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POLICY DEPARTMENT
ECONOMIC AND SCIENTIFIC POLICY **A**

Economic and Monetary Affairs

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Overview of Legislation Practices Regarding Exchange of Information between National Tax Administrations in Tax Matters

Study for the TAXE Special Committee



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STUDY

Abstract

This paper forms part of a series of analytical pieces on various key tax issues, prepared by Policy Department A at the request of the TAXE Special Committee of the European Parliament. It deals with the need for information exchange between sovereign states on tax-related issues, which is increasing rapidly. In this vein, the Organisation for Economic Co-operation and Development (OECD) and the EU have developed better instruments of information exchange. The OECD has enlarged the scope of Articles 26, 27 of the OECD Model Tax Convention (MTC) and has in parallel proposed a specific Tax Information Exchange Agreement (TIEA) Model. Both sources have been increasingly used in the bilateral treaty practice. In parallel, the EU has enacted two new directives: the Directive concerning Mutual Assistance for the Recovery of Claims and the Directive on Administrative Cooperation. This paper aims at providing a systematic overview of recent developments (including on the concept of 'automatic exchange') and explains the content and function of the legal sources delimiting each other. The paper also deals with the legal protection of taxpayers, especially with the protection of personal data and commercial, industrial, business and professional secrets. It emphasizes the necessity of an international tax secret as an EU minimum standard.

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LIST OF ABBREVIATIONS

ACBR	Advance Cross-Border Ruling
AEFI	Automatic Exchange of Financial Account Information
AEOI	Automatic Exchange of Information
AML	Anti-Money-Laundering
APA	Advance Pricing Agreement
Art	Article
CAA	Competent Authority Agreement (CAA)
CETS	Council of Europe Treaty Series
CJEU	Court of Justice of the European Union
COM	Commission
CRS	Common Reporting Standard
DAC1	Directive on Administrative Cooperation in direct taxation (Directive 2011/16/EU)
DAC2	Directive on Administrative Cooperation in direct taxation (Directive 2014/107/EU)
DTT	Double Tax Treaty
EC	European Community
ECFR	European Charta of Fundamental Rights
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOFIN	Ministers of Economical and Financial Affairs (Council of Minsters of Finance of all EU Member States)
ECR	European Cases Report
EU	European Union
FATCA	Foreign Account Tax Compliance Act
IGA	Intergovernmental Agreement
IRC	Internal Revenue Code (26 US Code)
IRS	Internal Revenue Service (United States)
Lit	Litera(e)

MCAA	Multilateral Competent Authority Agreement
M(T)C	Model (Tax) Convention
No	Number
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal
P	Page
Para	Paragraph
RFI	Reporting Financial Institution
Sent	Sentence
TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of the European Union
TIEA	Tax Information Exchange Agreement
US	United States
VAT	Value Added Tax

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EXECUTIVE SUMMARY

In parallel with the pace of globalisation, cross-border investments, establishments, personal and capital movements have increased tremendously. In contrast to this, the instruments of tax assessment, tax investigation and tax enforcement are still remaining national, limited by the territoriality principle as part of the international law. Thus, the exchange of information between EU Member States and even between Member States and third countries has become very important and corrective measures needed to be taken.

The exchange of information between national tax administrations is based on several legal sources which can be categorized in (i) bilateral treaties, (ii) multinational conventions and (iii) EU law. The information clauses in the Double Tax Treaty (DTT) are almost solely based on Art. 26 of OECD's Model Tax Convention (MTC). Since 2005, the OECD-standard can be characterized as an unlimited major clause without any restriction of bank secrets. This standard provides the classic mutual assistance for information exchange on request and for spontaneous information exchange in single examined cases. Besides, OECD has concluded specific Tax Information Exchange Agreements (TIEA) with a large number of tax havens, according to a model set by the OECD in 2002. These TIEAs provide only an information exchange upon request. Based on the OECD Model, requests may concern groups of taxpayers which have common characteristics. This is substantially different from so-called fishing expeditions¹.

EU law in direct taxation matters is very much drawing on the OECD standard, which is defined by the Directive on Administrative Cooperation in direct taxation (DAC1). Besides the Saving Directive of 2003, DAC1 has represented the first step into an Automatic Exchange of Information (AEOI) standard for five predefined groups of tax relevant facts. However, the DAC standard, enacted on 1.1.2014, has been quickly overruled by the rapid development of Foreign Account Tax Compliance Act (FATCA) agreements and the multilateral establishing of a new standard for Automatic Exchange of Financial Account Information (AEFI). DAC2 - enactment due on 1.1.2016 - adopts a common standard on reporting and due diligence for financial account information. As such, DAC2 sets automatic exchange of information of financial accounts for a wider range of tax matters compared to the Saving Directive, even in its new version (Council Directive 2014/48/EU), which has tightened the prerequisites on the beneficial owner term.

Indeed, several legal sources are available for the exchange of information on tax matters. EU Directives implemented into the national laws of EU Member States are superior to bilateral (national) DTT or TIEA agreements (if applicable) as well as to multinational conventions. However, the EU law sets only minimum standards, which may be overruled by bilateral or multilateral agreements among EU Member States.

Three fundamental types of (tax) information exchange instruments exist: information exchange on request, spontaneous information and automatic exchange of information. There is no clear hierarchy between these instruments as they are all part of a framework for effective international tax-risk-management with a specific function. Both information on request and spontaneous information are tools which focus on single cases. The spontaneous exchange of information expresses a further action taken by the resident administration (country) in favour of a foreign administration (country). In contrast, AEOI and the AEFI are tools for abstract-general tax risk management since they focus on a multitude of pre-

¹ In general terms, a fishing expedition is an investigation undertaken with the hope, though not the stated purpose, of discovering information.

defined cases without a concrete suspicion of a violation of tax law or tax losses. In the light of these differences, it may be possible to combine the above instruments, by establishing an AEOI system to give the recipient state the possibility to make a further request in a single case.

This “2-step approach” is now part of a proposal of the EU-Commission regarding tax rulings and transparency. The “2-step approach” is even used herein for state aid control purposes. The automatic exchange of information to enhance tax transparency will be further expanded by new tools: Advance Cross-Border Ruling (ACBR) and Advance Pricing Agreement (APA). Knowledge of basic data on ACBR and APA for all Member States will allow the EU-Commission to develop and maintain a systematic overview of the tax administrative policy in each Member States. Which single cases require a further state aid investigation can be decided in a second step.

The intensification of the exchange of information between national tax administrations calls for an effective legal protection of affected taxpayers. Legal protection of personal data of natural persons is provided by EU primary law (Art. 8 of the European Charter of Fundamental Rights (ECFR)) as well as secondary law (Directive 95/46/EC). Meanwhile, the Court of Justice of the European Union (CJEU) has ruled in a number of cases on the data protection of individuals. Intrusions into data protection rights have to be grounded on parliamentary law and have to be proportional to the pursued public interest. Important public interests are not limited to state aid control (Art. 108 TFEU), but involve also national taxation interests (e.g. tax supervision and prevention of tax fraud and tax avoidance). They have to be clearly identified by the law provisions and the intervention shall not go beyond the level necessary to pursue the goal.

An EU-standard of international tax secrecy has to be established to balance public interest with the protection of private data. This standard may lead to a change of Art. 22 of the Multilateral Competent Authority Agreement (MCAA), by applying tax secrecy also for third countries. A lack of legal protection can be found regarding legal entities which are not fully covered by the EU data protection law. Commercial, industrial, business and professional secrets shall be protected in the same way as personal data of natural persons. At present, enterprise secrets are protected by the freedom to conduct a business (Art. 16 ECFR) and property rights, including intellectual property (Art. 17 ECFR). Thus, Art. 17(4)DAC has to be read as an obligation to refuse the disclosure of these secrets. Furthermore, the protection of these secrets needs a procedural remedy which is still lacking in the national laws of EU Member States. A notification standard could be a minimum standard. A hearing and further objection in front of a court has to be weighed against the public interest of a functioning mutual assistance in tax matters. Therefore, the automatic exchange of information (AEOI and AEFI) cannot depend on a suspicion of tax violation in a single case.

1. LIMITATION BY TERRITORIALITY PRINCIPLE

KEY FINDINGS

The territoriality principle leaves a tax assessment and enforcement gap, due to the universality principle which applies in national tax laws.

This gap has to be closed by (international) mutual assistance and information exchange between the fiscal authorities of the different states.

In respect of international law field tax audits, investigation measures and other enquiries or determination procedures are prohibited on a foreign sovereign territory (*formal territoriality principle*). As far as determination procedures are concerned, mutual administrative or legal assistance of the foreign sovereign state is required. The principle of substantial territoriality does not equate to the principle of formal territoriality. The substantial territoriality would forbid to link legal consequences according to national law to foreign issues. However, the *universality principle* (world income principle) has almost completely replaced the territoriality principle (source principle). Thus, a disparity between substantial taxation and its formal enforcement occurs: substantial universality only meets formal territoriality. Hence, the need for international legal and administrative assistance arises. In recent years, states have enforced efforts to improve the mutual assistance in tax matters, especially within the EU.

2. INFORMATION EXCHANGES BASED ON BILATERAL LEGAL BASIS

KEY FINDINGS

The huge network of bilateral DTCs covers a widespread range of information clauses, ranging from small to large. Since 2005, the OECD-MTC model is a major information clause regardless of national bank secrets. On the basis of Art. 26, primarily information will be transmitted on request, but the sharing of spontaneous information will also be possible. The automatic exchange of information needs further administrative agreements between the tax authorities of the contracting states to predefine the scope of the relevant tax information which shall be supplied.

Since 2002, many OECD members have concluded TIEA with (former) tax haven countries, based on an OECD TIEA MTC. The information will be transmitted only in single cases and upon request. However, in line with an update of the Art. 26 OECD MTC commentary, information regarding specified groups of taxpayers may also be provided upon request. These group requests have to be distinguished from so-called fishing expeditions which are made in a major number of cases without a concrete suspicion in each single case.

