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from the International Academic Conference
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CONTEMPORARY CHALLENGES TO LEGAL PROFESSIONAL PRIVILEGE

BRATISLAVA LEGAL FORUM 2019

Zborník príspevkov
z medzinárodnej vedeckej konferencie
6. – 7. februára 2020

BRATISLAVSKÉ PRÁVNICKÉ FÓRUM 2020

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CONTENT / OBSAH

LEGAL PROFESSIONAL PRIVILEGE AND DAC 6[1]

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Abstract: DAC 6 introduced automatic exchange of reportable cross-border arrangments. Intermediary (defined in the Directive) is responsible to file information about that arrangement to competent authority of relevant EU member state. However, this is not the case, if intermediary enjoys legal professional privilege under the national law and not upon agreement between the intermediary and a client. Paper deals with the issue of legal professional privilege in context of DAC 6.

Key words: legal professional privilege, DAC 6, exchange of information, intermediary, banks

1 INTRODUCTION

As the world becomes increasingly globalised and cross-border activities become the norm, tax administrations need to work together to ensure that taxpayers pay the right amount of tax to the right jurisdiction. One key aspect of international tax co-operation is exchange of information which can be: spontaneous; on request; automatic and other types of administrative cooperations (such as simultaneous controls, administrative notification). The most effective tool is the automatic exchange of information. The purpose of the exchange of information is to fight against the tax evasion, tax avoidance; to achieve tax fairnes in the world; to secure international tax cooperation of state administrations.

Exchange of information exist on three levels: OECD, EU and national. The most effective would be if every state on the whole world have the same rules, but it is very hard to achieve globally. OECD adopting new rules in this field (often just in form of reccommendations, non-binding documents), EU is following these rules (adopting Directives) and member states of EU are obliged to implement Directives of EU, and are reqiuired to follow thu rules set by OECD.

1. **on Global level** - OECD has the most important role and has a long history of working on all forms of information exchange. Article 26 of the OECD Model Tax Convention on Income and on Capital, Convention on Mutual Administrative Assistance in Tax Matters and Base Erosion and Profit Shifting Plan (BEPS Plan) with its 15 Actions are the main documents adopted by OECD dealing with exchange of information.

2**. on EU level** – the European Commission, Council and Parlament are the key institutions passing the Law on EU level. Several Directives have been adopted in order to combat tax evasion and tax avoidance – e.g. ATAD[2], DAC[3] 1-6. EU follows the trends/rules given by OECD (e.g. BEPS/ ATAD, Action 12 BEPS (MDR)/DAC 6, Action 5 BEPS/DAC 3). The main Directive stipulating the exchange of information is Directive on administrative cooperation in the field of taxation, so called ,,DAC 1“, there are 6 amendments of this Directive and the 7th is on its way. Brief summary about the each DAC directive:

DAC 1 – automatic exchange of information on specific 5 categories of income

DAC 2[4] – automatic exchange of information on financial accounts

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[1] This article was prepared within the projects APVV-16-0499 „Zabezpečenie efektívneho výberu daní v kontexte informatizácie“

[2] Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (ATAD); Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries

[3] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC and its amendments

[4] Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation

DAC 3[5] - automatic exchange of information on advance cross-border rulings and advance pricing arrangements
DAC 4[6] – automatic exchange of information on the country-by-country report, tzv. CbC Reporting
DAC 5[7] – access of tax administration to information about beneficial owners
DAC 6[8] – automatic exchange of information on reportable cross-border arrangements
DAC 7[9] – postponement of certain time limits for the filling and exchange of information
DAC 8[10]? (7) - automatic exchange of information relating to digital platforms and their users
3**. on the State´s (national) level** – states adopting specific Acts to implement Directives of EU and some legal acts of OECD. Member states are obliged to implement Directives and reguired to implement the legal acts of OECD to their national law.

2 AUTOMATIC EXCHANGE OF INFORMATION IN THE FIELD OF TAXATION IN RELATION TO REPORTABLE CROSS-BORDER ARRANGEMENTS

THE SUBSTANCE of DAC 6: Intermediary or relevant taxpayer (if intermediary does not exist or enjoys the legal professioval privilege under the national law of the Member state) are liable to file information on reportable cross-border arrangements with the competent authorities of a member state determinated by Directive. The competent authority of a Member State where the information was filed, by means of an automatic exchange, communicate the information to the competent authorities of all other Member States. Reportable cross-border arrangement means any cross-border arrangement that contains at least one of the hallmarks set out in Annex IV of DAC as amended.

2.1 Intermediary

Despite the fact that there are more questionable and uncertain aspects of this Directive, aspects which would need explanations and deeper analysis, this paper will deal with just one problematic issue which is the issue of legal professional privilege of intermediary linked to the obligation to file information to competent authority.

To ensure the proper functioning of the internal market and to prevent loopholes in the proposed framework of rules, the reporting obligation should be placed upon all actors that are usually involved in a reportable cross-border transaction (its designing, marketing, organising or managing the implementation), as well as those who provide assistance or advice.

According the Art. 3 point 21 of DAC as amended intermediary is *,,any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement. It also means any person that... knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement.". Intermediary is* reasonable exptected to know due to his/her professional relevant expertise,

[5] Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation
[6] Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation
[7] Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities
[8] Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements
[9] Council Directive (EU) 2020/876 of 24 June 2020 amending Directive 2011/16/EU to address the urgent need to defer certain time limits for the filing and exchange of information in the field of taxation because of the COVID-19 pandemic
[10] Proposal of a Council Directive amending the DAC 1, COM(2020) 314 final, Brussels, 15.7.2020

knowledge, understanding of provision of these services and also based on relevant fact, documents, circumstances and information. Any natural person or entity acting as an intermediary is entitled to use all available information, to refer to all relevant facts and circumstances and to provide their expertise as evidence that they did not know and could not have known that they were involved in the reportable arrangement. Such persons are not intermediaries. Anything that can help to clarify the facts substantiating the claim of a natural person or entity can be used as evidence.

In addition to these basic requirements for an intermediary given in Art 3 point 21, a natural person or entity is considered to be an intermediary if meets at least one of the other additional conditions: such as a residence for tax purposes in a Member State; a permanent establishment in a Member state through which it provides services in connection with a cross-border arrangement; the fact that that natural person or entity is established or constituted under the law of a Member State or is governed by the law of a Member State; or the fact that that natural person or entity is registered with a professional organisation for legal, tax or similar consultancy services in Member State.

So at the first place, intermediaries are liable to file information on reportable cross-border arrangement with the competent authorities. But in certain cases, the reporting obligation would not be enforceable upon an intermediary due to a legal professional privilege or where there is no intermediary because, for instance, the taxpayer designs and implements a scheme in-house. According th Art 8ab (5) of DAC as amended *,,Each Member State may take the necessary measures to give intermediaries the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege under the national law of that Member State."* It means the legal professional privilege must stem from the national law, it cannot be agreed upon an Agreement between the intermediary and a client. So if the intermediary enjoys legal professional privilege, he/she is not more liable to file information, otherwise it would breach the legal professional privilege. In the case of Slovakia, legal professional privilege is enshrined in the Act No. 78/1992 Coll. on Tax Advisors and the Slovak Chamber of Tax Advisors, in the Act No. 586/2003 Coll. on Advocacy. If the intermediary who designed, marketed, organised etc. the cross-border reportable arrangement has the legal professional privilege as well as all intermediaries involved into that arrangement, it would be crucial in such circumstances to ensure that tax authorities do not lose the opportunity to receive information about tax-related arrangements that are potentially linked to aggressive tax planning. It would therefore be necessary to shift the reporting obligation to the taxpayer who benefits from the arrangement in such cases.

The taxpayer is liable to file the information when there is no intermediary because the taxpayer designs and implements a scheme in-house. When designing "in-house" arrangements, the taxpayer may use his lawyers, accountants, tax experts who are his/her employees, and even in this case the person liable to file information is the taxpayer employing these people. If the taxpayer (user) contracts with an external intermediary - e.g. external lawyers, law firm, tax advisors, etc. (i.e. it will not be his/her employees), in this case the person liable to file information is the external intermediary, as he/she is the person who design, market, or implements a reportable cross-border arrangement, etc. and in this case it will be an individualised arrangement. The taxpayer himself/herself becomes a liable person even if the reportable arrangement is provided by an intermediary directly (not with involvement of intermediary based in EU) to the taxpyaer, but this intermediary is not an intermediary from an EU Member State and therefore does not meet the definition of an intermediary according to Art 3 point 21 of DAC as amended.

It must be said that an intermediary who otherwise enjoys the legal professional privilege - i.e. e.g. tax advisor, attorney doesn´t enjoy it without any limitations. This intermediary with privilege is liable to file information on a marketable arrangement (ie a standardized / generalised arrangement). Such an arrangement was not tailored to a specific client so it does not contain any information relating to a specific client and therefore intermediary has no obligation to maintain confidentiality about it, has no reason to enjoy privilege in this case. If there is information about the taxpayer, this part is covered by confidentiality. The duty of confidentiality applies to an individualised arrangement tailor made to the client.

2.2 Legal professional privilege and Slovakia

Slovak Republic, at the end of the day, has decided to *give intermediaries the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege under* the Slovak Law. But a long discussion and questionnaire preceded this decision. A big question in Slovakia was- whether to maintain legal professional privilege unchanged in the case of those entities who enjoy it according to national law - i. tax advisors, lawyers (so is linked to the profession) or break it and make them liable to file information.
In my opinion, the Slovak Republic has logically considered breaking the secrecy and imposing the obligation to provide information on cross-border reportable arrangements to those intermediaries who are actually planning these tax structures - i.e. tax advisors, lawyers (they have the most accurate information about arrangements). The Slovak Republic carried out a several-week survey in which has asked mainly large companies - which are most likely to use cross-border tax planning – so the largest taxpayers, whether they think that legislation should be amended in order to break the secrecy (to revoke legal professional privilege) of advice providers (tax advisors, legal advisors). The Slovak Republic had expected that their answers would be unambiguous in the sense that they were in favor of breaking the secrecy of these intermediaries (revocation of privilege), so that the obligation to file information did not fall on them - to taxpayers themselves and that this obligation would be actually fulfilled by those entities that design tax structures. However, most respondents answered that they were not in favor of this breach of secrecy. But at the same time, to the further question of whether the taxpayer will be able to competently report information on a cross-border arrangement, majority of respondents paradoxically answered ,,no“. These answers appear to be contradictory - on the one hand, the majority responded that they were in favor of keeping the secrecy/legal professional privilege and therefore this obligation to file information would fell on taxpayers, but at the same time on the other hand the majority replied that the taxpayer would not be competent to provide the competent authority with relevant information on cross-border arrangements.

The Slovak Republic has decided not to break the secrecy and keep the legal professional privilege - following the example of Germany, Austria, Czech Republic, also some other states, as well as on the basis of answers of taxpayers received via survey.

2.3 Bank and as intermediary

How it was already said, at the first place, intermediaries are liable to file information on reportable cross-border arrangement with the competent authorities. If they enjoy legal professional privilege under the national law linked to their profession this obligation should be shift to other intermediary which does not enjoy the legal professional privilege and which took part at the cross-border reportable arrangement. If every intermediary involved in the reportable cross border arrangement enjoy legal professional privilege or there is no intermediary involved, this obligation to file information to the competent authority is shift to the taxpayer (user of the arrangement).
There may be a situation where an intermediary who enjoys legal professional privilege informs another natural person or entity he or she considers to be an intermediary. If this natural person or entity, taking into account her/his expertise, is unaware of her/his involvement in the reported arrangement, such person or entity does not meet the definition of an intermediary and the intermediary who enjoys legal professional privilege cannot shift the obligation to file information to that other person or entity and need to inform the other intermediary next in a row. If this is not the case and no other intermediary exist or is all bound by the legal obligation of confidentiality, then need to inform directly taxpayer (user) of the reportable arrangement. Why it is important to mentioned. Because of the objection raised by banks. If there is a cross-border reportable arrangement it is likely to be the case where transactions will be made via banks. It can be assumned that banks are involved in that arrangements, but banks often do not know about their involvement. According to Euroepan Banking Federation (EBF) ,,*financial institutions do not have the information to determine whether a*

cross-border arrangement contains one of the hallmarks included in the Annex to the Directive". However, banks can be in some cases also intermediaries. Banks are considered to be intermediaries mainly with connection to the Hallmark D of Annex IV of DAC as amended. Hallmark D stipulates specific hallmarks concerning automatic exchange of Financial Account information and beneficial ownership. The main benefit test does not need to be fulfilled in the case of Hallmark D.

