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## **The crime of budget fraud and problems of error in Hungarian criminal law\*\*\***

**ABSTRACT:** Taking account of the importance of combating budget fraud and tax evasion, this article aims to examine the topic of error in general and in the case of tax evasion. After a brief introduction, the article is divided into two main parts. Firstly, in order to understand the relevant issues, the models of regulation of tax crimes in Europe are outlined, including Hungary's national legislation on the crimes of budget fraud, which can be a good example of effectively combating against tax evasion in the field of substantial criminal law. Secondly, error as a ground for excluding criminal liability in general and in the case of tax fraud is presented and discussed, with particular reference to the issues of error of law, error of fact and, finally, misjudging the social danger of the offence.

**KEYWORDS:** Criminal law, error in general, error of law, error of fact, error of the social danger of the act, tax evasion, tax fraud, budget fraud, economic crisis.

### **1. Introduction**

An efficient tax system is a basic condition for the proper functioning of the state, including the Member States of the European Union. Public tax revenues are particularly important in economically difficult situations. However, the sole creation of tax legislation cannot function effectively without the establishment of criminal law protection. Tax evasion and fraud have existed for as long as tax has existed, but the methods, form and means of combating this type of crime have changed from one era to another. The fight against tax fraud has occupied an important place in the criminal policy of the Member States of the European Union over the last decades. The repressive and preventive objectives of criminal law also apply to the area of criminal tax law. With criminal law, the legislature – in view of its *ultima ratio* character – contributes to the observance of the tax legislation in force by providing for criminal sanctions in certain cases, such as the intentional “deduction” of state tax revenues which is violating the Criminal Code. It should be emphasized that tax evasion and tax fraud are closely linked to economic activity, and over the past years, there have been several cases of budget fraud in which the crimes were committed in a criminal organization.<sup>1</sup> The economic crisis of 2006-2008 also led to several reforms in the area of tax law and criminal tax law. This crisis pressed the national legislators to introduce new instruments to protect the revenue side of the budget. In Hungary, a conceptual change was introduced with the creation of the criminal offence of budget fraud<sup>2</sup>, and several were also amended in German and Austrian tax criminal tax law.<sup>3</sup> The COVID-19 pandemic also had a negative impact on the economy, leading to a decline in state tax revenues. To protect the economy, a number of changes affecting tax law and criminal tax law were introduced in the Member States of the European Union.

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<sup>1</sup> Sántha, 2019a, pp. 68-75.

<sup>2</sup> Molnár 2011; Tóth, 2014.

<sup>3</sup> Jacsó, 2017b, pp. 451-466.

During the pandemic, the risk of budget fraud has also increased significantly in Hungary. The unlawful use of state-funded special allowances, the sale of goods or the provision of services without handing over receipts or the cash payment of the employees to avoid paying social security contributions and other related contributions to the budget are only the most representative examples. Moreover, a large number of workers committed what is known as 'sick pay fraud' (benefit fraud) by claiming sickness pay from the general practitioner without actually being sick because they were afraid to go to work. If these frauds become increasingly common, it cannot be excluded that the potentially large number of criminal procedures may need to be balanced by extraordinary means, such as an amnesty.<sup>4</sup>

Tax evasion and fraud not only damage public finances and therefore jeopardize the stability of the financial system, but also have a number of other consequences that can affect not only the country concerned, but also the economies of other countries and the global financial system in the course of globalization. The lack of tax revenue increases public deficits and debt levels of the Member States, reduces the resources available to stimulate public investment and employment, and – last but not least – undermines citizens' confidence in the fairness and legality of tax collection.<sup>5</sup> There are several reasons why the fight against tax evasion/tax fraud is necessary. These behaviors distort competition in the European Union's internal market and have a negative impact on good governance, macroeconomic stability, social cohesion, and public confidence in the institutions.

New trends have emerged in the fight against tax evasion and tax fraud, which can be traced back to a number of factors. The process of economic globalization, especially the increase in international trade with the rapid development of information technologies, has led to new forms of tax crime. Therefore, coordinated action against tax fraud has become an increasingly important policy priority in recent years.

In this study, we would like to emphasize the relevant problems of error in general and in the case of tax evasion. To understand the problem, firstly it is necessary to outline the differences between national regulations.

## **2. Models of regulation of tax crimes**

The revenue and expenditure sides of the budget are typically protected by various criminal offenses in the Member States. In Austria and Germany, for example, the revenue side is protected by the specially regulated criminal tax law (criminal customs law), while the expenditure side is protected by fraud (subsidy fraud), which is regulated in the criminal code. In Hungary, however, both sides of the budget are protected by a single criminal offence, which is regulated in the criminal offence of budget fraud.

Criminal tax law is a special area of criminal law in all Member States of the European Union. In some Member States, it is regulated in the Criminal Code (such as in Spain, Slovakia or in Hungary), in others it is contained in special regulations (such as in Germany or France), while in others it can be found in the Financial Criminal Code (such as in Austria, Portugal and the United Kingdom since 2017).<sup>6</sup>

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<sup>4</sup> Ambrus, 2020, pp. 107-118.

<sup>5</sup> European Parliament resolution of 19 April 2012 on the call for concrete ways to combat tax fraud and tax evasion (2012/2599(RSP)), Available at: [https://www.europarl.europa.eu/doceo/document/TA-7-2012-0137\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-7-2012-0137_EN.html) (Accessed: 11 November 2020)

<sup>6</sup> Sewell, 2020; Dannecker, 2015, pp. 373-439.; Dannecker and Jansen 2007.