2.1. Information clauses modelled on Art. 26 OECD Model Tax Convention

The information clauses in bilateral double tax agreements are generally divided into so-called small and major information clauses. *Small clauses* narrow the informational exchange requirement to the accomplishment of the agreement itself. *Major information clauses* contribute to the accomplishment of national tax law of the contracting states. Although Art. 26 OECD MTC is the negotiating basis for the conclusion of new DTTs, small disclosure clauses are found in older DTTs predominantly. However, the categorical classification of the DTT information clauses into “small” and “major” clauses cannot always be distinguished clearly; in fact *hybrid forms* exist as well as *extensions*.

With the OECD MTC, the residence requirement as a restriction for the relevance of personal tax circumstances disappeared. Since the revision of the OECD MTC in 2000, the information clause extends beyond the taxes regulated within the particular DTT to include all taxes, except social security contributions. The large information exchange is mainly needed by the state of residence due to the unlimited tax liability of the taxpayer in those countries. For this reason, major information clauses are mainly conducive to the enforcement of the world income principle in the residence state.

According to Art. 26(4)MTC 2005, the requested state must not disregard its domestic power of investigation claiming that it has no own fiscal interest in granting the requested information. Art. 26(5) specifies that a contracting state is not allowed to refuse the granting of information solely because the information is owned by a bank or another financial institution or by an authorized representative or trustee. The OECD MTC 2005 takes on the distinction between the protection of the banking secrecy and the protection of the commercial secret. Whilst the protection of commercial secrets is necessary to sustain fair competition, the banking secrecy may endanger competition through distorting signals (i.e. tax evasion and unfair competition between financial centers). Banking secrecy can basically be seen as a tool for states to keep up a location advantage.

On 17.7.2012 the OECD approved an update of Art. 26 and its interpretation. Art. 26(2) was amended to allow the use of information received for tax purposes also for non-tax purposes, provided such use is allowed by the tax legislation of both the recipient and source states and the competent authority of the source state authorizes such use. This used to be an optional provision, according to para. 4.3 of the amended commentary. Furthermore, the commentary expanded the interpretation of the standard of foreseeable relevance (Art. 26(1)) and of the term “fishing expeditions” to include a *group of taxpayers* not individually identified. Para. 5 of the commentary states that a reasonable possibility for the relevance of the requested information has to exist at the time the request is made, but once the information is received it is immaterial if the information is actually relevant. If the requesting state clarified the relevance of the requested information explicitly, the information must be provided.² Requests of information cannot be declined solely because a final assessment of the relevance of the requested information is still ongoing. However, speculative requests (fishing expeditions) are still explicitly excluded.

The most significant amendment is the possibility for requests of information on a group of tax payers (referred to in para. 5.2 of the commentary) as there is no obligation to identify the group individually. Declining the request of information arguing that it refers to a group of taxpayers not individually identified (i.e. without a concrete tax allegation in each individual case) will often be difficult to justify³. In most cases, this would lead to random or speculative requests. In order to fulfill the prerequisite of foreseeable relevance of the information and the request not being determined as a fishing expedition, the requesting state must provide detailed information on the necessity of the request. This includes describing the group and specific circumstances explicitly, explaining the applicable law and why there is reason to believe that the taxpayers in the group have been non-compliant with this law. Furthermore, it has to be demonstrated that the requested information would lead to compliance by those taxpayers. Various countries have already interpreted Art. 26 to include group requests. However, for other countries this represents a new interpretation.

² OECD, Commentary to Art. 26 OECD MTC, Para. 5.

³ See *Dourado*, in *Reimer/Rust* (Editors), Klaus Vogel on Double Taxation Conventions, 4. Edition, Alphen/Netherlands 2015, Art. 26, No. 187 ff.

Table 1: Development of Art. 26 OECD MTC

OECD-information Clause Model	Type
Art. 26 OECD MTC 1963 = limited major clause	not only in conducting the DTT, but limited on residents of the state parties and such tax types are mentioned in the DTT
Art. 26 OECD MTC 1977 = limited major clause	Omission of the requirement of state party residency
Art. 26 OECD MTC 2000 = unlimited major clause	Enlargement on all types of taxes of the state parties
Art. 26 OECD MTC 2005 = unlimited major clause without a restriction by bank secrets	Examination by the requested state does not depend neither on its own public tax interests nor on a national bank secret
Art. 26 OECD MTC 2012 = use information received for tax purposes and for non-tax purposes	provided such use is allowed under the laws of both States and the competent authority of the supplying State authorizes such use

2.2. Agreements on Mutual Assistance modelled on OECD Model Tax Convention 2002 (Tax Information Exchange Agreement)

Beyond its MTC, the OECD has published a model agreement about fiscal informational exchange in April 2002 – so-called “Tax Information Exchange Agreement (TIEA)”. It involves the exchange of fiscal information between OECD Member States and *tax havens* identified by the OECD and represents a result of the initiative “Harmful Taxation Project”. The model agreement is not a binding instrument. It can be the foundation for bilateral as well as multilateral agreements, whereby the latter can be interpreted / modelled as an integrated bundle of bilateral agreements. Hence, the OECD model displays an extension of the available resources within the informational exchange.

In the introduction, the OECD points out the importance for the informational exchange of the global compliance with the standards based on this agreement, by financial centers. This could be a hint for the intended field of application of this model agreement. The designated disclosure type in Art 5 TIEA MC is the request disclosure. Spontaneous provision of information and automatic provision of information are not regulated in Art 5 (1) TIEA MC, but after the opinion of the TIEA MC commentary they can be included by the bilateral disclosure agreements if requested by the contracting parties.⁴ Furthermore, Art. 5 TIEA MC contains a list of specifications which a request disclosure should include. Regarding the individual request disclosure, the model agreement conforms to Art. 26 OECD MC. In accordance with Art. 6 TIEA MC also *tax audits* abroad are generally possible. Art. 7 TIEA MC deals with the withholding of tax information. The usual clauses/limits for information exchange apply. For example, the right to withhold information if the requested state could

⁴ OECD, TIEA-Commentary, para. 39.

provide the information only by violating national law or put public order at risk. Moreover, company and commercial secrets are protected. The granting of information held by banks or other financial institutions has to be provided by both contracting parties. Accordingly, the distinction between the protection of the banking secret and the protection of commercial secrets is also made in this model agreement. Concerning the type of taxes included in the agreements (regulated in Art. 3 TIEA MC), the TIEA Model Convention commentary says that bilateral agreements cover at least the categories of direct taxes (taxes on income or profits), capital and wealth taxes, real estate taxes, inheritance or gift taxes, unless the contracting parties waive the inclusion of one or more tax types.⁵

Art. 5(6) TIEA MC contains a rule to secure the provision of answers in the informational exchange process. Art. 5(6) TIEA MC asks the requested state to provide the requesting state with the requested information “as promptly as possible”. This reminds of Art. 7(1) of Council Directive 2011/16/EU⁶, which calls for the provision of information “as quickly as possible”. Art. 5(6a,b) TIEA MC requires specific measures to speed up administrative assistance. According to lit. a), the competent authority of the requested contracting state has to confirm the receipt of the request in written form and to brief the competent authority of the requesting state on any shortcomings of the request preferably within 60 days. Moreover, regarding lit. b), the requested contracting state has to inform the requesting contracting state promptly if the competent authority of the former could not obtain and provide the information within 90 days from the request. The requested contracting state has to inform the requesting contracting state about the reasons and obstacles for the failure of the request. Art. 5(6b) TIEA MC sets a time limit of 90 days for the requested contracting state to answer incoming requests.

Art. 5(5a-g) TIEA Model Convention regulates the specific content of (written) information requests. The competent authority of the applicant state shall provide the following information to the competent authority of the requested state: the identity of the person under examination or investigation; a statement of the information sought including its nature and the form in which the applicant state wishes to receive the information from the requested state; (c) the tax purpose for which the information is sought; (d) grounds for believing that the information requested is held in the requested state or is in the possession or control of a person within the jurisdiction of the requested state; (e) to the extent known, the name and address of any person believed to be in possession of the requested information; (f) a statement that the request is in conformity with the law and administrative practices of the applicant state, that if the requested information was within the jurisdiction of the applicant state then the competent authority of the applicant state would be able to obtain the information under the laws of the applicant state or in the normal course of administrative practice and that it is in conformity with this TIEA agreement; (g) a statement that the applicant state has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties. The latter determines the *principle of subsidiarity*, which is common for informational exchange. The other points state that the requesting contracting state has to specify very precisely the reasons underlying the request of information. DAC1 does not contain a comparable listing of specifications. Art. 17(1) DAC1 merely refers to conditional subsidiarity.

⁵ OECD, TIEA Commentary, para. 9.

⁶ Council Directive 2011/16/EU of 15.2.2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EC, OJ EU of 11.3.2011, No. L 64/1 (= DAC1).

3. INFORMATION EXCHANGES BASED ON EU-LAW

KEY FINDINGS

Over the years, mutual assistance between EU Member States in direct taxation matters has remained chiefly regulated by Art. 26 OECD-MTC. With the Saving Directive, the EU legislator has moved a first step into the world of AEOI, admittedly only for the narrow scope of interest payments. The enlarging of the scope, the instruments and the speed of information exchange between the Member States by DAC1 in 2011 was largely overdue.

Still, the international development of the automatic exchange of information of financial accounts led the EU in 2014 to widen the AEOI to an AEFI standard with DAC2, overcoming the requirements of the Saving Directive.

3.1. EC Mutual Assistance Directive 77/799/EC⁷ and EU Directive on Administrative Cooperation 2011/16/EU

Informational exchange between EU Member States is based not only on international law agreements. The progress of the European integration led to an internationalization of economic processes. Already in the seventies, the limitation of investigative measures to the sovereign country according to a formal territoriality-principle resulted in difficulties for national tax administrations to monitor cross-border taxation. This led to shortfalls in tax revenues and to a distortion of the capital market, hampering competition and putting at risk the functioning of the internal market. The result was the EC Mutual Assistance Directive of 1977.

