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**THE DEVELOPMENT
OF INTERNATIONAL TAX INFORMATION EXCHANGE
IN INTERNATIONAL LAW, EU LAW AND HUNGARIAN LAW**
New opportunities for tax authorities, limitations to protect taxpayers

THESIS OF PHD DISSERTATION

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SUBJECT OF THE RESEARCH, HYPOTHESES

The subject matter of the research is international tax information exchange, which is one of the most relevant areas of international tax law nowadays from a practical point of view. In a strict sense, international tax information exchange relates to international tax law; in a broad sense, it is part of international financial law. The research aims at analyzing international tax information exchange and especially, its existing instruments, legal aspects and main challenges.

The issue is extremely important and topical, as the extension and improvement of international tax information exchange instruments is top on the agenda, and the international community takes significant efforts to ensure an effective implementation of the applicable rules. The topic is relevant from the taxpayers' perspective as well, since international tax information exchange affects taxpayers' economic interests and individual rights. The research aims at setting down recommendations for the future to further enhance international tax information exchange in both Hungarian law and international tax law.

As a practicing lawyer and tax advisor, I generally represent taxpayers in my everyday work. Therefore, in the research, I paid particular attention to taxpayers' opportunities to protect their legal interests in the international tax information exchange procedure. Taxpayer protection was not a matter of interest in the past, but its practical importance is uncontroversial.

Taxing right is one of the most important elements of a state's national sovereignty. Taxation is a fundamental instrument for states to collect revenues to finance state expenditures. In taxation, there is a conflicting interest however: while states aim at increasing tax revenues and broadening the taxable base, taxpayers seek to minimize their tax burden.

Taxpayers can easily manage their wealth and income globally. States' opportunities to exercise their taxing rights are however quite limited: generally, they cannot overstep the borders. This controversy raised the need to develop appropriate instruments to tackle international tax evasion and tax avoidance. In order to fight international tax avoidance, joint action and international standards are needed. International tax information exchange is a useful instrument for national authorities to collect information on resident taxpayers from other states, and to apply national tax regulations more effectively. International tax information exchange, therefore, is a hot topic on the agenda of international organizations,

the European Union and national states. The common objective is to create a global network of tax information exchange, which increases transparency between states. Implementing automatic exchange of information is the most significant step forward, which in the near future could become reality.

When analyzing the topic of international tax information exchange, I started from the following main hypotheses:

- International tax information exchange is a matter of international tax law; international tax law is a separate, autonomous field of international financial law, having outstanding practical importance;
- International tax information exchange is a significant instrument for resolving international tax law conflicts; specifically, it aims at tackling tax avoidance and tax evasion;
- Existing legal instruments in the field of international tax information exchange are diversified; various states and organizations have developed different models that could be controversial; using different (conflicting) instruments could undermine the effective implementation of international tax information exchange.
- The European Union has made significant steps in the field of international tax information exchange.
- Implementing the rules on international tax information exchange requires the protection of taxpayer rights.
- Hungary follows the international developments in international tax information exchange; it is a question if Hungary properly apply the underlying rules, and guarantee taxpayer protection both at legislative level and in practice.

METHODOLOGY OF THE RESEARCH

The methodology of the research consisted of analyzing legal theories, examining the history of law, and conducting legal comparison. The outcome of the research follows from analytical studies mainly.

The thesis is divided into three main structural parts. I used different methodologies when elaborating my findings in the three different areas.

The first structural part focuses on defining the scientific background and the main concepts subject to analysis. In this part, I investigate the definitions of international financial law and international tax law, and deal with international tax law conflicts and conflict resolution in detail. As an important instrument in resolving international tax law conflicts, international tax information exchange is a principal topic. This part of the thesis is mainly based on the analysis of legal theory.

