exchange of information: huge investments, but are we sure on the return?

The Czech Republic follows the government decision¹⁴ and prepares the agreement proposal to be concluded in line with Foreign Account Tax Compliance Act (FATCA) based on the model IGA IA (IGA reciprocal). Part of the Agreement shall be the Annex II containing the list of the Czech low risk financial institution exempt from the report obligation.¹⁵

The main principle of FATCA of banking information disclosure might be the key problem in most countries. As the Czech Republic does not apply any bank secrecy in case of tax administration request according to the Article 57 of the Act No. 280/2009 Coll. Tax Administration Procedure Code there is not any essential disputation on bank secrecy breach. Which means such automatic exchange of information should not have a negative impact on the free movement of capital. Nevertheless the Czech Republic must handle the interaction of FATCA and national law as most of the countries, particularly in the generally problematic fields related to FATCA as personal data protection and extraterritoriality soon.

On the other hand there is strong tax secrecy applied according to the Act No. 280/2009 Coll. Tax Administration Procedure Code and the data on tax payers should collect and particularly submit abroad only tax administration to tax authorities covered by the Act No. 164/2013 Coll. on Tax

¹⁴ No. 919, agreed on 12 December 2012.

¹⁵ <http://www.mfcr.cz/cs/aktualne/vybrana-temata/2013/zadej-nazev-nove-stranky-11744>

Administration International Assistance which means EU members or contracting state (following Article 26 OECD MTC) within the scope of the double tax treaties concluded. This principle should be implemented into the prepared agreement proposal and the data based on FATCA should be collected by the highest central tax authority (General Financial Directorate) from the relevant financial institutions according to the conditions of the final version of Agreement and Annex II and the General Financial Directorate subsequently submits the data collected to the USA in line with FATCA.

The Czech Republic agrees with the effort of Italy, Germany, France, Spain and the United Kingdom which manifested their will to promote a multilateral system of automatic exchange of information through intergovernmental agreements, going beyond Article 8 of the 2011/16/EU directive and the savings directive. The Czech Republic supports the trend of unification the information exchange rules of FATCA and principles applied within EU based on the 2011/16/EU directive.

The Czech financial sector has strong position in relation to its clients because of minimal differences among the price offers of the financial institutions and particularly the extremely high loyalty of the bank clients to their actual financial institutions. It is one of the reasons the major profit of bank sector derives from the high fees for standard services cheaper or unpaid in most countries. This situation on the market gives the financial institutions power to transfer any additional costs relating FATCA or updated EU directive influencing the profitability of the bank sector fully to their clients with low risk of clients' discouragement.

6. Joint audits and multinational audits: two Tax Administrations are better than one?

The Czech Republic does not build any barriers or obstacles for joint audits realization and accept the possibility of joint audits as indirectly expressed in the Article 18 of the Act No. 164/2013 Coll. on Tax Administration International Assistance which names the allowed techniques of cooperation but it does not call them joint audits.

The Czech Republic has not signed any agreements for join audits and any joint audits have been conducted until now but there are pending requests for such joint audit from Germany.

7. The "realpolitik": tax solutions of equivalent effect alternative to exchange of information

The Czech Republic has considered some unilateral initiative for tax collection improvement just on the level of political proclamation and discussion. In fact there are not any signals the Czech Republic should really shift to any alternative techniques to obtain information, i.e. acquisitions of stolen bank data, whistleblower reward programs or offshore amnesty programs.

We can say the Czech Republic usually support the German approach to the tax information exchange issue on the level of EU but it has not initiated any bilateral or multilateral initiative in

order to collect revenue. The Czech Republic supports the effort of EU to convince the Switzerland to switch to the automatic tax information exchange according the EU savings directive.

8. The legitimacy of tax solutions other than exchange of information: where do we stand?

As far as the use of illegally obtained data is concerned, it is not clear and homogeneous whether a public authority could profit of information acquired and/or received to support both an administrative and criminal tax assessment in some states but the approach of the Czech Republic is clear and strict as mentioned hereinafter.