Although banks are not entitled to provide tax advice in the sense of Act on Tax Advisors, so they are not entitled to design, market, offer, implement etc. tax schemes, but they can support tax schemes through the provision of banking activities in the form of creating foreign financial accounts as well as in the form of provision of investment advice (investment banks). The relevant question is whether the bank has or could have sufficient knowledge that it provides assistance, aid, support or advice through a financial service with respect to designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement. If it has or could have knowlegde then it can be considered for an intermediary. If a financial institution, e.g. the bank, does not know, taking into account its relevant expertise, that it is involved in the reportable arrangement, then it cannot be considered for an intermediary and is not obliged to file information on the reportable arrangement to the competent authority of the relevant member state. In general, financial institutions collect and verify a wide range of information about their clients even today under the OECD Standard[11], FATCA[12], EU AML legislation[13], in condition of Slovakia under Act No. 359/2015 Coll. and Act No. 297/2008 Coll.. According the European Banking Federation *,,With respect to the legal professional privilege, the EBF would like to raise concerns that certain intermediaries and/or their clients would use this provision to shift their respective reporting obligations under DAC 6 onto financial institutions. The EBF points out that where an advisor invokes professional privilege, absent multiple intermediaries, the principal obligation to report the transaction or scheme should fall to the relevant taxpayer. Hence, the EBF calls on the Commission and Member States to ensure that intermediaries who might be able to invoke professional privilege cannot transfer the burden of disclosure onto financial institutions."*[14]

3 CONCLUSION

Intermediary is liable to file information about reportable cross-border arrangement to competent authority of relevant EU member state. In certain cases, intermediaries may enjoy legal professional privilege according to national law and if this is so, they are not liable anymore to file information. In this case they are obliged to shift the report obligation to (to inform about the report obligation) another intermediary without legal professional privilege. If there is no other intermediary involved in that arrangement or every intermediary involved enjoys legal professional privilege, the report obligation is then shift directly to the taxpayer (so the user of the arrangement) and intermediary is obliged to inform about this the taxpayer. This legal privilege must be linked to the profession and cannot be agreed upon Agreement between intermediary and client, must be based on a national law. In certain cases also banks directly can be intermediaries according the Hallmark D of Annex IV of DAC as amended; may be involved in the cross border reportable arrangement in the way of providing

[11] Standard for Automatic Exchange of Financial Account Information in Tax Matters (Standard) - Includes Common Reporting Standard (CRS) (15 July 2014)

[12] The Foreign Account Tax Compliance Act (FATCA), which was passed as part of the HIRE Act in the USA

[13] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC

[14] EBF, Letter of EBF to Commissioner Moscovici; comments on the adopted amendment of the Directive on Administrative Cooperation (DAC 6), available https://www.ebf.eu/wp-content/uploads/2018/08/EBF_033344-EBF-Letter-to-Commissioner-Moscovici-Comments-on-DAC-Amendments.pdf

aid, support, assistance through a financial service with respect to a reportable arrangement. In this case the most important is the question whether the bank has or could have sufficient knowledge that it provides assistance, aid, support or advice. If yes, it will be an intermediary. Banks are often just a provider of financial account and services related to it without any knowledge of being involved into arrangement and without any possibility to examine whether an arrangement is aggressive within the meaning of the Directive. EBF calls on the Commission and Member States to ensure that intermediaries who might be able to invoke professional privilege cannot transfer the burden of disclosure onto financial institutions.

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MANDATORY DISCLOSURE IN RELATION TO CROSS-BORDER ARRANGEMENTS[1]

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Abstract: Mandatory disclosure regime about cross-border arrangements has been recently the subject of legislative activity that influence the activities of intermediaries and taxpayers. Exchange of information is of accelerating importance in the tax area, resulting in significant and demanding activities of organizations such as OECD or European Union. The aim of such arrangements is to reduce tax evasion and to provide sufficient information for tax administration purposes. However, the question arises as to whether reporting such information is sufficiently evaluated and effective. The subject of this article is to review recent legislative activities in this area and to quantify its impact on taxpayers.

Key words: disclosure, hallmark, directive, legal professional privilege, intermediary

1 INTRODUCTION

The mandatory disclosure regime introduced by EU Council Directive 2018/822 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (the "Directive") entered into force on 25 June 2018. Under the Directive, it constitutes an obligation for intermediaries and relevant taxpayers to provide information on the cross-border arrangement notified to the competent tax authority.[2] This arrangement concerns transactions involving either several Member States of the European Union ("EU") or one EU Member State and a third country, accompanied by a list of hallmarks. The main objective of the Directive was and should be to strengthen the transparency of taxpayers in the field of taxation and to fight aggressive tax planning as it states that: *"although Directive 2011/16/EU has been amended several times to strengthen the resources that tax authorities can use in response to aggressive tax planning, there is still a need to strengthen certain specific transparency aspects of the existing tax framework."*[3] This effort is complicated by the continuing - perhaps inevitable - lack and unavailability of information between tax authorities and taxpayers so-called "*information asymmetry.*"[4]

The Directive largely incorporates the model rules set out in the OECD Report on Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures[5]

[1] The study is the part of the project no. APVV-16-0499 „Zabezpečenie efektívneho výberu daní v kontexte informatizácie" (Ensuring effective tax collection in the context of informatization).

[2] Exchange of information is not the subject of only the Directive. There exists another documents related to exchange of information as well, such as double tax treaties, OECD standard for automatic exchange of financial account information in tax matters, BEPS, FATCA, etc. See more at: KORONCZIOVÁ, A.: Výmena daňových informácií za účelom zamedzenia daňovým únikom. In: Bratislava legal forum. 2018. Bratislava. p.49.

[3] Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

[4] OECD: Common reporting Standards. Online. Available at: https://www.oecd.org/tax/automatic-exchange/common-reporting-standard/

[5] OECD: Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, Paris, 2018. Available at: https://www.oecd.org/tax/exchange-of-tax-information/model-mandatory-disclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshore-structures.pdf

issued in February 2018 (hereinafter "Model Disclosure Rules"[6]). These rules are based on BEPS Action 12.[7]

The draftsman of the act is equally ambitious, arguing that: *"Draft of the Act is intended to dissuade intermediaries and taxpayers from using potentially aggressive tax planning practices and effectively contribute to efforts to create an environment of fair taxation."*[8] The question, however, is how much quantification of this purpose will be possible and the manifestation of its effects in practice as well.

In connection with the above-mentioned, in the National Council of the Slovak Republic ("National Council") the Act no. 305/2019 Coll. has been submitted to transpose the relevant provisions of the Directive. For the purposes of this Act, the obliged person is an intermediary provided that it is not subject to a legal professional privilege. In that case, the information shall be submitted to the competent authority by another intermediary or directly by the specific taxpayer. Tax advisors, auditors, banks and attorneys should be obligated persons against whom the obligation of confidentiality should have originally been applied.

The Act also specifies the exact details, format and deadline by which information should be reported to the competent tax authority. Failure to comply with the obligation to provide relevant information to the extent required by law will be subject to sanctions. A fine may be imposed up to EUR 30 000, even repeatedly.

The first report must be submitted to the competent tax authority by 31 August 2020 and will concern the reportable cross-border arrangement for which the first action to implement the arrangement (transaction) was carried out from 25 June 2018 to 30 June 2020.[9] On 11 September 2019, National Council approved the final version of Act no. 305/2019 Coll. amending Act no. 442/2012 Coll. on International Assistance and Cooperation in Tax Administration as amended (hereinafter referred to as the "Act"). Also, with regard to the legal reporting date, the Directive has retroactive effect for all reported cross-border arrangements.[10] However, in its meeting on the Directive, the European Commission states in its material that retroactivity should not apply to the penalties relating to the disputed transitional period.[11]

There was only one change in the comparison of the draft Act with the approved Act that was approved by the National Counsel. Pursuant to the approved wording of the legislation, banks - when acting as an intermediary in special circumstances cannot rely on the legal professional privilege and will be required to report the arrangement to the competent tax authority. If the intermediary is bound by the legal professional privilege and all intermediaries involved in the notified arrangement are bound by the legal professional privilege regarding the specific notified arrangement, the user of the

[6] OECD: OECD/G20 Inclusive Framework on BEPS Progress report July 2018 – May 2019, p. 23, part 3.1.5. online. Available at: https://www.oecd.org/tax/beps/inclusive-framework-on-beps-progress-report-july-2018-may-2019.pdf

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[10] See also: BROWN, P., A.: Combating Aggressive Tax Planning Through Disclosure: A Comparison of U.S. and EU Rules Applicable to Tax Advisors. Online. Available at: https://www.americanbar.org/groups/taxation/publications/abataxtimes_home/19jun/19jun-pp-brown-et-al-combating-aggressive-tax-planning-through-disclosure/, CMS: EU DAC 6 Directive introduces disclosure requirements for cross-border tax arrangements. Online. Available at: https://cms.law/en/deu/insight/eu-mandatory-disclosure-regime-mdr.

[11] European Commission. Summary record. Working party IV – Direct Taxation. 2018. online. Available at: https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=19686

notified arrangement becomes the obliged person instead of the intermediary to whom the obligation to provide the competent authority with information on the notified arrangement is transferred.[12]

Thus, the Act only stipulates tax advisors, auditors and lawyers (an important element is the legal professional privilege) as persons against whom the obligation of confidentiality applies. Under such a circumstances, the legislature chose a non-exhaustive list of laws that fall under such a regime. On the other hand, such a list does not preclude the application of other laws containing such an element of confidentiality. Other sections of the law remain unchanged, in line with the original Act and largely correspond to the text of the Directive.[13]

2 MANDATORY EXCHANGE OF INFORMATION IN RELATION TO CROSS-BORDER ARRANGEMENTS

The pressure on tax transparency through various disclosure regimes has been accelerating over the past decade. Before the Directive itself, it was, for example, the introduction of the so-called international assistance and cooperation in tax administration in the field of automatic country-by-country reporting. EU efforts in this area put pressure on CFOs of multinational enterprises in particular by creating tax planning and internal processes that are increasingly tax motivated (both with regard to the commercial and criminal liability of statutory representatives, etc.).[14] Another element that may affect the transparency of the tax system is the rules against hybrid mismatches, which the Slovak Republic has adopted in the current period by Act No. 301/2019 coll. amending Act no. 595/2003 coll. on Income Tax as amended.

In addition to internal firm liability relationships, another so-called reputational risk arises. In the field of multinational enterprises, such as consulting firms or law firms, a reputational risk can affect their global profits. Another issue that arises from this contribution is the quantifiability of transparency. Consulting firms are unable to cover all agreements and structures and are required to report to them (or the taxpayer themselves). The consequent reputation and financial risk is therefore a huge risk, especially in the context of multinational enterprises. Through the current international tax dispute mechanisms, companies risk global tax controls in several jurisdictions.[15] Such a dispute mechanisms are covered by BEPS, EU Arbitration Convention and also by Directive on Double Taxation Dispute Resolution Mechanisms in the European Union.[16] In order to facilitate the automatic exchange of information and to make more efficient use of resources, information should be exchanged through a common communication network ('CCN') established by EU.

In addition, it should be recalled that cross-border arrangements whose primary or one of the main objectives is to obtain a tax advantage contrary to the object or purpose of the applicable tax law are subject to the general anti-avoidance rule laid down in Article 6 of the EU Directive No. 2016/1164.[17] This is confirmed by the actual wording of the I. Main benefit test in Annex no. 1a of the Act.

According to Danish Mehboob, the exchange of information for the purposes of CRS or FATCA is less worrying than the obligations under the Directive because they are based on rules, but the

[12] Explanatory Memorandum to Act No. 305/2019 Coll. amending Act no. 442/2012 Coll. on International Assistance and Cooperation in Tax Administration as amended.

[13] EY: Legal and tax news. 2019. 7-9. online. Available at: https://www.ey.com/sk/sk/services/tax/ey-tln-2019-7-9-v-skratke

[14] MEHBOOB, D.: Tax directors advise their board on tax crimes ahead of DAC6. online. Available at: https://www.internationaltaxreview.com/article/b1j0gkm75169rj/tax-directors-advise-their-board-on-tax-crimes-ahead-of-dac6

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[16] KORONCZIOVÁ, A.: Riešenie sporov v oblasti zdanenia. In: Bratislava legal forum. Bratislava. 2019. p.45.

[17] Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements

Directive is not governed by such rules but rather by principles with broad so-called hallmarks[18] - arrangements of potential aggressive tax planning by drawing up a list of aspects and elements of the transaction that are a strong indication of tax avoidance or abuse of law. These indications are designated by the Directive as 'hallmarks' listed in Annex IV. of the Directive and Annex no. 1a of the Act. The question on the ground is therefore the intention of a certain level of abstraction or rigidity of setting such rules. Must be noted, that in the field of public law, the requirement of clarity and mandatory rules is beating. On the other hand, there is a requirement to grasp a particular institute or situation which under rigidity set can be problematic and frustrate the whole purpose of the rules in question.

A hallmark of a cross-border arrangement that poses a risk of tax evasion is, according to the law, the main benefit test (see also the text of general anti-tax avoidance rule) and the fulfilment of the so-called hallmark, which are as follows:

- Generic hallmarks;
- Specific hallmarks linked to the main benefit test;
- Specific hallmarks related to cross-border transactions;
- Specific hallmarks concerning automatic exchange of information and beneficial ownership ('CRS Avoidance Arrangement'); and
- Specific hallmarks concerning transfer pricing.