According to the research of Dannecker and Jansen<sup>7</sup>, the national regulations on criminal tax law can be divided into three models (I-III).<sup>8</sup> These can be supplemented by a fourth type of regulation, which was implemented in Hungary in 2012.

I.	II.	III.
<i>Comprehensive regulatory model</i>	<i>Differentiated system</i>	<i>Specific criminal law provisions</i>
In countries with a <i>comprehensive regulatory model</i> , we find a single criminal offence for all kinds of taxes (e.g. Germany <sup>9</sup> ).	In countries with a <i>differentiated system</i> , there is a fundamental distinction between tax evasion and its more serious forms (tax fraud), which implies “some extra criminal activity” (e.g. Austria <sup>10</sup> ).	In the countries classified in the third group, specific criminal law provisions can be found in different tax laws (e.g. Greece, Denmark).
IV. „Hungarian model”		
The Hungarian regulation can basically be classified into the comprehensive regulatory model. However, the unified approach that focuses on the budget differs greatly from the regulation of the other Member States, therefore – according to our point of view – it forms a separate category. <sup>11</sup>		

### **2.1. The crime of budget fraud in Hungary**

Under Hungarian criminal law, national and European financial interests are protected in the same way, therefore our solution could serve as an example for other countries. The Hungarian legislator tries to solve the major problem of tax evasion with new methods. Therefore, with Act LXIII of 2011, which came into force on January 1, 2012, the fraud-related offences (tax fraud, employment related tax fraud, excise tax violation, illegal importation, VAT fraud, unlawful acquisition of economic advantage, violation of the financial interests of the European Communities) were integrated into one single criminal offence. The name of this integrated offence was budget fraud.

With the new regulation of the financial criminal law of 2011, the legislature intended to achieve the following objectives: to ensure more effective and coordinated protection of the budget, to eliminate loopholes and opportunities for abuse, to eliminate interpretation problems in connection with the criminal offence of violating the financial interests of the European Communities, to eliminate delimitation problems, and to ensure uniform protection of the revenue and expenditure side of the budget as well as the national and EU budget.

<sup>7</sup> Dannecker and Jansen 2007; Dannecker 2015; Jacsó 2015; Jacsó 2017b

<sup>8</sup> „Uniform tax offense with qualifications or examples of rules”; „Uniform tax offense, supplemented by one independent offense to record serious violations” and “Criminal tax law special regulations in individual tax laws” See Dannecker, 2015, pp. 373-439.

<sup>9</sup> Germany has as uniform offence for tax and customs evasion in the crime tax evasion (Article 370 Tax Code – Abgabenordnung (AO)).

<sup>10</sup> E.g. perpetration of the tax evasion with the use of fictitious bills, transactions, this is separated in the crime of tax fraud (Art. 39 FinStrG, ‘Abgabenbetrug’). See more Leitner and Brandl and Kert, 2017, pp. 206-222. This model was introduced by the reform of the Financial Criminal Law (Finanzstrafgesetz - FinStrG) in 2010, by which the Austrian legislature decided for the solution similar to the Swiss legislation. See Dannecker 2015.

<sup>11</sup> Budget fraud Art. 396 of the Hungarian Criminal Code. See: Sántha, 2019, pp. 68-75.; Jacsó 2017b; Jacsó 2017c; Jacsó and Udvarhelyi, 2019, pp. 128-137.

In order to achieve the aforementioned objectives, the focus of the protection against budget fraud becomes the budget<sup>12</sup> itself.

Both the revenue and expenditure sides of the EU budget are covered by the legal definition of budget fraud. On the expenditure side, the Hungarian regulation protects not only the budget managed by the European Union or by other Member States, but also the budget of any other foreign states.<sup>13</sup>

<i>Structure of the regulation of budget fraud in the Hungarian Criminal Code (Article 396)<sup>14</sup></i>				
Article 396(1) a)–c)		Article 396(2) – (5)	Article 396(8)	Article 396(9)
1 <sup>st</sup> category	Budget fraud in the narrower sense	Aggravating circumstances	Reduction of the penalty without limitation	Explanatory provisions: - budget - financial loss
Article 396(6)				
2 <sup>nd</sup> category	Budget fraud committed on excise goods			
Article 396(7)				
3 <sup>rd</sup> category	‘Administrative budget fraud’	–	–	

The criminal offences of budget fraud can be divided into three different types of conducts: a distinction can be made between budget fraud in the narrower sense<sup>15</sup>, budget fraud committed on excise goods, and the violation of settlement, accounting or notification obligations relating to funds paid or payable from the budget (administrative budget fraud).<sup>16</sup> Budget fraud in the narrower sense can be committed by anybody who

- (a) induces a person to hold or continue to hold a false belief or suppresses known facts in connection with any budget payment obligation or with any funds paid or payable from the budget, or makes a false statement to this extent;
- (b) unlawfully claims an advantage made available in connection with budget payment obligations; or
- (c) uses funds paid or to be paid from the budget for purposes other than those authorized; and thereby causes financial loss to one or more budgets.

The criminal offence is a misdemeanor punishable by a maximum of two years’ imprisonment.<sup>17</sup> According to the Hungarian Criminal Code, budget fraud is a material offence punishable if it causes financial loss to one or more budgets. The penalty that can be imposed on the perpetrators of budget fraud depends on the amount of the financial loss. The legislature has defined as an aggravating circumstance that the budget fraud is committed in a criminal organization with accomplices or on a commercial scale.

