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Factors Affecting Modern Entrepreneurship and Tax Planning

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Abstract

One of the guiding principles of the European Union is freedom of establishment. At the same time, due to the possibility of abuse of rights, restrictions are possible. The objective of the study is to analyse cases regarding state intervention in commercial activities of antreprenierus imposing restrictions on rights and freedoms, in order to prevent companies from abusing the principles of free establishment. The author provides justification and cases for imposing restrictions, in particular, if there is a suspicion that tax evasion, unlawful reduction of the taxable amount has taken place instead of lawful tax planning, based on which businesses are required to provide information on true beneficiaries of companies, the goals and nature of transactions, as well as discusses the acceptable depth of such restriction by regulation. Several research methods have been used in this study: historical method, analytical method and inductive method.

Keywords: freedom of establishment, notion of economic substance, tax disputes, tax planning, tax evasion, anti-money laundering (AML), sanctions, legislation on "whistleblowers".

Introduction

The perception of legitimacy and validity in reducing the amount of taxes paid through the use of tax planning depends on the interpretation of the subjects of law and commercial activity of the relevant legislation, as well as upon the actions themselves to optimise the payment of taxes. The author has previously analysed the legislation of the EU Member States and practical cases of the EU Court of Justice (ECJ) in relation to determining the legitimacy of tax planning. In particular, based on the analysis of the Cadbury Schweppes case (Cadbury Schweppes and Cadbury Schweppes Overseas,

2006) and principle of freedom of the establishment of companies within the EU, the concept, content and criteria of legal tax planning have been derived as the basis for the economic activity of European companies.

In this paper, the author continues to explore the topic of tax planning and analyses the principles of freedom of enterprises in the EU, including the freedom of establishment enshrined in a Treaty on the Functioning of the European Union, and their compatibility with tax planning. Reference is also made to "markers" that allow one to distinguish between legitimate tax planning and tax evasion, and what companies should take into account when planning their business activities. At the same time, in this article, the author expands the list and analyses factors influencing modern entrepreneurial activity and tax planning. In particular, it refers to the potential of legal restriction of constitutional rights and freedoms, including freedom of establishment, if there is a suspicion that an illegal reduction has occurred in the taxable amount instead of legitimate tax planning, on the basis of which companies are required to provide information about the true beneficiaries of companies, purposes and the nature of transactions (AML).

The article also analyses other factors affecting commercial activity – the presence of sanctions legislation of the EU, the USA and other countries, which limits the feasibility of tax planning; exceptions that allow and even require the disclosure of commercial information to detect serious crimes in the public interest. When analysing these factors on the basis of practical cases, the author raises the question of the permissible degree of influence of these factors on the commercial activity, on the one hand, and the need for a regulatory definition of tax planning to prevent companies from abusing the fundamental basis for the functioning of the European economic space on the other hand.

1 The Principle of Freedom of Establishment in the EU and Its Compatibility with Tax Planning. The Concept and Criteria of Determining the Legitimacy of Tax Planning

The process of integration in the EU is encouraged by the measures for the creation of common markets (goods, capital, services, labour) and special regulations aimed at the provision of freedom of enterprise. In this respect one can conclude that freedom of enterprise is the main aspect encouraging the beginning of organisation of the free economic development of the EU, providing its unhindered coordination and interaction of its Member States.

Freedom of enterprise, in turn, is characterised by the following principles: principle of free movement of goods, principle of free movement of people, principle of free provision of services, principle of free movement of capital, freedom of establishment.

There is no doubt that for the purpose of cross-border business structure optimisation, the free movement of the "personality" of the legal entity, i.e., freedom of its establishment, is required. Freedom of establishment – this is the right of the independent establishment of undertakings, to manage them, in particular, businesses and companies,

in accordance with the terms set forth by the law of the nation where such a right is granted to its own citizens and in compliance with the rules governing capital.