As is clear from the Directive, purely national or non-EU setup do not fall within the scope of the Directive. This is not a surprising phenomenon. It is a manifestation of the fact that direct taxes are not harmonized within EU and their sovereignty of national direct tax legislation does not fall within the competence of the EU institutions.

2.1 SUBJECTS CONCERNED AND THEIR RESPONSIBILITIES

Attorney (as a liable entity with certain legal obligations[19]) is obliged to maintain confidentiality of all facts attorney heard in connection with the practice of advocacy, unless a special regulation on prevention and detection of money laundering and terrorist financing provides otherwise.[20] The tax advisor[21] is obliged to maintain the confidentiality of all facts that it heard in connection with the provision of tax advisory services. Tax advisor can only be exempted from this obligation by a written declaration or by a court. The obligation of confidentiality does not apply to the statutory obligation to thwart and report the commission of a crime.[22] The subject of banking secrecy is all information and documents on matters relating to a client of a bank or a client of a foreign bank branch that are not publicly accessible, in particular information on trades, account balances and deposit balances.[23] However, the fulfilment of the reporting duty to the competent authority of the Slovak Republic for the purpose of automatic exchange of information on financial accounts for the purposes of tax administration pursuant to Act No. 359/2015 Coll. on the automatic exchange of information on financial accounts for the purposes of tax administration and on the amendment of certain acts and on the automatic exchange of information on cross-border arrangements subject to notification.[24]

Pursuant to the aforementioned special acts and the wording of the Act itself, the obliged person is however, the intermediary, except where the notified arrangement is covered by a legal professional privilege or a similar obligation in another member state. The liable entity is, instead of the intermediary, the so-called relevant taxpayer, if all intermediaries involved in the notified

[18] MEHBOOB, D.: Tax directors advise their board on tax crimes ahead of DAC6. Online. Available at: https://www.internationaltaxreview.com/article/b1j0gkm75169rj/tax-directors-advise-their-board-on-tax-crimes-ahead-of-dac6

[19] Sec. 5(1) of Act no. 297/2008 coll. on protection against money laundering and protection against terrorist financing and amending certain acts

[20] Sec. 23(1) of Act no. 586/2003 on advocacy as amended

[21] Sec. 5(1) of Act no. 297/2008 coll. on protection against money laundering and protection against terrorist financing and amending certain acts

[22] Sec. 18(1,2) of Act no. 78/1992 coll. on Tax Advisors and the Slovak Chamber of Tax Advisers as amended

[23] Sec. 91(1) of Act no. 483/2001 coll. on Banks as amended

[24] Sec. 91(11) of Act no. 483/2001 coll. on Banks as amended

arrangement are obliged to maintain the legal professional privilege of the notified arrangement or the notified arrangement does not involve an intermediary.

In the context of the aforementioned legal regulation, from my point of view is problematic the situation of the so-called in - house accountants who are not bound by the legal professional privilege (unless they are an employee of a lawyer or a tax adviser, such persons are covered by confidentiality). The explanatory memorandum to the Act states that the user becomes a liable entity even if he proposes the notified arrangement himself, without using the intermediary services "in-house." When proposing "in-house" arrangements, the user can use its lawyers, accountants, tax advisers who are its employees and, in this case, also the user employing these people is obliged taxpayer. If a user contractually orders an external intermediary - e.g. external lawyers, law firm, tax advisors, etc. (it will not be its employees), the intermediary will be the liable entity as he proposes, or implements the cross-border arrangement. The user himself becomes a liable entity even if the notified arrangement is provided directly to the user by the intermediary, but that intermediary is not an intermediary from an EU member state and thus does not meet the definition of intermediary under Sec. 8a (d) of the Act.

According to that, the following areas might be risky[25]:

• Vagueness of some hallmarks - which, however, may seem an understandable solution in terms of minimum unification of direct taxes in EU[26];

• Congestion of tax authorities also by non-abusive transactions - increasing taxpayer's costs and excessive activity of tax authorities;

• Even with a view to deliberately overwhelming the tax authorities and concealing abusive schemes, it would not be surprised if the taxpayers will report what they do not need to overlook a critical and polemical transaction;

• The question remains of the extent to which States are able and willing to cooperate and exchange information with colleagues from other member states and thus the question is of the effectiveness of the different information exchange legislation within EU remains a challenge;

• Time horizon - reporting, evaluation, proof of abuse and all procedural steps can lead to a better chance of achieving the intended deterrent effect;

• The Directive leaves an uncertainty and ambiguity over companies in relation to several other aspects, in particular in relation to the treatment of their own employees;

• In relation to the legal professional privilege- there is a risk that member states will seek to gain indirect access to privileged information to which they would otherwise not have direct access. Tax avoidance schemes do not normally fall within the scope of criminal law; however, there may be situations where the disclosed tax regimes include an element of tax fraud that can lead to criminal charges. In such cases, intermediaries and taxpayers concerned should normally be exempted from the obligation to disclose information to the detriment of the tax authority.

Given the fact that direct taxation issues (and related reporting) are not unified within EU, the situation is easier for example in the United States, where it is beneficial from the fact that such a measures concerns a single tax system. In addition, the Directive regime applies only to cross-border tax planning and applies a worldwide approach to where the benefit of such tax planning is generated. Therefore, the descriptions of the transactions monitored are necessarily unclear in the Directive. Finally, it traditionally ends up in the eyes of the observer, so that what one person regards as permissible tax evasion may be perceived by others as unlawful tax evasion. There remains an open possibility that regulations ultimately issued by different EU member states may be inconsistent or

[25] See also: VANISTENDAEL, F.: From Abuse to Base Erosion, How did we get there? Luxembourg. 2019. online. Available at: https://webcache.googleusercontent.com/search?q=cache:H9ud2KkqSDAJ:https://wwwen.uni.lu/content/download/116645/1363600/file/The%2520Anti-Tax%2520Avoidance%2520Directive_Slides_MG_20180215.pdf+&cd=5&hl=sk&ct=clnk&gl=sk

[26] Vagueness of some hallmarks is argued also by another scientists, see: GOEL, A.: mandatory disclosure regime 2018/822 problems risks. Online. Available at: https://news.bloombergtax.com/daily-tax-report-international/insight-mandatory-tax-disclosure-rules-in-eu-confusion-galore

that regulations may be so vague that intermediaries on opposite sides of the transaction may have different views as to whether a transaction needs to be reported.[27]

3 CONCLUSION

It should be recalled that it is not excluded that certain financial intermediaries and other tax advisors are likely to have actively assisted their clients in hiding funds in tax havens. The announcement of measures of potentially aggressive cross-border tax planning can effectively contribute to efforts to create an environment of fair taxation in the internal market. In conclusion, the effectiveness of the Directive as well as the overall direction of tax policy in the area of information exchange will show only time. In the last part of my paper I summarized, in my opinion, the critical moments of the Directive, whose solution (or possibly only the real demonstration of reality) is based on implementation and legal practice. Legislative taxpayers have a difficult task ahead.

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LEGAL PROFESSIONAL PRIVILEGE OF TAX ADVISERS IN SLOVAKIA

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Abstract: This paper outlines the aspects of the legal professional privilege of tax advisers which is included directly in the Act on Tax Advisers in Slovakia. It also explains the interaction of this law with the Slovak Code of Criminal Procedure. For the moment, there is yet another challenge related to this topic. It is the interaction of the criminal law with the Directives of the EU regarding the anti-money-laundering. Now as there is the 5th Amendment of this Directive, which is being transposed into the Slovak legislation, there are new and difficult challenges for the tax advisers when dealing with this issue in practical cases.

Abstrakt: Príspevok sa zameriava na zákonnú mlčanlivosť daňových poradcov na Slovensku, ktorá je zakotvená priamo v zákone o daňových poradcoch. Vysvetľuje interakciu medzi týmto zákonom a slovenským Trestným poriadkom. V súčasnosti ale existuje v tomto smere ďalšia výzva. Je to interakcia medzi trestným právom a Smernicami EÚ týkajúcimi sa boja proti praniu špinavých peňazí. Teraz, keď je v platnosti 5. AML Smernica, ktorá bola transponovaná do slovenskej legislatívy, predstavuje táto téma nové a náročné výzvy pre daňových poradcov, pokiaľ sa ňou musia zaoberať pri riešení praktických prípadov.

Key words: legal professional privilege, tax advisers, AML

Kľúčové slová: zákonná mlčanlivosť, daňoví poradcovi, opatrenia proti praniu špinavých peňazí

1 INTRODUCTION

One of the topics that need to be discussed in connection with the profession of tax advisers in Slovakia is the legal professional privilege. Profession of tax advisers is quite young in Slovakia, the Act on Tax Advisers is stemming from the year 1992 after the political changes in our country. Already at that time, the legal professional privilege was something that had been integrated into the new Act related to this profession. However, since then the Act has only very little reacted to all the developments in the Slovak criminal law and was almost not changed since then. This paper shall analyze why the legal professional privilege as it is currently in our law brings application burdens and which changes in law (de lege ferenda) should be adopted in the future. In line with Art. 18 of the Act on Tax Advisers and Slovak Chamber of Tax Advisers[1] the tax adviser is obliged to maintain the privilege of all facts that he/she has learned in connection with the provision of tax advisory services. Tax adviser may only be exempt from this obligation by client´s written declaration or by a court. This obligation of legal professional privilege does not apply to the statutory obligation to thwart (prevent) and report the commission of a crime. In addition this obligation of privilege does not apply to the reporting duty under the anti-money-laundering (furthermore only "AML") legislation. Anyone who has been removed from the list of tax advisers or who has been suspended shall also be required to maintain the confidentiality (legal professional privilege). The Act also sets out that the obligation of the legal professional privilege shall also apply to the employees of the tax adviser and the employees of the Slovak Chamber of Tax Advisers. In the following paragraphs we will analyze the interaction between the Act on Tax Advisers and the criminal law in Slovakia. We will also deal with the respective interaction between the AML legislation and the legal professional privilege of tax advisers.

[1] Act no. 78/1992 Coll. on Tax Advisers and Slovak Chamber of Tax Advisers as amended

2 INTERACTION BETWEEN LEGAL PROFESSIONAL PRIVILEGE OF TAX ADVISERS AND CRIMINAL LAW

From the wording of the Act on Tax Advisers it is clear that the exemption from a legal professional privileged can be provided solely by the client or the court. The procedure how a client could exempt the tax adviser from the duty to stay "silent" is quite straightforward. He/She can just make a written statement and provide it to the respective authority. On the other hand, the process of the withdrawal of the privilege through a court has no regulation for the moment. The Slovak Code on Criminal Procedure[2] does not state a privilege exemption process. In line with the Art. 129 para. 2 of Code on Criminal Procedure a witness may not be questioned also in the possibility of violating the obligation of privilege imposed by law or by an international treaty unless he is exempted from this obligation by the competent authority or by the person in whose interest he is bound. As there is no special procedure to the exemption process and it is not clear which court is competent in this regard, there is a lot of uncertainty in the practical approach. In this respect we would like to mention the curious court case of the Upper Court (Krajský súd) Banská Bystrica *24S/99/2017*. The police (National Agency of Investigation) has submitted a request to the Specialized Criminal Court to exempt a tax adviser from her duty to "be silent", as the client was not willing to do so (has not taken the request of the police from the post). However, the Specialized Criminal Court has rejected to start the exemption procedure as it had stated not having the legal competence to do so. The Specialized Criminal Court recommended the police to request the administrative (civil) court of the district, where the tax authority which decides on the rights and duties of the client has its seat, to start the exemption procedure. The Upper Court (Krajský súd) Banská Bystrica rejected to do so as well, with the explanation that upon its conclusion the competent authority in this case is the Specialized Criminal Court as in criminal matters the criminal court should decide and this entire case is a criminal one. The conclusions of the court have been made on the basis of Act no. 757/2004 Coll. on Courts as amended, which describes the organizational structure of the juridical power in Slovakia. The result of this funny court case was that the request of the police was rejected and the case was again forwarded to the Specialized Criminal Court. If the Specialized Criminal Court decided after the first request of the police via an ordinary court decision and not only through a rejection letter, there would be a case for the Slovak Supreme Court to decide on the competence between two different courts as foreseen by Art. 18 para. 4 of the Administrative Court Procedure Code. Upon this described case we may sum up that this issue is still pending to be regulated properly under the Slovak legislation.

Art. 18 para. 2 of the Act on Tax Advisers prescribes that the obligation of privilege does not apply to the statutory obligation to thwart (prevent) or report the commission of a crime. In contradiction to this stipulation the Art. 340 para. 3 of the Criminal Code[3] states that a person who commits an offense by failing to report a crime shall not be liable if the person would violate a legally recognized obligation of privilege. In connection with the Art. 129 para. 2 Criminal Procedure Code which prohibits to question a witness if he/she breached the obligation of professional privilege imposed by law, we may conclude that there is a contradiction between the Act on Tax Advisers and the criminal law. According to the Act of Tax Advisers the professional would have the obligation to report a crime, however, in line with the criminal law he/she has to stay "silent". According to the prevailing legal doctrine the Criminal Procedure Code prevails. Tax advisers should not breach their privilege by participation in the criminal procedure.