<sup>12</sup> According to the legal definition of Art. 396(9)(a) of the Hungarian Criminal Code, ‘budget shall mean the sub-systems of the central budget - including the budgets of social security funds and extra-budgetary funds -, budgets and/or funds managed by or on behalf of international organizations and budgets and/or funds managed by or on behalf of the European Union. In respect of crimes committed in connection with funds paid or payable from a budget, the term budget shall also mean - in addition to the above - budgets and/or funds administered by or on behalf of a foreign state.’

<sup>13</sup> Sántha 2019; Jacsó and Udvarhelyi, 2019, pp. 128-137.

<sup>14</sup> Jacsó 2017c; Jacsó and Udvarhelyi, 2019, pp. 128-137.

<sup>15</sup> Karsai, 2013, pp. 919-931.

<sup>16</sup> Udvarhelyi, 2019b, pp. 6-23.

<sup>17</sup> Art. 396(1) of the Hungarian Criminal Code.

From the point of view of legal error, it should be emphasized that all three basic types of budget fraud are intentional criminal offenses. Similar to the PIF Directive, negligent conducts are not punishable. The consciousness of the perpetrator has to capture not only the punishable acts, but the result as well. The error precludes the criminal liability of the perpetrator. In the case of an error of the facts, the perpetrator is not aware of the objective elements of the criminal offence. In court practice, however, the perpetrator is acquitted due to the lack of a criminal offense, so that the criminal offence cannot be established. Errors of the social danger are rare in court practice.<sup>18</sup> It can be justified if the perpetrator receives false information from the authorities.

## ***2.2. Criminal liability of heads of business***

### ***2.2.1. Basis of the liability***

The characteristic of this type of liability is that the head of business does not participate in committing the crime, neither as a perpetrator nor as an accomplice. Liability is based on the perpetrator's position within an organization or hierarchy and his omission or breach of duty in connection with the criminal offence.

In 2001, as part of the harmonization of criminal law at European level, the Act CXXI of 2001 amending the Hungarian Criminal Code introduced the criminal liability of the heads of *business* regarding two criminal offences. Now, with respect to the budget fraud, Article 397 of the Criminal Code now contains the relevant provision, a separate offence named 'Omission of Supervisory or Controlling Duty in connection with Budget Fraud'. According to this article,

The leader of the business organization, or its member or employee entitled to control or supervision is punishable, if the member or employee fails to fulfil the duty of control or supervision, and thus makes it possible for the member or employee of the business organization to commit the budget fraud within the scope of the business organization's activities.<sup>19</sup>

### ***2.2.2. The elements of the liability of heads of business***

a) For the heads of business to be found guilty, a criminal offence (basic-offence) must have been committed by a relevant person. The basic-offence is budget fraud, which must have been committed within the scope of the business organization's activities. The offender of the basic-offence can be any member or employee of the business organization.

b) The subject of this special liability (head of the business), namely the special perpetrator is the leader of the business organization, or its member or employee entitled to control or supervision. In Hungary, instead of enumerating the potential liable persons, a framework-definition is used, the framework is filled by the relevant rules of civil law concerning the given organization. Usually, the laws of different kinds of business organizations lay down the conditions under which a person can be considered a leader, and the relevant law or the charter of the given organization describes the employees who are entitled to control or supervision.

c) The relationship between the head of the business/the business organization and the offender of the basic-offence must be examined on different levels. Firstly, the head of the business exercises control or supervision over the activities of the person who commits the crime. On the other hand, the offender of the basic-offence commits it 'within the scope of the

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<sup>18</sup> EBH 2003.931.

<sup>19</sup> Similar provision can be found regarding the crime of Active Official Bribery Art. 293 (4) and (5).

business organization's activities'. Consequently, if the budget fraud has no connection with the activities of the organization, or the employee or the member commits the crime for his own benefit, the leader is not responsible.

d) The next objective element is the offence of the head of the business. The criminal conduct of the leader is an omission, namely the failure to fulfill the control or supervision obligation. The nature of the failure must be examined prudentially, since the fact that an offence was committed within the framework of the business organization indicates provable errors and deficiencies in the organization. However, it is also very important to refrain from the approach according to which the mere fact of the offence presumes deficiencies in the control and supervision process. Therefore, the actual break of duty by the head of the business and its relation to the crime committed by the employee (member) must be examined in each case. It is suitable to distinguish between high-level leaders and other leaders. The task of the high-level leaders is to develop and operate a control and supervision system to prevent the commission of crimes and control the activities of the lower-level leaders. As far as the liability of subordinate leaders is concerned, the fulfilment or break of the personal duties of the particular leader must always be examined.

e) The subjective element of liability, the *mens rea* of the head of the business, must be examined from two angles. First, the criminal conduct (failure to exercise mandatory control or supervision) should be intentional. The other - and most controversial - issue of the *mens rea* of the head of the business is the awareness of the basic offence. According to one of the academic approaches, the head of business shall not know that the employee/member is about to commit a crime because he, as the perpetrator, is responsible for the basic offence. This is the abetting by omission.<sup>20</sup> On the other hand, it may be argued that the knowledge of the head of the business about the basic offence is not relevant, and he is responsible on the basis of the special form of liability, regardless of whether he did or did not know that the employee/member wanted to commit an offence. This approach is confirmed by the argument that the liability of the heads of business is a *sui generis* form of criminal perpetration that precedes the application of the rules of abetting.

f) The final – and further problematic – element is the *link* between the head's of the business omission and the basic offence. The words of Article 397 ('if the member or employee fails to fulfill his duty of control or supervision, and *thus enables* the member or employee of the business organization to commit budget fraud') indicate that this relationship is a (hypothetical) causal link between the omission of the head of business and the budget fraud.