The second structural part examines the legal instruments of international tax information exchange and can be divided into further subparts. First, I focus on the historical development of international tax information exchange, then analyze and evaluate the most relevant existing legal instruments. Specifically, I analyze in detail double tax treaties, tax information exchange agreements, Swiss Rubik-agreements, FATCA regulations, the OECD Multinational Convention, the Common Reporting Standard and the OECD BEPS efforts. Considering that the European Union has made the most relevant practical improvements in the field of international tax information exchange, I focus on EU-law instruments and investigate related case-law where applicable. I also discuss the concept and main features of European tax law. In this structural part, when examining the historical development of international tax information exchange, I use the analysis of legal history as the principal methodology of the research; when investigating the legal instruments, I use the analysis of legal norms; when examining the pros and cons of the various legal instruments, the methodology consists mainly of comparative research.

The third structural part focuses on taxpayer rights and requires, further to the analysis of international tax law, the study of constitutional law concepts, fundamental rights and tax procedure. In my view, taxpayer protection is fundamental in the international tax information exchange procedure, as states' interest to collect tax revenues globally cannot prevail over

taxpayer rights. When examining taxpayer rights, I investigate, on the one hand, the fundamental rights such as secrecy and data protection; on the other hand, the procedural rights such as notification rights; participation rights; the right to appeal. As taxpayer protection has not been of particular interest in the past, I argue that it will be inevitable to set down a statutory minimum standard for taxpayer protection. I examine how states can provide more effective taxpayer protection. In this structural part, comparative analysis dominates the methodology of the research.

The research paid particular attention to the Hungarian implementation of legal instruments on international tax information exchange. Hungary, as a member of the OECD and the European Union, actively supports the adoption of international tax information exchange rules. At the end of each section, I summarize in brief the practical application of every single international legal instrument in Hungary. In addition, I include a detailed analysis on taxpayer protection in Hungary, making recommendations for future legislative changes.

FINDINGS OF THE RESEARCH

International tax information exchange is a matter of international tax law; international tax law is a separate, autonomous field of international financial law having outstanding practical importance

Before I could begin analyzing international tax information exchange, I first had to investigate how international tax information exchange could be established within the system of legal fields and branches. This was inevitable as there is no common understanding in legal theory on how to classify and define international tax law and international financial law.

International financial law, which is the broadest framework of international tax information exchange, uses concepts and terms from international public law, international economics, financial law and financial studies. Furthermore, it is closely related to other fields of law. The study of certain international financial law issues started with Lippert¹ at the end of the 19th century, and continued from the second half of the 20th century. Lippert and his followers considered international financial law as part of international law, emphasizing that the sources of international financial law are international law instruments.

In Hungarian legal literature, international tax law is considered as a unique area of international financial law², where international financial law is defined as the set of legal relationships governed by financial-law-related international contracts, conventions and agreements.³

In Hungarian legal theory, Nagy Tibor⁴ made the most significant contribution to developing the concept of international financial law.⁵ Tibor considered international financial law as a separate legal branch, rather than a separate area of financial law only. He argued that the complexity of the underlying legal instruments, the practical importance, extensive legal

¹ Lippert, Gustav: Rechtsbuch des internationalen Finanzrechts. Graz, 1935, Lenkam Verlag, pp. 88-125; cited by Simon.

² For more details, see Simon István, Pénzügyi Jog II., Chapter 9.- Part VIII.: Nemzetközi Pénzügyi Jog; Osiris, 2012.

³ Simon (2012).

⁴ See Nagy Tibor: Jurisprudence and theories of international financial law in the East and Middle European region. In: Bokorné Szegő Hanna (szerk.) Questions of international law. Akadémiai Kiadó, Budapest, 1991. Vol. 5, pp. 161–181.

⁵ Csűrös (2012), p. 22.

theory and broad jurisprudence all support that international financial law should be treated as a separate legal branch⁶.

As a result of my research, I share the view of Nagy Tibor to treat international financial law as a separate legal branch. Starting from his legal theory, I define international financial law as follows: international financial law is the set of all those financial-law-related international agreements, legal instruments, other legal documents and practices that aim at regulating international financial law issues, and preventing and resolving conflicts. International financial law lays down obligations for states, international organizations and integrations; however, it also indirectly affects private law relationships. The increasing practical importance of international financial law is incontestable, as international financial law has a huge impact on state financing and domestic economy. International financial law creates an autonomous regulatory framework, which is supported by unique fundamental principles. Among these fundamental principles, sovereignty is the most relevant: on the one hand, it is the base of all international financial relationships; on the other hand, it is the main source of conflict. All the above arguments support the view that international financial law should be treated as a separate legal branch.