Article 49 of the Treaty on the Functioning of the European Union (TFEU) (Treaty on Functioning of the European Union, 2012) establishes the freedom and prohibits the restriction of freedom of establishment to citizens of any Member State in the territory of another one. This prohibition also applies to restrictions regarding the establishment of representative offices, subsidiaries and daughter companies by citizens of any Member State which have established their business in any Member State.

The ECJ in the Cadbury Schweppes case (2006), which has been analysed before by the author in his article The Definition of Tax Planning in the Case-law of the Court of Justice of the EU (ECJ) (Zelmenis, 2022), is based on the decision on the principle of freedom of establishment. And on the basis of this principle, in this case, the competent opinion of a supervisory nature has been provided and tax planning has been interpreted by the court.

In this case the Court has been addressed by the question of the freedom of establishment of undertakings and benefitting from tax benefits in the European Union. The group Cadbury Schweppes and Cadbury Schweppes Overseas Limited have stated that the legislation of the United Kingdom regarding controlled foreign companies is contrary to the provisions of TFEU regarding the free movement of capital.

As a result of hearing the case, the ECJ has supported the side of the company by establishing that the provisions of the EU Member State (in this case, the United Kingdom) cannot be enforced and restrict the rights and freedoms of the company having founded a foreign controlled subsidiary if it follows all the circumstances of the case that, irrespective of enjoying tax advantages, this company is engaged in actual economic operations in any EU Member State.

Having heard the case on its merits, the ECJ has drawn the conclusion that if the provisions of national legislation restrict the operation of the principle of freedom of establishment and performance of economic activity, as well as the operation of the principle of free movement of capital, the actions of companies which may cause doubts for tax authorities are unavoidable consequences of any other restrictions on freedom of establishment and performance of economic activities.

In its ruling the ECJ has explained that the establishment of a company in the EU Member State for the purpose of gaining a profit in compliance with the legislation providing for tax benefits does not in itself suffice to constitute abuse of that freedom and, accordingly, is not a violation. Article 43 of TFEU provides that freedom of establishment and performance of economic activities allow one to engage in economic activities, found and manage undertakings according to the conditions stipulated by the legislation, including legal entities founded in the relevant EU Member State. Furthermore, the ECJ has emphasised that the fact that a resident company establishes a subsidiary in another EU Member State does not create the general presumption of tax evasion and a compromise cannot be made to exercise the fundamental freedoms guaranteed under TFEU.

Therefore, the ECJ has established a law that freedom of establishment and performance of economic activity within the scope of TFEU provides the performance of an economic activity by means of actual and effective establishment for an unrestricted term in any EU Member State for the purpose of performing true (and not fictitious) economic activity.

The concepts interpreted and presented in the argumentation part of the rulings of the ECJ: entirely artificial arrangements; abusive practice; objective and subjective criteria/factors; "mailbox companies"; bogus company – are the key ones for this ruling; they form the basis of the methodology for the evaluation of the legitimacy of tax manoeuvres of companies by the ECJ.

In the case of Cadbury Schweppes in particular, the ECJ addresses the concept "wholly artificial arrangements", and points out that the national legal provisions, providing restrictions on exercising freedom of establishment, may be justified in the case that they are aimed at fighting wholly artificial arrangements which are used by companies and aimed at circumventing the national legislation.

The next important concept, applied by the ECJ in resolving tax disputes, is the term "abusive practice". It can be concluded that two criteria should be considered when determining abusive practice: (1) an objective non-compatibility of the goal of the legislation with the results achieved by the company as a result of the implementation of specific types of economic activity, and (2) the subjective intentions of the company manifested as an abusive practice to receive advantages.

In the case of Cadbury Schweppes, the ECJ is addressing the terms – a "mailbox company" and a "bogus company". The instructions and recommendations of the ECJ mean that the size of premises, the number of personnel, and the quantity of equipment cannot be determined without taking into account the type of business activity the company performs.