30 years later the Commission considered that the Mutual Assistance Directive did not meet any longer the requirements for administrative cooperation.⁸ The proposal of an EU Directive on Administrative Cooperation (DAC1) was endorsed by the ECOFIN on 15.2.2011 and had to be incorporated into national law by 1.1.2013. Its aim is to strengthen the cooperation between the tax authorities of the EU Member States⁹ with common principles and rules. The Directive gives a *minimum standard* for intergovernmental cooperation on tax matters.

⁷ Directive 77/799/EC of 19 December 1977, OJ EC No. L 336, p. 15-20.

⁸ COM (2009) 29, Explanatory Memorandum, Context of the proposal, General context.

⁹ Footnote 6, OJ EU No. L 64, p. 2, para. 7.

DAC1 is an important step towards effective administrative assistance and exchange of information. The following amendments of the former Directive 77/799/EC can be emphasized:

- requirement of a central liaison office in every Member State with a centralized responsibility for the information exchange procedure (Art. 4(2));
- possibility to earmark liaison departments with the task to exchange directly tax relevant information with the competent offices of other Member States (Art. 4(3));
- standardization of the submission forms for the request of information according to standard computerized formats (Art. 20). The use of these standard formats is accompanied by regulations concerning the use of the *Common Communication Network (CCN)* in Art. 21;
- setting time limits for providing the requested information. Art. 7(1): not later than six months; not later than two months if the requested tax authority possesses that information; Art. 7(3-6): specific short timed procedures of sending receipt, notifying request deficiencies or explaining the reason for the failure of submitting the requested information);
- enlargement of the scope of spontaneous and automatic exchanges of information (Art. 8 and 9);
- abolishment of limits of national bank secrecyes by setting its outside scope of protected commercial, industrial or professional secrets (Art. 17(4); Art. 18(2));
- enabling and stimulating presence of all parties' administrative tax officers (Art. 11) and simultaneous controls/audits by two or more tax authorities (Art. 12).

These measures - already successfully implemented for VAT¹⁰ - shall make the information exchange faster. As language is an issue for efficient information exchange between cooperating countries, DAC1 states that the requests for cooperation, including requests for notification and attached documents may be in any language agreed between the cooperating parties (Art. 21(4)).

3.2. Council Directive 2003/48/EC (Savings Directive)¹¹

The former EC Mutual Assistance Directive 77/799/EC did not provide for a mandatory automatic information exchange system. In the field of cross-border financial transactions the aim of the Savings Directive is to make savings income accumulated in the form of interest payments by beneficial owners in one EU Member State who are fiscally resident in another Member State subject to effective taxation (Art. 1 Saving Directive 2003/48/EC of 3.6.2003). For the first time in the EU tax law, the saving directive foresees in a predefined number of cases mandatory automatic exchange of information between the Member States (Art. 9 Directive 2003/48/EC). If the beneficial owner is resident in a EU Member State and the paying agent is established in a different EU Member State, the minimum amount of information to be reported by the paying agent to the competent authority of its Member State of establishment shall consist of (see Art. 8(1) Directive 2003/48/EC):

¹⁰ See Council Regulation No. 904/2010 of 7.10.2010 on administrative cooperation in the field of VAT, OJ EU of 12.10.2010, No. L 268/1.

¹¹ Council Directive 2003/48/EC of 3.6.2003 on taxation of savings income in the form of interest payments, OJ EU of 26.6.2003, No. L 157/38.

- the identity and residence of the beneficial owner;
- the name and address of the paying agent;
- the account number of the beneficial owner and
- the amount of interest paid or credited during the tax year.

This information has to be transmitted at least once a year and within six months following from the end of the tax year of the Member State of the paying agent. This automatic exchange of information is undermined by the narrow scope of the Savings Directive which is limited to the taxation of savings income in the form of interest payments on debt claims, while excluding the taxation of pension and insurance benefits.

Member States that exchange information pursuant Directive 2003/48/EC were not permitted to rely on limits to the exchange of information as set out in the former Directive 77/799/EEC¹². However, Austria, Belgium and Luxemburg were allowed to not apply the automatic exchange during a transitional period. Instead of the automatic information exchange these Member States shall levy a withholding tax at a rate starting by 15% and ending by 35% (since 1.7.2011) of the interest amount (see Art. 11 directive 2003/48/EC). Since 1.1.2011 Belgium takes part in the automatic information exchange and does not levy the withholding tax any longer. Luxemburg has followed this same tax policy change as from 1.1.2015. Only Austria is still refusing the automatic exchange of information of savings interests.

3.3. Council Directive 2014/48/EU (amended Savings Directive)¹³

The definition of the term “*interest payments*” has been substantially enlarged by Directive 2014/48/EU of 24.3.2014. The new Art. 6 includes income from securities, from the sale, refund or redemption of the debt claims and benefits from life insurance contracts among interest payments. The application range of automatic exchange of information according to this directive has therefore been widened. Furthermore, the Directive pursues a “*look-through-approach*” for payments made to certain entities or legal arrangements established or having their place of effective management in certain countries or territories where Directive 2003/48/EC or equivalent measures do not apply¹⁴. The *beneficial owner* according to Art. 2(1) of the Savings Directive means any individual who receives an interest payment or any individual for whom an interest payment is secured, unless evidence is provided by the individual that interest payment was not received or secured for his own benefit. The latter case applies when the paying agent acts on behalf of a legal arrangement or on behalf of another individual being the beneficial owner. With the amending of directive 2014/48/EU, a third paragraph was added to Art. 2 stating that the *beneficial owner definition* of Art. 3(6) and the *customer due diligence measures* of Art. 7 and Art. 8(1b) of Directive 2005/60/EC¹⁵ shall apply whenever an economic operator within the scope of Art. 2 of directive 2005/60/EC (institutions and persons covered by this directive):

¹² See recital 16 of the Council Directive 2003/48/EC.

¹³ Council Directive 2014/48/EU of 24.3.2014 amending Directive 2003/48/EC on taxation of savings income in the form of interest payments, OJ EU of 15.4.2014, No. L 111/50.

¹⁴ Directive 2014/48/EU.

¹⁵ Directive 2005/60/EC of the European Parliament and the Council of 26.10.2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ EU L 309/15.

- makes an interest payment to, or secures such a payment for, an entity or a legal arrangement *and*
- the entity or legal arrangement is not subject to effective taxation¹ *and*
- the entity or legal arrangement is established or has its place of effective management in a country or jurisdiction outside the territory of the TFEU.

Paying agents subject to Anti-Money Laundering (AML) obligations shall make use of this information already available to them under these obligations.¹⁶ For contractual relations or transaction entered into or respectively carried out after 1 January 2004 the paying agent shall establish the identity of the beneficial owner, consisting of the name, address, date and place of birth and the tax identification number (Art. 3(2b) of Directive 2014/48/EU). In the latter case prior reference is given to the official proof of tax residency voluntarily provided by the beneficial owner through provision of his passport, identity card or any other official document.

The information, which shall be provided according to Art. 8 (1) of Directive 2014/48/EU, is

- the identity and residence of the beneficial owner or, in cases of shared beneficial ownership, the identity and residence of all beneficial owners who fall within the scope of Article 1 of the Directive 2003/48/EC;
- the name and address of the paying agent;
- the account number of the beneficial owner or, where there is none, identification of the debt claim giving rise to the interest payment or of the life insurance contract, security or share or unit giving rise to that payment and
- information concerning the amount of the interest payment.

3.4. Council Directive 2014/107/EU (amended EU Directive on Administrative Cooperation)

Beside the field of interest taxation which is still covered by the saving directive (see 3.2. and 3.3.) the directive on administrative cooperation (see 3.1) has enacted an *automatic exchange of information* between the Member States for the *following five predefined categories of income and capital* (Art. 8(1) DAC1) from 1.1.2014 on:

- income from employment;
- director's fees;
- life insurance products not covered by other union directives like 2003/48/EC amended by directive 2014/48/EU (see 3.2. and 3.3.);
- pensions;
- ownership of and income from immovable property.

¹⁶ Art. 3 para. 2 lit. a) of Directive 2014/48/EU (for contractual relations entered into before 1 January 2004).

The Member States have to report the aforementioned information to the Member State of residence at least once a year, within six months following the end of the tax year of the Member State during which the information became available (Art. 8(6) Directive 2011/16/EU).

Despite this further progress for automatic exchange of information in tax matters, a wide range of cross-border financial investments and transactions at the EU level were still not covered. In parallel, the US government exerted a tremendous pressure on foreign financial industries with *Foreign Account Tax Compliance Act (FATCA)*. FATCA requires foreign (non-US) financial institutions (FFIs) such as banks, funds, certain brokers, trusts and trust companies to disclose details of all reportable accounts to the US Internal Revenue Service (IRS). Reportable accounts are financial accounts maintained by the FFI where the account holder is either a specified person (i.e. any individual who is a citizen or resident of the United States) or is a non-US entity with controlling persons that include one or more specified US persons. Controlling persons are individuals who exercise control over an entity. If the financial institution does not comply with this obligation it has to withhold a tax of 30% of payments from US sources and transfer this tax amount to the IRS as from the 1.7.2014¹⁷. If the foreign state concludes a so called *Intergovernmental Agreement (IGA)*, financial institutes resident in this foreign state are treated as "compliant financial institutes" and are exempted from the US withholding tax. With the IGA the foreign state accepts the automatic exchange of information as the *Common Reporting Standard (CRS)* for foreign financial accounts¹⁸. Until 17.6.2015 58 States have signed an IGA type A and 7 states have signed an IGA type B. Further 40 states have already agreed to sign an IGA type A and 7 more an IGA type B¹⁹. All EU Member States as well as a number of other states featuring strong bank secrecy (like Liechtenstein, Switzerland) are affected by this new financial legislation.