In line with Art. 341 para. 1 of the Criminal Code who has learned credibly that other person is preparing or committing a crime for which this law provides for a maximum term of imprisonment of at least ten years or one of the offenses listed under the corruption crimes and the person does not thwart (prevent) committing or completing such a crime, he has to be punished to imprisonment of up to three years. As indicated above when describing the stipulation of the Act on Tax Advisers the tax advisers´ privilege does not apply in this case (this is a big difference to the legal privilege of the attorneys in law). The definition of the offense says that it has to be the preparation and commission of a "more serious" crime and there is the obligation to thwart (prevent) the unlawful action. The duty is also fulfilled by notifying the competent authority.

Tax advisers should be cautious in relation to criminal responsibility when providing tax advisory services. Under the Criminal Code there might be four various roles in the crime involvement.

[2] Act no. 301/2005 Coll. as amended (Code on Criminal Procedure)
[3] Act no. 300/2005 Coll. as amended (Criminal Code)

Principal is the person committing a crime (this can be also a legal entity). Accessory commits a crime together with the Principal. This could be also a tax adviser if he/she is acting on behalf of the Principal (e.g. via a power of attorney). Further there is the Aider. It is the person who has partial responsibility, helping the principal with the crime commitment, e.g. in case of unlawful tax advices. And last but not least there is the Abetter, who is the person organizing, guiding, asking the Principal to commit the crime. Such a person has full responsibility. In line with the current jurisprudence tax adviser do not bear criminal responsibility in case of negligence or in case of receiving wrong documents provided by clients. In this respect we would like to mention the court decision of the Czech Constitutional Court *II.ÚS 2046/07 from 17 April 2008* in a case where chairman of a joint-stock company has be sentenced due to the reason that he put fictitious invoices into the bookkeeping of the company to be recorded and let them being paid. In this case he was sentenced as tax evader. His argument had been, however, that he was not the person who had prepared and submitted the corporate income tax return and the VAT returns. This would be the tax adviser of the joint-stock company. The Constitutional Court has dismissed claimant´s constitutional complaint as according to the ruling jurisprudence the statutory body of a legal entity (in this case the board of a joint-stock company) is responsible for the bookkeeping of the company. According to the Czech Constitutional Court the tax adviser could be in worst case only an accessory or aider, which had been, however, not proved in this respective case. Tax advisers cannot bear responsibility for documents provided to him/her, which are fake or fictitious with the aim to decrease the tax base (in case of corporate income tax) or get a VAT claim or refund (in case of VAT). A different problem is the negligence, because the Slovak criminal law has a special offense under Art. 260 Criminal Code called "distortion of the data concerning the economic and trade evidence" (skresľovanie údajov hospdárskej a obchodnej evidencie), which can be a negligence crime and a tax adviser could be sentenced up to 8 years in jail. This crime can be used by judges if they do not find any other kind of offenses under the Criminal Code, in that case they could opt to und subsume the activity of the tax adviser under this crime.

In this court case the claimant was giving rise to the constitutional and criminal law principle in dubio pro reo. However the Constitutional Courts decided that all court instances before have taken all pains to collect und summarize all the proofs and evidence they only could and have been dealing very diligently with all the arguments of the claimant and the state defenders. An interesting argument of the claimant is the intention to commit the tax evasion, which is always needed in case of criminal offenses. The claimant stresses that it is necessary to distinguish between the conclusions of the tax offices on wrong disclosure of the tax liability and the conclusion of the police/prosecutors in the criminal proceedings on the criminal responsibility.

In this case it is a very popular topic at the criminal court proceedings mainly in Germany how the tax adviser can prove that he was not involved into the tax evasion/tax fraud. The members of the statutory body of a company (e.g. a limited liability company or a joint-stock company) should act with due care. To fulfill all the signs/hallmark of the due care might be e.g. getting professional opinions on the issue at hand from various professionals, like lawyers, tax advisers, accountants, auditors, etc. Nowadays it is very popular for such members of the bodies to get at least 2-3 various opinions (something also second opinions) in order not to be held liable in the future (we are writing here about both the civil and criminal liability). Therefore it is not rare, that if any criminal court cases are involved, the members of the bodies refer to the advisers as people who are responsible for the transaction and therefore according to them, they should bear the full responsibility. As this is the case for the moment, it is very advisable for the tax advisers to document very carefully all the communication with the client, to have a perfect documentation on the provided documents and to make the client aware of any and all risks that might occur during the transaction. This kind of court cases is still not very common in Slovakia, but we might count with the shift from Germany, firstly to the Czech Republic and then consequently to Slovakia.

There is another crime/criminal offense, where the tax advisers should be very cautious and this is the crime under Art. 339 Criminal Code called favoritism (nadržiavanie). This offense is committed if the person is helping someone not to "get the justice", not to be judged or sentenced. In case of a tax adviser it is very questionable if for example taking accounting and tax documents into the premises of the tax adviser could have the hallmarks of this offense. We think this is not the case because as shown in some lines further the police/prosecutors are in no kind hindered to come to the premises of a tax advisers and take any documents they can in line with the request of the prosecutor or judge. The only specialty is that the tax adviser cannot cooperate.

In line with the Art. 18 of the Act on Tax Advisers this professional cannot cooperate with the police or prosecutor. In our view presence of an attorney-at-law is always advised from the first stages of the criminal proceedings. If the policemen/prosecutors show up, they should be informed about the legal professional privilege. Tax advisers cannot provide information on their clients. They cannot even confirm, if a firm or natural person is a client of the tax adviser. And what is more important, the tax adviser is not entitled to hand over clients´ documents to police or prosecutors.

3 INTERACTION BETWEEN LEGAL PROFESSIONAL PRIVILEGE OF TAX ADVISERS AND AML LAW

Worldwide we see maximum efforts to combat the money laundering. In this effort mainly OECD, UN and EU are very active. There is already the 5th Directive on AML in the EU, which had to be transposed to the legal order of the EU member states around the beginning of 2020. This has happened also in Slovakia. In the forefront of the combat with the money-laundering and terrorist financing are the banks. They have learnt to build very tight, clear and strict rules and to put the entire responsibility on the shoulders of the clients.

Among lot of reporting obligations the banks are trying to check new clients through the internal and external databases of suspicious persons and firms. Furthermore they check mainly bank transfers from exotic countries and from exotic bank accounts.

Tax advisers are also obliged persons who have to comply with the law and have to fulfill thousands of regulations. Under Art. 17 of the AML Act[4] the obliged entities shall report an unusual business operation. Under Art. 21 of the AML Act entities shall provide information related to commercial relations and transactions. After the analysis of the AML legislation it needs to be pointed out, that there are differences between the treatment of the attorneys and tax advisers in the domestic legislation. It is to stress that attorneys have broader exemptions, in cases like:

- processing legal analyses. This aspect does not apply if the legal analysis is provided for legalization or financing of terrorism.
- the defense of the client in criminal proceedings,
- representing the client in Court proceedings (in general), or
- the provision of legal advice related to the proceedings referred to under bullet point 2 and 3, including legal advice on the initiation or prevention of proceedings referred to under bullet point 2 and 3.

On the other hand tax adviser has under the current Slovak AML legislation following exemptions:

- legal advises in connection with client´s defense or representation during criminal proceedings (however tax advisers are not eligible to represent clients in court proceedings – this could be always only the attorney-at-law),
- although various legal advises in the field of tax could be provided in the position of client´s adviser during the criminal proceedings (court proceedings included),
- advice related to the prevention of criminal proceedings is exempt from the reporting duty as well,
- also advice prior to such proceedings

To conclude the comparison between attorneys and tax advisers in the field of AML one can see that attorneys have de facto better situation in the court proceedings as they have broader exemptions when defending the clients in front of the court. A tax adviser can never be a real defendant at the court, as this role have only attorney in Slovakia for the moment. There is kind of criticism from the institution like OECD and UN related to advisers´ profession in Slovakia that there are only few cases a year of reporting any unusual business operation to the finance unit at the Ministry of Interior which is in charge of the supervision of AML in Slovakia. It is true that in some countries the oversight role on the members of the professional chambers in the field of AML have been taken over directly by the chamber.

In Slovakia tax crimes related to direct and indirect taxes are included in the broad definition of "criminal activity" in the AML Directive. Member States (according to the Directive) should allow a definition of the criminal activity to the greatest extent possible under their national law. Transposition into the Slovak legal system has been made by general reference to Criminal Code. Reference has

[4] Act no. 297/2008 Coll. as amended on AML and terorist financing

been made to note no. 41 of Slovak AML Act, whereas all transactions potentially related to tax crimes as defined in Slovak Criminal Code should be relevant.

4 CONCLUSIONS AND RECOMMENDATIONS

As a result of our paper we recommend an update of the Act on Tax Advisers as it is out of date in the part where the legal professional privilege is stipulated. The problem is that this Act is not in line with the Slovak criminal law, which has been amended considerable after 2005.

In addition we would recommend to specify in the Act of Tax Advisers or more in general in the Criminal Procedure Code the procedure of court exemption of privilege. Also tax adviser should be actively legitimated to file a request for privilege exemption, as this could be an effective means of self-protection in times when due care of the managers is very often used as an argument at the court proceedings.

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LEGAL SOLUTIONS TO THE ARISING PROBLEM OF TAX HEAVENS AND THEIR INFUENCE ON THE EUROPEAN ECONOMY

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Abstract: It is difficult to provide a uniform and effective definition of a tax haven in every case, as many jurisdictions present different forms of tax haven, but they always have one aspect in common - a favorable tax policy. Tax havens are also known as the "oasis states" or as companies operating there call themselves: "international offshore financial centers". The last term is becoming more and more popular nowadays. The Organisation for Economic Co-operation and Development (OECD) has decided to define in part the phrase that is the subject of this article in its 1998 guidelines. This explanation is partial, as it only indicates the features that a country's tax system must meet in order to be considered as a tax haven, or as it is defined in the legislation "country or territory applying harmful tax competition". We can formulate a general definition of a tax haven on the basis of the above mentioned guidelines. A tax haven will therefore be called a country or geographical area whose legal system, in particular tax system, is extremely lenient for foreign capital.

Key words: tax heavens, tax oasis, tax paradise, OECD, tax evasion, tax optimization, income tax, tax savings, tax circumvention, tax avoidance, tax planning.

1.ORIGINS OF TAX HEAVENS.

The beginnings of tax havens cannot be determined precisely. However, it is estimated that it began in post-colonial times, when many Overseas Territories gained their independence. The main problem these countries faced was independence in itself, because without the "care" and sovereignty of the colonial powers, these countries were left to their own devices with a residual economy and poor infrastructure. The solution to these problems could only be achieved by attracting investors to these territories who wanted to do business and thus contribute to economic development. The main question, however, was how to encourage wealthy people to invest their funds in places where there is almost nothing. One of the ideas to solve the problem was to exempt investors from the obligation to pay any income tax in exchange for investing a certain amount of capital in the economy of a given country (and other privileges such as: flag or citizenship). However, this idea did not receive full approval as the opponents believed that the lack of tax obligations towards these entities makes their presence virtually insignificant. However, the plan was put into effect and partially implemented as the investors went ahead and built the infrastructure on their own (mostly in the hotel and leisure industry). A problem that was not anticipated at the early stages of planning was the simultaneous influx to these countries of people hiding assets resulting from criminal acts (drugs, arms and human trafficking). However, the profitability of the practice prevailed over moral considerations, so some "investors" were not eliminated. As a result of such activities, the international opinion was more interested in the actions of the newly created countries and the desire to obtain information about new "entrepreneurs" coming to their territories in large numbers. In order to protect their only sources of income, these territories did not provide information about entities investing capital in their country, which caused problems with international relations. These countries were seen as territories applying unfair tax competition and the process of excluding them from any possible economic and commercial relationship implemented, in order to force them to cooperate and exchange information. The OECD and its member countries were the first to implement this policy. Under pressure from international politics, some countries such as the Philippines[1], have changed their internal policies by concluding cooperation and information exchange agreements on tax and financial grounds. Others, such as Hong-Kong, are continuing with their policies without any intention of giving in to external pressure.

[1] https://finanse.wp.pl/opublikowano-liste-rajow-podatkowych-6114345334867585a, access 04.02.2020.

2. DEFINITIONS OF TAX HEAVENS.

2a.Characteristics and definition problem.

It is difficult to provide a uniform and effective definition of a tax haven in every case, since many jurisdictions have a variety of legal systems, but they always have one aspect in common - a favourable tax policy. Tax havens are also known as the oasis states and companies operating there themselves are called- international offshore financial centers. The latter term is becoming very popular today[2].

2b. OECD guidelines.

The Organisation for Economic Co-operation and Development (OECD) has decided to define in part the phrase that is the subject of this chapter in its 1998 guidelines. This explanation is partial, as it only indicates the features that a country's tax system must meet in order to be considered a tax haven, or as it is defined in the legislation "country or territory applying harmful tax competition". These characteristics are:
- No income tax or income tax of a purely nominal nature,
- No effective exchange of tax information with other countries,
- No transparency,
- Lack of significant actions aimed at introducing effective exchange of tax information with other countries and transparency.