Finally, it can be concluded that the case has established the position that all of the indicators of illegal tax planning are described by just one aspect of the business and tax planning known as a "substance". The notion known as "substance" is what allows for the examination of a company's operation from the perspective of actual economic activity and commercial independence.

The following should be taken into consideration when engaging in tax planning as a focused lawful activity of the taxpayer with the goal of minimising its expenses for paying taxes, duties, fees, and other necessary payments. Freedom of establishment, along with the aforementioned principles, is the primary cornerstone of how the entire European economic space functions, which makes it easier for business subjects to abuse them.

However, the rights provided by the Constitution and international documents, e.g., Article 17 of the Charter of Fundamental Rights of the European Union (2016) – the right to protection of property, Article 16 – freedom of business, Article 45 – freedom of movement, Article 48 – the presumption of innocence, Article 1 of the Additional Protocol to the Convention on the Protection of Human Rights and Fundamental

Freedoms – protection of the right of ownership, Article 2 (European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950) – freedom of movement and Article 45, 49 of the TFEU, can be restricted and are not absolute; therefore, for the purpose of reduction of the risk of money laundering it is possible to impose restrictions on the right of individual entities; however, in this case the proportionality of imposed restrictions should be maintained and there should be an option to appeal against the resolution on the application of such measures. Further the article discusses measures developed by states to limit the conditions of the business to abuse by the principles mentioned above and the practice of their application.

2 Anti-Money Laundering (AML) Legislation, Its Constitutionality and Practice of Implementation

In compliance with the case law of the European Court of Justice (ECJ), confirmed, for example, in *Ordre des Barreaux* (*Ordre des barreaux francophones et germanophone and Others v Conseil des ministers*), irrespective of the criticism of this practice in the legal literature, the AML regulation restricts the fundamental rights and freedoms of the person provided by the national constitutions of the EU Member States, including the right to privacy and the right to access justice.

For example, in the decision of the ECJ of 26 June 2007 No. C-305/05 it is concluded that the right to a fair trial is not infringed by the imposition on lawyers of the obligations to inform and cooperate with the authorities responsible for combatting money laundering when participating in certain financial transactions with no link to judicial proceedings. Such obligations are justified by the need to combat money laundering effectively (*Ordre des barreaux francophones et germanophone and Others v Conseil des ministers*, 2007); it is concluded that services provided by attorneys are not exempt from Value Added Tax and that the application of this tax does not violate the right to an effective judicial defence and the principle of equality of parties guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union.

In its ruling of 25 April 2013 in case No. C-212/11, the ECJ recognises that freedom of establishment is not restricted by the provision according to which the undertaking (its subdivisions) should provide information requested by the Member State represented by state authorities – the Financial Intelligence Unit.

In this ruling, the main case of Jyske Bank, the Danish subsidiary of the Danish bank NS Jyske Bank, has acted, based on the conditions of freedom of provision of services (without establishing a company in Spain); however, the Spanish tax authority has provided notification regarding this, unless it appoints a representative for communication with this authority, to examine the organisational structure of Jyske, as well as AML procedures in relation to its services. As a result, it is determined that compliance with the AML provisions is in the public interest. Accordingly, fundamental rights, such as freedom of establishment, may be restricted to ensure that the legislation's intended goal

is met. Compliance with the AML provisions should be monitored without going beyond what is necessary and without applying the rules in a non-discriminatory manner. (Jyske Bank Gibraltar Ltd. v. Administración del Estado, 2013)

On the other side, in the opinion of the Advocate General in case C-78/18 (the ruling of EC is not available when drafting the thesis) concerning the Hungarian national system of AML provisions and the provisions of Articles 7, 8 and 12 of the Charter of Fundamental Rights of the European Union regarding the free movement of capital, confidentiality and protection of personal data, and regarding the right to freedom of association, it is concluded that there should not be discriminatory regulation of restrictions in the AML field for foreign entities, differing from domestic companies. In this situation the Hungarian national legislation has required foreign (other) donors, where donations exceeded the set amount, to submit an additional declaration on the origin of funds in the situation when this is not required from resident donors (EU Commission v. Hungary, 2020).