International tax law is a specific field within international financial law. International tax law studies started with various scientific works in the 12th century⁷. International tax law means the set of legal norms aiming at resolving tax law conflicts arising out of transactions having international elements⁸. As Erdős Éva points out, international tax law has two faces: it not only resolves, but also creates, international tax law conflicts⁹.

In legal literature, it is customary to use a strict and a broad concept of international tax law. International tax law in the strict sense means the set of legal norms aiming at resolving controversies and discrepancies between national tax laws¹⁰. International tax law in the broad sense means all domestic tax laws adopted by national tax systems to resolve situations where

⁶ Nagy Tibor: A nemzetközi pénzügyi jog problémája (kandidátusi disszertáció). Budapest, 1961.

⁷ First in Jacobus's works, see Lippert 1912, p. 11.

⁸ Rohatgi, R.: Basic International Taxation. The Hague – London – New York, 2002, Kluwer Law International, p. 11.

⁹ Erdős (2007), p. 267.

¹⁰ Basic themes in international taxation, In: Introduction to principles of international taxation, IBFD, International Tax Academy, Budapest, 1994. pp. 3-4.

rules to tax non-resident taxpayers or foreign income collide with the national tax laws of another state¹¹.

Based on my research, I agree with the broad concept of international tax law. International tax law instruments such as double tax treaties cannot be interpreted separately; we need a complex practical approach when resolving international tax law conflicts. In this context, domestic law, EU law and international instruments should jointly apply, and all rules should be coordinated to resolve international tax law conflicts. As an example, when applying double tax treaties, international treaties generally prevail over domestic rules; however, if domestic laws are more favorable, domestic laws should prevail. Furthermore, double tax treaties frequently refer back to definitions in domestic laws¹². Consequently, we have to take into consideration domestic (tax) law when resolving international tax law conflicts.

When resolving international tax law conflicts, international customs, reciprocity, international legal principles, recommendations and guidelines from international organizations and all related practises ('soft law')¹³ have an important role further to international agreements. As Dániel Deák points out, in the field of international taxation there is a developing, broad legal framework and set of definitions, on which the various states mostly agree¹⁴.

As a result, I define international tax law as the set of all those legal norms, agreements, principles and practices that aim at resolving international tax law conflicts. International tax law creates international tax law conflicts, on the one hand; it aims at resolving international tax law conflicts, on the other hand. As a result, international tax law is in continuous progress. International tax law is a separate, independent field of international financial law.

¹¹ Erdős (2007), p. 269.

¹² For the interpretation of double taxation treaties, see Vogel, K., *Double Tax Treaties and their Interpretation*, in *International Tax and Business Lawyer*, 1986, and Garbarino, C., *Manuale di Tassazione Internazionale*, IPSOA, 2008, pp. 143-148. Regarding the interpretation of double tax treaties, the Vienna Convention on international treaties is also relevant; the Vienna Convention generally governs the interpretation of international treaties, and was approved in 1969 by the Vienna diplomatic congress. The convention also applies to double conventions. Hungary implemented the Vienna Convention by means of Regulatory Act 1987/12.

¹³ See Csűrös (2015), p. 33.

¹⁴ See Deák Dániel: *Adójogi globalizmus*, In: *Állam- és Jogtudomány*, LVI., 2015, 3., p. 29-54.

International tax information exchange is a fundamental instrument to resolving international tax law conflicts, and especially tax avoidance and tax evasion

International tax information exchange is a form of tax assistance which enables states to share tax information on domestic taxpayers with other states when foreign elements arise in a tax law relationship. International tax information exchange is governed by international conventions, intergovernmental agreements and domestic tax laws.