Finally, it should be emphasized that there were no cases in which Hungarian criminal courts punished the head of the business based on these special forms of liability. We can console ourselves that the existence of a legal order in itself has a considerable deterrent effect on the future attitudes of business and other leaders.

### 3. Error in general and in case of tax evasion

The topic of error in criminal tax law is an important practical problem raising a number of theoretical problems.<sup>21</sup> The regulation of errors is an immanent part of the criminal law system in the Member States of the European Union. According to the research of Dannecker and Jansen, the error is evaluated among the *mens rea* elements of the criminal offence only in the Czech Republic and in Slovakia.<sup>22</sup> In case of tax evasion, we generally have to differentiate between error within criminal law and error outside of criminal law regulation. In the first case

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<sup>20</sup> Molnár, 2017, pp. 107-118.

<sup>21</sup> Dannecker and Jansen, 2007.

<sup>22</sup> *Ibid.*

it is an error in accordance with the elements for the criminal offence, while the second means the error in the circumstance outside of the criminal law.<sup>23</sup>

### ***3.1. Error in general as a reason for excluding criminal responsibility***

Errors are the fault of senses, the incorrect reflection of reality in human consciousness. Criminal law errors can have considerable consequences: Excluding or limiting the criminal liability of the perpetrator for a criminal offence. Of course, an error does not change the existing situation or the objective reality, but it affects the mens rea and may exclude the intent to commit a criminal offence.

In criminal law, a traditional distinction is made between errors of fact and errors of law, and a third form is also known in the Hungarian legal system, namely the error of the social danger of the act. This latter form of error is often referred to 'error of unlawfulness of the act' or 'error of prohibition' in foreign legal literature ('Verbotsirrtum' in German criminal law).<sup>24</sup>

According to the traditional principle of 'ignorantia legis neminem excusat' (ignorance of law excuses no one), an error of law does not exclude criminal responsibility, since everyone is presumed to know the law. However, in common law legal systems, judicial practice recognizes a legal error as relevant when a legal text was inaccessible to the accused or is invalid because of vagueness, or the accused acts on the basis of an official's incorrect legal opinion.<sup>25</sup> Moreover, in some civil law systems, legal errors have been incorporated into the criminal codes, see, e.g. Article 122-3 of the French Criminal Code<sup>26</sup> or Article 17 of the German Criminal Code.<sup>27</sup>

Error of law (in a narrow sense) usually does not affect the punishability of the perpetrator, if the perpetrator is not aware

- that his/her conduct constitutes a criminal offence;
- of the legal classification of his/her criminal conduct;
- of the level of the punishment.<sup>28</sup>

However, it should be emphasized that there are no clear dividing lines between the three types of error mentioned, which interact and can complement each other, e.g. the error of law, namely the lack of adequate knowledge about the legislation and legal requirements, may be the basis of the error of the social danger.<sup>29</sup> It is also worth mentioning that the first case of error of law/ignorance of law is 'general ignorance', which means a lack of information about a legal provision or a legal question.<sup>30</sup> In this context, Dan-Cohen pointed out that the

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<sup>23</sup> See more about the error regulation by tax evasion in Europe by Dannecker and Jansen, 2007. About the error in financial criminal law: Kahl and Kert, 2017, pp. 206-222.

<sup>24</sup> The German criminal law distinguishes between two forms of error (error of fact and error of prohibition, Art. 16 and Art. 17 German Criminal Code). 'Error of fact (1) Whoever, at the time of the committing the offence, is unaware of a fact which is a statutory element of the offence is deemed to lack intention. Any criminal liability due to negligence remains unaffected. (2) Whoever, at the time of commission of the offence, mistakenly assumes the existence of facts which would satisfy the elements of a more lenient provision may only be punished for the intentional commission of the offence under the more lenient provision.' Error of prohibition: 'If, at the time of the committing the offence, the offender lacks the awareness of acting unlawfully, then the offender is deemed to have acted without guilt if the error was unavoidable. If the error was avoidable, the penalty may be mitigated pursuant to Art. 49 (1).' See more about the differences between the two forms of error: Roxin, 2008, pp. 275-390.; Dannecker, 2007, pp. 57-322; Nagy, 2004.

<sup>25</sup> Scaliotti, 2002, pp. 1-46.

<sup>26</sup> 'A person is not criminally liable who proves that he believed, because of the error of law which he was not in a position to avoid, that he could legitimately carry out the act.' See in Elliott 2000.

<sup>27</sup> 'If the perpetrator, while committing an offence, is not aware to act unlawfully, his guilt is excluded, provided that he could not have avoided this error.' See in Badar, 2005, pp. 203-246.

<sup>28</sup> Gál, 2007.

<sup>29</sup> Hati, 2012, pp. 11-18.

<sup>30</sup> Gellér, 2008.

indeterminacy of the standards makes it less likely that ordinary citizens will be able to rely on them or the sheer volume and complexity of the law would probably elude the legally untutored citizen.<sup>31</sup> Furthermore, it is possible that even a lawyer could not have known for sure that the act in question constituted a crime which is called 'special ignorance of law' by Gellér. This may be due to the vagueness of the effective law or the retroactive amendment of the legal provision in question, and the third possible situation when the perpetrator sought legal advice from the authority and acted accordingly but the advice later proved inappropriate.<sup>32</sup> The latter, as we will see later, may be relevant as an error of the social danger in Hungarian judicial practice.