The European Court of Human Rights has dealt with the conflict between the AML regulation and fundamental rights in the case of Mihoid v. France. In this case the French lawyer demands the rules provided by three AML directives, adopted by the EU, requiring attorneys to report on suspicious transactions to be additionally clarified in an internal resolution of the National Council of Attorneys on the approval of internal AML procedures for attorneys. However, the European Court of Human Rights in its case has concluded that provisions concerning the fight of money laundering as the legitimate interest allow the attorney's obligation to perform due examination and to report on suspicious transactions to the anti-money laundering authorities of the respective Member State (Michaud v. France, 2013).

3 Sanctions Legislation of the USA, EU and Several Other Countries

The Resolution of the Council of European Union dated 22 November 1996 and Regulation No. 2271/96 contain provisions according to which decisions and resolutions of administrative authorities, issued beyond the EU borders, are not recognised and enforced (Article 4), as well as citizens and residents of the EU Member States, legal entities established in the EU are not obliged to respond to such foreign acts and actions of authorities having issued such acts (Article 5), and resolutions of such foreign authorities and courts, based on a range of sanctions of the United States introduced in relation to Cuba, Iran and Syria in the Annex to this Regulation (the list is replaced with the list in the Annex to Delegated Resolution of the Commission No. 2018/1100 (Council Regulation (EU) 2018/1100 amending the Annex to Council Regulation (EC) No. 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, 2018)).

Additional sanctions are provided by other regulatory enactments for 33 countries (EU sanctions map, 2020), for example, sanctions applicable to the Korea People's Democratic Republic (Council Regulation (EU) 2017/1509 concerning restrictive measures against the Democratic People's Republic of Korea and repealing Regulation, 2017) introducing financial restrictions, restrictions on the movement of goods and other sanctions based on the resolutions of the Council, which, in turn, are based on the restrictive measures of the United Nations (United Nations Security Council Consolidated List, 2020). The sanctions of the UN and EU restrict the feasibility of tax planning for the countries which are not EU and UN Member States or which are convicted by the UN of any actions.

In addition to sanctions, it is worth mentioning the so-called EU "black list" of tax jurisdictions including the countries which do not implement the automated exchange of financial information with the tax authorities of EU Member States (for example, Fiji, the Cayman Islands, Panama, Seychelles) (Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes 2020/C 64/03, 2020) and the "grey list" comprising the countries tending to demonstrate visible improvements in the automated exchange of financial information as on 31 December 2020 (Turkey, Bosnia and Herzegovina, Jordan, Thailand, Morocco, etc.).

Countries included on the above lists do not ensure transparency, fair tax competition and conformity of their legislation with the OECD strategies of fighting tax base erosion and profit shifting (BEPS), which are aimed at reducing the scales of tax planning strategies by using so-called "gaps" in the tax legislation of various countries.

Considering the fact that 137 global countries are members of BEPS (BEPS member state list, OECD, 2019) and there are very few countries which have not assumed the obligations or actually do not follow BEPS strategies developed for preventing tax evasion and reduction of taxes (the so-called "black list"), such measures restrict practicability for unlawful tax evasion through "tax havens" and "bogus" companies, taking into account the obligation of the automated exchange of information among countries. However, it should be noted that in the legal literature there are doubts regarding the EU lists of "tax havens" by underlining that the biggest tax havens in the USA (like the state of Delaware, South Dakota and Florida) are not included on these lists due to political reasons (Akhtar & Grondona, 2019).

Furthermore, a reference should be made to the list of countries which do not cooperate with other countries in fighting against money laundering, including with the FATF. The list of FATF includes countries like Cyprus, the Russian Federation, Israel and Liechtenstein, as well as some other countries (FATF, 2000).

