Analyses and Studies
Analizy i Studia

CASP
Centre for Analyses and Studies of Taxation
Centrum Analiz i Studiów Podatkowych

No. 2(18) | December 2024 pp. 19–26 ISSN 2451-0475

International double taxation treaties from the perspective of exchange of information between tax authorities

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The world is becoming more accessible as a result of globalization, which has an impact on the number and the nature of the operation of the subjects of tax law and the involvement of the international element. Double taxation treaties are one of the basic instruments of tax policy aimed at minimizing the effects of the natural effect of government regulation on the tax entity. However, by its very nature, any tax relief represents a potential scope for tax avoidance, i.e. it can be abused by the tax subject. In order to limit the negative effects associated with this, these treaties incorporate provisions allowing the exchange of information between the tax administrations concerned in order to minimize the risk of tax evasion and avoidance. The aim of this article is to present the results of an analysis carried out on the information exchange provisions contained in bilateral double taxation treaties to which the Czech Republic is bound.

Keywords: double taxation treaties, DAC Directive, exchange of information, tax entities, tax administration, international cooperation

JEL Classification: K34

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Introduction

Globalization, which is proceeding at a breakneck speed, is no longer a surprise. The evolution of technology cannot be stopped. They have made the world more accessible. Every day we witness the constant movement of people, goods, services and information. This movement naturally encounters various barriers. One of them is undoubtedly state regulation. Tax burden, if disproportionate and unreasonable, have the capacity to significantly impede or restrict this movement. Restrictions on international trade are in themselves undesirable. All the more so if it forces taxpayers to avoid tax. Double taxation treaties are one of the basic instruments of tax policy, aimed at minimizing the effects of the natural effect of state regulation on the taxpayer. Where a tax entity operates in more than one country, it automatically falls under the jurisdiction of several tax systems, which naturally leads to multiple tax burdens. Double taxation treaties are de-

signed to prevent this. In them, the contracting states agree on rules which, by their nature, provide some relief to the tax entity concerned. If the conditions laid down are met, the tax liability is reduced. However, it should not be forgotten that any tax relief represents a potential scope for tax avoidance, i.e. it can be abused by the taxpayer. As globalization progresses, the degree of internationalization of tax law increases. It is not uncommon for individual countries to have dozens of bilateral double tax treaties. In order to reduce the negative effects associated with this, these treaties have incorporated provisions allowing for the exchange of information between the tax administrations concerned in order to minimize the risk of tax evasion and avoidance. In this area, there has been a significant development of legal regulation in recent decades in the area of international exchange of information and international assistance in tax administration. Along with the internationalization of tax law, tax administration is thus gradually becoming more complex. It is a direct proportion – the more accessible the world is, the more robust the state regulation and the state machinery. Double taxation treaties and the system of international tax cooperation thus acquire an additional dimension. Its task is now also to make every effort to minimize the negative impact on taxpayers. It is imperative to strive for a balanced system of rights and obligations. This is all the more so since, in many respects, this regulation now affects not only taxpayers, but also other participants or intermediaries in transactions and financial institutions. In terms of the impact of regulation, in recent years, more and more obligations have been imposed on these participants, forcing them to move from a passive role as providers of information on request to an active role, the essence of which is not only the automatic transmission of information but also its active search. In this context, one cannot forget the key information risk that necessarily affects the exchange of information in the tax area, namely the risk that the information in the international cooperation system is so abundant that all parties involved start to get lost in it – taxpayers in their obligations, which some may use beyond its intended impact to carry out undesirable tax optimization, and tax authorities in the amount of information on taxpayers. In order to eliminate this risk, it is imperative to describe the existing state of this complex system and to subject it to a critical analysis in terms of the identified risks. The purpose of this article is to briefly introduce the reader to the results of the analysis carried out on the international double taxation treaties to which the Czech Republic is bound, or a comparison of the provisions governing the exchange of information. The aim of the analysis was to describe the development of legal regulation of double taxation from the perspective of information exchange between tax authorities. An analysis with similar scope, which brings an innovative view of the issue, was published already in 2000 (Bacchetta, Espinoza, 2000).