Error of law is not regulated by the Hungarian Criminal Code which distinguishes between error of fact and misjudging the social danger of the offence (error of the social danger of the act).

### **3.2. Error of fact**

Given the fact that an actual error affects and can exclude the intention to commit a criminal offence, our starting point is the principle that the perpetrator must be aware of all the objective statutory elements of the respective criminal offence, i.e. he/she must know the relevant features of the criminal conduct, the object of the perpetration (e.g. the object of another person in case of theft), the result of the criminal conduct (e.g. the damage) and the causal relation between the conduct and the result, and finally the place (e.g. the public event), the time (e.g. at night), the means (e.g. armed) and the method of the perpetration (e.g. with violence). Consequently, the perpetrator shall not be punishable for a fact which was not known to him at the time of committing the criminal offence.<sup>33</sup> If the perpetrator lacks knowledge of an objective statutory element of the offence, this element cannot be taken into account in the legal classification of the act.<sup>34</sup> Accordingly, an error of fact could have the following legal consequences:

- a) Error excluding the perpetrator's liability for the offence in question.
  - The perpetrator made an error in the relevant features of the object, e.g. the accused shall not be punishable for counterfeiting money if he/she did not know that the money was counterfeit at the time of payment;
  - The perpetrator was not aware of the relevant features of the criminal conduct, e.g. the perpetrators (a brother and her sister) shall not be punishable for incest if they had no knowledge about the family relationship between them;
  - 'Error of age-defence': if a person has a consensual sexual relationship with a person younger than 14 years old, he/she cannot be convicted of sexual abuse if he/she reasonably believed that the partner was above this age;
  - Error about the causal relationship between the conduct of the perpetrator and the prohibited result of the offence, e.g. the nurse gives the patient poison from a factory-labelled medicine box and the patient dies, the nurse cannot be held liable for homicide if she/he was not able to recognize the exchange of the pills, even by exercising reasonable care.<sup>35</sup>
- b) Error excluding the punishability of the perpetrator for the offence in question but liability for another – usually a less severe – offence.
  - Age misconception: if the perpetrator has a consensual sexual relationship with a person under the age of 12, but he truly believes that the partner is 13 years old, he cannot be convicted of rape, but is guilty of sexual abuse;

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<sup>31</sup> Dan-Kohen, 1984, pp. 625-677.

<sup>32</sup> Gellér, 2008.

<sup>33</sup> Hungarian Criminal Code, Art. 10(1).

<sup>34</sup> Blaskó and Lajtár and Elek, 2013, pp.137-147.

<sup>35</sup> Sántha, 2019b, pp. 207-211.

- Error in the qualifying circumstances of the offence in question (except for the result of the offence): If the victim was already dead when the perpetrator dismembered the victim's body into pieces, he/she will not be punished for qualified homicide, but for simple homicide even if he/she believed that the victim was still alive at the time of the dismemberment;
- According to Article 20(3) of the Hungarian Criminal Code, an error of fact does not exclude punishability if the error was caused by negligence and the Code punishes the offence committed by negligence as well. E.g. the woman is liable for negligent homicide if she gives birth to a healthy child who dies due to inadequate care because she mistakenly believes the child was stillborn;
- An error in the identity of the victim (error in personae) can only be relevant if the victim is strongly protected, e.g. if the perpetrator intends to injure his neighbor but hits a police officer in the dark, he/she cannot be convicted of assault on a public official, but (the less severe) bodily harm. The same rule applies to the error in object (error in obiecto).
- c) Error not affecting the liability of the perpetrator (irrelevant error).
- Error in the identity of the victim, e.g. the perpetrator intends to injure his neighbor but hits another person in the dark;
- 'Situations of failed attacks'<sup>36</sup> or aberratio ictus, when the perpetrator's act is not carried out on the target person, but – as a result of his/her negligence – on another person present at the crime scene. E.g. if the perpetrator aims to kill X but by chance or lack of skills hits Y, who dies, he/she is liable for negligent homicide of Y and also for the attempt of (intentional) homicide of X;
- Irrelevant error of the causal relationship (dolus generalis), e.g. the perpetrator wrongly assumes that his victim has already died as a result of his prior violent conducts and throws the body into the river, whereupon the still-living victim drowns. This error is irrelevant, the offender is punishable for homicide<sup>37</sup>;
- Error of the result as a qualifying circumstance of the offence is irrelevant since the more severe consequences attached to the result as a qualifying circumstance of the crime may be applied if the perpetrator is at least charged with negligence in respect of the result.<sup>38</sup> E.g. the perpetrator is guilty of bodily harm causing serious health impairment, even if he/she did not intend to cause this effect but he/she was able to recognize it.<sup>39</sup>

### ***3.3. Error of fact in tax evasion***

In criminal proceedings for economic crimes, especially in tax evasion proceedings, the perpetrator's error plays an important role. What constitutes a factual error when it comes to tax evasion? First, we must determine what constitutes the elements of the crime that are defined in the Criminal Code. Especially when it comes to the crime of tax evasion, the answer is not so simple and concerns the question of the blanket laws.<sup>40</sup>

According to the German Federal Constitutional Court, 'the prerequisites for criminal liability must then be described sufficiently clearly either in the blanket penal act itself or in the law referred to (...). In addition, the blanket law must make it sufficiently clear what the proposal refers to.'<sup>41</sup> This has to comply necessarily with the legal certainty requirement in criminal law. *Binding* was one of the first in criminal law literature who paid greater attention to this particular

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<sup>36</sup> Blomsma, 2012.