This US tax policy has been flanked by the OECD which published on 21.7.2014 has a "*Standard for Automatic Exchange of Financial Account Information in Tax Matters*". The OECD standard includes two elements to secure a proper exchange of information on financial accounts:

- a model agreement between the competent authorities of the contracting states on the automatic exchange of financial account information to improve international tax compliance ("*Competent Authority Agreement – CAA*");
- a common standard on reporting and due diligence for financial account information ("*Common Reporting Standard – CRS*").

As of 29.10.2014, 51 states have signed a multilateral competent authority agreement (MCAA) based on the OECD-CAA standard. With this international standard for automatic exchange of financial account information the OECD has speed up EU development on this matter. In order to guarantee a unified common reporting standard between the EU Member States, DAC1 (see 3.1) had to be adapted to this new worldwide standard. This has been realized by the Directive 2014/107/EU of 9.12.2014 (DAC2)²⁰. Art. 89(3a) DAC2

¹⁷ See Sec. 1471-1473 US IRC: an US withholding agent has to deduct and pay 30% of the payments to non-compliant foreign financial institutions.

¹⁸ See the detailed IGA, differed as a bilateral type A and an unilateral type B on <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx> (accessed at 21.6.2015).

¹⁹ A list of states is published on <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx> (last update on 17.6.2015, accessed at 21.6.2015).

²⁰ Council Directive 2014/107/EU of 9.12.2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ EU of 16.12.2014, No. L 359/1.

obliges each Member State to take the necessary measures to require its financial institutions to perform the CRS. The CRS stipulates that the competent authority of each Member State is obliged as from 1.1.2016 to communicate via automatic exchange specific information on financial accounts to any other Member State. For Austria this obligation will start in 1.1.2017.

4. INFORMATION EXCHANGES BASED ON MULTILATERAL LEGAL BASIS

KEY FINDINGS

The bilateral and EU legal sources for automatic exchange of financial account information (AEFI) are supplemented by the Joint Council of Europe/OECD Convention amended in 2010, which simplifies the information exchange between the EU and third countries to a common standard. The MCAA of 2014 provides a further common standard for the AEFI. Both sources clarify that national bank secrecyes are no longer an impediment for the exchange of information.

The main multilateral legal source for information exchange on tax matters is the Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters (the "Joint Convention"), signed in Strasbourg on 25.1.1988.²¹ The objective of the Joint Convention is to enable each party to counter international tax evasion and to enforce better its national laws, whilst, at the same time, respecting the rights of the taxpayers. The EU contracting parties are Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Poland, Sweden and the United Kingdom (also Member States of the Council of Europe) and Canada, Japan, Korea, Mexico, New Zealand and the United States. The Joint Convention applies therefore to countries that are outside the scope of DAC1 and DAC2 (like Australia, Canada, Japan and the United States) easing cross-border cooperation amongst these countries. In addition, administrative assistance under the Joint Convention covers all forms of compulsory payments made to governments, for example, to social security agencies²², which are not covered by DAC1 and DAC2. The amending protocol of 27.5.2010²³ aligns the Joint Convention with the recent internationally agreed standard on the exchange of information for tax purposes, for example, by abolishing bank secrecy for tax purposes (Art. 21(4)). This is a sign that bank secrecy is no longer acceptable internationally. In addition, the amending protocol provides for the opening up of the Joint Convention to non-Council of Europe and non-OECD countries. In this respect, the OECD hopes that the updated Joint Convention will become a powerful instrument in countering offshore tax evasion.

A further important multilateral agreement has been already mentioned in the context of DAC2 (3.4.). The MCAA of 29.10.2014 will force several States worldwide to follow the new standard of automatic exchange of financial account information.

²¹ CETS No. 127.

²² Art. 2(1bii) of the Joint Convention enumerates in the list of covered taxes «compulsory social security contributions payable to general government or to social security institutions established under public law».

²³ CETS No. 208.

5. CONCURRENCES OF THE LEGAL BASES

KEY FINDINGS

National laws, based on EU-Directives are superior to bilateral DTT or TIEA, as well as to multinational conventions. Therefore, DTT information clauses, TIEAs and multinational conventions are almost only relevant in relation to third countries (non-EU Member States).

The variety of legal sources regulating international cooperation raises the question of concurrences between these legal sources. EU law is superior to national legislation. EU law is also superior to the exchange of information articles in tax treaties (see 2.1.). Accordingly, EU Member States are bound by the principles of DAC1 (see 3.1.), as implemented into national law. This can result in overlaps/disagreements in relation to the exchange of information involving articles in tax treaties, especially if a tax treaty only contains narrow information provisions that are not up to the standard of DAC1. In these cases, the standard of DAC1 which is implemented into national law of the Member States displaces the narrower information provisions of bilateral tax treaties. Only if the obligation in a tax treaty to provide information goes further than that prescribed by DAC1, the provisions of the tax treaty apply. In this respect, DAC1 provides a *minimum standard* for the purpose of realising the harmonized exchange of information between EU Member States. From the perspective of the individual taxpayer and private institutions, that can lead to a more intensive intrusion of private legal rights as confirmed by the irrelevance of bank secrecy as a former impediment of a cross-border exchange of information (regarding legal protection see further 8.).

The arguments above remain valid also as regards the relationship between EU-Directives and multilateral sources, like the Joint Council/OECD-Convention of 25.1.1988. For example, DAC1 (also in its last amended version by DAC2, see 3.4.) sets a minimum standard of information exchange in EU tax matters which cannot be undercut by a multinational agreement. The EU-Commission only uses an infringement procedure of Art. 258 TFEU when a Member State does not implement the supremacy of EU law as such.

Thus, Art. 26 DTT provisions and multinational agreements have little relevance in the relationship between Member States compared to third countries. Especially TIEAs (see 2.2.) are focused on tax haven states and not on EU Member States to which the Directive would apply.

6. TYPES OF INFORMATION EXCHANGE

KEY FINDINGS

Exchange of information on request, spontaneous transmitted information and automatic exchange of information (AEOI) are different means of mutual assistance of sovereign states in tax matters and establish together an international tax risk management. No hierarchy between the three instruments exists. On request or spontaneously pursued, information exchanges deal with concrete-single cases after a first examination and target a concrete tax risk. In contrast, the AEOIs are focused on a multitude of predefined cases without a concrete suspicion of tax losses and are targeting abstract tax risks.

6.1. Short Overview

International tax cooperation has *three different instruments* for exchange of information: (1) the exchange of information on request (see 6.2.); (2) the spontaneous exchange of information (see 6.3.); (3) the automatic exchange of information (see 6.4.). All three instruments of exchange of information are relevant to DAC1 (amended by DAC2, see 3.1. and 3.4.) and other legal sources in relation to VAT²⁴ and excise duties²⁵. The same set of instruments is provided by Art. 5-7 of the Joint Convention of the Council of Europe/OECD (see 4.).

In contrast, Art. 26 of the OECD DTC does not distinguish between the three kinds of instruments for exchange information, but Art. 26(9) of the Commentary notes that the rule set in Art. 26 (1) allows for the exchange information according to these three instruments. Art. 5 of the OECD TIEA-Model only explicitly mentions the exchange of information on request. However, according to the Commentary on Art. 5 of the OECD TIEA-Model, the contracting parties may expand cooperation by way of automatic and spontaneous exchanges of information.²⁶

6.2. Exchange of Information on Request

The exchange of information on request describes a situation in which the competent authority of one state asks for particular information to the competent authority of another state with a special tax-case in mind. The requested information typically relates to an examination, inquiry or investigation of the liability of a taxpayer for specified tax years. The requested authority clarifies the relevant facts and transmits the information to the requesting authority. Art. 18(1) DAC1 and Art. 26(4) OECD-DTC state that the requested authority should use its information gathering measures to obtain the requested information, even though that authority may not require such information for its own tax purposes. This can be classified as the *passive exchange of information* because the requesting state has no control or influence over the actions of the requested state. This method of the exchange of information is also passive from the point of view of the taxpayer, as the taxpayer cannot require the state of residence to use the mutual assistance procedures. It is a general principle of tax cooperation that a contracting party should use all means in its own

²⁴ Council Regulation (EU) No. 904/2010 of 7.10.2010 on administrative cooperation and combating fraud in the field of value added tax, OJ EU of 12.10.2010, No. L 268/1.

²⁵ Council Regulation (EC) No. 2073/2004 of 16.11.2004 on administrative cooperation in the field of excise duties, OJ EU of 4.12.2004, No. L 359/1.

²⁶ OECD TIEA Model, marginal No. 39.

territory to obtain the information before sending a request, except where this would give rise to disproportionate difficulties. This principle is to be found in Art. 17(1) DAC1 and in the OECD "Manual on the Implementation of Exchange of Information Provisions for Tax Purposes" (the "OECD Manual").²⁷

In general, a precondition for the supply of information is that the requested information is foreseen to be relevant to the enforcement of the domestic laws of the requesting state. The fiscal authority checks incoming requests with respect to their relevance from the point of view of an *ex-ante observer*. This means the requested authority does not investigate explicitly if the requesting authority actually possesses no tax claim. In doing so, it is assumed that the requesting authority has used its investigation capabilities to the full extent before submitting an information request (*subsidiarity principle*).

A big step towards effective administrative assistance and exchange of information is the standardization of the requests and information. Art. 20(1)(3) DAC1 state that an information request or a spontaneous provision of information (see below 6.3) shall be formulated according to a *standard form*. The automatic exchange of information (see below 6.4.) shall also be sent using a standard computerized format (Art. 20(4) DAC1). The standard form of the request has to contain specifics like the identity of the person under examination and the tax purpose for which the information is sought (the same information has to be provided if information is requested after a TIEA, see above 2.2.). In addition, the requesting authority may, to the extent that it is known, provide the name and address of any person believed to be in possession of the requested information, as well as any element that may facilitate the collection of information by the requested authority. The use of standard formats is accompanied by regulations concerning the use of the *Common Communication Network (CCN)* in Art. 21 of DAC1 to make the information exchange faster, as it is already the case for VAT. As language may also be an issue for efficient exchange of information between cooperating countries, the requests for cooperation, including requests for notification and attached documents can be in any language agreed by contracting parties (Art. 21(4) DAC1).

