INTERNATIONAL DOUBLE TAXATION AND LEGALITY OF CRYPTO CURRENCIES: EFFECTIVENESS OF TAX ADMINISTRATIONS FROM THE HUMAN RIGHTS PERSPECTIVE

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INTERNATIONAL DOUBLE TAXATION AND HUMAN RIGHTS

Tax liability and harmonisation: legal and fiscal possibilities

The power to levy taxes is one of the key features of the sovereignty of a state. At the beginning, taxes were levied basing on territory, focusing on the place in which the assets were situated or the location of goods transfers. Later, with the development of industrial states and the need to finance global infrastructures and social services, modern states tended to move towards a more global system of taxation, notably on worldwide income tax. This major development led to a need to combat international double taxation (with principles such as exemption or credit methods) and, as a consequence, exchange of information in order to ensure protection of human rights. Thus, taxpayers' right protection is increasingly coming under the radar of public scrutiny and, as will be presented in this article, should be featured more prominently also in human rights discourses. International, regional and national legal acts guarantee rights for taxpayers. However, the American Convention on Human Rights,[1] for example, contains rights similar but not identical to those in the European Convention of Human Rights.[2] A vital part of the globalisation process includes the migration of labour and capital and, therefore, it is admitted that double taxation[3] is a systematic failure with frequent occurrence in the field of global taxation. It can be avoided by developing and refining the core of present unilateral and multilateral taxation systems through the means of

[1] ACHR – American Convention on Human Rights.
[2] ECHR – European Convention of Human Rights.
[3] DT – double taxation.

domestic legislation, international treaties such as double taxation conventions[4] and adherence to international legislative powers. Therefore, to the constantly expanded developments, including cryptocurrencies, below is a discussion of means that could be applied to the global taxation system to avoid DT and double non-taxation, reduce tax avoidance, eliminate tax evasion and improve taxpayer rights' protection worldwide. Therefore, double taxation – as well as double non-taxation – before the emergence of cryptocurrencies, was a challenge for both taxpayers and tax administration. And now tax practice all over the world, from human rights perspective, highlights that it is not always possible fiscally what is possible legally, and it is not always possible legally what is possible fiscally.

For several years it has been debated for and against the international tax harmonisation, and there is still no general agreement on an international level whether tax policies should be left at the domestic level or rather be harmonised through the adoption of common rules and elimination of national differences. A lot of definitions are not automatically interchangeable. However, all the states already mutually agreed and conceded the right of an international tribunal to examine their internal tax laws, inter alia, recognising that harmonisation of tax rules is apparently the most extreme form of tax competition and the most difficult cooperation to achieve.[5]

At the same time, the lack of clarity and legal gaps within the European states has appeared because of no consensus on the technical definition of tax harmonisation.[6] On the one hand, for the purpose of the single market in the European Union,[7] the European Court of Justice[8] was providing a concept of "negative harmonisation" in the field of social policy or also known as "indirect harmonisation" for the establishment the internal market. For instance, EU directives were used to improve relations between social policy and common market developments. And in the end, it turned the internal harmonisation into a reflexive

[4] DTCs – double taxation conventions.
[5] Spence, I., *Globalisation of Transnational Business: the Challenge for International Tax Policy*. Intertax, Issue 4, 1997, pp. 143-147. Jeleńska, A.The essence of tax harmonization. *Toruński Rocznik Podatkowy*, 2015. Available at: http://www.trp.umk.pl/download/trp2013/ISTOTA_HARMONIZACJI_PODATKOWEJ.pdf
[6] For more information: Jeleńska A., *The essence of tax harmonization*. *Toruński Rocznik Podatkowy* 2013. Available at: http://www.trp.umk.pl/download/trp2013/ISTOTA_HARMONIZACJI_PODATKOWEJ.pdf
[7] EU – European Union.
[8] ECJ – European Court of Justice.

harmonisation. In comparison to the similar policy in the US, member states are enjoying considerable freedom of action in the field of social policy.[9]

Consequently, it was important to take into consideration certain issues relating to the compatibility of legislation on taxation with international human rights instruments taking into account virtual currencies and latest technologies. And, therefore, it is necessary to design an International Taxpayer Bill of Rights[10] and establish an International Tax Court.[11] For the presented changes it is important also to investigate how the Organisation for Economic Co-operation and Development[12] and the United Nations[13] tools strengthen and assist taxpayers` rights in a globalised world, together with the European Union[14] and Council of Europe[15] protection level. A good example at the regional level is how an American Taxpayer Bill of Rights[16] elaborated by the Internal Revenue Service[17] improved daily life of taxpayers by setting out taxpayers' fundamental rights.

Taxpayers' protection in Europe

European legislation on taxation, including DTC, is not fully homogenous and, thus, some provisions differ in respect to i.e. state specific tax levels, tax basis etc. As a consequence, cases on DT matters may be introduced as general principles of relevance to other areas of practice, and vice versa cases on non-tax matters may establish principles of relevance to taxation. Within the ECHR there are only a few issues which are unique to taxation – Article 6 (Right to a fair trial) in conjunction with Article 14 (Prohibition of discrimination), Article 1 of the First Protocol (Protection of property; hereinafter Article 1/1) and Article 4 of the Seventh Protocol of the ECHR (Right not to be tried or punished twice). Therefore, it is important to investigate the best ways to protect taxpayers` rights when all domestic remedies are exhausted and what changes and developments need to be undertaken in order to achieve an improved level of defense of human rights on a global level in the field of taxation.