According to the basis of the above guidelines, we can formulate a general definition of a tax haven as:
„A country or geographical area not cooperating or partially cooperating with other countries in exchanging information of a financial nature, whose legal system, in particular tax system, is exceptionally lenient for foreign capital through extraordinary reduction or complete exemption of entities from the obligation to pay public tribute in the form of income tax on profits earned on the territory of paradise".
As a consequence, a tax haven will also be called a country or geographical area whose legal system, in particular tax system, is extremely lenient for foreign capital. These actions, or lack of them, consist in complete exemption from the obligation to pay a public tax in the form of an income tax on the profits made in the territory of the paradise by the company or the establishment of a flat tax rate regardless of income. Very often, the accounting and establishment requirements are also simplified in these countries and the anonymization of investors is facilitated by requiring only basic data which makes it impossible in practice to identify the investor effectively. The main purpose of such measures is to attract businesses and capital to the area. Legal orders applying harmful tax competition are often discriminated against for this reason in the international arena, as other countries lose huge amounts of money due to the transfer of taxable income by entrepreneurs from their home countries, who obviously do not bear the public burden in those countries.

2c. Shortcomings in OECD definition.

A legal definition based on OECD guidelines adds a lot to the meaning of tax havens, but has some shortcomings which are not covered by its content: the flat-rate income tax, unnaturally simplified requirements for accounting and company establishment (especially for foreigner capital),Other privileges (such as the granting of citizenship or the possibility of using the flag of a country). In my opinion, as the author of the article, these issues should be included in the OECD guidelines, as they are important information for the precise identification of tax haven countries.

2d. 27.06.2012 European Commission Statement[3].

This document interchangeably uses the term "non-cooperative jurisdictions", defining them as areas that are able to finance public services without the need to collect income tax, or setting a negligible

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[2] J. Grzywacz, Pranie pieniędzy. Metody, raje podatkowe, zwalczanie, Warszawa 2010, s. 51.,
[3] Statement from the Commission to the European Parliament and the Council on concrete ways to improve the fight against tax fraud and tax evasion, including in relation to third countries. Brussels 27.6.2012.COM(2012) 351 final.

rate of tax collection, thus offering their "services" to (non-residents) wishing to avoid taxation in their countries. This leads to the conclusion that these countries apply unfair tax competition by preventing or hindering the collection of public-law debts by their countries of residence to a significant extent.

2d. Opinion of the European Economic and Social Committee of 31.07.2012 on the Tax and financial havens: threats to the EU internal market[4].

According to this publication, tax havens are places where, in addition to high-level executives from major industrial and financial companies, figures from the international, wealthy social and artistic circles, and multimillionaires, live people with controversial reputations, profiting from economic crime, organised crime, terrorism, arms trafficking, drugs and other broadly defined illegal or legitimate activities. These territories have many common features, such as, for example, a low level of taxation of residents who do not carry out any activity in the area anyway, or are apparent, as well as unclear rules for the operation of the fiscal and legal apparatus. In this way, harmful competition with mysterious structures is established, which leads to a completely opaque legal status.

2e. Definition in Polish tax law.

In the Polish legal order, the full list of countries and territories applying harmful tax competition in the field of corporate income tax can be found in the Ordinance of the Minister of Development and Finance of under the same title. As a result the definition of tax havens used in Polish legislation may be contained in the name of the regulation indicating the list of countries and areas considered by Poland as tax havens. Officially, tax havens in Polish legislation are therefore known as:
„Countries and territories applying harmful tax competition in the field of corporate and personal income tax."
But in fact Poland uses the directions of OECD to decide which countries should be put on the list.

3. CLASSIFICATION AND DESCRIPTION OF DIFFERENT CATEGORIES OF TAX HAVENS.

3a. Categories of tax heavens due to OECD guidelines.

According to the OECD, a tax haven is called a territory where the legal system allows foreign entities to reduce the tax burden in their country of residence. There are three basic categories of tax havens[5]:
- The first one - these are countries and areas that are characterised by a complete absence of personal and corporate income tax (examples of such countries are the Cayman Islands and the Bahamas).
- The second category is made up of countries - oasis in which taxes do exist, but their level is relatively low, especially in relation to income earned outside their territory (e.g. Liberia, Cyprus).
- The third category includes countries where taxes are set at quite high levels (not deviating from the general trend) but which provide special privileges and exemptions for certain entities or their activities (Luxembourg, Ireland).

The first two categories are classic tax havens, which are small post-colonial areas. The main source of their budget revenues are relatively high indirect taxes, which compensate for losses due to no or low rates of direct taxes. The third category of countries is classified as tax havens because of their favourable tax policies, but it cannot be equated with the first two because the level of information exchange and collection generally complies with all the requirements imposed by more legislative advanced countries - these countries often belong to the European Union and are signatories to a number of conventions and agreements on combating unfair tax competition[6].

[4] Opinion of the European Economic and Social Committee on the Tax and financial havens: a threat to the EU internal market (own-initiative opinion) (OJ C 229, 31.7.2012, p. 7). Rapporteur: Mr Iozia, Co-rapporteur: Mr Herandez Bataller.

[5] M. Obszyńska-Krasnodębska, R. Krasnodębski, Raje podatkowe, Przegląd Podatkowy 1995, Nr 1–3.

[6] T. Lipowski, Raje podatkowe a unikanie opodatkowania, Warszawa 2004

3b. Categories of tax heavens by the factor of harmful tax competition.

In the doctrine and science of taxation, there is also another division of tax oases, which is based on the criterion of harmful tax competition. Tax havens can be divided into two categories. The distinguishing criteria is the recognition of the area by the international community as a country or territory with harmful tax policies. Thus, we distinguish between countries with a mild tax regime tolerated by the OECD and those whose activities in this field are controversial (with a negative reputation). The bad fame that some of the countries in the second category (which are discriminated against) owe a large part of their activity to these the areas of persons linked to terrorism, the drug industry, illicit trafficking in weapons and ammunition and any other negatively perceived phenomena from which the financial revenues have been subject to the tax regime of the above mentioned countries, belong primarily to this group: Seychelles, Panama, Bahamas. The second category of countries are those with a tolerated tax policy which, despite favourable regulations, are not discriminated against due to the transparency of their tax systems, which is ensured by international agreements. These countries are also sometimes called quasi-tax countries, the members of this group include the following countries: USA, Great Britain, Cyprus.

3c. Reasons for qualifying a country as certain category of tax haven.

Taking the example of the Seychelles, the general mechanisms on which the favourable tax policy of that country is based and its qualification as a discriminated party can be presented. Firstly, the country does not cooperate with either the European Union or the United Kingdom (which was the head of the country during colonialism and which, as we know, is still a member of the EU), but is bound by international agreements (TIEA) with other countries such as China, Cyprus, Malaysia and other tax havens (e.g. the Kingdom of Bahrain), which makes it very difficult to vet tax residents there. Another issue worth noting is that this country does not provide Poland or the EU with any information on: income, assets and business activities on their territory. The cost of setting up a company (IBC), which is fully exempt from income tax, is $100, a government fee. Another aspect is the high degree of secrecy that characterizes this legal system, the registers there do not disclose the shareholders or directors of the companies, these data are known only to the registration agent.

Resolutions of company bodies are also subject to secrecy. Only basic information such as the articles of association are kept in the commercial register, but it is never clear whether the data indicated there are true. There is also no obligation to employ local employees, and the sole shareholder also the director may be a natural or legal person. Nor is there any obligation for the company to produce reports and financial statements or to keep accounts. The only requirement in this respect is to indicate (in practice, unverifiable) any country in the world where, according to the company director's statement, the documents concerning the company's accounts are located. Therefore, as can be easily noticed, the conditions for doing business in that country are very favorable, while the level of anonymity may raise some concerns. The USA can be mentioned as an example of a country belonging to the second (non-discriminate) category. In this country, despite broad declarations regarding the fight against taxpayers' anonymisation and money laundering, the states conducting a policy of zero income tax, including Delaware and Wyoming, are very strongly supported. This is due to the desire to make profits, resulting from economic pragmatism. The main tool to attract investors to the above states is the zero income tax rate on income earned outside the USA and the lack of VAT. However, companies established on the territory of this country are not as mysterious as in typical tax havens. The legal requirements in this respect are much stricter, it is necessary to disclose more extensive data and assign profits to a particular partner or partners. A safeguard against excessive anonymisation of entities is also the necessity to present confirmed copies of the so-called Apostille documents. The distinguishing feature of this system, however, is a flat rate tax to the state in the amount of $300, an additional fee is the cost of registration of the company, which closes in the amount of $90. A feature common to typical tax havens is, for example, a very limited requirement to present financial statements, i.e. to keep accounts and document expenses incurred. The only security in this respect is the need to report annually on bank accounts with a turnover of more than $10,000, as a result of combating the terrorist threat. However, this obligation applies only to accounts maintained outside the territory of the USA. Another limitation is the thematic scope of conducted business activity, in this legal form one cannot conduct activity such as insurance, lottery, bank. In these areas, a meticulous verification is necessary, which is carried out in a very meticulous manner. To sum up, it can be noted that tax solutions do not differ too much in discriminated and tolerated countries. The decisive factor is therefore the degree of anonymisation of entities which conduct business activity in the territory of a given country[7].

3d. OECD list of Unco-operative Tax Havens.

As a result of the 1998 guidelines, in 2000 the OECD issued a report containing a list of countries that have been designated as tax havens. By April 2002, 31 of these countries had made formal commitments to meet OECD standards on transparency and exchange of information. Despite these arrangements by a large number of countries, some of them have not entered into agreements. However, under the influence of the OECD dialogue and further efforts to improve the exchange of information, Nauru and Vanuatu concluded these agreements already in 2003 and Liberia and the Marshall Islands made similar commitments in 2007. The accession of these countries to the OECD agreement has accelerated the integration process for the remaining listed countries. As a result, in May 2009, the OECD Tax Committee decided to remove from the list of countries applying harmful tax policies the other three countries, which were Andorra, the Principality of Liechtenstein and the Principality of Monaco. As a result of these actions, the list currently remains empty, but the OECD continues to monitor the actions of individual countries that indicate their activities in terms of harmful tax competition.[8]

4. INFLUENCE ON EUROPEAN ECONOMY.

Based on the statistical information contained in the European Commission's materials[9], the following conclusions can be drawn. Firstly, there is no doubt that the diversion of money into tax havens leads to a loss of public contributions paid in the home countries of those opting for this type of tax evasion, by eroding the tax base. This in turn leads to a depletion of resources for basic state investment and all social services financed from the state budget. Based on these statistics, the annual budgetary depletion of the European Union countries as a result of moving money to tax havens reached EUR 40 billion. Interestingly, this result is incomparably lower compared to the crisis period of 2008, when the level of capital withdrawn reached a record level of almost 60 billion Euros. The second conclusion directly stemming from the impact of tax havens on the European economy is the issue of anonymisation and thus facilitating financial and tax-related crime. As already indicated in the previous stages of work, tax havens often create favourable conditions for conducting business activity without requiring investors to provide more extensive information identifying them. Through such activities, a situation is created which favours concealing the identity of individuals under a corporate structure. In Poland, in order to counteract such practices, the Central Register of Real Beneficiaries has been launched, in which all corporate entities must present the ownership structure (of natural persons) under pain of criminal liability. Another problem that I see in the context of tax havens and their impact on the European economy is the issue of hiding assets. These actions may be aimed at hindering bailiff enforcement by moving funds and property to areas where Polish (and even European) jurisdiction does not reach to avoid responsibility for financial obligations.

5. LEGAL SOLUTIONS.

Unfavorable tax practices are addressed by legislators in the countries of residence of entities fleeing from paying public levies, as well as international organisations of which they are members[10]. The remedies can be divided into two categories[11], these are the following:

1) Internal tax legislation and the relevant practice of administrative authorities - this category of activities consists of the following measures:

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[7] K.Turaliński, Jak legalnie nie płacić podatków, Raje podatkowe i spółki off-shore, Wyd.Artefakt.edu.pl, Warszawa 2014, str. 53-55

[8] https://www.oecd.org/countries/andorra/list-of-unco-operative-tax-havens.html

[9] Estimating International Tax Evasion by Individuals, TAXATION PAPERS Taxation and Customs Union
WORKING PAPER No 76 – 2019

[10] The list of Tax Havens is published in the Report adopted by the OECD Council on 9.4.1998 and presented to Ministers on 27-28.4.1998.

[11] Analysis of possible countermeasures, OECD Harmful Tax Practices Forum, Note on countermeasures against tax havens on the list.