However, this regulation does not exclude the possibility of lawful tax planning by choosing the most favourable tax regime for the taxable entity, where the tax rate is lower (or the tax base is lower), as well as by using legal benefits and discounts available on the national level of countries which are not included on these lists.

When tax havens from the end of the 1990s disappeared and tax relations improved, some Western countries started playing an important role in tax planning and are named as the new tax havens, like the Netherlands, Ireland, Belgium, Switzerland and others.

For example, following a violation by Luxembourg, the Netherlands and Belgium, concerning selective benefits for large groups of companies, like Fiat, Amazon, Starbucks and Apple, which allowed them to pay lower taxes, the Commission has also resolved to investigate the situation of taxes and the state aid of the company IKEA (European Union Commission, 2017). In the case of IKEA, the Commission of the European Union also resolved that tax evasion had been found for a period of 6 years on account of the restructuring of groups and licence fees for the intellectual property, and that the unlawfully received Dutch state aid was provided as tax benefits (EC Possible State aid in favour of IKEA. No. SA.46470 (2017/NN), 2017).

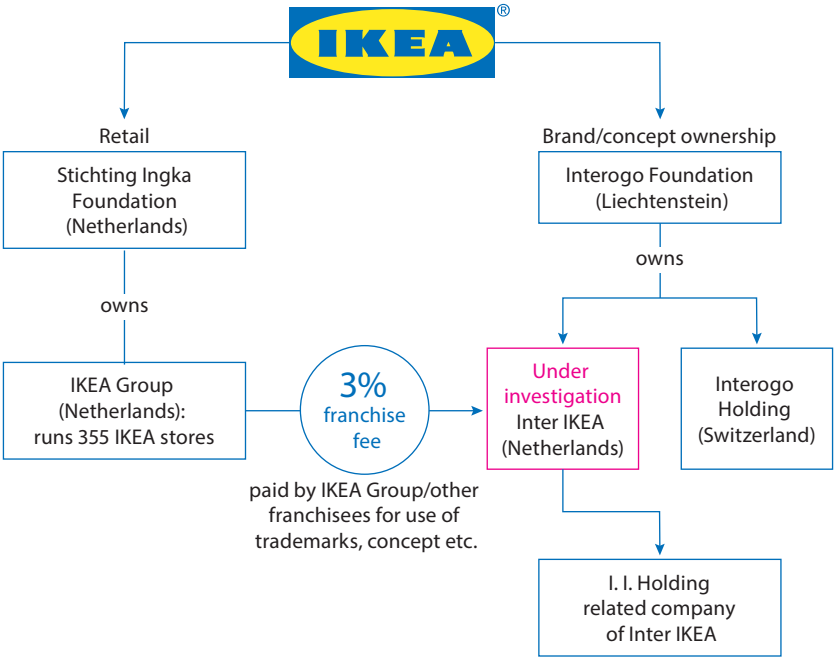
In the above referred Commission`s case, IKEA was divided into two separate groups in 1980: Inter IKEA and Ingka; the group Inter IKEA purchased the right of the intellectual property that provided the right to use the trademark IKEA by other dealers and producers of IKEA, while the group Ingka dealt directly with trade, i.e., stores.

Inter IKEA is owned by the Fund Interogo, established in Liechtenstein, Systems – the company of the group Inter IKEA, established in the Netherlands, owns the concept of the franchise IKEA, and Systems is owned by the Dutch company Inter IKEA Systems Holding BV, that, in turn, is owned by a Luxembourg company Inter IKEA Holding SA (IIHSA). Systems has signed agreements with 11 franchise groups in 49 countries, the majority of which are owned by Ingka Group.