International tax information exchange is a developing area of international tax law, and aims at resolving international tax law conflicts. International tax law conflicts are wide-ranging: the most important are double or multiple taxation, tax avoidance, harmful tax competition and positive and negative discrimination¹⁵. In the research paper, I investigate the definitions of these concepts. I focus on tax avoidance and tax evasion, as international tax information exchange aims at resolving the international tax law conflicts of tax avoidance and tax evasion.

Tax avoidance is generally defined as a legal way of minimizing taxes, whereby the taxpayer utilizes loopholes and inconsistencies in the tax system to reduce the tax burden¹⁶. A typical form of tax avoidance is when the taxpayer stipulates contracts and establishes business relationships in a way that, as a whole, results in a favorable tax position. In the case of tax avoidance, no specific legal norms are violated; however, the laws are inappropriately used and the taxpayer's conduct is contrary to the spirit of the laws.¹⁷ Tax avoidance is legal in the sense that no legal provisions are disregarded; however, abuse of law as a subjective element can be detected.¹⁸

It is common to use the term 'aggressive tax planning' when speaking of tax avoidance. The concept is common in European tax law. Aggressive tax planning is close to tax avoidance; however, it is on the margin between legality and abuse of law. The taxpayer uses loopholes and inconsistencies in tax laws to reduce the tax burden, however, abuse of law is not blatant. It is difficult to distinguish between aggressive tax planning and tax avoidance, and

¹⁵ Erdős (2007), p. 271.

¹⁶ Erdős (2007), p. 268, Földes Gábor: Adójog, Osiris Kiadó, Budapest, 2004. p. 77.

¹⁷ Deák Dániel: A pozitív jog csődje: Adóelkerülés és adóparadicsomi tervezés, visszaélés az alapvető EK szabadságokkal, p. 93.

¹⁸ Deák Dániel: A pozitív jog csődje: Adóelkerülés és adóparadicsomi tervezés, visszaélés az alapvető EK szabadságokkal, p. 93.

international tax law applies the same instruments to avoid tax avoidance as to aggressive tax planning. Therefore, when I use the concept of tax avoidance, I also refer to aggressive tax planning.

Tax evasion is an illegal behaviour, whereby the taxpayer reduces the tax burden contrary to the legal provisions. Tax evasion is closely linked with the black economy, and criminal actions such as fraud, money laundering, bribery, violation of accounting rules and financial fraud¹⁹.

It is difficult to set the borders between tax avoidance and tax evasion, since both behaviours aim at reducing tax burden. I agree with Deák Dániel who states that in the case of tax evasion the legal norms are violated: the taxpayers' actions deviate from the text of the law; in the case of tax avoidance the legal norms are not violated, the integrity of the legal system is damaged by circumventing the laws however²⁰.

Information exchange between states is extremely important in tackling tax avoidance and tax evasion. Taxpayers should not be in the position to take unreasonable advantage of the differences between various tax systems.

Existing legal instruments in the field of international tax information exchange are diversified; in order for the international tax information exchange to function properly, it is inevitable to coordinate between the various legal instruments

International tax information exchange has developed significantly in the last decade. Various international organizations, political interest groups and states have discussed the issue and developed different solutions.

In my research, I analyzed the development of the information exchange process and the single legal instruments. I began by examining double tax treaties and tax information exchange agreements, then continued with the analysis of the specific Rubik-agreements, and finally studied the legal instruments on automatic exchange of information; in the field of automatic exchange of information, I analyzed the instruments adopted by the United States, the OECD and the EU (FATCA, Multilateral Convention, CAA, CRS, OECD BEPS, EU Savings Directive, Directive on Administrative Cooperation).

¹⁹ Erdős (2012) 166. o.

²⁰ Deák (2005), p. 192.

As a result of a comparative analysis of the legal instruments, I have come to the conclusion that the currently available legal instruments are very diverse, and the various instruments have different merits and shortcomings. I also conclude that there are several inconsistencies among the single legal instruments, causing difficulties in the application of the norms and increasing costs for organizations participating in the information exchange.