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[9] Bernard C, Deakin S.,'Negative' and 'Positive' Harmonization of Labor Law in the European Union 1 Jun, 2002 in *Print Articles* / Volume 8, Issue 3. Available at: http://cjel.law.columbia.edu/print/2002/negative-and-positive-harmonization-of-labor-law-in-the-european-union/

[10] ITBR – International Taxpayer Bill of Rights.

[11] ITC – International Tax Court.

[12] OECD – Organisation for Economic Co-operation and Development.

[13] UN – United Nations.

[14] EU – European Union.

[15] CoE – Council of Europe.

[16] ATBR – American Taxpayer Bill of Rights.

[17] IRS – Internal Revenue Service.

Forty-seven European states are bound by the ECHR, which may be regarded as the highest level of European taxpayers' protection. In Europe, nevertheless, there are three main Courts which work toward improvement of taxpayers' protection: the European Court on Human Rights,[18] after all the domestic remedies were exhausted; the ECJ, which covers disputes within 28 Member States[19] of the EU and a tribunal under the EU Arbitration Convention, which embraces 31 states of the European Economic Area[20].[21] The Court of Justice of the European Free Trade Association guarantees the free movement of persons, goods, services, and capital and provides equal conditions of competition and abolishes discrimination on grounds of nationality. However, the common policies in the fields of agriculture, fisheries, taxation, foreign trade, and currency are not covered by EEA law. There are also ad hoc arbitral tribunals under trade and investment agreements; albeit, they do not establish international precedents.

A recent analysis of tax case law indicates that the ECJ is exponentially becoming more important source of case law regarding taxpayers' rights protection than the ECtHR. After the *Ferrazzini* case[22] in 2001, all the contradictions became evident, since tax law is one of the most harmonised areas of EU law and elimination of DT is an essential element of the fundamental four freedoms of the EU single market.[23] An important fact is that the ECJ determines a preliminary ruling by a request of a court of an EU MS. The request must be reinforced by a "community interest" and the final decision remains with the referring court. Therefore, this practice is not approachable for domestic tax law challenges. It, however, makes taxpayers' protection better since there is no need for exhaustion of all domestic remedies.[24]

Under the principles of the EC Treaty – the EU MSs are required to provide national treatment to all non-residents. This rule was used in direct tax case law of the ECJ quite frequently. However, it is interesting enough that case law of the ECJ is seen increasingly in

[18] ECtHR – European Court on Human Rights.
[19] MS – Member States.
[20] EEA – European Economic Area.
[21] Baker, P., *International arbitration in tax matters*, IBFD, 2016, p. 471-472.
[22] IT: *Ferrazzini v Italy*, ECHR Case 44759/9812, July 2001, application no. 44759/98.
[23] Alter, J. Karen, *The European Court`s Political Power*, Northwestern University, Oxford, 2009., p. 184.
[24] Baker, P. Some comments on European Tax Law and Human Rights. *Legal remedies in European tax law*, IBFD 2009, p.539-540.

situations of economic DT (dividends) than in the juridical DT.[25] Thus, without having any initiative from EU law, MSs are not required to prevent juridical DT, which can also be called "non-discriminatory" DT, and, thus, this phenomenon is beyond the scope of basic freedoms.[26] At the same time, there is a lack of transparency, which, in itself, is harmful to crossborder activity.[27] Therefore, it is important to ensure that the set of rules for preventing DT are transparent, in order to avoid diverging interpretations and to achieve the intended result. The identified situations of DT can be solved by recasting of the Interest and Royalties Directive and straightening the existing non-binding European Taxpayers' Code; developing a common consolidated corporate tax base adopted in March 2011, which would help to avoid juridical DT in the future; extension of the coverage; and a need to complete the framework of DTCs between the 28 EU MSs.

A valuable step was made by adopting a new Directive on double taxation dispute resolution mechanisms in the European Union.[28]All the EU MSs have to implement it into domestic law now, making the proposed rules a subject of the jurisdiction of the ECJ.[29] The Directive is important as there is already an unacceptable number of outstanding cases worth an estimated € 10.5 million. This is a beneficial impulse for further development and changes since the EU law for tax purposes usually takes the form of directives and decisions of the ECJ.

European taxpayer bill of rights and Tax Ombudsman

However, much depends on the state itself. Thus, France issued the Taxpayers' Charter (introduced in 1987 and 2005), which applies to all relationships between taxpayers and the tax authorities and includes provisions that make the Charter legally binding.[30] And the OECD has published a practice note on Taxpayers' Rights and Obligations in 2003; however, the first server was launched in the nineties.[31] Drysdale (2016), thus, has noted the purpose of the "European Bill", which was reported as a policy to promote best practices in developing co-

[25] Lang, et al., *Value Added Tax and Direct Taxation. Similarities and differences*, IBFD 2009, pp. 362-363.
[26] Opinion of the A.G. Geelhoed in *Kerckhaert-Morres*, para.38. EU Commission Communication N. 121, 2011, p. 6.
[27] OECD, *Tax Effects on Foreign Direct Investment*, Policy Brief, February 2008.
[28] Directive 2016/0338 (CNS): Directive on Double Taxation Dispute Resolution Mechanisms in the European Union, 19 May 2017.
[29] Opinion Statement FC 4/2017: *On the proposed Directive on Double Taxation Dispute Resolution Mechanisms in the European Union*. CFE Fiscal Committee. 23 May 2017, pp. 6-7.
[30] CFE Forum 2008: The Taxpayer's Charter – a Model for Europe? Stephane Austry, Associe', CMS Bureau Francis Lefebvre, Paris, considered the topic of "France: Taxpayers' Charters". And K. Murphy. The Taxpayers' Charter: a case study in tax administration. *Centre For Tax System Integrity*. Working paper 62, February 2005. Available at: https://www.researchgate.net/publication/29811451_The_Taxpayers'_Charter_a_case_study_in_tax_administration
[31] Drysdale D., *Putting taxpayers' charters to the test,* ICAS, 24 January 2016.