<sup>37</sup> Karsai and Szomora, 2010, pp. 77-102.

<sup>38</sup> Hungarian Criminal Code, Art. 9.

<sup>39</sup> Sántha, 2019b, pp. 207-211.

<sup>40</sup> 'Blankettstrafgesetze': Tiedemann, 2014; Dannecker, 2007, pp. 57-322.

<sup>41</sup> BVerfG, Beschl. v. 29.04.2010 – 2 BvR 871/04, 2 BvR 414/08, 56.

form of criminal offense. The disposition of the criminal offence must not be completely 'empty', because this would impair the legislature's power to exercise punitive power and this would be incompatible with the requirement of certainty. In contrast, elements of the offense with a normative character only presuppose the application of individual non-criminal legal terms or legal rules. They have to be filled in, but not in the form of blanket penal norms. These penal norms do not contain any express legal reference to any other norm. The classic example of this is the subject of theft, a 'foreign' thing, whereby the definition of 'foreign' property must be determined on the basis of the civil law.<sup>42</sup> The question of whether tax evasion should be understood as a blanket law or as a criminal offense with normative character is not assessed uniformly in the states. In Germany there is a dispute about the classification of the crime of tax evasion. According to the opinion of the judicial practice, the criminal norm of tax evasion contains provisions relating to substantive tax law by the elements of tax loss and the breach of duty.<sup>43</sup>

Contrary to the opinion of the jurisprudence, the legal literature takes the view that tax evasion is not a blanket offense, but a criminal offense with normative features.<sup>44</sup> However, the established jurisprudence regards certain cases as errors of fact.<sup>45</sup> The abbreviation of tax represents a blanket reference to the laws that determine the tax claim of the state. Nevertheless, according to the Federal Court of Justice in Germany, an error about the tax claim is an error of fact according to § 16 Art 1 Sentence 1 of the German Criminal Code.<sup>46</sup> The jurisprudence in Germany sees the error about the tax claim in § 370 AO as a special case of the doctrine of error.<sup>47</sup> The "subject of the intent" is the existence and amount of the tax claim. 'According to the established case law of the Federal Court of Justice, the intent of tax evasion includes that the perpetrator knows the reason and amount of the tax claim or at least believes it to be possible and wants to reduce it, whereby the conditional intent is sufficient. If the taxpayer incorrectly assumes that no tax claim has arisen, there is an error of fact that excludes intent according to case law (§ 16 (1) sentence 1 StGB)'.<sup>48</sup>

In Hungarian judicial practice, the error of fact in budget fraud cases is *almost completely ignored*, although the perpetrators often rely on errors of fact, e.g. that they were not aware that the invoice was fictitious or – in case of the so-called 'temporary work agency scam'<sup>49</sup> – they did not know that the fraudulent agency failed to pay the social security and other related contributions to the budget. According to the practice of the tax authorities, an invoice is fictitious if it has significant deficiencies in content and includes false information about the business transaction or the participants. An indication of a fictitious invoice could be if the economic transaction between the participants on the invoice did not take place at all, or the transaction took place but not between the persons specified on the invoice, or the transaction took place between the persons, but the buyer knew or should have known that he was actively

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<sup>42</sup> Dannecker, 2007, pp. 634-674.

<sup>43</sup> See Art. 370 AO: 'Tax evasion (1) A penalty of up to five years' imprisonment or a monetary fine shall be imposed on any person who

1. furnishes the revenue authorities or other authorities with incorrect or incomplete particulars concerning matters that are relevant for tax purposes,

2. fails to inform the revenue authorities of facts that are relevant for tax purposes when obliged to do so, or

3. fails to use revenue stamps or revenue stamping machines when obliged to do so and as a result understates taxes or derives unwarranted tax advantages for himself or for another person.'

Available at: [https://www.gesetze-im-internet.de/englisch\\_ao/englisch\\_ao.html#p2615](https://www.gesetze-im-internet.de/englisch_ao/englisch_ao.html#p2615) (Accessed: 12 January 2021).

<sup>44</sup> Dannecker, 2007, pp. 634-674.

<sup>45</sup> Bülte, 2019, pp. 176-217; Bülte, 2013, pp. 65-72.

<sup>46</sup> 'Steueranspruchstheorie': Krell, 2019, pp. 145-175.

<sup>47</sup> According to meaning in the literature this is not necessary. See: Bülte, 2019, pp. 176-217.

<sup>48</sup> BGH 1 StR 296/19. The conditional intent is in this case *dolus eventualis*.

<sup>49</sup> Sántha, 2019b, pp. 207-211.

involved in the tax evasion. Circumstances to be examined in this regard, e.g.: can the company be found at the registered office; whether the company has the personal and material requirements necessary to perform the business transaction; whether the company is listed in the business register at all or is in liquidation, etc. If this is the case, the buyer (the accused in the criminal procedure) has taken the substantial steps to check the above-mentioned requirements and could not recognize that the invoice was fictitious, he/she cannot be held liable for budget fraud, which can only be committed intentionally.