Pursuant to Art. 5 DAC1, the requested authority shall communicate to the requesting authority any information referred to in Art. 1(1)DAC1 that is in its possession or has been obtained as a result of administrative enquiries. The single central liaison office, liaison departments and the competent officials may also be involved. (Art. 4(6)DAC1). The requested authority takes care of the information request *in the same way* it provides information for national taxation issues (Art. 6(3)DAC1: *equivalence principle*). Information shall be provided as quickly as possible, and no later than 6 months from the day the request is received (Art. 7(1)DAC1).

6.3. Spontaneous Exchange of Information

The spontaneous exchange of information is the provision of information in a singular case to another contracting party that is foreseeable relevant to that other party and that has not been previously requested. According to the OECD, the spontaneous exchange of information relies on the active participation and cooperation of *local tax officials*.²⁸ Art. 9(1a-e) DAC1 lists *five circumstances* in which the competent authority of a Member State must communicate the information referred to in Art. 1(1)DAC1 to the competent authority of another Member State without previous request:

²⁷ OECD *Manual on Information Exchange*, 2006, Module 1, p. 2 et seq.

²⁸ OECD *Manual*, Module 2, p. 3.

- (a) the competent authority of one Member State has grounds for supposing that there may be a loss of tax in the other Member State;
- (b) a person liable to tax obtains a reduction in, or an exemption from, tax in one Member State which would give rise to an increase in tax or to liability to tax in the other Member State;
- (c) business dealings between a person liable to tax in one Member State and a person liable to tax in the other Member State are conducted through one or more countries in such a way that a saving in tax may result in one or the other Member State or in both;
- (d) the competent authority of a Member State has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises;
- (e) information forwarded to one Member State by the competent authority of the other Member State has enabled information to be obtained which may be relevant in assessing liability to tax in the latter Member State.

DAC1 has the potential to enlarge the scope of spontaneous information exchange in Europe since Art. 9 (2) states that the competent authority of each Member State may communicate spontaneously to the competent authority of the other Member State any information of which they are aware that may be useful to the competent authority of the other Member States. Identifying the existence of one of the aforementioned circumstances requires remarkable undertaking by tax officials who are acting without a specific request. However, information exchanged spontaneously represents a very effective manner to counter tax evasion and tax fraud, as it reports facts and information that another Member State could hardly or very seldom autonomously detect. The spontaneous exchange of information as an effective tool to fight tax fraud has increased rapidly in the EU. Relating to the former Mutual Assistance Directive 1977/799/EC the Court of Justice of the EU (CJEU) has ruled in favour of the obligation to the spontaneous exchange of information.²⁹ Art. 10 DAC1 sets a time limit for the transmission of spontaneous information. Information shall be forwarded as quickly as possible and not later than one month after it becomes available.

6.4. Automatic Exchange of Information

The automatic exchange of information involves the systematic and periodic transmission of "bulk" taxpayer information by the requested state to the requesting state regarding various categories of income without a formal request being made.³⁰ In contrast to the spontaneous exchange of information, the automatic exchange of information does not refer to a specific case. Rather, information referring to defined case groups is transmitted automatically. According to Art. 3 (9) DAC2: "'Automatic exchange' means the systematic communication of predefined information of residents in other Member States to the relevant Member State of residence, without prior request, at pre-established regular intervals." The automatic exchange of information can be classified as a mean of *cross-border risk management*, as it offers a Member State the possibility to match the information transmitted with the information contained in a tax declaration or return. The most cost effective way to

²⁹ Case C-420/98, *W.N.* (13 April 2000), Para. 13.

³⁰ *OECD Manual*, Module 3, p. 3.

process the information is to receive the foreign-source information in digital form so that it can feed into the recipient's tax data base, automatically match the income data reported by taxpayers and, furthermore, be easily transmitted to local tax offices. As already mentioned above (see 3.3. and 3.4.), the automatic exchange of information has gained relevance in the world of international cooperation on tax matters, with the common standard on *Financial Account Information*³¹ being adopted by the EU³².

However, the recipient state is faced with the need of processing a huge amount of data delivered by foreign states without prior concrete risk examinations. The Member States have to secure that the transmitted information will be used in a proper tax risk management framework and not be simply archived. To avoid the risk of accumulating huge datasets of unprocessed information, the competent authority of a Member State may indicate to the competent authority of another Member State that it does not wish to receive information regarding specific tax categories (see Art. 8(3) DAC2³³). Member States can use this provision to ensure that the data received through the automatic exchange of information will be processed and evaluated by their national risk management systems.

The implementation of Directive 2014/107/EU (see above 3.4.) makes the Saving Directive 2003/48/EC (see above 3.2.) outdated and redundant. Consequently, on 18.3.2015 the European Commission presented a proposal to the EU Council to repeal the Saving Directive³⁴. On the same day, the European Commission has released a proposal regarding a *further mandatory automatic exchange of information* on "Advance Cross-Border Rulings - ACBR" and "Advance pricing Arrangements - APA"³⁵. This proposal is following a *2-step-approach*. As a first step, each Member States has to send automatically *basic information* about ACBR und APA to all other Member States and to the Commission (Art. 8a(5) Directive Proposal). This gives all other Member States the opportunity to assess if the ACBR or the APA affects its financial interests and its national tax law. The Commission can use the data for further examination in state aid law matters (Art. 107 ff. TFEU; see further 7.). After this evaluation of the basic data transmitted, in a second step, each Member State may have the possibility to request further information in single cases. This approach *combines* the *automatic exchange of information* on general tax-risk-related matters with the exchange of *information on request* in specific cases.

6.5. Concurrences of the Information Types

The exchange of information on request always starts at the initiative of a state that is interested in securing its tax revenues, and is therefore requesting specific information before another state has examined the case. From this perspective, the spontaneous and automatic exchanges of information feature *additional developments*. Both instruments require activity by the Member State that transmits the information by its own initiative. The requesting states decide what kind of information may be relevant to another Member State. International tax cooperation has progressed further, whereby states are proactive and transmit useful information. In general, TIEAs do not provide for the automatic sharing of tax information (see above 2.2). Thus, the new common standard of automatic exchange of financial account information embodies a remarkable step towards proactive tax cooperation between countries, including former tax havens.

³¹ See *OECD*, Standard for Information Exchange of Financial Information in Tax Matters – New single global standard for the automatic exchange of information between key authorities worldwide, 2014.

³² See Directive 2014/107/EU(DAC 2).

³³ Amended version Directive 2014/107/EU.

³⁴ http://ec.europa.eu/taxation_customs/taxation/personal_tax/savings_tax/revised_directive/index_en.htm

³⁵ European Commission, proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, 18.3.2015, COM (2015), 135 final.

As regards the usefulness of the instruments (information types) to fight tax fraud and evasion, there is *no hierarchy* between the various forms as each information type is appropriate to pursue a specific goal. The interaction of the different information-types is widely recognized as an adequate system for the purpose of sharing/exchanging information on tax-related matters. Information on request and spontaneous information gathering are considered to be case-specific as they contribute to reduce *concrete risks*. By contrast, the automatic exchange of information contributes to reducing *abstract risks*.

Table 2: Mutual Assistance Principles

Principles	Meaning
Reciprocity	Standardisation of instruments, procedures, data or secret protection
Equivalence	Scope of examinations does not differ from domestic cases
Subsidiarity	Each tax authority shall firstly exhaust its own instruments to examine or verify abroad facts

Table 3: Mutual Assistance Instruments

Instrument	Cause
Request for mutual assistance	After examination of a single case for the benefit of the requesting state
Spontaneous transmittance of information	After examination of a single case for the benefit of the recipient state
Automatic transmittance of information	In a systematic predefined field of cases for the benefit of the recipient state

7. USE OF INFORMATION EXCHANGE FOR STATE AID CONTROL

KEY FINDINGS

The automatic exchange of tax information may also be used for state aid control purposes by extending the scope of recipients. In this case, the automatic exchange of information gets a double function. The proposal of a second amendment of the DAC is following this approach in the field of cross-border tax rulings. Via the automatic transmission of basic data, the European Commission will get a systematic overview over the types of ACBR and APA which are used in each Member States and its tax policies (first step). On this basis the EU-Commission could open state aid investigation procedures should a suspicion of a hidden state aid policy of a Member State occur (second step). However, this investigation may conflict in single cases with the confidentiality principle and with enterprise secrets (Art. 16, 17 ECFR). In view of the proposed 10-years period for retrospective automatic exchange of information (Art. 8a (2) of the proposed new DAC), the risk of undermining confidentiality and proportionality principles warrants a reflection on the limits for the mandatory exchange of basic data.

The different types of information exchange are aligned to secure the fiscal interests of national states by transmitting information which are relevant for tax assessment or tax enforcement in the recipient states (see above 6.). The information exchange on tax matters between EU Member States does not aim to safeguard state aid rules on the basis of Artt. 107 ff. TFEU. However, a Member State may decide to disclose information about harmful tax behaviour or tax policy of another Member State or report this information to the EU Commission and ask to initiate state aid control procedures.

Therefore, a more systematic approach to enlarge the information exchange by a state aid control function is needed. According to the European Commission, the automatic exchange of information can be an additional mean of state aid supervision. In the proposal of an amendment of the DAC of 18.3.2015³⁶, the recipients of the automatic exchange of information on ACBR and APA are not only all other Member States, but also the European Commission. According to Art. 8a DAC, the Commission will get the following mandatory information from each Member State about its ACBR and APA which are issued in favour of *legal persons*:³⁷

- the identification of the taxpayer and where appropriate the group of companies to which it belongs,
- the content of the ACBR or APA, including a description of the relevant business activities or transactions or series of transactions,
- the description of the set of criteria used for the determination of the transfer pricing or transfer price itself in the case of an APA.

³⁶ See footnote 35.

³⁷ After the proposed new Art. 8a(3) DAC the automatic exchange will not apply in a case where an ACBR exclusively concerns and involves the tax affairs of one or more natural persons.