operation, trust and confidence between tax administrators and taxpayers, ensuring greater transparency on rights and obligations for taxpayers and encouraging a service-oriented approach.[32]

Out of this is an idea that deserves attention: the establishment of a European tax Ombudsman – following the USA, Canada, Australia, and India – regarding taxpayers' legal protection on the EU level. This has been proposed by K. Äimä (2009) and supported by M. Helminen (2009). However, unfortunately, it is clear that the establishment of a separate European Tax Ombudsman and/or European Tax Court would require a heavy legislative and political procedure including an amendment to the European Community Treaty.[33]

Recent research in the field of political power and protection of human rights demonstrates how the EU has created a special leverage for citizens of each MS to influence domestic policy from the inside out through the system of political machinery. However, generalising from CoE and EU cases, it is important to analyse how productive the special tools are in connection with the obviously administrative nature of the relations.[34]

Political will and case law

At the same time, a separate political issue arises in, whether the ECJ "would be willing" to interpret EU law in litigants' favor when a case appeared. In spite of the lack of research in this field, most professional observe that the ECJ makes strategic calculations in the decision-making process; the ECJ avoids decisions that could create a strong political reaction. Thus, in order to avoid political pressure, the clarity of EU legal documents, case precedents, rules, and regulations is of great importance.[35] In this respect, it would also be necessary for cooperation and joint work of two European courts: the ECJ and the ECtHR. For example, with regard to the case law practice, the ECJ has accepted some of the ECHR principles with regard to tax law, namely:[36]

1. "The right to enjoy the property and the right to pursue an occupation or business;[37]
2. The non-retroactivity of criminal law;[38]

[32] Drysdale, D., *Putting taxpayers' charters to the test*, ICAS, 24 January 2016.
[33] Pistone P., *Legal Remedies in European Tax Law,* IBFD 2009, p.179, pp. 219-220 with reference to Kristiina Äimä (2009) and Marjaan Helminen statements. See also Fast K., Taxpayers' Charter – ett alternativ för Sverige?, *Skattenytt* 2009, pp. 721–733.
[34] Cfr.supra footnote 5, pp.184-201.
[35] Idem, p. 190.
[36] Mancini, F.G., "La tutela dei diritti dell'uomo: il ruolo della Corte di Giustizia delle Comunità Europee", *Rivista trimestrale diritto e procedura civile*, 2001, p. 797 et seq.
[37] *Hauer* (ECJ, 1979); *Vaolsabbia* (ECJ, 1980); *Schrader* (ECJ, 1989).

3. The right to an effective juridical protection;[39]
4. The right of defense;[40]
5. The right not to incriminate oneself (*nemo tenetur edere contra se*);[41]
6. The right to respect for private life;[42]
7. The right to the inviolability of the home."[43]

According to Baker (2000), the right to a fair trial requires special attention. It is an important issue in tax matters and includes: the right to a reasonable length of proceedings, the right to obtain a decision having a judicial nature, the right to an independent and impartial judge, the right to a public hearing together with equality of arms between the parties in the inquiry, the right of silence, and the right to legal assistance and fullness of juridical protection.[44]

In this way, *tempus exigit mutationem*, if it violates human rights (whether it is a right to property or the right to a fair trial), these rights must be properly protected and evolve with time. Thus, appropriate measures should be taken even if the legislation or international legal acts does not include situations of DT. Otherwise, it means the right to a fair trial is not being implemented properly and everything has to start from the beginning – with a definition of the concept of equity in taxation.

Therefore, compliance with the right to fair trial principles in tax matters has to be strengthened by various stakeholders before it comes to the cases of virtual currencies.[45] In this regard, legal changes should be done at every level: international, national and local.

[38] *Kent Kirk* (ECJ, 1984); (ECJ, 1987); *Taricco* (ECJ, 2015), as of May 2018 the Italian Constitutional Court returned the case to the ECJ. Daniele L. *Il caso Taricco e il dialogo tra le Corti. L'ordinanza 24/2017 della Corte costituzionale*. Naples, 2017.
[39] *Landeweyck* (ECJ, 1980), *Johnston* (ECJ, 1986).
[40] *Höchst (ECJ, 1989)*; *Dow Benelux* (ECJ, 1989).
[41] *Orkem v. Commission* (ECJ, 1989); *Otto BV* (ECJ, 1993).
[42] *National* Panasonic *v Commission* (ECJ, 1980); *Adams v Commission* (ECJ, 1985).
[43] Kofler Georg, et al., *Human Rights and Taxation in Europe and the World*, IBFD, 2011, p. 90.
[44] Backer, P. QC, *Taxation and the European Convention on Human Rights*, British Tax Review, 2000, no 4, p. 4.
[45] Cryptocurrency and virtual currency are used as synonyms in this article.

LEGALITY OF CRYPTOCURRENCIES AND EFFECTIVENESS OF TAX ADMINISTRATIONS FROM THE HUMAN RIGHTS PERSPECTIVE

Legality of bitcoin and problem of double non-taxation

In order to avoid a populistic presentation and perception of cryptocurrencies and for a better description of the research, author of the article is focusing on *Bitcoin*, as the world's first cryptocurrency.