The Dutch tax authorities and Systems have concluded an agreement concerning the amount of taxable franchise licences regarding the other company Inter IKEA in Luxembourg, I. I. Holding C.A. (Holding) for licence fees of the franchise which should be paid to Systems, while Holding has signed a licence agreement with Systems allowing Systems to use the intellectual property of the company for the development of the franchise concept IKEA, providing for the payment of the licence fee. The licence fee reduces the taxable income of Systems by the transfer of a considerable part of its income to the holding, which, in turn, is exempt from payment of tax of the relevant amount according to the tax rules of the holding valid in Luxembourg at that time.

Thus, IKEA manages to reduce its taxable income on account of restructuring the group and licence fees for the use of intellectual property, which finally deprives Luxembourg of the relevant part of income. The Commission of the European Union considers that the payment for the transfer of this intellectual property right does not correspond to the actual price, and thus the company has not assessed the correct tax amount for the income of the group and incorrectly receives state aid as a tax exemption of companies of the group IKEA.

This opinion concerning tax planning and state aid is shared by the ECJ, for example, in its ruling of 24 September 2019 in the case Grand Duchy of Luxembourg v. European Commission concerning state aid provided to Fiat Chrysler Finance Europe (European Union Commission, 2014, No. SA.38375 (2014/NN).



Graph of the European Commission in IKEA proceedings, No. SA.46470 (2017/NN) (Milne, R., Toplensky, R. 18.12.2017. IKEA's complicated tax-driven structure faces EU scrutiny)

In this case Fiat Chrysler Finance Europe (Fiat) applied to the tax authorities of Luxembourg for an early tax decision; the tax authorities of Luxembourg adopted the early tax decision by agreeing that the transfer would be analysed in compliance with the circular letter concerning the approval of the method of distribution of the profit within the group Fiat Chrysler, and which allowed Fiat Chrysler Finance Europe to define the amount of its corporate tax payable in the Grand Duchy of Luxembourg annually and which provided that transactions among companies within the same group should be paid for as if they were performed by independent companies by transfers according to comparable conditions with non-related parties, and it was explained how the remuneration of non-related parties should be defined, in particular, in relation to financial transactions of the group of companies. However, the European Commission initiated an investigation of the state aid (reduction of the payable tax) of the Grand Duchy of Luxembourg (Grand Duchy of Luxembourg v. Ireland, 2019).

Thus, it can be concluded that even in cases where legal tax planning is carried out using state-defined tax benefits or exemptions, the Commission of the European Union may declare those benefits or exemptions to be incompatible with EU law and unjustified state aid, as well as declare the group's tax planning to be tax evasion and

illegal tax planning, and require it to pay the associated costs. However, in the situation with McDonald's Europe, for example, the European Commission concluded that there was no tax evasion and that the Grand Duchy of Luxembourg did not provide unlawful state aid. In this case, McDonald's Europe Franchising is the subsidiary of McDonald's Corporation based in the USA. The company is a tax resident of Luxembourg and has two subsidiaries where one is in the United States and the other in Switzerland (European Union Commission, 2018. Decision State Aid – Luxembourg. Possible State aid in favour of McDonald's Europe, No. SA.38945 (2015/NN)).

McDonald's stated that, although in compliance with the tax legislation of the USA, the subsidiary in the USA was not the "permanent representative office; in compliance with the tax legislation of Luxembourg it was the "permanent representative office". As a result, income from the royalty should be exempt from taxation in compliance with the legislation on the corporate tax of Luxembourg. Thus, the tax authorities of Luxembourg concluded that the company did not have to pay the corporate tax in Luxembourg, as the profit would be taxed in the United States. Thus, in this case, McDonald's part of income in Luxembourg was exempt from taxes.

The Commission of the European Union concluded that the Grand Duchy of Luxembourg provided lawful state aid and that the company did not evade taxes, as the state authorities of Luxembourg applied the treaty for avoiding double taxation between Luxembourg and the USA by exempting the income of the American division from the corporate taxation of Luxembourg.