These *basic data* will give an overview of which kind of ACBR and APA concerning legal persons are taking place in individual Member States. This will make the tax ruling policy of EU Member States, more transparent. However, the Commission will not know the complete content of the ACBR and APA (see above 6.4.: «2-step approach»). The obligation to automatically submit information has to be balanced with the need to protect fundamental rights of the ECFR of affected taxpayers. In particular, Art. 17(4) DAC gives the Member States the right to refuse the provision of information when this leads to the disclosure of a commercial, industrial or professional secret or of a commercial process. *Enterprise secrets* are part of the freedom to conduct a business (Art. 16 ECFR) and property right, including intellectual property (Art. 17 ECFR). Thus, the information to be shared has to strike the balance between being on the one hand as concise as possible and on the other hand providing sufficient information to the EU Commission to judge whether it should request for more information in a state aid control procedure against a Member State. This will be balanced if the automatic exchange is limited by reporting only the «*type of matters addressed with by the ruling*»³⁸. Furthermore, in an electronic standard form contents of ACBR and APA can only be described by *keywords* which give a *typecasting* idea what has been ruled. But the complete number of typecasting information offers an overall picture about the tax ruling policy in each single Member State. It gives the EU Commission a better insight about existing state aid internal the EU. On the second step, the Commission will have to decide to go into a preliminary investigation by making requests for further detailed information about the content of the ACBR and APA of a specific Member State. Therefore, the proposal of a further amendment of the DAC is not only a «2-step approach» of the mutual assistance between the national tax authorities, but also of the state aid control by the EU Commission.

Art. 21(5) of the proposed new DAC enhances tax transparency by setting a new secured *centralised database* managed by the EU Commission. Both Member States and the Commission shall have access to the information recorded in this database. It will serve two main purposes: to give each Member State easy access to information about tax ruling policies in other Member States with the aim of assessing the relevance of ACBR and APA for national tax interests; to provide the Commission an overview tax policies in EU Member States over time. Thanks to this database, information on ACBR and APA will be collected in a systematic way rather than ad hoc or randomly.

This will take time, however. To speed up the gathering of relevant information, the proposed new Art. 8(2) DAC enacts a *retrospective* automatic exchange of information, according to which the competent authorities of the Member States shall inform the competent authorities of all other Member States as well as the European Commission on any ACBR and APA issued within a period beginning ten years before the entry into force of the new DAC. The 10 years time-span is related to the time limit set by Art. 15(1) of the Council Regulation (EC) No. 659/1999³⁹ for the recovery of unlawful state aid. This is a key provision of the new double function in the amended DAC proposal of 18.3.2015. This far-going obligation about ACBR and APA may, however, conflict with the *confidential principle* set by EU law. Taxpayers who have applied for ACBR and APA at national tax authorities in the past may have done so under tax confidentiality granted by the national laws. Furthermore, they may have paid considerable fees to get administrative binding answers by the national tax authorities. Hence, they may be disappointed if the content of individual ACBR and APA is transmitted the EU-Commission.

³⁸ *Commission Staff Working Group*, Technical analysis of focus and scope of the legal proposal COM (2015) 135 final, of 18.3.2015, SWD (2015) 60 final, Annex 5, under 5.1.

³⁹ Council Regulation (EC) No. 659/1999 of 22.3.1999 laying down detailed rules for the application of Art. 93 of the EC treaty, OJ of 27.3.1999, L 83/1.

However, the protection of confidentiality is not absolute. The CJEU has ruled that the principle of legitimate expectations cannot be extended to the point of generally preventing a new rule from applying to the future effects of situations which arose under the earlier rule⁴⁰. Regarding the recovery of state aid granted, a central element of EU law does not legitimate the expectation that the aid is lawful if it has not been granted in compliance with this procedure⁴¹. A Member State that has issued ACBR or has concluded APA has to take into account both tax legislative acts and administrative acts as state aid granting sources. EU Member States need to be aware that the EU Commission is obliged by Art. 108 (1) TFEU to supervise systems of state aid in the EU. To this end, the EU Commission is entitled to make requests even for specific tax cases whereby the taxpayers have provided information to the national tax authorities under the protection of tax confidentiality. The taxpayer's expectation of this information secrecy may not be fulfilled. These expectations are subordinated to primary EU law and, therefore, the submission of the requested information has to be considered as an efficient instrument for state aid control.

The specific innovation of the proposed new Art. 8a(2) of the DAC is to take the automatic exchange of tax relevant information for the purpose of state aid control and use this instrument of international tax risk management for a double-function. In contrast to regular state aid investigations, no concrete suspicion of unlawfully granted aid exists which justifies a single request. A general abstract state aid risk management takes the place of single, case examinations. In the past, no legal person could expect that the information which has been disclosed in an ACBR or APA proceeding to the national authorities will later be part of a *systematic information exchanges* with the EU Commission and other Member States. Member states will have to report a large number of ACBR and APA where no evidence of state aid can be found. This is the consequence of the nature of a general-abstract reporting system with a broad range of information. Thus, the confidential principle has to be balanced with the state aid-control mission of the EU-Commission in a proportional manner. In the light of the proportionality principle which is even a principle of the EU law the following restrictions have been made:

- The earlier agreed ACBR and APA remain *valid* (relevant for the individual taxation also after bringing the new DAC into force).
- The maximal time period of reporting has been linked with the maximal time period of recovering unlawfully granted state aid.
- The automatic reporting of information has been reduced on *basic data* which do not cover commercial, business, professional secrets or commercial processes (enterprise secrets).

Given these limitations, even a *retrospective* automatic exchange of information respects the proportionality principle and does not infringe taxpayer's confidentiality. However, if in a further process of state aid-investigation the EU Commission would require in single cases additional details which are part of an enterprise secret protected by Art. 17 (4) DAC, the confidentiality principle could be an impediment for submitting the requested information. This confidence has to be protected at least in the retrospective cases where no double-function of tax information exchange has been originally on the table.

⁴⁰ CJEU of 11.12.2008 – C-334/07 P, Commission/Freistaat Sachsen, para. 43 ; CJEU of 22.4.2008 – C-408/04 P, Commission/Salzgitter, para. 104 ; CJEU of 26.3.2015 – C-596/13, Globula/Commission, para. 45.

⁴¹ CJEU of 20.3.1997 – C-24/95, Alcan Deutschland, para. 25; CJEU of 22.4.2008 – C-408/04 P, Commission/Salzgitter, para. 104; CJEU of 11.12.2008 – C-334/07 P, Commission/Freistaat Sachsen, para. 45.

8. LEGAL PROTECTION OF TAXPAYERS

KEY FINDINGS

European law provides for a legal protection of personal data of natural persons at the level of the primary law (Art. 8 ECFR) and secondary law (Directive 95/46/EC). In the light of the jurisdiction of the Court of Justice of the European Union (CJEU), the information exchange of personal data has to be based on Parliamentary law and has to be justified by a clear defined public interest (e.g. tax supervision, prevention of tax fraud and tax avoidance) and has to be proportional in relation to its purpose. Furthermore, there are limitations in the collection and processing of the personal data for tax purposes. Therefore, an EU standard of tax secrecy has to be designed. Its observation shall be a binding precondition also for the transmission of data to third countries.

A framework for data protection of legal entities is lacking. Business data shall be granted the same legal protection as personal data of natural persons. Business secrecy is protected by Art. 16 ECFR (freedom to conduct a business) and Art. 17 ECFR (right to property including intellectual property). Art. 17 (4) DAC has to be read as an obligation to refuse the disclosure of those secrets. However, the legal protection of data is still a matter of national law. The national procedures of data protection for personal data and business secrets shall be effective. At least, a notification standard should be set as a strict minimum. Hearings and objections before national courts have to be weighed against the public interest of mutual assistance in tax matters. Therefore, the automatic exchange of information (AEOI and AEFI) cannot depend on a sole suspicion and data-protection issues related to single cases.

8.1. Legal Enterprise Secrets

Art. 17 (4) DAC gives the Member States the right to refuse the provision of information where it would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process. Accordingly, Art. 26(3c) OECD-MTC prohibits imposing a contracting state the obligation to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process. A trade or business secret is generally understood to imply facts and circumstances that are of considerable economic importance and that can be exploited practically and the authorised use of which may lead to serious economic and/or financial damage⁴². However, Art. 18(2) DAC and Art. 26(5) OECD-MTC state that the provision of information shall not be refused solely because the information is held by a bank or other financial institutions. This distinction makes sense, as the different secrets shall protect different issues. The aforementioned *enterprise secrets* protect a country's companies, their inventions and investments and herewith strengthen economic competition. These secrets are part of the freedom to conduct a business (Art. 16 ECFR), are often the result of business and are protected as (intellectual) property (Art. 17 ECFR). In contrast to this, *bank secrets* are not results of business. By hindering relevant income information, bank secrets prevent the competent authority of a Member State to determine the exact taxpayer's base, favouring tax fraud and tax evasion. Furthermore, investors tend to invest in countries where no such information has to be provided to their state of residence. In contrast to protecting enterprise secrets (as in Art. 17(4)DAC mentioned), bank secrets hamper competition and the internal market.

⁴² OECD, Commentary on Art. 26 OECD-MTC, No. 19.2.

8.2. Personal Data Protection by EU law

Art. 25 and recital No. 27 DAC1 clarify that all exchange of information is subject to the provisions implementing Directive 95/46/EC⁴³ and to the Regulation (EC) No. 45/2001⁴⁴. Recital 28 adds that DAC1 respects the fundamental rights and observes the principles which are recognised in particular by the ECFR. As part of the primary EU law⁴⁵ Art. 7 ECFR⁴⁶ demands respect for private and family life. Art. 8 ECFR refers to the protection of personal data. Art. 8(2) ECFR specifies that “such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.” Limitations on the exercise of the granted rights and freedoms by the Charter have to be provided by law and have to respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others (Art. 52(1) ECFR).