The idea of *bitcoins* is taken from the concept of a cash transfer, where:

1. The value transfer is instant;
2. There is no need to trust the business partner;
3. The transaction is irreversible.

These characteristics make a cash transfer unique. However, as soon as a cash transfer takes place at a distance, the transfer loses these characteristics, as it always involves a third party (Pay Pal, Maestro, Visa, Back, etc.). The third party can always block the transfer or take the money back out of the account. However, it is important to remember that it can also be made by a government through a controlling process and starting from the sufficient legislation.

Despite the fact that *bitcoin* currency is not controlled by a central institution, there is only a fixed supply of coins available (21 million *bitcoins*). However, one *bitcoin* can be divided into 8 decimal places. The value of a *bitcoin* is determined by the fact that everyone uses the same software and believes in its value. Thereby it becomes a reality. Analysing historical development of *fiat money*[46], nowadays we might define *bitcoin* as a currency without intrinsic value that has not been regulated wholly and entirely by governments and internationally in the offing. Therefore, in terms of monetary economics, acceptance of money is pure because of its convenience as a public good. In the case of cryptocurrencies, they are pure because of its convenience for civil society.

In the US, according to the 2014 Guidance from the IRS, cryptocurrencies are considered property, which makes them subject to capital gains and income taxes. There is no tax liability in case someone has bought cryptocurrency, however, after there will be a digital purchase of any product the holder of cryptocurrency is a subject to taxation. The only reason

[46] *Fiat money* - money without intrinsic value (in author's understanding – in gold) that is used as money because of a government decree. N. Gregory Mankiw (2014). Principles of Economics. p. 220. ISBN 978-1-285-16592-9.

for that is the owner's increase in value.[47] Interestingly, however, that to attract the cryptocurrency business**,** the Senate of Wyoming has passed a decision exempting "virtual currencies" from property taxation in the state. And "virtual currencies" are defined as "any type of digital representation of value that is used as (1) a medium of exchange, unit of account or store of value, and (2) is not recognised as legal tender by the United States government".[48]

The Russian Federation refrains to make virtual currency legal. However, this year the Ninth Moscow Court of Appeal allowed the inclusion of cryptocurrency in the bankruptcy of a debtor, changing the decision of a court of the first instance. Now the interest of lawyers is chained to the way this measure will be implemented in the absence of special legislation and tax authorities are only currently engaged in the development of legislation regulating the concept of crypto-currency in the country.[49]

According to the Global map of cryptocurrency regulations, *bitcoin* is illegal in ten countries (Afghanistan, Algeria, Bangladesh, Bolivia, Morocco, Pakistan, Qatar, Republic of Macedonia, Vanuatu and Vietnam) and restricted in ten countries (American Samoa, China, Ecuador, Egypt, India, Indonesia, Iran, Nepal, Saudi Arabia and Zambia).[50]

The outlined analysis shows the audience the lack of internal and external harmonisation, especially for taxpayers' benefit. For instance, in terms of human rights, if one taxpayer uses a government benefit (*e.g.*, a license) and one does not, then punishing them both by taking away a benefit which only harms one, may seem unfair. The same situation is with cryptocurrencies worldwide. Therefore, coming back to harmonisation, due to the nature of the virtual currencies and for a better functioning of the global market, it has to be direct rather than indirect. From the human rights perspective, the dilemma with cryptocurrencies affects taxpayers and states, and simultaneously it highlights a thin line between positive and natural law.

[47] The IRS Guidance Notice 2014-21 on how existing general tax principles apply to transactions using virtual currency. 2014. Source: https://www.irs.gov/pub/irs-drop/n-14-21.pdf

[48] State of Wyoming. Senate File No. SF0111. Property taxation-digital currencies. 2018. Available at: http://www.wyoleg.gov/2018/Introduced/SF0111.pdf

[49] Petukhova L., Bitcoin as property. In Russia it was allowed collecting crypto currency from debtors. *Forbes*. May 2018. *Source: http://www.forbes.ru/finansy-i-investicii/361107-bitkoin-kak-imushchestvo-v-rossii-razreshili-vzyskivat-kriptovalyutu-s*

[50] As of 19 June 2018. Source: https://coin.dance/poli.

For example, people in different countries continue *Bitcoin mining,*[51] without paying taxes for the earned income and tax authorities, in their turn, are without any tool for recording and accounting the activities. Therefore, scarcity of information and official reports on the tax frauds, illegal income and deficiency of legally bounding procedures create a favorable environment for corruption and illicit oligopoly. This is the point where a problem of possible double non-taxation arises.

Nature of cryptocurrencies: bitcoin vs fiat money

The initial transaction to obtain a *bitcoin* is by buying them from a *bitcoin* company. There are several big *bitcoin* companies that buy and sell *bitcoins*, much like a stock exchange. The money can be transferred to the company in different ways. If it is done through a bank, it is later possible to approach the bank in order to find out the identity of the buyer or seller. However, there are also bitcoin companies that offer the sale of bitcoins in cash or have specific procedures in place that ensure the anonymous purchase and sale of bitcoins (e.g. localbitcoins.com).

There are also different virtual currencies, such as Ethirium and Ripple. However, they do not have the same market value as *bitcoin* and are not proven to work yet. A particular currency to look out for however is *Manaro*, which is specifically designed to prevent technology from tracing who bought the currency.

A bitcoin address

The bitcoin address can be seen like an email address and can be created instantly on a Bitcom website:

- The address is about 26-35 characters long.
- The address always begins with a 1 or a 3.
- The address contains both letters and numbers.
- The address is case sensitive.[52]
- A person or a business can have many different bitcoin addresses.
- The *bitcoin* address is controlled with a private key (much like the password of an email address).