The international community agrees that automatic exchange of information and increased cooperation between tax authorities are the most effective ways to tackle international tax avoidance. Adopting a new standard, however, is the first step in ushering in a new era. Automatic exchange of information can only be a commonly used international standard if all participating states apply the rules in accordance with common, standardized procedural rules. In order to accomplish this, the following considerations should be taken into account:

- There must be a coordinated approach among the various models. The instruments available must not apply in parallel or conflict with one another. The OECD holds that states can use existing international agreements as legal basis for automatic exchange of information, but common procedural rules should be adopted to apply the rules in a uniform way. The Common Reporting Standard could be an appropriate tool to establish common procedural rules. The EU made significant steps towards a uniform application of the laws when in 2015 it amended the DAC in accordance with the automatic information exchange standard flowing from the Common Reporting Standard and abolished the EU Savings Directive.
- FATCA has had a great impact on the Common Reporting Standard, however, there are significant differences between the two systems. In practice, this could generate conflicts that should be avoided. Financial institutions taking an important practical role in the automatic tax information exchange process would likely have to bear significant burdens if they had to use different systems depending on the states involved in tax cooperation.
- Automatic exchanges of information should be introduced at the same time in all countries. If any of the states refuse to apply the standard, national governments and tax authorities will be unable to obtain useful information: taxpayers using tax avoidance techniques can thus easily transfer their centers of business to countries not participating in the automatic information exchange.

- Mutual cooperation is key. For automatic information exchange to function effectively worldwide, all participating countries must apply the rules mutually, according to the same conditions. The OECD Common Reporting Standard seeks to meet this objective when it includes the opportunity to suspend the application of the system if any of the states fail to comply with the applicable rules (e.g. violate secrecy regulations or fails to identify controlling persons). Mutual application is a delicate issue in the case of the US, especially when it comes to the IGA 1 Model.

The European Union has made the most significant steps in the field of international tax information exchange

In EU Member States, the resolution of tax law conflicts is governed by an additional level compared to international tax law. European law aims at resolving conflicts by means of tax harmonization.

In the field of international tax information exchange, the European Union was a pioneer when it introduced automatic information exchange in savings taxation. The procedural rules and technical standards developed in the Savings Directive served as an example for the international community. Automatic exchange of information was first extended to additional income types as of 2015, including income from employment, income of managing directors, life insurance, pensions and real estate income. The next challenge will be the further extension of automatic exchange of information to financial account information in 2017.

Tax harmonization is not governed by positive laws in most cases: on the one hand, soft law, and on the other hand, the negative harmonization adopted by the European Court of Justice can be the basis for tax harmonization. Examples of soft law instruments are the recommendation to combat aggressive tax planning, various action plans and communications by the Commission. An example of negative harmonization is the ECJ case-law analyzing the relationships between double tax treaties, EU law and national tax laws²¹.

The negative harmonization of the European Court of Justice is based on the protection of the four freedoms. The European Court of Justice firmly states that while regulating direct taxes is within the Member States' competence, the Member States should exercise their rights

²¹ E.g. Schumacker, Avoir Fiscal, Gilly.

contrary to EU law²². When the European Court of Justice examines the Member States' tax laws in the light of the EU Treaties, it performs a complex investigation²³. First, the Court examines if the matter falls within the scope of EU law, namely, if there is a cross-border situation. Second, the Court examines if the national law or legal practise restrict any freedoms and if yes, whether the restriction can be justified. Similarly, the Court examines if any discrimination sussists. In the case of a restriction the Court investigates, in third step, if the restriction can be justified by any relevant (public) interest.

The Court is quite strict in interpreting the justification grounds. In last decades' case-law the Member States were successful in relying on the following few arguments:

- a) protecting the division of taxing powers between Memeber States²⁴;
- b) safeguarding the effectiveness of tax audits²⁵;
- c) need to guarantee effective tax collection²⁶;
- d) tackling tax evasion and tax avoidance²⁷.