This matches with the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4.11.1950 (ECHR)⁴⁷. Under the heading “Right to respect for private and family life” Art. 8 of the Convention provides: “Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in democratic society in the interests of national security, public safety or the economic well-being of the country for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”. At the level of the EU fundamental rights, the ECHR sets a kind of a *minimum standard*, which can be enhanced by EU law (see Art. 52 (3) ECFR).

As part of the secondary EU-law, the data protection Directive 1995/46/EC of 24.10.1995⁴⁸ aims to protect the right to privacy with respect to the processing of personal data of natural persons. But the free flow of data shall neither be restricted nor prohibited (Art. 1). Pursuant to Art. 3(1) of Directive 1995/46/EC the directive is applicable for the processing of personal data defined in Art. 2(a) of the directive by automatic means. Personal data is defined as the information regarding identified or identifiable persons (identification by an identification number, or other factors relating to his identity). In order to collect and process personal data, a specified, explicit and legitimate purpose is needed and the data has to be adequate, relevant and not excessive regarding those purposes (Art. 6 (1b-c) of Directive 1995/46/EC). Processing of the personal data is only allowed under the circumstances listed in Art. 7 of Directive 1995/46/EC. The relevant case here is stated in Art. 6(1e) and refers to the processing of data in order to fulfil a task carried out in the public interest or in the exercise of official authority.

⁴³ Directive 95/46/EC of the European Parliament and of the Council of 24.10.1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ EU of 23.11.1995, L 281/31.

⁴⁴ Regulation No. 45/2001 of the European Parliament and of the Council of 18.12.2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ EU of 12.1.2001, L 8/1.

⁴⁵ Art. 6(1) of the Treaty on European Union of 13 Dec. 2007 (TEU), consolidated Version, OJ EU of 26.10.2012, C 326/13.

⁴⁶ Charter of Fundamental Rights of the European Union, OJ EU of 26.10.2012, C 326/391.

⁴⁷ CETS No. 5.

⁴⁸ Directive 95/46/EG of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ EU of 23.11.1995, L 281/31.

8.3. Jurisdiction of the CJEU regard personal data protection

On these legal bases, the CJEU has made in recent years paramount decisions in the area of data protection. In the cases of *Schecke GbR/Eifert* the Grand Chamber of the CJEU⁴⁹ has examined if the publication of information on beneficiaries of agricultural aid on the website of agricultural state agencies violates (primary) EU law even though the publication has been foreseen by EU regulations⁵⁰ to respect the principle of transparency and the concept of “open government”. At first, the CJEU secured that even EU regulations have to be assessed in the light of the provisions of the EU Charter, which, following Art. 6 (1) TFEU has the same legal value as the “Treaties”. However, the fundamental right of personal data protection is *not an absolute right*, but must be considered in relation to its functions in society⁵¹. Art. 52 (1) ECFR accepts limitations of fundamental rights, but any limitation on the exercise of the rights and freedoms recognized by the EU Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the EU or the need to protect the rights and freedoms of others. In the specific context of personal data protection rights, the data processing is only permitted for *specified purposes* and on the basis of the consent of the person concerned or some other legitimate basis laid down by law (Art. 8(2) ECFR). Regarding the personal scope of the data protection the CJEU *differs between natural and legal persons*. Legal persons deserve data protection only as far as the official title of the legal person identifies one or more natural persons.⁵² On the other hand, it is not relevant in this respect that the data published concerns activities of a professional nature.⁵³ The publishing of the concrete amount of aid deriving from the Common Agricultural EU policy violates the fundamental right of data protection of the beneficiaries because this amount represents part of their personal income.

As regards the justification of interference into fundamental right of personal data protection, the CJEU investigated the following issues in a *three-stage check*:⁵⁴

1. Does a law exist that provides the interference of the fundamental right?
2. Does a general interest exist that is accepted by EU law and may justify the limitation of the fundamental right?
3. As one of the general principles of the EU law: Is the limitation of the fundamental right proportional in relation to the legitimate aim pursued?

In the concrete cases the CJEU saw a disproportional public transparency. The principle of proportionality requires that measures implemented by EU acts are appropriate for attaining the objective pursued and do not go beyond what is necessary to achieve it. The CJEU has pointed out that it is necessary to determine whether the EU Council and Commission

⁴⁹ CJEU (Grand Chamber) of 9.11.2010, Joint Cases C-92/09 and C-93/09, *Volker und Markus Schecke GbR und Eifert v. Land Hessen*, (2010) ECR I-11063.

⁵⁰ Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy, OJ EU of 11.8.2005, L 209/1; No. 1437/2007 of 26.11.2007 amending Regulation (EC) No 1290/2005 on the financing of the common agricultural policy, OJ EU 7.12.2007, L 322/1; Commission Regulation (EC) No 259/2008 of 18.3.2008 laying down detailed rules for the application of Council Regulation (EC) No 1290/2005 as regards the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), OJ EU of 19.3.2008, L 76/28.

⁵¹ CJEU (footnote 49), para. 48.

⁵² CJEU (footnote 49), para. 53.

⁵³ CJEU (footnote 49), para. 59.

⁵⁴ CJEU (footnote 49), para. 66 ff.

balanced the EU's interest in guaranteeing the transparency of its acts and ensuring the best use of public funds against the interference with the right of the beneficiaries concerned to respect for their private life in general and to the protection of their personal data in particular. The Court has held in this respect that derogations and limitations in relation to the protection of personal data must apply only in so far as it is *strictly necessary*.⁵⁵ The CJEU misses the consideration of the EU legislator to reduce the intrusion of the personal data rights of natural persons by limiting the publication of data by name relating to those beneficiaries according to the periods for which they received aid, or the frequency or nature and amount of aid received.⁵⁶ However, finally the CJEU reduces the requirements of proportionality for the limitation of fundamental rights even of such legal persons who are titled by a name of a natural person. The CJEU argues that legal persons are already subject to a more onerous obligation in respect of the publication of data relating to them. Furthermore, the obligation on the competent national authorities to examine, before the data in question are published and for each legal person, which is a beneficiary of aid, whether the name of that identifies natural persons would impose on those authorities an unreasonable administrative burden.⁵⁷

In two further cases, the Grand Chamber of the CJEU⁵⁸ has taken the opportunity to set limits on the retention of personal data generated or processed in connection with the provisions of the Directive 2006/24/EC⁵⁹. The aim of the Directive 2006/24/EC has been to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member States in its national law. The fight against serious crime and terrorism is an objective of a *general public interest*.⁶⁰ These public interests has to be weighed with the offence of the fundamental right to privacy and the other rights laid down in Article 7 and 8 ECFR measured on the proportional principle. Due to Art. 7 of Directive 2006/24/EC certain principles of data protection and data security must be respected by providers of publicly available electronic communications services or of public communications networks so that the retention of data does not affect the essence of the fundamental right to the protection of personal data enshrined in Art. 8 ECFR. According to Art. 5(4) TEU the content and form of EU action *shall not exceed what is necessary* to achieve the objectives of the Treaties under the *principle of proportionality*. Under EU law, limitations to rights and freedom granted by the EU Charter have to genuinely satisfy an objective of general interest. According to settled case law of the CJEU, the principle of proportionality requires that actions of EU institutions shall be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives. The decision of the CJEU of 8.4.2014 states that clear and precise rules governing the scope and application of the measure in question must be laid down and minimum safeguards must be imposed so that the persons whose data have been retained have sufficient guarantees to effectively protect their personal data against the risk of abuse and against any unlawful access and use of that data.⁶¹ It furthermore stresses that this requirement *is more important if the personal data is processed automatically* and significant risk of unlawful access to those

⁵⁵ CJEU (footnote 49), para. 77.

⁵⁶ CJEU (footnote 49), para. 81 and 84.

⁵⁷ CJEU (footnote 49), para. 87, citing the European Court of Human Rights of 2 March 2009, 2872/02 – K.U. ./. Finland (HUDUC data base).

⁵⁸ CJEU of 8.4.2014, Joint Cases C-293/12 and C-594/12, Digital Rights Ireland Ltd. v. Kärntner Landesregierung a.o.

⁵⁹ Directive 2006/24/EC of the European Parliament and of the Council of 15.3.2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, OJ EU of 13.4.2006, L105/54.

⁶⁰ CJEU (footnote 58), para. 42.

⁶¹ CJEU (footnote 58), para. 54.

data exists.⁶² The CJEU misses clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Art. 7 and 8 ECFR. The main reasons that lead the CJEU to the invalidity of Directive 2006/24/EC are that no differentiation, limitation or exception are being made in the light of the objective of the directive (the fight against serious crime):⁶³

The Directive does not restrict the retention of data “in relation (i) to data pertaining to a particular time period and/or a particular geographical zone and/or to a circle of particular persons likely to be involved, in one way or another, in a serious crime, or (ii) to persons who could, for other reasons, contribute, by the retention of their data, to the prevention, detection or prosecution of serious offences.” The Directive “fails to lay down any objective criterion by which to determine the limits of the access of the competent national authorities to the data and their subsequent use for the purpose of prevention, detection or criminal prosecutions concerning offenses that, in view of the extent and seriousness of the interference with the fundamental rights enshrined in Art. 7 and 8 of the Charter, may be considered to be sufficiently serious to justify such an interference.” The directive “does not contain substantive and procedural conditions relating the access of the competent national authorities to the data and to their subsequent use. In particular, the Directive does not lay down any objective criterion by which the number of persons authorized to access and subsequently use the data retained is limited what is strictly necessary in the light of the objective pursued.” Above all, the CJEU criticizes that the access by the competent national authorities to the data retained is not made dependent on a prior review carried out by a court or by an independent administrative body who has to examine if the access to the data and their use is strictly necessary for the purpose of attaining the objective pursued.