[51] *Bitcoin mining* is the process by which transactions are verified and added to the public ledger, known as the block chain, and also the means through which new bitcoin are released. Anyone with access to the internet and suitable hardware can participate in mining. Source: *https://www.investopedia.com/terms/b/bitcoin-mining.asp*

[52] However, with the first seven letters of the address it is possible to decode the rest with special software, which might be developed also by the interested states and not only by legal entities.

- The bitcoin address is vulnerable to hacking. In case someone acquires the private key it is possible to send as many bitcoins as desired. Transactions are irreversible.

It is possible to send money to the same addresses several times in order to have the *bitcoin* address – at the receiving end – indicated to you.

Bitcoin software

Bitcoins need a basic programme, much like an email client concept (Microsoft Outlook). Different *bitcoin* applications are used to manage *Bitcoin* on a device and are called *Bitcoin* wallet applications. However, they are vulnerable to hacking, which leads a lot of people to store their *bitcoins* in a different system. There are numerous basic *bitcoin* programmes (apps) available and include: armory, breadwallet, electrum, greenaddress, multibit and mycelium. *Bitcoin* also makes use of web-based *Bitcoin* wallet services similar to web-based email services (such as Gmail or Hotmail). These websites include bitfinex, bitstamp.net, blockchain.info, btc-e.com, campbx.com, cex.io, circle.com, coinbase.com, kraken.com and localbitcoins.com. There are also some websites that can be used to sell and buy *bitcoins* while other websites facilitate private bitcoin transactions between parties, unknown to each other (e.g. Locbit.com).

Application area

Bitcoin is used more and more often for different purposes. A lot of people use it to send remittances home, as there is nearly no transaction fee. It is also popular for people who do not have access to bank accounts. A third group, that often uses bitcoins, consist of small and medium enterprises in countries where the internet connection is poor and slow.

In addition to these purposes, bitcoin is an investment opportunity due to its quickly rising value. It fluctuates a little bit (rather like a commodity, than a currency), However, according to a lot of sources, it is still stable enough to invest in it. There has been approximately $1.3 billion invested in *Bitcoin* companies over the last 5 years, however, it is important to keep in mind that *Bitcoin*'s value of a decreased from approximately $11050 to $7000 for the last year.

Cryptocurrency: the new frontier for tax evasion and avoidance?

Since bitcoins are often believed to facilitate completely anonymous transactions, it is also used to buy firearms, drugs, ransomware, to finance terrorism and many other illegal activities. The transfer process of *bitcoins*, however, is publicly available on open source.

There are several websites that show all transfers from one *bitcoin* to another. It is not publicly available to whom the *bitcoin* addresses belong. For this, the company that sold the *bitcoins* to the person can be contacted. However, again, there is no legal binding for stakeholder to do so.

In order to prevent and reveal tax evasion, it is extremely important to look for bitcoin accounts of clients. They might be reluctant to disclose the accounts, as there is often a lot of money in them. However, the bitcoins are directly traceable to the person. Some registered software are able to trace it, therefore the possibility that other illegal actors can do it cannot be neglected. Therefore, for a tax administration, it is considered to look whether the client has a *bitcoin* address on their personal devices.

And a taxpayer has to be aware of legal differences and jurisdictions when dealing with virtual currencies because the more devoted a cryptocurrency user is – the more complicated it is to track accounting records in order to pay the right amount of taxes. In the US, for example, "some traders have managed to avoid paying taxes on cryptocurrency-for-cryptocurrency trades by appealing to something called the "like-kind exception," which lets people defer tax payments when trading one property for another, similar property. For instance, if you trade your house for another one, which then gains in value, you don't have to pay taxes on that gain until you have the cash for it (since the increase in value is tied up in the house itself). But a provision in the new tax law signed late last year limits this exception to real estate, meaning cryptocurrency traders must pay taxes on crypto-for-crypto trades made after December 31, 2017, when the law took effect. What about trades before that? That's less clear."[53]

Furthermore, in case a client has *bitcoins* but is not willing to share the private key, there is no way of retrieving the money in the *bitcoins.* There are two possibilities to break the chain of ownership of a client with his/her *bitcoins*. The easiest one is to put the *bitcoins* in an exchange and pull the money back out. The money put in will not be the same as the money returned and the chain of ownership will be broken. The second possibility is to use the services of a *bitcoin* laundering service (such as Helix). The disadvantage here is that the owner of Helix will still be aware of the chain of ownership.

[53] Orcutt, M. America's cryptocurrency tax policy is confusing everyone. Technology Review. April, 2018. Available at: https://www.technologyreview.com/s/610859/americas-cryptocurrency-tax-policy-is-confusing-everyone/

Instruments for violations

Therefore, because of the unaccountability of cryptocurrency usage, all major dark marketplaces rely on *Bitcoin* as the primary currency.

The one characteristic of a cash transfer that the *bitcoin* cannot replace is the possibility of a transaction with a lack of trust. The marketplaces on the deep web, therefore, count on reviews and their reputation (e.g. *AlphaBay*).

There are several marketplaces and shops that provide different services and they are highly professional. Nobody controls the dark web. However, the servers of the marketplaces are physically present and can be targeted.

Therefore, a legal framework for cryptocurrencies will allow governments to fight corruption and tax evasion. It is extremely important that government will start to monitor and investigate software for two different groups: law enforcement and commercial enterprises (banking and financial sector).

After the General Data Protection Regulation (GDPR), there have been several questions regarding the legality of retrieving personal information of the owner of *bitcoins*. This depends on the law of the particular country. It will be rather easy to obtain the identity of a person that bought *bitcoins* at the US- or UK- based company, however, the technology is very much ahead of the law in this regard and therefore, the law must be interpreted for each country separately.