The Court also examines if the justifiable restriction is proportionate in order to achieve the outstanding (public) interest. As a result of my research I conclude that the European Court of Justice deals with the question of information exchange in the context of evaluating proportionality. The Court checks if Member States have sufficient means to obtain information from other Member States, and if the answer is yes, encourages Member States to use of the information exchange instruments. The Member States cannot maintain restricting measures and cannot introduce extra burdens (or burden of proof) for taxpayers if they can

²² C-279/93 Finaanzamt Köln-Altstadt kontra Roland Schumacker, EBHT 1995 I-00225, 21. pont

²³ Lsd. még Békés (2012), 102-105. o.

²⁴ See C-446/03 Marks & Spencer, EBHT 2005 I-10837, 45. p; C-470/04 N, EBHT 2006 I-7409, 42. p; C-231/05 Oy AA, EBHT 2007 I-6373, 51. p; C-414/06 Lidl Belgium, EBHT 2008 I-3601, 31. p. See also Békés Balázs: A közvetlen adók európai rendszerének jellemzői, In: Cooperatrici Veritatis, Ünnepi kötet Tersztyánszkyne Vasadi Éva 80. születésnapja alkalmából; Budapest, Pázmány Press, 2015, pp. 93-110.

²⁵ See C-101/05 A, EBHT 2007 I-11531, 55. P.; C-157/08 Passenheim-van Schoot, EBHT 2011 II-00137, 55. p; C-262/09 Meilicke, 41. P, C-318/10, SIAT, 36. p.

²⁶ See C-269/09 Commission vs Spain, 64. p; C-498/10 X, 39. p; C-53/13 és C-80/13 Strojírny Protějov and ACO Industries Tábor, 46. p.

²⁷ C-72/09 Établissements Rimbaud SA kontra Directeur général des impôts és a Directeur des services fiscaux d'Aix-en-Provence, EBHT 2010 I 346; C-196/04 Cadbury Schweppes, EBHT 2006 I-07995; C-524/04 Test Claimants in the Thin Cap Group Litigation, EBHT 2007 I-02107.

access the relevant tax information from the other Member States. European tax law thus takes an important step in encouraging tax information exchange.

EU Member States strongly cooperated with the OECD in order to develop the information exchange rules in an effort to resolve conflicts arising out of inconsistencies between international regulations (OECD, FATF) and EU standards. EU law was first to implement the technical (data transfer, data format, etc.) requirements included in the CRS and CAA, with the aim of avoiding parallel application of different rules in Member States. Adopting international standards streamlines, expedites and lowers the cost of the practical implementation of automatic information exchange.

Furthermore, it is an outstanding development that the EU is working on the introduction of a more transparent, statutory and uniform (CbC) system for multinational enterprises in the field of corporate income taxation, in conformity with the OECD BEPS project.

Summarizing in brief, European tax law closely follows the international developments in the field of international tax information exchange. In the near future, implementing the FATCA rules could be a challenging task for the EU. Member States have not yet developed a uniform practice; therefore, tax harmonization could be necessary.

Implementing the international tax information exchange rules requires appropriate taxpayer protection

In the course of my research, I paid particular attention to taxpayer rights in the international tax information exchange procedure. My starting point was that in international tax information exchange procedures no uniform rules have been established to protect taxpayers. A detailed analysis of taxpayer protection rules in international legal instruments and domestic laws proved that taxpayer protection was not a key issue and states' interest to guarantee effective information exchange prevailed over taxpayer rights.

Neither the legal instruments of international tax information exchange, nor the international conventions governing fundamental rights provide uniform, effective taxpayer protection; domestic rules differ from country to country. Even if legal protection is granted in terms of legislation, taxpayers face difficulties when it comes to enforcing the rules in cross-border

situations. Taxpayers are defenseless against authorities involved in tax information exchange.²⁸

As a result of my analysis, I found that taxpayer rights can be violated at various stages in the international tax information exchange procedure:

- First, when requesting states launch a request for information, e.g. if the request is unlawful or violates taxpayers' legitimate interests;
- Second, in the requested state's procedure, especially if the requested state needs to gather information in order to meet the request; taxpayer rights also come into question if the request is rejected and the requested state needs to evaluate the conditions for this; furthermore, taxpayer protection comes into question if information obtained illegally is transmitted to another country;
- Third, in the requesting state, when the requesting state delivers a decision based on the information acquired.