Double taxation treaties

Modern tax law is characterized by a high or increasing degree of internationalization. It is not uncommon for states to have bilateral double taxation treaties with 100 other states. The emergence of bilateral double taxation treaties is linked to the development of international trade and increased population movements in the second half of the 19th century. They saw their greatest expansion about 100 years later. At present, contracts are concluded rather in units and in many cases they are an update of contracts already concluded (Brzeziński, 2017).

The purpose of double taxation treaties is to prevent or at least minimize the effects of a phenomenon that arises from the natural interaction of national sovereignty in the tax area. This phenomenon has two aspects – territorial and personal. The territorial aspect represents the unrestricted right of a state to tax phenomena that take place on its territory. The personal aspect is the unrestricted right of a state to tax its own citizens regardless of where they operate or conduct the activity that is the subject of the tax. In the case of

situations with an international element, there is a double burden on taxpayers, particularly in the case of income tax. This phenomenon hinders international trade and harms the world economy. It hinders the free movement of persons, goods, capital and services within the European Union. Double taxation treaties can also have negative consequences. This is particularly the case if their operation results in the creation of a tax haven, albeit not directly, but as a result of a change in the economic environment during the lifetime of the treaty, e.g. the treaty with Cyprus (Brzeziński, 2017; Hamaekers, 2006).

Double taxation treaties have the following functions: avoiding double taxation, avoiding double non-taxation, reducing the possibility of tax evasion, ensuring tax non-discrimination and ensuring an equitable distribution of income between the contracting states (Dombrowski, Buchtová, 2022). Double taxation agreements are an example of the application of the principle of equality, which implies equal treatment of subjects in the same factual situations. For example, the OECD Model Tax Convention explicitly prohibits discriminatory treatment of taxpayers (Brzeziński, 2017).

Double taxation treaties are a source of tax law. They are subject to ratification and publication in the *Collection of International Treaties*. They do not require the adoption of a special law to operate within domestic law – they are directly applicable, but do not constitute an independent basis for the imposition of tax obligations. They are applicable only in conjunction with the relevant tax laws. The legal essence of double taxation treaties is that the contracting state, while retaining the right to tax the income in question, agrees to adjust the amount of taxation on the basis that the income has been taxed in the other contracting state. Thus, if two tax jurisdictions have the right to tax the same income earned by the same taxpayer, the double taxation treaty provides a way to separate the scope of jurisdiction by limiting the application of the domestic law of one of those states to the taxation of that particular income. For the sake of completeness, it should be noted that the taxation provisions in bilateral international agreements on mutual promotion of investment have a similar function to that of double taxation treaties. An alternative to bilateral double taxation treaties is the unilateral waiver of a state's right to levy taxes made under domestic law. However, this is rather rare and occurs on the basis of reciprocity, similar to double taxation treaties (Brzeziński, 2017; Nováková, Králová, 2024; Radvan, Mrkývka, 2016).

In principle, bilateral and multilateral double taxation treaties can be concluded. The bilateral ones prevail. The basis for negotiating the conclusion of a double taxation treaty is usually the model treaties. The most widely used is the OECD model treaty (Balco, 2018). Another example of a model treaty is the UN model treaty recommended for agreements between economically developed and developing countries. Generally, as the paper of West and Wilkinson shows, the context of developing and developed country treaties is one of the potential areas of future research (West, Wilkinson, 2024).

The large number of double taxation treaties makes them difficult to update and, in effect, to administer. The international community sees the solution in a multilateral convention on the implementation of tax treaty-related measures. This treaty is intended to make all the bilateral double taxation treaties signed with a given country available without the need for lengthy bilateral negotiations.

At the level of the European Union, where the avoidance of double taxation is, by its very nature, one of the fundamental prerequisites for its functioning and for the realisation of the freedoms on which it depends, a multilateral agreement concluded by the member states could be a solution (Pistone, 2002).