There are a lot of initiatives – software – that enable the tracing of a person if he/she has split up their *bitcoins* into different *bitcoin* accounts. It also enables one to see whether the transaction has been made to a certain *bitcoin* company or a known dark web server and from where. Afterward, law enforcement officials can then approach the *bitcoin* company in order to obtain the identities of the *bitcoin* owner.[54]

[54] The information provided in this part of the article was gathered by the author from different scattered sources over a long period of time and represents only the researcher's point of view and analysis.

Instruments on preserving the rights of taxpayers

Simultaneously, cohesive interpretation of DTCs by some contracting states (CSs) is necessary as a mean to avoid DT and double non-taxation. In the mutual interpretation of a treaty it is crucial for the contracting parties to understand how the treaty is interpreted by other CSs – thus, a problem of interpretation arises since conventions commonly are drafted in more than one authentic version. G. Maisto (2005) argues that a DTC, drafted in more than one authentic language, might be difficult or even impossible to understand by the other contracting parties. G. Maisto furthermore outlines the problem of interpretation of the other authentic version (i.e. the other language version), since the core meaning of a text unavoidably goes missing in translation. The tax-treaty meaning of terms must be understood in the context of the other contracting state´s view – and the only way of analysing this is to follow the other state's court practices. Therefore, it is advocated that each state should have direct access to the court decisions of the other CS. A need for free flow and exchange of information should be solved on a multilateral level and that the information and infrastructural solutions should be easily accessible and attainable (e.g. via internet).[55]

The OECD Model Tax Conventions[56] should be amended in order to insert an article obliging the CSs to report all relevant judgments to an institution, such as the OECD or the International Tax Court. This institution could then collect and translate the judgments, and make them available – free of charge – to the public via the internet.[57]

Nowadays, globalisation and e-commerce justify the emerging of new *lex mercatoria* for the financial markets. This fact, on the one hand, radically reduces the risks of linguistic misunderstanding while, on the other, represents some sort of new technological Esperanto that hammers out the differences but facilitates reciprocal comprehension. It then seems appropriate, that a case law database and a tax glossary[58] (by the International Bureau of Fiscal Documentation - IBFD) should be carried out in the multilateral context as the only possible solution to the problems, taxpayers facing on a daily basis. This would make knowledge of the interpretation of these terms more accessible and facilitate discussion

[55] Maisto Guglielmo, *Multilingual Texts and Interpretation of Tax Treaties and EC Tax Law*, IBFD, Vol. 1 EC and International Tax Law Series, 2005, p. 331.
[56] OECD MTC - OECD Model Tax Conventions.
[57] Ibidem, p. 332
[58] Idem, pp. 326-332.

within the European and international tax communities on the importance of a common understanding of multilingual issues in tax treaties.

An International Tax Court

Thus, avoidance of DT of persons and preservation human rights violation in relation to taxation could highly benefit from an ITC related to these issues. The question of the creation of an international tax tribunal was raised already in 1947 by the Independent Financial Adviser.[59] The same question was raised in 1960 by the International Chamber of Commerce, the International Bar Association and legal commentators called for the creation of an ITC.

Already as soon as multilateral DTCs started to go into effect, Bűhler (1998) sought an international court for tax matters to be created and it was argued that the main objective for such a court would be to interpret the convention itself - since an objective body for interpretation is considered to be of utmost importance for a multilateral treaty. The court should, furthermore, have to be a multilateral instrument, rather than a conciliation board which on a bilateral basis would gather whenever disputes between States would occur on taxation. It was also suggested that the judges should hold true independence in order to guarantee that the tax administration should not be able to influence the appointment of the judges. Despite these discussions on the need for the ITC, since 1961, after the OECD was founded, the topic has not been further discussed in this context on an official level.

One could argue that the probability of the establishment of the ITC is quite unlikely and that it consequently is more probable that already existing international tribunals such as the ECJ, ECtHR or the International Court of Justice[60] will continue to settle tax cases. It can be argued that multilateral disputes on the interpretation of DTCs should be referred to the ICJ. However, not a single case has been recognised in which the ICJ has decided a tax dispute over the interpretation of a DTC.[61]

Minimun standard for taxpayers

It can be argued that the above would be the "*minimum standard*" and that a state should be allowed to grant taxpayers with a wider scope of procedural rights – e.g the right to be notified of the information exchange at the stage when the state receives a request for

[59] IFA – Independent Financial Adviser.
[60] ICJ – International Court of Justice.
[61] Lang Michael, et al., *Multilateral Tax Treaties. New Development in International Tax Law*. Kluwer Law International, 1998, pp. 167-169.

information and to have the right to challenge such exchange of information. Thus, Schush (1998) indicated that the development of an automatic platform for an automatic exchange of information between tax authorities was in progress. However, many issues remained open even though the general principles for such a platform seemed to be of global consensus.[62] Oberson (2014) further suggests that on occasions the notifications could be postponed in the case of extraordinary circumstances (e.g. if such a notification could jeopardize the outcome of the process), – but this rule should be an exception. Since there does not exist an international court on tax matters, the reviews of a Global Forum (Global forum on transparency and exchange of information for tax purposes) could affect:

- The efficiency of the case process between CSs;
- Implementation of treaties by each participant;
- Implementation of the substantive and procedural rights of the taxpayers.