The international tax information exchange procedure can further improve if taxpayers receive appropriate legal protection over the entire course of the procedure. This also applies to the protection of fundamental rights and procedural rights. In order for taxpayers to receive appropriate legal protection, we should consider the information exchange procedure as a separate, autonomous administrative procedure, and grant appropriate taxpayer protection in every single stage of the procedure, taking into account the specific features of the procedure. Notification rights, participation rights and the right to appeal should be recognized to enhance the enforcement of fundamental rights.

Effective taxpayer protection could improve if taxpayers were notified about the information request before the request is transmitted to the other state. Only a few exceptions would apply to this rule (for example if the notification undermined the outcome of the information exchange²⁹). In order to provide clarity for taxpayers, uniform rules should apply when

²⁸ Koppensteiner F., *Internationale Amtshilfe in Steuersachen: Rechtsschutz des Steuerpflichtigen im erstechen und ersuchenden Staat*, 2012, p. 239.

²⁹ This approach echoes that of the OECD, which holds that states can provide the right to notification, as long as they provide exceptions for cases in which notification can undermine the effective information exchange.

defining the scope of exceptions. Taxpayers should be notified about the request also in this case, even if at a later stage of the procedure.

Further to notification rights in the requesting state, taxpayers should be in the position to defend their rights also in the requested state. Participation rights in the tax procedure conducted in the requested state could fulfil this requirement. Taxpayers should be able to prevent the transmission of any unlawfully gathered information to another state. In order to provide effective legal protection, the authorities should enable the taxpayer to file an appeal to suspend the information exchange procedure. As the situation now stands, once the information is transmitted, the taxpayer is no longer in the position to challenge the requested states' failures in the procedure. Moreover, the requesting state cannot contest any failures in the requested states' procedure³⁰.

If the requested state does not provide any legal protection in the information gathering process, it is extremely important for taxpayers to be able to put forward any challenges, in the requesting state, during the final stages of the procedure. In this way, they can question the decision-making procedure and the underlying documentary evidence. To do this, the taxpayer should be informed of the information requested, and should have the right to challenge the legal value, quality and trustworthiness of the information.

Since the various states have different practices, international legal instruments on tax information exchange should establish a statutory, uniform minimum standard for taxpayer protection. The rules should be supported by unified law enforcement to enable taxpayers to exercise their rights in practice.

De lege ferenda, international legal instruments on international tax information exchange (e.g. CRS, DAC) could set down the statutory minimum standard for taxpayer protection as follows:

- In the case of an information request, the requesting state should notify taxpayers about the request at the beginning of the procedure; if no notification to the taxpayer is provided, the request should not be allowed to be transmitted to the requested state; lack of notification could only be allowed if there is sufficient proof that notifying the taxpayer in advance could very likely undermine the positive outcome of the procedure; if no

³⁰ See also Oberson (2015) p. 242.

notification is provided in advance, the taxpayer should be informed at a later stage of the process and be in the position to challenge the lack of notification;

- If the requested state needs to gather information, participation rights should be granted to taxpayers during the procedure; the taxpayer should have the right to participate in the information gathering process, view documents, make comments; if taxpayer rights are seriously violated (e.g. unlawful acquisition of information; data collection over the statutory limitation period), the taxpayer should have the right to file an appeal and block the supply of information to the requesting state;
- In the requesting state, taxpayers should be able to exercise legal remedies provided by national law to challenge the tax authorities' decision; the right to appeal before an independent court should be also available;
- In the case of automatic exchange of information, taxpayers should be informed in advance, in any case, about the automatic information exchange and the data to be provided; this notification, if supported by appropriate deadlines, would enable taxpayers to revise the data to be provided, or, if certain conditions have been met, request the cancellation of the data; if the data to be transmitted is held by persons other than the taxpayer (e.g. financial institutions), the data-holder transferring the information should notify the taxpayer in advance; the notification should include communication on the information exchange, the data to be transmitted, the purpose of the exchange and the authorities receiving the information; appropriate technical solutions should be adopted to transfer, process and store the data in order to prevent violating secrecy and data protection rules.