When courts rarely accept these defenses, the acquittal decisions are based on the lack of criminal offences and do not refer to the provision of error of fact. However, one exception can be mentioned: budget fraud is committed, as an indirect perpetrator by the so-called *de facto* leader of the company, who prepared and submitted the false tax return, misleading both the *de jure* leader and the tax authority. In this case, the *de jure* leader of the company cannot be punished for his error of fact.<sup>50</sup> In another case, the court pointed out: It may appear that the official head of business acted negligently and did not foresee the consequences of his actions, because he failed to pay the attention expected of him and trusted in the *de facto* leader, gave full authorization to him, but the crime of budget fraud cannot be committed by negligence.<sup>51</sup> Moreover, there are many examples in which the Prosecutor's Office, on the basis of criminal tactical reasons, does not bring charges against these *de jure* leaders (who are in many cases practically stooges in many cases), but rather examines them as witnesses and collects evidence against the *de facto* leader.<sup>52</sup> At the same time, judicial practice is not at all uniform: there are court decisions in which the *de jure* leader/stooge was also responsible for budget fraud. According to the courts' reasoning, the official head of business is fully responsible for directing and controlling the activity of the company and he/she may not rely on the defence that he/she was not aware of the processes and events in the company.

### 3.3.1. Misjudging the social danger of the offence

Intent consists of two separate components, the cognitive part and the volitional part. The cognitive part can also be divided into two elements: The first is knowledge of the facts, which means that the perpetrator must be aware of all the objective elements of the offence, and the second is awareness of the social danger of the act which is established if the perpetrator is aware of the unlawfulness of the act or of the material danger of his/her conduct, or he/she knows that the act in question is morally reprehensible.<sup>53</sup> The perpetrator can therefore only rely on the error of the social danger of the act if he knew neither the illegality nor the danger and did not recognize the conduct.

In most criminal cases, the criminal courts assume that the offender was aware that the act was socially dangerous because knowledge of the objective elements of the offense also conveys an awareness of the social danger.<sup>54</sup> Moreover, it is not sufficient that the perpetrator 'commits the act in the mistaken belief that it is not dangerous to society', but must have reasonable grounds for this belief.<sup>55</sup> Based on this legal definition, a successful defense of this type of error is very limited in court practice.

The Courts take into account the following circumstances when examining the awareness of the social danger:

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<sup>50</sup> BH2010.319.I.

<sup>51</sup> Szeged Court of Appeal Bf.23/2014/6.

<sup>52</sup> Fodor, 2017, pp. 90-111.

<sup>53</sup> Sántha, 2019b, pp. 207-211.

<sup>54</sup> Karsai, 2019, pp. 77-102.

<sup>55</sup> Hungarian Criminal Code, Art.10(2).

- The nature of the criminal conduct in question: most criminal offences are traditionally punishable (e.g. homicide, rape, theft), the danger and unlawfulness of these crimes are obvious to everyone.<sup>56</sup> Similarly, lending money on usurious rates is a socially condemned and forbidden act, even for the perpetrator who has only completed a primary school education. In contrast, there are several criminal offences which are defined in so-called framework dispositions, which refer to rules stipulated by statutes of other fields of law.<sup>57</sup> The framework disposition of budget fraud, for example, is filled in by the highly complex customs and tax legislation – in the form of laws, government regulations and other rules – which are frequently changed and sometimes difficult to understand even for an expert.

In these cases, perpetrators are more likely to commit the offence in the erroneous belief that it is not dangerous to society, especially if the courts of first and second instance disagree.<sup>58</sup> Moreover, understanding the legal background of the relevant national and EU law often requires specific (legal) expertise, and knowledge of a regulation of an administrative nature can usually be expected from those who regularly deal with the rules. However, an error as to the social danger of the act may be invoked by an accused who occasionally and arbitrarily infringes the complicated and difficult-to-access regulations.<sup>59</sup>

- The personal circumstances of the perpetrator, especially his/her level of education, expertise and practice, but error is not a valid defense in relation to the commonly known facts<sup>60</sup>, and the court refused to consider the argument that knowledge of a subordinate regulation – e.g. a government regulation – is not to be expected from a layperson.<sup>61</sup> Higher expectations must be set for persons with special experience for the content of the law and, in this context, for the error of social danger.<sup>62</sup> In a criminal case relating to credit transactions, the court emphasized that the defendant, who had completed a degree in economics and had professional experience, could have been expected to have the necessary knowledge of the social value judgement of the facts;<sup>63</sup>

- False information by an authority: the accused acquitted by the court in a case of budget fraud who did not pay tax on the basis of the decision of the tax authority of the second instance after taking possession of warehouse receipts. According to the decision, the tax is not due merely by possession of the receipts. The court pointed out that the defendant who acts in reliance on the decision of the authority, even if the decision of the authority was wrong, he/she has reasonable grounds to believe that the act is not dangerous to society;<sup>64</sup>

- It is generally considered that incorrect information/misadvice from a lawyer (private attorney) cannot give rise to an error of the social danger. By contrast, according to the court's questionable decision, however, the perpetrator shall not be punishable if he/she commits the offence on the basis of and in reliance on the advice of a lawyer because he/she committed the offence in the mistaken belief that it was not socially dangerous. In this case, the lawyer is liable for the offence as an indirect perpetrator;<sup>65</sup>

- Employment of an accountant is a common defense of the perpetrator in budget fraud cases, e.g. 'the accountant was responsible for preparing and submitting the tax return' (Elek 2009). This defense is not accepted by the court: The employment of an accountant does not eliminate the liability of the accused (the head of the business) for the submission of the tax

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<sup>56</sup> Sántha, 2019b, pp. 207-211.