International exchange of information

The purpose of the legal framework for the exchange of information between tax administrations is not only to combat tax evasion, as it might

seem at first sight, but more generally to correctly determine, assess, and ensure the collection of tax, while minimizing interference with the functioning of taxpayers.

The exchange of information between countries is an essential condition both for avoiding double taxation and for effectively combating tax evasion. It is based on the basic assumption that the competence of the state authorities and therefore of the tax administration authorities is limited to the competence of the state concerned, which, as in the case of double taxation treaties, has a territorial and personal aspect. The territorial aspect represents the unrestricted right of a state to tax phenomena occurring on its territory. The personal aspect is the unrestricted right of a state to tax its own citizens regardless of where they operate or carry out the activity that is the subject of the tax. The latest research points out and proves, especially on data, the growing importance of tax information exchange (Ryder, Bourton, 2024; Wang, Zhang, Gao, 2024).

States have long sought to establish a comprehensive, closely interlinked system of mutual cooperation which, consistent with the preservation of the principle of state sovereignty, will enable them not only to exchange information effectively in the exercise of their control powers but also to use other tools necessary for the proper collection of tax, including supporting tools such as service of process.

The cornerstone is the multilateral Convention on Mutual Administrative Assistance in Tax Matters, drawn up in Strasbourg on 25 January 1988[1] (hereinafter referred to as ‚the Convention'). In it, the contracting states undertake to provide each other with the information necessary for the administration of taxes and to assist in the recovery of tax debts (Brzeziński, 2017). This international treaty constitutes the basic comprehensive instrument for the international exchange of information. It regulates cooperation in the field of tax administration, both at the level of demand and payment. According to article 1, paragraph 2 of the Convention, this cooperation includes exchange of information, participation in tax investigations (simultaneous tax investigations and presence at tax audits abroad), assistance in the enforcement and implementation of provisional measures and service of documents. Unlike double taxation treaties, the Convention has a broader scope. It applies not only to income or wealth tax, but also to the other range of taxes defined in Article 2 (e.g. indirect and excise taxes, social security contributions).

The Convention provides the tax administrator with the possibility of choosing the legal instrument of cooperation which is the most advantageous for it in terms of the exercise of its competence and the principles of tax administration contained in the Tax Code. Article 27, paragraph 2 of the Convention contains an interpretative rule according to which European legislation takes precedence in application unless the Convention provides for broader cooperation for the member states of the European Union. All states of the European Union are signatories to the Convention.[2]

The Convention is followed by the Multilateral Competent Authorities Agreement on Automatic Exchange of Financial Account Information (MCAA), which implements the provisions of Articles 6 and 22 of the Convention and regulates the rules for the automatic exchange of information and makes the OECD Common Reporting Standard (CRS) binding. This agreement is aimed in particular at combating tax evasion.

The legal framework for the system of administrative cooperation in the field of taxation between the member states of the European Union consists of a set of directives on administrative cooperation in the field of taxation (DAC). It is questionable why the form of directives, which require implementation by the member states, was chosen for this area rather than the route of

[1] For the Czech Republic, it is effective as of 27 January 2014 and applicable to taxable years beginning on or after 1 January 2015.

[2] List of signatories to the Convention is available on the website: https://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf.

directly applicable EU regulations. The directives and the way in which they are transposed into the legal system of a particular state are in some respects reminiscent of the operation of international treaties, which regulate this area in relative detail. A member state of the European Union can thus take into account not only the specifics of the functioning of its own tax administration, but also the international agreements currently concluded, whether on the exchange of information or on the avoidance of double taxation, when implementing them through specific provisions in national legislation.