- Creation and modernisation of legislation on control and reporting of information relating to tax havens. This concerns in particular transactions of transfer of ownership or other rights in rem in property, provision of services, loans, payments and other financial and judicial operations to entities associated with tax havens. These transactions should be subject to appropriate penalties or nullity if they fail to comply with these obligations. States should also cooperate in the field of exchange of information in this regard by creating, for example, an international database. Of course, these requirements would only apply to countries that are recognised as applying non tax competition and included in the relevant legislation or registers.
- Audits and audits of entities associated with tax havens, examining in particular transfer pricing and other aspects relevant to tax avoidance.
- Tightening the rules on tax havens, by removing exemptions and reductions applicable to companies engaged in oasis-related activities, especially through controlled entities.
- Refusal to make deductions of payments to persons operating in tax havens in the relevant legal acts. This is a very severe and effective sanction which would prevent the deduction of costs incurred for the creation or acquisition of an optimisation chain entity located in a tax haven. The measure is fairly simple and does not impose a financial burden on legitimate operators in the event of error, and is complemented by a change in the burden of proof of the correctness of the deductions that would be borne by the deductor. However, differences in the substantive law on deductions applied in different countries may be a problem.
- Refusal of tax exemptions or tax credit for income earned in listed tax havens or for foreign taxes paid in tax havens. This provision would make it possible to tax any income obtained in tax havens in the countries of residence.
- Capital gains - exclusion from preferential treatment of any capital gains arising from the disposal of assets located in a listed tax haven.
- Registered office - An entity controlled by shareholders from a Member State and located in a tax haven could be considered to be resident in a Member State.

2) Bilateral tax treaties - Obligatory:

- Not to conclude any agreement with listed tax havens, except for exchange of information. This prohibition would only apply to comprehensive agreements on income taxes.
- To exchange existing agreements concluded by Member States with tax havens.

Exceptions to the prohibitions and, at the same time, the justification for legally concluding or maintaining agreements with listed tax havens would be those concluded when:

- They relate to the establishment of restrictions on benefits or provisions against the acquisition of contractual rights, preventing the agreements from being used to the detriment of other countries,
- They regulate the exchange of information,
- A tax haven officially and effectively exchanges information,
- The Member State will exchange the information received from the tax haven with the other countries concerned.

If these requirements are not met cumulatively, the agreement should not be concluded or should be terminated.

6. EXTRA-LEGAL SOLUTIONS.

Non-legal countermeasures - supplementing the legal activities of state bodies. Their effectiveness is, of course, much lower than that of legal measures, but their scope of application is less restricted and may serve to indicate a way of interpretation in certain circumstances. Of course, these measures can only apply to areas and territories that are on lists drawn up in accordance with legislative requirements. The restrictions applied to the above countries must not be too exorbitant, so that they are not discriminatory and are not perceived as incorrect and inappropriate. The adoption of uniform Community legislation on this issue may also be a problem, given that many of the EU's 'major' countries have strong economic relations with their former colonial territories. A uniform classification of all tax havens may also be a problem, since, as mentioned in the introduction, the nature of their activities sometimes varies considerably. Given the above, it would be appropriate to take the correct view that these measures can only be symbolic and subsidiary to legal measures. An interesting solution based on the indicated method is the creation by countries of internal lists divided into: white, grey and black[12]. The white lists contain a list of countries not perceived as tax havens despite favourable financial policies, while the grey ones are perceived as prospectively "threatened" with recognition as a tax haven, while the black ones are considered as tax havens. In April 2009, the OECD published "black" and "grey" lists of territories that do not exchange tax information with third countries. Among the countries on the "black" list there were min. Costa Rica, Malaysia and the Philippines were among the countries on the "grey" list, while several dozen tax havens were placed on the "grey" list. Countries on both categories of lists were offered to be included on the "white" list in exchange for signing at least twelve Tax Information Exchange Agreements (TIEAs). Some of these countries (e.g. Malaysia) have agreed to this arrangement, which means that taking a place on a particular list is an effective way to convince a country on the "darker" side to cooperate.

7. SUMMARY.

In the opinion of the author of the article Tax Havens are a phenomenon that has a detrimental effect on the finances of European countries from which money is taken out. However, this problem is difficult to solve due to the sovereignty of states and the freedom to conduct business, which cannot be violated without a legitimate reason. Bearing in mind the above mentioned information, the author creates a position according to which an effective strategy to counteract erosion of the tax base with the use of tax havens is legal actions in the form of concluding international agreements supported by non-legal activities such as the indicated creation of white, grey and black lists related to the phenomenon of tax havens. It should be emphasized that the activities of international organizations such as the OECD or the European Union cause a gradual decrease in tax avoidance using entities located in tax havens.

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COMPARISON OF BANK SECRECY, TAX SECRECY, TRADE SECRECY AND PROFESSIONAL SECRECY OF LAWYERS

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Abstract: In the paper, we present a structured analysis and comparison of the various institutes of secrecy (privilege) in Slovakia in order to evaluate the strength of the legal protection provided to each type of protected information. First, we sketch the origins of the four selected institutes of secrecy, namely the bank secrecy, tax secrecy, trade secrecy, and professional secrecy of lawyers. Second, we analyze the secrets according to the following categories: (i) subjects; (ii) objects; (iii) rights and obligations; (iv) exemptions; (v) treatment of respective secrets according to the criminal law, and anti-money laundering legislation. Finally, we briefly compare the secrets and provide an estimate of their relative strength.

Key words: bank secrecy, tax secrecy, trade secret, attorney-client privilege, anti-money laundering

1 INTRODUCTION

Legal systems with strong rule of law institutions and developed market economies tend to provide for strong protection of confidentiality of certain types of information – secrets. These include for instance information developed and exchanged between lawyers and their clients (professional secrecy of lawyers, or attorney-client privilege), banks and their clients (bank secrets), tax authorities and tax subjects (tax secrets), or within and among firms and business partners (trade secrets). Protection of these secrets is required to the extent and for reasons specific to individual secrets; some have roots in the constitutional right to privacy, especially in relation to public authorities, whereas the law of trade secrets originates in the freedom to conduct business.

Yet, these secrecies are not uncontroversial. It has been long recognized that bank secrecy laws, together with the attorney-client privilege, especially in non-cooperative jurisdictions, may facilitate illegal tax evasion, bribery, money-laundering, or even financing of terrorism.[1] The point of overlap of these illegal activities is the secret offshore vehicles, which are mostly established not only for the reasons of tax evasion or corruption but also expropriation – destruction of shareholder value – by the management.[2] The abuse of secrecies has also led to specific corrective mechanisms deployed throughout various jurisdictions, such as the EU's anti-money laundering directives.[3] These mechanisms allow for exemptions from the rigorous application of the secrecy rules, thereby providing additional authority to tax authorities and law enforcement. In fact, much of the debate over the legitimacy of uses of these secrecies relates to paying a fair share of taxes and criminal activities, including drug trafficking, bribery, or money-laundering in general. This short study attempts to compare the relative strength of these secrecies also in relation to the anti-money laundering rules.

[1] For recent Panama Papers commentary see e.g. TRAUTMAN, L. J. Following the Money: Lessons from the Panama Papers. For a more popular take on this issue see e.g. SHAXSON, N. Treasure Islands: Tax Havens and the Men Who Stole the World.

[2] O'DONOVAN, J., WAGNER, H. F., ZEUME, S. The Value of Offshore Secrets: Evidence from the Panama Papers, p. 1-2.

[3] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (Text with EEA relevance) (further as AMLD).

1.1 Professional secrecy of lawyers

Perhaps the most prominent among these secrecies is the professional secrecy of lawyers, also known as the client-attorney privilege. The secrecy exists primarily to secure that anyone can receive proper legal advice and assistance in any dealings with public authorities, but also with private actors. As the laws and regulations increase in numbers and become increasingly more complex, the fundamental assumption of legal order that the law is generally known to all its subjects relies upon the option of anyone to seek and get proper advice from the experts who study and know the law in its complexity, i.e. lawyers. Yet anyone seeking such advice would also seek assurance that the information disclosed in relation to obtaining the advice will not be used against him/her or to the benefit of third parties, and therefore will remain confidential. Therefore, only the assurance of secrecy of exchanged and produced information between lawyer and client may lead to full and unrestricted disclosure of all necessary information from the client to the lawyer, which is, in turn, necessary for the lawyer to provide the most qualified advice. Strong guarantees of confidentiality build trust between lawyers and their clients; they not only safeguard the interests of clients but also the interests of the proper administration of justice.[4]

The attorney-client privilege is a prerequisite of the right to a fair trial, which is also its main legal basis. Other legal bases may be the nature of the legal profession itself, the right to legal assistance, or the right to respect for private and family life.[5] Its historical roots date back to Roman law, while the first institutions of the attorney-client privilege in the Western legal tradition began to form in the late Middle Ages.[6] The first institutionalization of privilege in the Slovak legal environment took place in the mid 19th century, highlighting the significant legal tradition of the institution.[7] Although the privilege was violated during the communist era, when the communist state and party interests often overrode the clients' interests, the post-1989 development marks the return to the proper understanding of this privilege.[8]

The confidentiality includes the information provided to but also developed and provided by the lawyer, over the course of providing qualified legal service. Typically, the lawyer must be a member of the bar, authorized to provide qualified legal services under the law, although occasionally even in-house lawyers are shielded with some degree of confidentiality. However, the privileged communication must occur within the framework of legal service; any communication with an authorized lawyer yet outside of this framework would not be considered confidential. What follows are the guarantees that even if the privileged information is unlawfully disclosed to third parties, it may not be used to the client's disadvantage or to the benefit of a third party.

The attorney-client privilege is indeed a very strong and enduring right of the client; confidentiality is normally not limited in time and only the client may waive the right under normal circumstances.[9] There are however certain circumstances where the almost absolute right of the client is suppressed in favor of the public interests. For instance, in cases where the lawyer learns about ongoing or planned criminal activity, most jurisdictions require the lawyer to disclose such information to law enforcement. Yet, this window is very narrow as will be explained in the following pages.

1.2 Bank secrecy

Another well-known type of secrecy is bank secrecy. Although the majority of modern market economies provide for rules safeguarding strong bank secrecy, the Swiss bank secrecy is perhaps

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[4] CCBE. Code of Conduct for European Lawyers, art. 2.3.1.

[5] VAN GERVEN, D. Professional secrecy in Europe. See also the Recommendation No. R(2000)21 of the Committee of Ministers to Member States on the Freedom of Exercise of the Profession of Lawyer.

[6] For brief historical overview of the attorney-client privilege see also HODÁS, M. Attorney-client privilege (History and aim – constitutional view).

[7] OLEJ, J. Slovakia, p. 481.

[8] HODÁS, M. Attorney-client privilege (History and aim – constitutional view), p. 122.

[9] On absolute and post-mortem duration of the client-attorney privilege see for instance the famous US case Swidler & Berlin v. United States, 524 U.S. 399 (1998).

the best known globally. It is perhaps one of the main factors contributing to the attractiveness of Switzerland as the top global financial center, though its contribution appears to be exaggerated.[10]

Although currently, much of the discussion over bank secrecy is driven by privacy concerns, its origins could be traced to the wider societal discussion over taxation and its enforcement by the authorities and stability and diligence of banking. The roots of Swiss banking secrecy are in the private law, designed to protect individuals and firms from the domestic tax authorities, although the secrecy was later extended to attract foreign capital to Switzerland, contrary to popular belief that the Swiss strengthened bank secrecy laws in the pre-WW2 period to provide safe haven for the capital of fleeing racial or political victims from Nazi Germany.[11] In fact, "*the idea, …, that banking secrecy was created for humanitarian reasons, is not backed up by any evidence and clearly belongs in the realm of myth.*"[12]

In reality, the Swiss law of 1934 introducing strong protection of banking secrecy, sanctioned by the criminal law and heavy fines and imprisonment punishment, was a compromise over two issues: (i) left-wing parties sought to regulate banks in light of numerous failed and publicly rescued banks, whereas (ii) the right-wing parties feared this would lead the supervisory authorities to acquire extensive information about clients of the banks.[13] As a compromise, the law introduced strong regulation of the banking industry while providing clients with extensive protection of their private information kept by the bank. However, the strong bank secrecy law, but also a sustained practice of maintaining professional confidentiality of banks even prior to the adoption of the law, have historically remained an issue between Switzerland and its neighboring countries, since it attracted depositors from abroad to the detriment of tax authorities of neighboring countries.[14] The tension between the right to privacy (the bank secrecy), and legitimate tax interests of states has existed since.