It is further assumed that the Global Forum in the future could analyse the degree to which various states adhere to the protection of taxpayers` rights (e.g. secrecy and data protection rules).[63]

Oberson and Elgar (2014) state that a "*minimum standard*" should involve, at least, the right for a taxpayer to receive and access information on an ongoing international tax matter for the taxpayer involved. Such a "*minimum standard*" should involve at least the right to receive information in the beginning of the process about the exchange of information. Also the taxpayer, prior to the tax assessment, should have the right to challenge the decision made by the requesting state, have the right to information on which foundation of the tax assessment decision has been made and the state at least should provide him or her with the "main content" of the information transferred in the tax assessment.

Finally, in May 2017 in the *Berlioz Investment Fund S.A v Directeur de l'administration des Contributions directes*[64] case, the ECJ stated that taxpayers have the right to challenge a tax information exchange order, improving thus the taxpayer's protection within the EU. Therefore, this case is of precedential value in the possible debate of tax authorities' information exchange requests. It should be noted that this practice of application the EU Charter to the tax cases was perhaps promoted by the adoption of a European Taxpayers'

[62] Oberson Xavier, Edward Elgar, *International exchange of information in tax matters. Towards Global transparency*, 2014, p. 13.
[63] Idem, p. 13.
[64] *Berlioz Investment Fund SA*, (ECJ, C-682/150).

Code by European Commission in 2014.[65] Notwithstanding, it is not legally binding and, thus, there is no attempt to hold the tax administration accountable to taxpayers.

Particular attention is required to the right of silence in tax matters, highlighted by Baker in 2012.[66] The issue of whether a taxpayer may refuse to supply information that might prove the taxpayer's guilt in a subsequent penalty or criminal prosecution has risen from time to time before the ECtHR.[67] Thus, in *Van Weerelt (2015),*[68] the Netherlands tax authorities obtained information from the German authorities under the Mutual Assistance Directive (77/799 - before it was repealed by a new Directive 2011/16);[69] the information indicated that taxpayer had an interest in a Liechtenstein foundation that had been liquidated in 2000. Therefore, the Court held that the tax administration was entitled to ask the applicant to supply information that could not be obtained from any other source, for the purpose of levying taxes and interests and, thus, no violation of the *nemo tenetur* principle (the right not to incriminate oneself) enshrined in Article 6 of the ECHR has been found.[70]

In order to conclude an inference, one could note that the current multilateral legislation, applicable on international taxation, expressed in Article 47 of the EU Charter[71] and Article 6 of the ECHR, is in lack of full protection of taxpayers' rights – since the current articles simply were not drafted to secure the rights of taxpayers – and, thus, are not pervasive in case of DT. Therefore, it is important to interpret Article 6 in such a manner to compromise tax procedures.

Hence it is argued by many of the above-mentioned scholars (e.g. Philip Baker, Duncan Bentley and Adrian Sawyer, Giulio Maisto) that there is a need for a fully pervasive legislation and legal instruments (courts) on preserving the rights of taxpayers. Possible solutions may activate the current treaties under the UN and/or OECD which could be further developed, for example, with the amendment of an equivalency to the ATBR. An amendment of a binding

[65] European Commission: *Guidelines for a Model for A European Taxpayers' Code*. Ref. Ares (2016) 6598744 - 24/11/2016.
[66] Baker, P. QC, Recent Tax Cases of the European Court of Human Rights. *European Taxation*, December 2012. Exported on 8 May 2017 by IBFD, pp. 584-586.
[67] UK:Finance (No2) Act 1987, sec. 62, which was enacted to reserve the effects of the decision in UK: HC, 22 Jan. 2001, Padmore v. IRC (1987) STC 36 (Chancery Division). Ibidem., p. 586.
[68] NL: *Van Weerelt v Netherlands,* ECtHR, 16 June 2015, application no. 784/14.
[69] Mutual Assistance Directive (1977): Council Directive 77/799/EEC of 19 December 1977 Concerning Mutual Assistance by the Competent Authorities of the Member States in the Field of Direct Taxation and Taxation of Insurance Premiums, EU Law IBFD.
[70] Annual Report. International Law Division, Ministry of Foreign Affairs, *International Human Rights Proceedings*, 2015, p. 12.
[71] Charter of Fundamental Rights of the European Union (2010/C83/02).

European and/or International Taxpayers Bill of Rights to the current UN and/or OECD legal framework would have the benefit of already existing and functioning surveillance of legislation under EU Charter or the ECHR in the format of the ICJ and/or ECtHR and ECJ.

A new protocol to the ECHR

As it has been argued earlier, DT and failure to adhere to taxpayers' rights is a systematic problem and, thus, this article argues on the importance of amending a new Protocol to the ECHR on the elimination of DT and likewise strengthening of the taxpayers' rights, taking always into account current information technology developments.

The proposed new Protocol would include the main articles on tax principles relating to human rights. Tax principles may be considered being a part of the current human rights treaties and further tax doctrine could be amended to already existing human rights basis and treaties. Alternatively, further tax principles may instead be developed as a system of fully new and independent human rights treaties, e.g. under the UN or OECD.

Current experience and perspectives

Every taxpayer has a range of fundamental rights and each state has obligations to protect them. Thus, for example, the US IRS adopted the ATBR, which is a keystone document to provide taxpayers with a better understanding of their rights. The document takes several existing rights set forth in the tax code, and sets them to the ten broad categories, making it more visible and easier for taxpayers to understand these rights. The fundamental articles of the ATBR include: the right to be informed, right to quality service; rights to pay no more than the correct amount of tax; rights to challenge the IRS's position and be heard; rights to appeal an IRS decision in an Independent Forum; right to finality; right to privacy; right to confidentiality; right to retain representation; right to a fair and just tax system.