Thus, the author of the Thesis points out that tax benefits or benefits granted by the state within the scope of corporate tax planning are not always recognised by the European Commission as not allowed state aid, and lawful tax planning without sanctions by the EU is still possible.

4 Business Secret, the Role of Mass Media and Legislation on "Whistleblowers"

In tax legislation the role of business secret, mass media and whistleblowers is important in relation to tax evasion by large and important companies (Leaked Documents Expose Global Companies' Secret Tax Deals in Luxembourg, 2014). Without mass media that fully understands the difference, lawful tax planning is often mixed with tax evasion, causing public scandals and harming the reputation of corporations.

Such scandals can also be caused by staff or internal service providers (accountants, advisers, etc.), who have "leaked" the companies` documents to the broader public (tax leaks) concerning payable taxes and their amounts, or reports on possible violations of firms to state tax authorities (whistleblowers).

Examples of such scandals involving tax leaks are the so-called "Panama papers" (These are the Paradise Papers. *Suddetutche Zeitung*, 2020), "Mauritius leaks" (Treasure Island: Leak Reveals How Mauritius Siphons Tax from Poor Nations to Benefit Elites.

International Consortium of Investigative Journalists, 2019). "Luanda leaks" (How Africa's Richest Woman Exploited Family Ties, Shell Companies and Inside Deals to Build an Empire. *International Consortium of Investigative Journalists*, 2020) as well as tax leaks of the US President Donald Tramp and other tax scandals (Repeated leaks and revelations are chipping away at Trump's attempts to keep his tax records secret from the American public. *Business Insider*, 2019).

In such cases, records of company income are, as a rule, protected by business secret, that does not allow their publication in full scope; however, their protection is not applicable to an investigation performed by the state authorities concerning possible administrative or criminal offences.

Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (freedom of expression) (European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950), as well as Directive of the European Parliament and Council No. 2019/1937 of 23 October 2019 (Council Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law, 2019) provide for the protection of whistleblowers in cases when the provided information is made public for the public interest to find serious violations (Former PwC employees face trial over role in LuxLeaks scandal. *The Guardian*, 2020). However, whistleblowers are often subject to court prosecution due to the abuse of business secret, such as in the scandal with the Luxembourg leaks; irrespective of this, the Bonus of the European Parliament is granted for such reports.

Protection of a business secret is regulated by Directive No. 2016/943 of 8 June 2016 (implemented in the national legislation of the EU Member States), that provides for the protection of information under the status of business secret against its unlawful gaining, use and disclosure, as well as specifies that a business secret is information (all the criteria should be satisfied) that is usually not known or not accessible to a broad range of persons equally to the range of persons who usually use this information, has commercial value, as this information is secret and is subject to reasonable measures of security under relevant circumstances as adopted by the person in lawful control of this information (Article 2).

However, national legislation contains exceptions regarding the freedom of expression of opinions and information. The supplement to exemptions from the Directive provides that the Directive is not applicable to the disclosure of business secrets for the public interest and disclosure of information to state authorities or national state authorities (freedom of expression). However, in the resolution of 15 March 2017 in the criminal case LuxLeaks, the Appeal Court of Luxembourg resolved that Antuan Deltour, the employee of Price Waterhouse Coopers, who participated in tax leaks in Luxembourg, was declared guilty of stealing information within the country and gaining access to the data base by fraud, as well as the unlawful possession of this information, and he was sentenced to conditional imprisonment for 6 months and a fine of EUR 1500 was applied to him. However, later in 2018, the cassation court cancelled the judgment.

At the same time another employee Raphael Halet was declared guilty of stealing business information within the country and gaining access to the data base by fraud and laundering of money received as a result of the criminal offence, as well as possession of the subject of the theft within the country, as well as a violation of the obligation to maintain a business secret, and according to the court's conclusion, the exemption of the whistleblower did not apply to the accused person, however, mitigating conditions were applied - his motivation and the lack of criminal intentions; these circumstances were taken into account when setting the penalty, thus imprisonment was not applied and he had to pay the fine of EUR 1000. Still, both persons faced a potential civil charge for the damage caused. However, the journalist Eduard Perren who published the materials received from Deltour was acquitted and no charges were imposed on him (Summary translation of the Court of Appeal of Luxembourg judgment, 2017).