The bank secrecy in Slovakia dates back to 1920s Czechoslovak banking act which established a fundamental obligation of bank employees to observe confidentiality and even penalized its violation with fines and imprisonment.[15] The banking secrecy did not have a proper purpose during the communist regime, as the financial institutions were state-owned; the banking secrecy returned in 1992 with the adoption of market-based banking law.[16]

1.3 Tax secrecy

Generally speaking, tax procedures, which typically involve public tax authorities on one side and taxpayers on the other, are confidential in nature and inaccessible to the public. The principle of confidentiality of tax procedures is based on the fundamental right to privacy and the right to good administration as enshrined in the EU Charter of Fundamental Rights.[17] Yet the extent to which the right to privacy limits disclosure or even publishing of certain tax-related data of taxpayers varies from jurisdiction to jurisdiction. The issue is even more complicated with the pressures of the globalized world, in which tax authorities are naturally pushed towards a greater exchange of taxpayers'

[10] VOGLER, R. U.: Swiss Banking Secrecy: Origins, Significance, Myth, p. 51.
[11] GUEX, S. The Origins of the Swiss Banking Secrecy Law and Its Repercussions for Swiss Federal Policy, p. 241.
[12] VOGLER, R. U.: Swiss Banking Secrecy: Origins, Significance, Myth, p. 28.
[13] Ibid, p. 13.
[14] Of course, with deepening globalization, the list of countries grows too and is not restricted to neighboring countries.
[15] Sec. 33 of the Act no. 239/1924 Coll. on deposit books, joint-stock banks and revision of banking institutions.
[16] Sec. 23-25 of the Act no. 158/1989 Coll. on banks and savings-banks, sec. 38 of Act no. 21/1992 Coll. on banks.
[17] See for instance: PISTONE, P. The EU Law Dimension of Human Rights in Tax Matters In BROKELAND, C. (ed.): Principles of Law: Function, States and Impact of EU Tax Law, pp. 230, 256; DEBELVA, F., MOSQUERA, I. Privacy and confidentiality in exchange of information procedures: some uncertainties, many issues, but few solutions.

information in order to tackle tax evasion, proliferated by advanced globalization and persistence of tax havens with strong tax and bank secrecy.[18]

In Slovakia, the law of tax procedure has traditionally included the confidentiality of tax procedure[19], although specific legal institute of tax secrecy has been introduced in 1999.[20] Currently, the law balances the interests of the state in publishing some information on tax debtors (defaulters) yet safeguards background and circumstantial information on taxpayers. In fact, the whole tax administration is based on the principle of confidentiality (non-publicity), which maintains that "*the whole tax administration is in principle not public, which prevents misuse of information about tax subjects and safeguards the protection of tax secrecy as well.*"[21]

1.4 Trade secrecy

Trade secrets have become increasingly more important for businesses in recent decades and with it came the need to strengthen their protection. Digitization, changing patterns of employment (typical employees are no longer life-long "loyalists"), flexible and expanding the scope of trade secrets, often in contrast with intellectual property rights, increasing the value of trade secrets all contributed significantly to the massive investments into protecting business secrets by businesses and led to vocal calls for strengthening of legal frameworks protecting trade secrets.[22] The EU responded by the Trade Secrets Directive, which strengthened a common European approach to trade secrets and their enforcement.[23]

The connection between the trade secrecy and the remaining analyzed secrecies is perhaps weaker than among the remaining ones, yet for instance, the tax authorities need to recognize trade secrets within the framework of exchange of information.[24] The Slovak law recognized trade secrets with the return to market economy in the early 1990s; the post-revolution Commercial Code, valid until these days, introduced trade secrecy in sections 17-20.[25] The trade secrecy framework has been recently changed in order to harmonize with the European framework, set within the Trade Secrets Directive.

In the next part of the paper, we provide a legal analysis of the examined secrecies.

2 ANALYTICAL PART

2.1 Analysis: Professional secrecy of lawyers

The attorney–client privilege is defined as the lawyer's obligation to maintain the confidentiality of the information disclosed by the client in the context of the attorney–client relationship and the right of the client to consider any advice to the lawyer confidential. This obligation is regulated by section 23 of the Legal Profession Act.[26] According to this, a lawyer cannot reveal any information learned in connection with the practice of law (related to a client) and shall, in general, treat such information as strictly confidential. The privilege starts to exist from the very moment a potential client talks to a lawyer for the purpose of obtaining legal advice or representation and exists throughout the

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[18] DEBELVA, F., MOSQUERA, I. Privacy and confidentiality in exchange of information procedures: some uncertainties, many issues, but few solutions, pp. 363-364.

[19] See sec. 2(5) of the Act no. 511/1992 Coll. on Tax and Fees Administration.

[20] Sec. 23-23b of the Act no. 511/1992 Coll. on tax and fees administration; subsequently Sec. 11 of the Act no. 563/2009 Coll. on tax administration (Tax Administration Code, further referred as TAC).

[21] Explanatory statement to the TAC.

[22] ALMELING, D. S. Seven Reasons Why Trade Secrets Are Increasingly Important.

[23] Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (Text with EEA relevance) (further as Trade Secrets Directive).

[24] DEBELVA, F., MOSQUERA, I. Privacy and confidentiality in exchange of information procedures: some uncertainties, many issues, but few solutions, pp. 375-376.

[25] Act no. 513/1991 Coll. Commercial Code (further as Commercial Code).

[26] Act no. 586/2003 Coll. on legal profession and on amendment of the act no. 455/1991 Coll. on trade business (Trade Act), as amended and other acts related to the law practice (hereinafter referred as Legal Profession Act).

representation of the client. The client does not have to actively claim the right for it to exist; it exists by the law to the benefit of the client, not the attorney.[27] The duration of the privilege is not restricted unless waived or until a certain circumstance arises that would justify the termination of the obligation.

The duty of confidentiality is thus very strong, almost absolute, and there are only a few exemptions when a lawyer may (or must) break his/her duty:

1. **Crime prevention:** When a lawyer is obliged to act to prevent a crime, or more specifically a felony that carries a maximum custodial sentence of at least ten years under the Criminal Code, or one of the corruption offenses.[28]
2. **Anti-money laundering duties:** When a lawyer is obliged to break the duty of confidentiality by the anti-money laundering legislation, as there is a great risk that the legal services could be misused.[29] However, the obligation to report any suspicious transaction or any attempt to commit such transaction to the financial intelligence shall not arise if the lawyer gathered such information in relation to (i) legal analyses (unless they are used to launder money or finance terrorism); (ii) representing a client in criminal proceedings; (iii) representing a client in court proceedings; or (iv) providing legal advice related to proceedings in (ii) and (iii).[30] Strong anti-money laundering duties of lawyers are also supported by the case law.[31] In *Michaud v. France*, a French lawyer reported suspicions regarding possible money laundering activities of their clients. Among other things, the applicant, a member of the Paris Bar and the Bar Council, submitted that this obligation, which resulted from the transposition of European directives, was in conflict with Article 8 of the ECHR, which protects the confidentiality of lawyer-client relations.[32] The Court held that there had been no violation of the ECHR. While stressing the importance of the confidentiality of lawyer-client relations and of legal professional privilege, the court considered that the obligation to report suspicious transactions pursued the legitimate objective of prevention of disorder or crime, since it was intended to combat money laundering and related criminal offenses, and that it was necessary for pursuit of that objective.[33]
3. **Waiver:** When the client (or his/her legal successor(s)) waives the privilege unless the lawyer believes disclosing the privileged information may be to the detriment of the client.[34]
4. **Lawyer's interests:** When a lawyer enters into a dispute with the client or in disciplinary proceedings.

The obligation to keep the clients' information confidential applies not only to lawyers but also to trainee lawyers or other employees, who are entrusted with the performance of individual legal services. This obligation persists even if the legal service is terminated. As a consequence of revealing the clients' confidential information the lawyer not only jeopardizes his/her own professional responsibility but also runs the risk of incurring disciplinary sanctions, the most serious of which is disbarment. If the trainee lawyer breaches the duty of confidentiality, then it can result in a suspension of legal practice or removal from the list of trainee lawyers. Moreover, the duty of confidentiality applies on other staff and any person engaged by the lawyer in the course of providing professional services, whether inside and outside of the law firm (if provided a derivative power of attorney/charged to perform particular tasks within the framework of the provision of legal services).[35] Breach of the duty

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[27] CCBE. Statement on professional Secrecy/legal professional privilege (LPP).

[28] Sec. 23(9) of the Legal Profession Act in connection with sec. 341 of the Act no. 300/2005 Coll. Criminal Code (further as Criminal Code).

[29] See recital 9 of the AMLD and sec. 23(1) of the Legal Profession Act and referred Act no. 297/2008 Coll. on the prevention of money laundering and terrorist financing and on changes and amendments of some other acts (further as AMLA).

[30] See sec. 22(1) of the AMLA.

[31] European Court of Human Rights (further as ECrHR), Chamber judgment Michaud v. France (06.12.2012).

[32] Article 8 The European Convention on Human Rights (further as ECHR).

[33] CCBE. Statement on professional Secrecy/legal professional privilege (LPP).

[34] See sec. 23(2-3) of the Legal Profession Act. The duty of attorney to maintain confidentiality despite a waiver by the client is also supported by the case-law (see Supreme Court decisions 4 To 83/2006, 2 To 12/2013).

[35] Sec. 23(8) of the Legal Profession Act.

of confidentiality may also lead to contractual liability and criminal liability if the intensity of the breach is too high.[36]

The way in which the exemptions from the attorney-client privilege are regulated in the Slovak legal system pursues only legitimate aims in the interest of the society and therefore such interference with the privilege should be lawful. Such a legal framework serves to detect criminal activities and in consequence, have the potential to also cleanse the legal profession of lawyers participating in criminal activities.

2.2 Analysis: Bank secrecy

Banks collect and develop an increasing number and volume of data about their clients, including data about their clients' financial assets, financial discipline, practices, and creditworthiness, or simply financial matters in general. It is therefore essential for the clients that the information they entrust the banks with is protected from misuse and remains confidential with regards to unauthorized personnel. In fact, the object of the bank secrecy, as regulated by the section 91(1) of the Act on Banks, includes *"all information and documents, which are not publicly available, on matters concerning the clients of banks and branches of a foreign bank (…), including but not limited to information on transactions, account balances and deposit balances."*[37] Similar to the attorney-client privilege, banks must observe the secrecy even in relation to potential clients and former clients.[38]

Yet, even though the scope of the bank secrecy is wide, the Slovak legislation does not provide the banks' clients with absolute confidentiality. In fact, there are certain circumstances under which a bank is allowed (or obliged) to share the clients' confidential information. Moreover, the bank secrecy is protected not only by the law, but also by an agreement between the client and the financial institution.

There are several exemptions under which the bank discloses the bank secrecy:

1. **Prior consent or instruction of the client:** With the client's prior consent or instruction, the bank shall provide information protected by the bank secrecy to the third person in accordance with section 91(1) of the Act on Banks. The client's consent or instruction to provide information must be in writing and must include the purpose and conditions for providing the information.[39] The client's consent is also required for inter-bank exchange of the client's confidential information on bank products provided by banks registered within the joint banking register.[40] The client may provide such consent when he/she requests additional banking products, as the bank may assess his/her creditworthiness and financial discipline. The client's consent is not required in case of basic banking product (conditions apply).[41]
2. **Provision of confidential information to public authorities:** A large group of exemptions includes the provision of confidential information without the client's consent to (i) supervisory authorities (especially the National Bank of Slovakia and other public authorities); and (ii) other state and public authorities, such as courts, criminal police, tax authorities, executors, etc.[42] The latter group of public authorities includes a wide range of authorities, which may request confidential information in writing, although the requests must be related to specific legally recognized purposes.[43] As such, these exemptions render the bank secrecy ineffective on state authorities, clearly prioritizing the public purpose, which requires that the banking system must not be misused. However, the exemptions are of passive character and require requests from state authorities. There is also a small group of similar exemptions for providing confidential information to various public authorities as a fulfillment of various obligations:

[36] Sec. 373 (libel), 374 (unauthorized use of personal data), 375-376 (harm of another's rights), 377 (breach of confidentiality of oral expression and other expression of a personal nature) of the Criminal Code.
[37] Act no. 483/2001 Coll. on banks and amending certain laws (further as Act on Banks).
[38] Sec. 91(2) of the Act on Banks.
[39] Ibid.
[40] Sec. 92a of the Act on Banks.
[41] Sec. 92b of the Act on Banks.
[42] Sec. 91(4) of the Act on Banks.
[43] Ibid.

international sanctions lists; automatic exchange of information on financial accounts for tax administration purposes; or cybersecurity duties.[44]

3. **Provision of confidential information as a part of providing payment services:** A bank must provide clients' information when it provides payment services, therefore such provision is not considered a violation of bank secrecy.[45]
4. **Anti-money laundering and anti-terrorist financing exemptions:** It is not a breach of bank secrecy when the bank has an obligation to report unusual or suspicious banking transactions under the AMLA.[46] Such unusual transactions include for instance credit or debit operations of large amounts of money out of the ordinary volumes of transactions or in volumes not corresponding to the client's income, or if the transaction appears to be purposeless or related to a suspicious project, etc.[47] In fact, banks, among other institutions or individuals, are obliged to assess their clients' behavior and motives, as well as other objective circumstances related to such clients and transactions. The failure to undertake anti-money laundering and anti-terrorist financing duties may be strictly sanctioned by the financial police intelligence unit.[48]
5. **Various other exemptions:** Banks are also obliged to reveal identity of a client-recipient if another client-sender accidentally wires money to the wrong bank account and the recipient fails to return the money within seven calendar days. Moreover, the protection of banking secrecy is also reduced if the client fails to fulfill contractual obligations towards the bank. Bank secrecy will not cease to exist, but the bank can pass on the client's information to other persons to process its claims. These recipients, however, need to observe confidentiality of the received information and may not use the information for other purposes. As a matter of protecting banking sector interests, banks may provide other banks with limited information about their defaulting clients (conditions apply).[49]
6. **Crime prevention:** All persons obliged to maintain confidentiality may break confidentiality if required in order to prevent a crime (more specifically a felony that carries a maximum custodial sentence of at least ten years under the Criminal Code, or one of corruption offences).[50]
7. **Exemptions under various legal acts:** Beyond the abovementioned exemptions are also many other exemptions that are regulated by other acts under which the Bank is obliged to disclose the banking secrecy without the client´s consent.[51]

The duty to observe the bank secrecy relates to employees of banks, members of banks' statutory bodies, or supervisory boards. The duty of confidentiality extends beyond the term of employment or another type of contract and the term of office.