8.4. Specific data protection needs regarding automatic exchange of information

The AEOI as a tool of international tax risk management in an abstractly defined scope of cases (see above 6.4.) will grant the recipient states access to a large amount of data of individuals. As Art. 25 and recitals 27 and 28 of DAC1 emphasize, each Member State has to observe the provisions of the implemented Directive 95/46/EC as well as the fundamental rights of the individual taxpayer (see above 8.2.). Art. 6(1) of the Directive 95/46/EC sets especially the *following limitations* for collecting and processing personal data:

- collection and processing of personal data are limited by specified, explicit and legitimate purposes and its further procession is bound to those purposes (lit. b));
- collection and processing of personal data have to be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed (lit. c));
- personal data shall be kept no longer than necessary for the purposes for which the data were collected or for which they are further processed (lit. d)).

Art. 12 of the Directive 95/46/EC provides the individuals a *right of access at information* about the collection and procession of his/her personal data. However, Art. 13(1e) of Directive 95/46/EC gives the Member States the discretion to restrict the scope of obligations

⁶² CJEU (footnote 58), para. 55.

⁶³ CJEU (footnote 58), para. 59-63.

and rights provided in favour of individuals when such a restriction constitutes a necessary measure to safeguard an important financial interest of a Member State or of the EU including taxation matters. This exception shows that the EU-legislator considers national tax matters as a *legitimate public interest* to restrict the personal data rights of individuals. In the light of the aforementioned jurisdiction of the CJEU (see above 8.3.) the restriction has to be set by parliamentary law and shall not go beyond that level which is necessary to pursue the public goal of tax supervision and enforcement. Art. 25 sent. 2 DAC1 demands such restrictions to the extent required in order to safeguard the national tax interests, yet.

The bulk of cross-border exchanged personal data will rapidly increase after implementing DAC2 (see above 3.4.) in the national laws. The scope of automatic transmitted financial account information will be by far broader than it has been before according to Art. 8(1) DAC1. The EU Commission's Expert Group on Automatic Exchange of Financial Account Information (AEFI) is concerned that the DAC2 may violate preconditions set by recent CJEU rulings about data protection (see above 8.3)⁶⁴. The EU-Commission AEFI Expert Group argues that one of the fundamental principles governing the legitimacy of the collection of data is that indicia for an incorrect behaviour of persons must exist. As these requirements are unalterable, data collections without cause, at random, may simply be unconstitutional.

However, the automatic exchange of information is an instrument which is based only on general-abstract risk management criteria. Therefore, it must be sufficient if the transmitted facts (like name of the account holder, account balance or value, total gross amount of interests or dividends) are *potentially relevant* for the residence state of the account holder. Furthermore, the Member States have to guarantee that the information transmitted are not just stored, but are used in matching systems to verify the incoming tax returns as a part of the international tax risk management. An important notification obligation is provided by the new Art. 25(3)DAC2. Each Member State shall ensure that each Reporting Financial Institution (RFI) under its jurisdiction informs each individual Reportable Person concerned that the AEFI relating to him/her will be collected and transferred in accordance with DAC2. Additionally, each Member State shall ensure that the RFI provides to that individual all information he/she is entitled to under its domestic legislation implementing Directive 95/46/EC in sufficient time for the individual to exercise his/her data protection rights. And in any case, before the concerned RFI reports the AEFI to the competent authority of its Member State of residence. The new Art. 25(4)DAC2 gives a hint for the maximum of safekeeping period. The data shall be retained for no longer than necessary to achieve the purpose of the DAC2, and in any case in accordance with the domestic rules on statute of limitations.

The EU-Commission AEFI Expert Group also points out the need of appropriate protection of the personal data transferred under AEOI. Yet, DAC2 does not have any effective mechanism to protect the data of account holders *transferred outside of the EU*⁶⁵. An example of a good practice is offered by Art. 22 of the multinational Convention on Mutual Administrative Assistance in Tax Matters of 29.10.2014 (MCAA)⁶⁶. This provisions of secrecy demands the following:

“(1) Any information obtained by a Party under the Convention shall be treated as secret in the same manner as information obtained under the domestic laws of that Party, or under the conditions of secrecy applying in the supplying Party if such conditions are more restrictive.

⁶⁴ First Report of the Commission AEFI Expert Group on the implementation of Directive 2014/107/EU for automatic exchange of financial account information, March 2015, pp. 7 f., 24-26.

⁶⁵ Commission AEFI Expert Group.

⁶⁶ See above 3.4. and 4.

(2) *Such information shall in any case be disclosed only to persons or authorities (including courts and administrative or supervisory bodies) involved in the assessment, collecting or recovery of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, taxes of that party. Only the persons or authorities mentioned above may use the information and then only for such purposes. They may, notwithstanding the provisions of paragraph 1, disclose it in public court proceedings or in judicial decisions relating to such taxes, subject to prior authorisation by the competent authority of the supplying Party. However, any two or more Parties may mutually agree to waive the condition of prior authorisation.*

(3)

(4) *Notwithstanding the provisions of paragraphs 1, 2 and 3, information received by Party may be used for other purposes when such information may be used for such other purposes under the laws of the supplying Party and the competent authority of that Party authorises such use. Information provided by a Party to another Party may be transmitted by the latter to a third Party, subject to prior authorisation by the competent authority of the first-mentioned Party."*

Art. 22 MCAA provides the *international tax secret* by enlarging the national tax secret-standard of the submitting state on the information receiving states. Concurrently, it expresses the principles of *equivalence* and *reciprocity* as general principles of the international information exchange (see above 6.5.). These preconditions may be pattern to safeguard personal data protection between the Member States as well as in the relationship to third countries. The EU standard of data protection has to be observed not only by each Member State, but also by third countries which are been provided with personal data of any Member State of the EU. Every EU citizen need the confidentiality to be assured that his/her personal data will be transmitted to other fiscal authorities only for tax purposes and under the precondition of EU data protection.

8.5. Additional effective procedural instruments needed to protect the freedom rights of taxpayers

The fundamental right of data protection is mainly reserved for natural person (see above 8.2. and 8.3.). *Legal persons* deserve data protection only as far as the official title of the legal person identifies one or more natural persons (see above 8.3.). This remains a *severe lack of legal protection of legal entities* whose business or commercial secrets are jeopardized by the exchange of information. Thus, Art. 17(4) DAC is key (see above 8.1.). Enterprise secrets are less jeopardized by AEOI, but more by spontaneous information or by information which is transmitted on request. The last-mentioned cross-border transmittances of information are always based on examinations in single, concrete cases. The legal protection of the taxpayer still depends on the national laws in the Member States. In respect of *incoming requests*, we find a clear relationship between *notification, consultation and intervention rights*. National legislations of the Member States differ greatly in this respect. Member States with no notification rights, such as Belgium, Finland, Spain and the United Kingdom, do not have consultation rights⁶⁷. Consequently, if taxpayers are not aware of a request, they cannot intervene. In Member States without notification rights, taxpayers may only intervene when they "exceptionally" become aware of the request, for example, when the tax authorities are not in the possession of the necessary information and have to request it. The right to intervene more or less depends on random events. Overall, it can

⁶⁷ See the General Report of *Seer and Gabert*, Mutual Assistance and Information Exchange, EATLP International Tax Series, Vol. 8, Amsterdam 2010, pp. 23-54.

be said that the level of taxpayer rights at this stage of the process of the exchange of information depends on notification rights. However, taxpayer rights are just effective with regard to the legal protection of taxpayers if they are informed of the request before the information is transmitted to the other State. In other circumstances, taxpayers have no possibility of appeal.

In the OECD's opinion, national law can help to prevent mistakes and facilitate the exchange of information.⁶⁸ Clearly, however, notification rights should not give rise to delays in the exchange of information or make it ineffective. It is the task of the law, on the one hand, to protect the taxpayer and, on the other, to create rules that permit the effective and swift exchange of information between states. With regard to consultation rights, there are opinions of tax administrators who state that hearings may not have a positive effect on the result of the investigation in all cases because, if taxpayers are warned in advance, they may be able to defeat the objective of the request by adopting counteractive measures. This may be the case for tax fraud investigations. Consequently, it is advocated that, in emergencies, a hearing should not take place, as this could endanger the exchange of information. Generally, extensive legal protection may block the exchange of information. As a result, the public interest for the executable exchange of information *must be balanced* against the individual's rights to legal protection. Accordingly, taxpayers must provide convincing evidence to verify the risk of violating their individual rights, for example, with regard to enterprise secrets (see 8.1.). If there is no relevant likelihood that the tax authorities could use enterprise secrets for purposes other than lawful taxation, the information should be exchanged without delay.

A highly developed instrument regarding legal protection is the *preliminary injunction* used by a court before a final judgement that prohibits the delivery of cross-border information. However, in most states, there are only less effective legal protections, which, at least, provide for claims in respect of the damage that a taxpayer has suffered as a result of violations of enterprise secrets. Compared to the legal protection with regard to incoming requests, the legal protection against the making of requests is less strong. In these circumstances, most states do not have any notification rights.

Where the taxpayer's Member State of residence intends to request another State regarding the taxpayer's tax situation in that State, the EU-wide position of the taxpayer is weaker compared regarding incoming requests. Only a few Member States have notification rights compared to the situation for incoming requests so that there are virtually no Member States that have to inform the taxpayer regarding incoming requests. Consequently, taxpayers have very few rights with which to prevent a Member State of residence from requesting information from another State. It is, however, a positive sign that some Member States first cooperate with the taxpayer and try to obtain the required information before sending a request to another Member State. In many cases, this can result in an effective and satisfying resolution of an issue.

⁶⁸. Para. 14.1 of the Commentary on Art. 26 of the OECD MC.

Table 4: Legal Protection of Taxpayers

Instruments	Content
Notification right	Tax Authority or Financial Intermediaries have to inform the taxpayer before transmitting his/her data to the foreign tax authority
Hearing right	Right of the taxpayer to be heard before transmitting his/her data to the foreign tax authority
Right of filing an objection	Right of the taxpayer to intervene against the transmittance of his/her data in front of a court of his/her home state.
Preliminary injunction right	Right to get preliminary legal protection by an interim suspension
Right of damage compensation	as a last resort: at least financial compensation

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NOTES

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