The IRS is the main government agency in the United States responsible for fair and impartial administrative relations with taxpayers and, thus, for example, it has an opportunity to provide assistance through a Low Income Taxpayer Clinic or a Tax Advocate Service for taxpayers who cannot afford representations in their dealings with the IRS. Taking into account that the US tax code is notoriously more complicated than the majority of its European counterparts, one can conclude that amendment(s) could be made to the ECHR in order to provide the European taxpayers with extended rights. There is a high probability that the CoE could open for the signature of a protocol concerning DT to the ECHR in order to

provide the European taxpayers with the equivalent rights to those held by American taxpayers.

Following the above, the OECD and the UN could take steps towards the improvement of the taxpayers' rights globally. In this sense, the idea of harmonisation should not be impaired by the critic that 'harmonisation is designed to protect jurisdictions with high taxes and pervasive double taxation'.[72] Positive perception of tax competition should be changed because of the violation of human rights.

History shows us a lack of political will towards such measures and the complexity of these decisions are due to different domestic backgrounds. For example, within the EU the problem of DT still exists regarding the direct income and heritage. Therefore, making a 'European Taxpayer Bill of Rights' binding by way of appropriate measures – in the form of a Protocol to the ECHR or a directive on the EU level would be good solutions for both, taxpayers and contracting European states. Every state could create a safe impartial environment implementing international human rights obligations. Within the EU, DT is possibly the worst obstacle against free movement in the internal market. Thus, it is important to develop a satisfactory international framework due to the increase in the number of taxpayers who fall under the network of DT, especially after the appearance of cryptocurrencies.

Thus, all the cases give a good basis for a future International Tax Court. The Court would be not a tool for harmonisation of tax law and tax systems, changing domestic policies. Rather, this court would work towards the improvement of taxpayers' protection worldwide.
In the opinion of leading lawyers and researchers, the decisions of the ECtHR and the ECJ have traditionally adopted a "limited taxpayer-favorable" position in relation to claims where taxpayers opposed the levy of confiscatory taxes alleging a violation of Article 1/1. Thus, the International Tax Court on the basis of an ITBR could play a key role in developing the efficiency of the process for the benefit of the participating states – but such an ITC could also play an instrumental role in each states' implementation and, most importantly, the procedural and substantive rights of taxpayers which is so difficult to put into practice nowadays.[73]

[72] Position of a senior Mitchel J.D. regarding the tax harmonisation versus competition in the EU, 2005.
[73] The matter of court's decision execution is of particular importance. Good examples of judicial precedents are: *Hornsby vs. Greece*, ECtHR, 1998; *Immobiliare Saffi vs Italy*, (Application no. 22774/93), ECtHR, 1999.

There are many problems with which the ECHR, providing justice for a wide range of taxpayers, does not encroach on all challenges of taxpayers' discrimination within one state or between different states. For instance, in the *Jafarov v. Azerbaijan* (2016)[74] case, there was a need to justify the accuracy of the government's tax policy. This requires a deep knowledge of the domestic law and, thus, the issue was not solved properly.[75]

Moreover, there are a lot of cases where domestic remedies had not been exhausted or applications were inadmissible and, therefore, probably the ECtHR does not receive a chance to improve taxpayers' protection of the CoE State Parties which are not members of the EU and/or the OECD.

CONCLUSION

Humanity has unnoticeably overstepped globalisation and entered a gig economy world where virtual currencies are creating new challenges for the international community. However, there is no possibility to solve the modern generation calls with old-fashion solutions, especially considering current political, security and economic developments.[76] Therefore, as it has been argued earlier, DT and failure to adhere to taxpayers' rights is a systematic problem and, thus, this article argues on the importance of amending a new Protocol to the ECHR on the elimination of double taxation and likewise strengthening of the taxpayers' rights. And the International Tax Court has to be established in order to provide taxpayers with effective access to the fair trial, which includes the right to the implementation of court's decision without unnecessary delays. It will help taxpayers and tax authorities operate more effectively, analysing cryptocurrencies issues, a problem of tax burdens, exchange of information, lack of information or miscommunication regarding taxation and tax rates in different countries.

This is just one approach to the issue, which examines a backbone and wishbone of the rule of law, democracy and human rights between two or several states regarding taxation. Tax policies are still considered a specialist field out of reach for human rights lawyers. It is

[74] AZ: *Jafarov v. Azerbaijan*. ECtHR, 17 Mar. 2016, application no. 69981/14.
[75] Baker, P. QC, Some recent decisions of the European Court of Human Rights on Tax Matters (and Related Decisions of the European Court of Justice), *European Taxation*, August 2016, p. 342-351.
[76] Gig economy - a labour market characterised by the prevalence of short-term contracts or freelance work as opposed to permanent jobs. According to Investopedia, June 2018.

the writer´s intention that this article increases the appetite for the material side of human rights

and in particular the extensive rights in the context of taxation in a globalised world.

SUMMARY

International double taxation and legality of crypto currencies: effectiveness of tax administrations from the human rights perspective

The scope of this article is on the issue of double taxation and double non-taxation with an addition of cryptocurrencies developments. Apart from the double taxation problem, the first half of the article is focused on the legality of cryptocurrencies as well as readiness to confront cryptocurrencies operations by governments, tax administrations and legal entities. And the second part represents a research on issues of legal information sharing, legal interpretation, and precedent interpretation. Description of double taxation problems and *Bitcoin* concept is introduced for the further benefit of taxpayers and tax administrations, and as a weighty argument for establishment of an International Tax Court.

Key words: tax law, tax

Słowa kluczowe: prawo podatkowe, podatek