According to the Article 93, paragraph 1 of the Act No. 280/2009 Coll. Tax Administration Procedure Code the evidence against the tax payer can be used only in case the evidence was acquired legally regardless the evidence was obtained during the process or before the first step of the process. On the other hand such originally illegally obtained data can be considered as indices.

Based on the Sabou case¹⁶ the taxpayer is not generally informed or is not involved in the due course of procedure. Moreover the taxpayer does not have any possibility to reject the request or the use of data. But according to the one of basic principles of tax administration the taxpayer cannot refuse to collaborate with the Tax Administration without jeopardizing his position as stated in the Article 5, paragraph 3 of the Act No. 280/2009 Coll. Tax Administration Procedure Code. There is a general approach of the Czech Republic respecting the principle that the interest of state to collect taxes cannot overrule the principles of collecting taxes itself as stated in fact in the Act No. 280/2009 Coll. Tax Administration Procedure Code, declared in the Constitution of the Czech Republic, Act No. 1/1993 Coll. and moreover expressed in the Act No. 2/1993, Declaration of Basic Rights. Additional there are judgments of the Constitutional Court¹⁷ and the Supreme Administrative Court¹⁸ declaring the same approach.

The Czech Republic itself is not considering the implementation of a so called Rubik standard agreement with Switzerland or a similar one with any other country as the Czech Republic puts stress on the potential update and modification of the EU savings directive towards disclosure of tax information regime from the Switzerland for example on the EU level.

9. Conclusions

The Czech Republic clearly supports intensive and effective tax information international exchange to collect taxes from the Czech taxpayers' worldwide income but it refuses strictly any utilization of illegally obtained data or information on its taxpayers and/or tax residents. The Czech Republic doesn't join the activities as FTT or CCCTB usually but it generates huge effort to sign new double

¹⁶ Case C-276/12 Sabou v. Financial Authority

¹⁷ Constitutional Court, 6 December 2006, No. IV. ÚS 48/05

¹⁸ Supreme Administrative Court, 28 August 2009, No. 7 Afs 62/2009 – 112

tax treaties following the updated OECD MTC and renegotiate the older ones to implement the updated Article 26 of the OECD MTC.

In efforts to further geographically expand the so-called good Tax Administration, the characteristic features of which are the exchange of information, transparency and support of fair tax competition, Agreements on Exchange of Information in Tax Matters are being concluded. These agreements supporting the Tax Administration in fight against harmful tax practices have been so far concluded with 7 offshore jurisdictions up to date.¹⁹

“The international exchange of information in the area of direct taxes is defined by the Act on International Assistance in Tax Administration pursuant to EU regulations. An additional significant tool is the international treaties for the avoidance of double taxation. So far there have been 88 treaties concluded up to date.”²⁰

“Another major tool for the international tax co-operation is working agreements – Memorandum of Understanding and Mutual Administrative Assistance of Tax Administrations. On the basis of two concluded Memoranda of Understanding – with the Slovak Republic and the Federal Republic of Germany – there is the so-called direct cross-border co-operation in the form of exchange of information at the level of authorized Financial Directorates (in case of the Memorandum with Germany) or at the level of authorized Tax Offices (in case of the Memorandum with Slovakia).”²¹

Contrary to its huge and successful effort in international cooperation the Czech Republic has not found the way to develop successfully a competitive tax policy and change the tax environment into more stable, efficient and attractive one in the long run which the annual reports of the World Bank²² have illustrated over and over again.

¹⁹ General Financial Directorate, Communication and International Relations Department. The Annual Report of the Czech Tax Administration 2011. Prague, 2012. ISBN 978-80-85045-41-3, p. 35

²⁰ General Financial Directorate, Communication and International Relations Department. The Annual Report of the Czech Tax Administration 2011. Prague, 2012. ISBN 978-80-85045-41-3, p. 35

²¹ General Financial Directorate, Communication and International Relations Department. The Annual Report of the Czech Tax Administration 2011. Prague, 2012. ISBN 978-80-85045-41-3, p. 35

²² The World Bank. Doing Business, Paying Taxes Statistics. Online:
<http://www.doingbusiness.org/data/exploretopics/paying-taxes>, 15th November 2013.