In order to ensure law enforcement, states that violate the rules should be excluded from information exchange, and should not be able to obtain assistance from other countries participating in the exchange.

Hungarian legislation in the light of international tax law and EU law

The research paid particular attention to the implementation in Hungary of international legal instruments and EU law. As a result, I concluded that the Hungarian legislator is committed to applying the automatic exchange of tax information. The Hungarian legislator has taken all

the necessary steps to implement the relevant international and EU instruments, and has complied with the related international obligations.

Even so, there is still a lot to do in terms of taxpayer protection in order to guarantee appropriate protection in the international tax information exchange process.

Hungary, similarly to other European states, guarantees the right to privacy and data protection at constitutional level. The international tax information exchange process, however, provides no specific procedural rights to taxpayers. Neither the Tax Procedure Act, nor the Act on International Tax Cooperation contains such measures. This is because the Hungarian legislator takes the view that the international tax information exchange procedure cannot be treated as a separate procedure, but is part of the information gathering process.

Taxpayers are usually informed about the exchange request, or the outcome thereof, when the Hungarian tax authorities actually make use of the information received. In my view, Hungarian legislation should include rules on mandatory notification and provide participation rights to taxpayers at the initial stage of the international tax information exchange process. In so doing, the Hungarian legislator would be required to consider the international tax information exchange process as a separate, autonomous procedure.

This research paper sets out detailed recommendations on how to enhance taxpayer protection in the international tax information exchange process under Hungarian law. *De lege ferenda*, I suggest amending the existing legislation, which could take various forms.

As a simple solution, the International Tax Cooperation Act could expressly provide that the Hungarian tax authorities must notify taxpayers when an international tax information exchange request is about to be forwarded to a foreign tax authority. The International Tax Cooperation Act should also include that notification should take place in the form set forth in the Administrative Procedure Act.

According to another solution, the International Tax Cooperation Act could lay down detailed rules regarding taxpayer notification in a separate section. In this case, the International Tax Cooperation Act would expressly regulate the procedural deadlines, the form and content of the notification. The related provisions could be worded as follows:

- (1) Provided that no domestic legislation or international agreement provides otherwise, taxpayers shall be notified in advance about any request for international tax information exchange.
- (2) The notification should include the name and address of the requesting authority, the name and address of the requested authority, the subject of the request, and an explanation as to why the tax authority considers the request foreseeably relevant to establish the taxpayer's tax obligations; the notification shall include the information that the taxpayer can file written observations within 8 days from receiving the notification.
- (3) By way of exception, the notification can be omitted if it could seriously undermine the positive outcome of the procedure.
- (4) The taxpayer can file written observations relating to the request within 8 days from receiving the notification. Filing written observations would not bar the tax authority from sending the request, however, the tax authorities could decide not to forward the request.

Regarding participation rights, it would be recommended to regulate at a legislative level (possibly in the Tax Procedure Act) that the right to view documents is fully granted to taxpayers also in the international tax information exchange process. As a result of the right to view documents, the taxpayer should have the right to file written observations or make declarations. Furthermore, the taxpayer could be present at procedural investigations, verifications and could suggest further evidence.

Taxpayers should be entitled in the international tax information exchange process to the same legal remedies as provided in tax administrative procedures and during tax investigations.

The development and practical application of automatic international tax information exchange will trigger new challenges in Hungarian legislation and case-law. At the level of the legislation, it is of substantial interest to lay down all procedural aspects to ensure the secure transfer of data and the fulfilment of the data protection requirements as far as the data holders are concerned. The rules should be supported with appropriate sanctions in order to deter participants in data transfers from violating taxpayer rights.

I truly hope that the findings of my research can support the further development of international tax information exchange.

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