Thus, it is necessary to underline that in situations when large companies are involved in potential tax fraud (or tax planning or state aid are wrongly viewed as tax fraud), irrespective of the national and supra-national regulation of protection of whistleblowers who do not have sufficient protection, as it has been mentioned in mass media on several cases - in the situation of Wikileaks and Edward Snowden, as well as in relation to other reporters (Declassified: From Snowden to WikiLeaks to Crypto AG, these are the biggest leaks of the past decade and what we've learnt from them. *Business Insider*, 2020).

Conclusions

Peculiarities of tax legislation, its interaction with legal anti-money laundering provisions, provisions of so-called whistleblowers, as well as sanctions determine the complexity of the approach for defining tax planning, its distinction from tax evasion/tax avoidance, and factors that businesses should take into consideration when conducting their tax planning. Businesses should be aware that this issue cannot be resolved on the basis of a single system of legal sources when conducting business. Without ignoring US and EU sanction provisions, international treaties, policies adopted by a certain range of countries, the approach of the ECJ and the role of its rulings, it is necessary to determine the factors influencing business and tax planning using national legislative acts and supranational EU law as the basis.

Furthermore, it should be considered that the practice of adoption of decisions by competent tax authorities varies from country to country, which leads to submitting disputes to the ECJ for resolution. It is the practice of the ECJ to determine the approach to the interpretation and distinction between legitimate and illegitimate tax planning and establish several core concepts, based on which it is possible to judge the lawfulness of tax planning: the concept of abusive practice, the concept of the use of wholly artificial arrangements, and the use of substance has also been become increasingly meaningful during the last few years (Cadbury Schweppes case).

In the decision, described in the article, the court emphasises the importance and inviolability of the principle of freedom of establishment, which is fundamental to the existence of the EU.

The ECJ also emphasises the importance of conducting an assessment of the behaviour of the taxable entity, while paying particular attention to the goals, objectives and reasons behind the disputed regulation. It concerns the goal set by subjects of business operations, implementing the principle of freedom of establishment, and the essence is to allow EU Member States entities to establish subsidiaries and other "secondary" organisations in other EU Member States for the purpose of performing operations, and thus encouraging economic and social integration within the EU.

Considering the fact that in the European Union business operations are based on the principles of business activities and freedom of establishment, special legislation, legislation of the so-called extra territorial sanctions law (US taking the leading role in this field) shall be involved in the interpretation of the law on tax planning. Among the issues are bilateral sanctions, and the non-acceptance of such provisions by the UNDP or other organisations, however, affecting other countries and the business operations of their entities with the target country subject to US sanctions.

In the USA, transactions in US dollars are prohibited if a company or individual violates or is suspected of violating anti-money laundering regulations. Tax planning and global business operations are both affected by this issue and such risks should not be ignored.

Commercial secrets and client confidentiality are also factors that affect commercial activity.

Lawyers are also required to participate in the system of notifying suspicious transactions and operations, except for when providing legal advice in criminal and administrative cases involving money laundering.

The peculiar aspect of modern tax planning is that it assumes that the "authors" of such tax planning (lawyers, accountants, auditors, or tax advisors) are required to notify the appropriate authorities of legal violations. This is directly related to the special legislation on "whistleblowers" and information providers, which completely alters the approach to tax planning and to the fundamental concepts, such as business or confidential information.

It is possible to impose restrictions on people's and businesses' rights in order to lower the risk of tax evasion; however, in this scenario, the proportionality of the imposed restrictive measures must be observed, and it must be possible to challenge the decision to impose such measures.

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