<sup>57</sup> Ibid.

<sup>58</sup> Supreme Court Bfv. III.843/2008/5.

<sup>59</sup> Supreme Court Bfv.II.360/2007/5.

<sup>60</sup> Metropolitan Court of Appeal Bf. 5.1.017/2004/9.

<sup>61</sup> Supreme Court Bfv.I.593/2006/5.

<sup>62</sup> Elek, 2018.

<sup>63</sup> Supreme Court Bfv. X.16/1999/6.

<sup>64</sup> EBH 2003.931.

<sup>65</sup> BH 2018.216.II.

return, as he/she should have verified the submission.<sup>66</sup> However, in our view, a leader of a company can successfully rely on the defence of error of the social danger if he/she made all reasonable efforts to control the accountant's activity;

- The reference to criminal law-literature (textbooks, commentaries) is of great interest in court practice. According to an earlier decision, an explanation published on judicial practice (e.g. a commentary on the Criminal Code) may not form the basis of the error of the social danger, but is (only) to be regarded as an opinion of legal literature.<sup>67</sup> In another case, the accused law student argued that his opinion of the case and his conduct had been established on the basis of a criminal law textbook and therefore he could not have committed the offence. However, the court did not accept the accused's defense: Knowledge of the legal literature alone is not a reason to invoke the error of the social danger; rather, the defendant must also confirm that he/she carefully examined the relevant legal literature and did so before committing the offence.<sup>68</sup>

#### 4. Conclusions

The protection of public tax revenues through criminal law measures is an integral part of national criminal law in all Member States of the European Union. However, the Directive 2017/1371 of the European Parliament and of the Council<sup>69</sup> has brought about a significant change in this area, as it has established the criminal law basis for joint action against serious VAT fraud<sup>70</sup> to the detriment of the common VAT system.<sup>71</sup> The foundations were laid by the new EU criminal law introduced by the Treaty of Lisbon, which paved the way for harmonization in the area of tax criminal law.<sup>72</sup>

The measures to combat tax evasion and tax fraud are also in line with the opinion of the majority of EU citizens. The Eurobarometer surveys from 2017 show that the following areas must be a priority for the citizens of the European Union: The fight against terrorism (80%), unemployment (78%) and environmental protection (75%), as well as the fight against tax fraud (74%).<sup>73</sup>

As can be seen, the Hungarian Criminal Code provides effective protection of the national budget and of the budgets through the crime of budget fraud. It should be emphasized that the fight against tax delinquency in Hungary has taken place at various levels.<sup>74</sup> The Hungarian tax system has been restructured in recent years. In 2015, the online cash register was introduced.

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<sup>66</sup> Supreme Court Bfv. III.315/2002/3.

<sup>67</sup> Supreme Court Bfv. III.97/2000/5.

<sup>68</sup> Supreme Court Bfv. II/13/2009/5.

<sup>69</sup> Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. See: Udvarhelyi, 2019a, pp. 205-215; Udvarhelyi, 2019c, pp. 208-211.

<sup>70</sup> According to the PIF Directive, this is the case when activities or omissions related to VAT fraud relate to the territory of two or more Member States of the Union and cause total damage of at least EUR 10 million. (Art. 2(2) of the PIF Directive)

<sup>71</sup> See more details about the results of the HERCULE III Project „Criminal Law Protection of the financial interests of the EU – Focusing on Money Laundering, Tax Fraud, Corruption and on Criminal Compliance in the National Legal Systems with reference to Cybercrime. Available at: <https://hercule.uni-miskolc.hu/study> (Accessed: 06 November 2020).

<sup>72</sup> See about Europeanisation of tax criminal law, especially of the regulation of tax evasion: Dannecker, 2015, pp. 373-439; Jacsó, 2017b, pp. 451-466.

<sup>73</sup> Britons want to see more cooperation with EU in security and fighting terrorism new poll finds. Available at: <https://www.europarl.europa.eu/news/en/press-room/20170427AVI72826/uk-eurobarometer> (Accessed: 6 November 2020).

<sup>74</sup> Jacsó, 2017a, pp. 1330-1332, Jacsó and Udvarhelyi, 2019, pp. 129-128.

In connection with the fight against tax crime, another measure should also be highlighted: the Electronic Public Road Trade Control System<sup>75</sup> introduced in 2015.

This system is particularly important in the context of VAT fraud, as it aims to strengthen the market position of law-abiding traders, to make the movement of goods more transparent, to prevent food fraud, which often endangers human health, and, last but not least, to prevent tax evasion. With the help of this system, the actual route of the goods can be tracked because the transport-related data (name and quantity of goods, recipient, sender, vehicle registration number, etc.) must be registered in a central electronic system before the transport begins. Within five years, the VAT tax gap fell by 12 percentage points to 9%; such a reduction in VAT fraud is also exemplary at the EU level.<sup>76</sup>

It should be emphasized that a common approach is needed to effectively fight against tax evasion; states cannot solve this problem alone. The European Union and the Member States must work together to combat tax evasion and tax fraud.

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<sup>75</sup> See: Electronic Public Road Trade Control System. Available at: <https://ekaer.nav.gov.hu> (Accessed: 20 October 2020).

<sup>76</sup> Significant reduction in tax evasion. Available at: <https://ado.hu/ado/jelentosen-visszaszorult-az-adocsalas/> (Accessed: 12 January 2021).

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