The DAC Directive system is gradually being supplemented by the Council of the European Union to add a new range of automatically exchanged information. The DAC Directive system consists of:

- DAC I – (Council Directive 2011/16/EU) – employment income, directors' remuneration, life insurance products, pensions, ownership of immovable property and income from immovable property.
- DAC II – called GATCA (Council Directive 2014/107/EU) – information on the financial accounts of taxpayers abroad.
- DAC III – (Council Directive 2015/2376/EU) – exchange of information on advance tax rulings and advance transfer pricing assessments.
- DAC IV – (Council Directive 2016/881/EU) – report provided annually by European Union multinational enterprises or groups of third country multinational enterprises with at least one entity established in the European Union to the tax jurisdiction in which they operate.
- DAC V – (Council Directive 2016/2258/EU) – provides access to anti-money laundering information for tax authorities. Standardised business registers are being developed within the European Union to identify beneficial owners of companies – exchange of beneficial owner information.
- DAC VI – (Council Directive 2018/822/EU) – mandatory reporting and exchange of information on tax optimization structures.
- DAC VII – (Council Directive 2021/514/EU) – exchange of information between countries from operators of sharing economy platforms (Airbnb, UBER, etc.) – information on sellers using the platforms.
- DAC VIII – (Council Directive 2023/2226) – provision of information to crypto asset operators and crypto asset-related service providers.

The European Union has signed agreements on a common standard for notification between member states and countries outside the European Union, namely Switzerland, Liechtenstein, Monaco, Andorra, and San Marino.

The EU directives regulating cooperation in tax administration are implemented in the Czech legal system through Act No. 164/2013 Coll., on International Cooperation in Tax Administration and on Amendments to Other Related Acts, as amended, and selected provisions of Act No. 280/2009 Coll., Tax Code, as amended (in particular DAC V). The implementation of DAC VIII is currently underway. The DAC Directives and, consequently, the national legislation adopted on their basis correspond to the applicable OECD Global Standard (Dombrowski, Buchtová, 2022).

The information exchange system based on the Convention is complemented by bilateral Tax Information Exchange Agreements (TIEAs) with non-signatory countries. They are concluded with countries in which a large number of Czech companies are not established but may have a significant impact on the tax obligations of Czech taxpayers, e.g. transactions with an impact on tax liability in the Czech Republic are conducted through them. The Czech Republic currently has treaties with the following countries: the British Virgin Islands, Jersey, Bermuda, the Isle of Man, Guernsey, the Republic of San Marino, the Cayman Islands, the Principality of Andorra, the Commonwealth of the Bahamas, the Principality of Monaco, the Cook Islands, Aruba, and Belize.[3]

[3] The list of Tax Information Exchange Agreements signed by the Czech Republic is available on the website

For the sake of completeness, it is necessary to draw attention to the fact that the more intensive is the effort of tax administrations to exchange of information, the more intensive is the effort of taxpayers to find new ways to avoid tax liability (Langenmayr, Zyska, 2023).

Double taxation treaties concluded by the Czech Republic

Currently (as of 3 July 2024) the Czech Republic has concluded international double taxation treaties with 97 countries.[4]

The oldest is the treaty with the Netherlands from 1974. The treaty with the Netherlands is an illustrative example of developments in this area. The original provision on exchange of information from the 1970s was replaced in 2013 by a more modern version or supplemented by provisions that extend the original obligation of the contracting state. The original provision provided for an obligation to exchange information available to the tax authorities without actively seeking it. The new provision, on the other hand, establishes the obligation that if one contracting state requests specific information, the other state shall implement the measures at its disposal to obtain such information. The new version also reflects a more active role of the requested state in obtaining information from banks, financial institutions and other parties outside the tax entity and the tax administration that have relevant information. The same change has been made to the provisions governing the exchange of information in the latest treaty concluded, namely with the United Arab Emirates, which replaces the 1997 treaty that was in force until now.

The original provisions, which were the result of treaty negotiations in the 1970s, are only a brief expression of the general obligation of the contracting states to exchange information. In addition to the original text of the treaty with the Netherlands, the 1978 treaty with Japan also contains provisions on the exchange of information. The analysis carried out showed that this practice remained virtually unchanged until 2005, when a treaty was concluded with Norway, Serbia, and Montenegro. These provisions already provide for an obligation to procure information, within the limits of available resources, at the request of the other contracting party, similar to the treaty with the Netherlands.