The bank secrecy is protected by the sec. 264 of the Criminal Code (endangering trade, bank, postal, telecommunication, and tax secrets), which makes persons criminally liable for eliciting information subject to bank secrets with the intention of disclosing it to an unauthorized person, or willfully disclosing such secrets to an unauthorized person.

2.3 Analysis: Tax secrecy

Tax secrecy is a special type of protection of information about the taxable entity that has been obtained during the tax administration – a procedure related to the correct determination of tax and the securing of payment of tax and other related activities.[52] Although the law of tax secrecy is rather brief, it does not compromise any of its practical importance. The recent amendment to the TAC significantly reformed the institute of tax secrecy, with the objective to ensure international tax

[44] Sec. 91(8, 11, 13) of the Act on Banks
[45] Sec. 91(6) of the Act on Banks.
[46] Sec. 91(7) of the Act on Banks; AMLA.
[47] Sec. 4(2) of the AMLA.
[48] Sec. 32-34 of the AMLA.
[49] See also some other specific exemptions in sec. 92 of the Act on Banks.
[50] Sec. 93(3) of the Act on Banks in connection with sec. 341 of the Criminal Code.
[51] See e.g.: Sec. 190 of the Act No. 160/2015 Coll. civil proceedings code for adversarial proceedings as amended by later regulations, or Sec. 81(f) of the Act no. 311/2001 Coll. Labor Code as amended by later regulations.
[52] Sec. 11(1) of the TAC.

cooperation and to remove barriers in providing information in the fight against tax evasion and frauds. As a result of this amendment, for example, information as to whether a particular entity has been or is currently subject to a tax audit or tax execution procedure and the date of registration for VAT or excise duties, or the type of registration are no longer subject to tax secrecy. This amendment may significantly improve the effectiveness of the fight against tax evasion and tax fraud.

A tax secret is typically specific information about a particular tax subject, e.g. information about personal, financial or property circumstances of the tax subject, or information about the business of the tax subject, which may be of sensitive nature, representing a competitive advantage or disadvantage (if revealed, for instance, bank loans, etc.).[53] Tax secrecy must not be interpreted too wide – in fact, secret is only information, which must be kept secret due to important public interest.[54] Therefore, tax authorities but also any other person who gains knowledge of tax secrets are obliged to maintain the tax secrecy and use it only for lawful purposes. The duration of tax secrecy is not explicitly regulated by the law, yet anyone who has learned a tax secret must maintain its confidentiality without any time restrictions, regardless of their position.[55]

Unlike the remaining three of the reviewed secrecies, tax secrecy relates mostly to public authorities where the public interest is rather prominent when considering what is and what is not a tax secret and what exemptions apply. First, the information which was or has been publicly accessible is not a tax secret, as well as the information that a tax control or tax enforcement proceedings took or is taking place. Second, there are several exemptions, which do not constitute a breach of tax secrecy:[56]

1. **Use of tax secrets by the tax administration authorities or customs authorities:** This exemption includes uses such as publication of financial statements of certain tax subjects, but also publication of a large group of various lists by the tax authorities (financial directorate, municipality) on a regular basis, for example: (i) list of tax debtors (defaulters);[57] (ii) list of tax subjects that have been permitted tax reliefs or tax remissions; (iii) list of tax subjects that have been permitted a deferral of payment of taxes or payment of taxes in instalments;[58] (iv) list of taxable entities registered for value added tax and excise taxes and list of deleted payers of value added tax; (v) list of payers of value added tax in whose case the reasons for cancellation of registration have occurred; (vi) list of taxable entities alongside with the amount of tax assessed on the corporate income or supplementary tax assessed on the corporate income or tax loss of a legal entity based on value added tax returns of legal entities; (vii) list of taxable entities which claimed deduction of the R&D expenses or exemption under special regulation[59]; (viii) list of taxable entities along with the amount of overpaid tax and the tax liability reported; (ix) list of chosen financial institutions based on records of payments of special levy of chosen financial institutions.[60]
2. **Publication of information about final convictions for tax crimes,** which should have its restraining impact on other tax subjects.
3. **Publication of information about the violation of tax laws or other related laws by the financial administration,** which should have its restraining impact on other tax subjects.
4. **Disclosing tax secrets to providers of financial administration IT**.
5. **Consent of the tax subject:** Tax subjects may provide their consent either in writing or orally into the official minutes at the tax administration.

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[53] Explanatory statement to the sec. 11 of the TAC.
[54] Supreme Court decision 8 Sži 30/2014.
[55] See also Supreme Court decision 5 Sžf 23/2007.
[56] Sec. 11(5) of the TAC.
[57] In this context, see also Supreme Court decision 8 Sži /30/2014, wherein the Supreme Court also held, in relation to freedom of information request requesting information about paid tax of a certain subject, that the information about the tax due, as well as the information about whether and when the tax was paid did not constitute a tax secret.
[58] For (i)-(iii), there are however financial thresholds applicable on all of these lists so as to provide certain administrative (and in some cases punitive) proportionality.
[59] See sec. 13a(6) and 30c of the Act no. 595/2003 Coll. on income tax (further as ITA).
[60] Sec. 52 of the TAC.

The tax secrecy is protected by criminal law just as well as the bank secrecy.[61]

2.4 Analysis: Trade secrecy

In October 2017, an extensive amendment of the Commercial Code was adopted, effective as of 2018, introducing a wide revision of the trade secret provisions, especially related to the conditions of the violation of trade secrets and the means of protection of trade secrets. With the amendment of the Commercial Code, a trade secrets violation has been redefined more precisely as a separate unfair competition offense.[62]

Trade secret refers to (i) commercial, manufacturing and technological facts (ii) relating to the enterprise, which (iii) have actual or potential material or non-material value, (iv) are not commonly available in the business circles in question, and (v) are to be kept confidential at the discretion of the entrepreneur, who ensures that their enterprise's secrets are protected in a suitable manner.[63] Trade secrets, although belonging to intellectual property rights – intangible industrial property, are not registrable; in fact, they emerge whenever the defining elements combine. Active protection of confidentiality of such information is an essential requirement of the trade secrecy and no entrepreneur can simply rely on an agreement with third-parties as to the extent of the trade secrecy.[64] The trade secret is also related to confidential information exchanged in business relations, which must be kept confidential as well and used only for agreed purposes, based on the condition that such information is denoted as confidential.[65] Yet, confidential information must clearly be understood as a wider term than the trade secret.

Trade secret belongs to the enterprise and the entrepreneur (the owner of the trade secret) as an ideal object, immaterial asset and object of the absolute right of the owner of the trade secret.[66] Therefore anyone can endanger or breach the trade secret whether or not in a contractual relationship with the entrepreneur.

The duty to maintain the trade secrecy must be observed not only by the owner of the trade secret – the entrepreneur – but also by anybody who has knowledge about the contents of the trade secret. In general, subjects of the trade secrecy must not breach or endanger trade secrecy, for instance by unlawfully obtaining, using, or disclosing of the trade secret.[67] Although the protection of a trade secret is not time-bound, it lasts only as long as all the attributes of a trade secret are fulfilled. In case of an alleged infringement of trade secret, the court may request the trade secrets owner to supplement the evidence that the information is indeed a trade secret according to the Commercial Code.

The following instances are not considered an unlawful gathering of trade secrets:[68]

1. **Independent discovery or creation:** Anyone may independently reach the same information without being penalized for their undertaking. There are no priority rights in the law of trade secrets, therefore two or more persons may independently own the same trade secrets.
2. **Reverse engineering:** Anyone may observe, research, deconstruct, or test the industrial procedures or products and learn previously unknown information (to them) without committing unlawful activity.
3. **Execution of employees' rights to information:** Employees' representatives, such as trade unions, may have access to trade secrets, whereas such access is not unlawful.
4. **By other means,** while respecting fair business conduct and not interfering with the rights of third persons (e.g. franchising contracts).[69]

[61] Sec. 264 of the Criminal Code.
[62] Sec. 51 of the Commercial Code. For a thorough English introduction to the Slovak trade secrets litigation see also EUIPO. The baseline of trade secrets litigation in the EU Member States.
[63] Sec. 17 of the Commercial Code.
[64] Supreme Court decision 5 Obo 98/99.
[65] Sec. 271(1) of the Commercial Code.
[66] PATAKYOVÁ, M. et al.: Commercial Code: commentary. 4th edition, s. 65.
[67] Sec. 51 of the Commercial Code.
[68] Sec. 51(6) of the Commercial Code.
[69] Explanatory statement to the Act no. 267/2017 Coll. amending the Commercial Code.

There are also other instances when gathering, using, or disclosing trade secrecy is lawful:[70]

1. **Protection of public interest:** Trade secrecy may be revealed or otherwise breached in order to safeguard the public interest, especially related to revealing unlawful actions or other unlawful activities (e.g. criminal activities). It is important to stress that the actions or activities may have occurred in the past but may also be on-going. Unlike in other types of secrecy, trade secrecy may be breached to reveal or prevent unlawful activities in general, without any specific test (compare with footnote no. 28).
2. **Other legal mandates:** e.g. under the Freedom of Information Act[71], administrative or criminal procedures, tax[72] or auditing purposes, etc.[73]

As the trade secrecy is primarily considered a value pertaining to business, it is protected under the Commercial Code. The Commercial Code provides the owners of trade secrets absolute protection under the sec. 20 and relative protection under the sec. 51 of the Commercial Code. Moreover, similar to bank secrecy and tax secrecy, severe breach of trade secrets is criminally sanctioned.[74]

3 CONCLUSION

The Financial Secrecy Index (FSI), the world's most comprehensive assessment of the secrecy of financial centers, ranks the jurisdictions according to their secrecy and the scale of their offshore financial activities. According to the recent FSI, published on the 18th of February 2020, the world's most important providers of financial secrecy are the Cayman Islands, the United States, and Switzerland.[75] Slovakia has a financial secrecy index of 51/100. A globalized world means more complex business relations and transactions, often based on opaque structures, misusing difficulties of international cooperation and taxation. The Panama Papers provide a useful case study of how massive the system is and how various types of secrecies intertwine. The problems go far beyond taxation. In providing secrecy, the offshore world corrupts and distorts markets and investments, shaping them in ways that have nothing to do with efficiency. The secrecy creates multiple avenues for fraud, tax evasion, escape from financial regulations, bribery, or money laundering. As a result, the legal order must include certain precise proportionate mechanisms to prevent misuses of secrecies.

In this short yet thick study, we provided an analysis of the four prominent secrecies. Their relative strengths root in their historical purposes. Without hesitation, the professional secrecy of lawyers is the strongest one, which is clear from the narrow extent of exemptions to the secrecy. The bank secrecy is also a relatively strong type of secrecy, although anti-money laundering legislation requires additional, yet legitimate compromises to the clients' privacy. The tax secrecy belongs to weaker secrecies as there is a strong legitimate public interest in tax collection, which provides the basis for publishing certain tax subjects' data. Finally, the trade secrecy is the only secrecy that does not exist by law but must be actively secured by the entrepreneur's actions. It is not related to privacy or rule of law considerations, but to the fundamental economic rights, which makes it softer in the

[70] Sec. 51(7-8) of the Commercial Code.

[71] Sec. 10(2) of the Act No. 211/2000 Coll. on free access to information and on amendments and supplements to certain acts (further as FOIA). Disclosure of the following information shall not be deemed as a violation of or endangerment to a trade secret: (i) information related to a significant impact on health of the population, world cultural and natural heritage, environment, including biological diversity and ecological stability; (ii) information on environmental pollution; (iii) information obtained for public funds or relating to the use of public funds, or to the disposition of state or municipal property; (iv) information on state assistance.

[72] For instance, observing trade secrecy cannot be used as a reason not to disclose information included within the trade secret during tax procedures, as that would compromise the public interest in due tax collection. Furthermore, in such cases the trade secrets would be covered by the tax secrecy. See Supreme Court decision 5 Sžf 23/2007.

[73] Explanatory statement to the Act no. 267/2017 Coll. amending the Commercial Code.

[74] Sec. 264 of the Criminal Code (endangering trade, bank, postal, telecommunication and tax secrets).

[75] See https://fsi.taxjustice.net/en/ (accessed Feb 2, 2020).

application and with more exemptions. A further assessment of the whistleblowers' treatment in light of these secrecies would be a useful addition to this paper in the future.

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