The analysis also shows that after the year 2005, treaties have been concluded which contain similar provisions to those of the 1970s (e.g. the 2007 treaty with Tajikistan, the 2009 treaty with Syria). These are mainly states that are not signatories to the Convention.

Recent treaties are beginning to include provisions responding to the fact that multilateral agreements are being concluded in the field of international exchange of information. For example, the 2022 treaty with San Marino contains a provision stating that *"the possibilities of exchange of information provided for in this Article do not limit, nor are they limited by, those contained in existing international agreements applicable between the Contracting States that relate to the exchange of information in tax matters."*

These special provisions on the exchange of information were of fundamental importance, particularly at a time when the system of international exchange of information based on the Convention was not yet operational, as they represented, in effect, the only instrument for cross-border cooperation for the tax authorities. The relevant provisions of bilateral double taxation treaties to which the Czech Republic is bound allow for all types of information exchange, including automatic exchange, as they are based on the provisions of Article 26 of the OECD Model Treaty. These provisions are still relevant today, especially in the case of countries which are signato-

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of the Ministry of Finance of the Czech Republic: https://www.mfcr.cz/cs/kontrola-a-regulace/legislativa/mezinarodni-spoluprace-v-oblasti-dani/prehled-dohod-tiea.

[4] The list of international double taxation treaties signed by the Czech Republic is available on the website of the Ministry of Finance of the Czech Republic: https://www.mfcr.cz/cs/zahranici-a-eu/smlouvy-o-zamezeni-dvojiho-zdaneni/prehled-platnych-smluv.

ries to the Convention. Of the 97 states with which the Czech Republic has a bilateral agreement, 15 are not party to the Convention. Specifically, these are Bangladesh, Belarus, Egypt, Ethiopia, Iran, the Democratic People's Republic of Korea, Kosovo, Kyrgyzstan, Qatar, Sri Lanka, Syria, Tajikistan, Turkmenistan, Uzbekistan, and Venezuela. The provisions in these treaties correspond to the generally used wording also found in treaties with states that are signatories, to the Convention, which varies in principle according to the time of the conclusion of the treaty (see the conclusions of the analysis above). It follows that no special regime for the exchange of information is provided for in these bilateral agreements.

Conclusion

Double taxation treaties are one of the basic instruments of tax policy aimed at minimizing the effects of the natural effect of state regulation on the taxpayer. Every tax concession represents a potential scope for tax avoidance, i.e. it can be abused by the taxpayer. As globalization progresses, the degree of internationalization of tax law increases. It is not uncommon for individual countries to have dozens of bilateral double tax treaties. In order to reduce the negative effects associated with this, these treaties have incorporated provisions allowing for the exchange of information between the tax administrations concerned in order to minimize the risk of tax evasion and avoidance.

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Originally, the provisions of the bilateral treaties only provided for the obligation of the contracting states to exchange information available to the tax authorities without actively seeking it. In contrast, in treaties concluded after the entry into force of the Convention, the provisions on exchange of information provide for an obligation that, if one contracting state requests specific information, the other state shall implement the measures at its disposal to obtain that information. The new version also reflects a more active role of the requested state in obtaining information from banks, financial institutions and other parties outside the tax entity and the tax administration that have relevant information.

In view of the robust system of legal regulation of international exchange of information, it cannot be expected that its importance or content will be increased in the future. Given the number of signatory states to the Convention, it can be expected that further obligations in the area of information exchange, as well as in other areas of international tax cooperation, will be addressed through the Convention or, in the case of the EU member states, through the DAC Directives system. In this case, although the system covers only a small group of member states in terms of numbers, the importance of these directives is mainly due to the intensity of cross-border activities of tax operators in the exercise of the fundamental freedoms that are the essence of the existence of the European Union.

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Received: September 15, 2024
Accepted: September 27, 2024
Published: December 30, 2024

· PUBLISHER ·
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