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Article

Recent Development in Exchange of Information within the EU for Tax Matters

Roman Seer*

In a more globalized world, the need for mutual assistance between sovereign states is increasing. Therefore, the Organisation for Economic Co-operation and Development (OECD) and the EU have intensified the instruments of information exchange. The OECD has enlarged the scope of Articles 26, 27 OECD-Model and has proposed a specific Tax Information Exchange Agreement (TIEA)-Model. Both sources have been increasingly used in the bilateral treaty practice. The EU has enacted two new directives: the Directive concerning Mutual Assistance for Recovery of Claims (2010/24/EU of 16 March 2010) and the Directive on Administrative Cooperation (2011/16/EU of 15 February 2011). Notwithstanding these sources, some Member States pursue a utilitarian bilateral solution with Switzerland, the so-called Rubik Agreements. This article will give a systematic overview of the recent developments by explaining the content and function of the legal sources delimiting each other and by giving an outlook for the future.

1 Introduction

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 required, mutual administrative or legal assistance of the respective other state are necessary. The *principle of substantial territoriality* does not equate to the principle of formal territoriality. Substantial territoriality would forbid to link legal consequences according to national law to foreign issues. However, the *universality principle* (world income principle) has almost replaced the territoriality principle (source principle) completely within the states' practices. 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 intensified its efforts to improve the mutual assistance in tax matters, especially within the EU. The following article will give an overview of this development.

2 Information exchanges based on bilateral legal bases

2.1 Information Clauses Modelled on Article 26 OECD Model 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 on information that conduces to the accomplishment of the agreement itself. Beyond that, *major clauses* conduce to the accomplishment of national tax law of the contracting states. Though Article 26 Organisation for Economic Co-operation and Development (OECD) Model Convention is the negotiating basis for the conclusion of new Double Tax Treaties (DTTs), small disclosure clauses are found predominantly in older DTTs. The small information clause did not comply with the OECD Model Convention of 30 July 1963 which already contained a major information clause. However, this was about a constrictive major information clause which only applies to the taxes regulated in the DTTs and was limited to persons resident in the contracting states. Such restrictions can also be found in recent DTTs; for example, concerning the tax types in the DTT concluded from Germany with Belarus from 30 September 2005,[1] with Kyrgyzstan from 1 December 2006[2] and with Croatia from 6 February 2006.[3] 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 Model Convention from 11 April 1977 initially, the feature of residence as restriction for the relevance of personal tax circumstances disappeared. Since the revision of the OECD Model Convention from 2000 the information clause extends beyond the taxes regulated within the particular DTT to all taxes, but does not include social security contributions. Those are taken into account by Article 2 No. 2 lit. b) ii) of the European Council/OECD Convention from 25 January

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1 Bundesgesetzblatt (Federal Law Gazette) Part. II 2006, p. 1042.
2 Bundesgesetzblatt (Federal Law Gazette) Part. II 2006, p. 1066.
3 Bundesgesetzblatt (Federal Law Gazette) Part. II 2006, p. 1112.

1988.[4] 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 like the Directive 2011/16/EU[5] mainly conduce to the enforcement of the *world income principle* in the state of residence. According to the German Federal Ministry of Finance, it is no longer distinguished between a DTT and an EU Mutual Assistance Directive regarding the information exchange. Only in cases where a DTT goes further than the EU Administrative Cooperation Directive, the DTT has to be applied.

Article 26 OECD Model Convention experienced an amendment in 2005 by paragraphs 4 and 5 which the commentary[6] merely defines as a clarification. According to Article 26 paragraph 4 DTT Model Convention 2005, the requested state must not disregard its domestic power of investigation, because it has no own fiscal interest towards the requested information. Article 26 paragraph 5 DTT Model Convention 2005 adds that a contracting state is not allowed to refuse the granting of information solely because the information is possessed by a bank or another financial institution or by an authorized representative or trustee. Herewith, the OECD Model Convention 2005 follows the distinction of the protection of the banking secrecy and the protection of the commercial secret which has also been made within the draft directive COM (2009) 29 for Mutual Administrative Assistance in Europe. Whereas the protection of commercial secrets is necessary to sustain fair competition, the banking secret potentially endangers competition because it gives incentives for competition distorting tax evasions by market participants and simultaneously distorts competition between financial centres. It can basically be seen as a tool for states to keep up a location advantage. Measured by this standard, uncooperative states are defined.

On 17 July 2012, the OECD approved an update to Article 26 and its commentary. Herewith, Article 26 paragraph 2 was amended to allow the use of information received for tax purposes 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. According to paragraph 4.3 of the amended commentary, this used to be an optional provision. Furthermore, the commentary was expanded to develop the interpretation of the standard of foreseeable relevance (Article 26 paragraph 1) and the term 'fishing expeditions' with respect to a *group of taxpayers* not individually identified. Paragraph 5 of the Commentary states that a reasonable possibility for the relevance of the requested information has to be existent at the time the request is made, but once the information is received it is immaterial if the information is actually relevant. This results in requests not being declined solely because a final assessment of the relevance of the information to an ongoing investigation can only be made after the information is provided. If the requesting state clarified the relevance of the requested information explicitly, it shall be provided. However, speculative requests (fishing expeditions) are still explicitly excluded.[7]

The most significant amendment is the allowance for requests relating to a group of tax payers referred to in paragraph 5.2 of the commentary, because there is no obligation of identifying the taxpayers individually. Justification of the request not being a fishing expedition will often be difficult, as the requesting state cannot refer to an ongoing investigation of a certain taxpayer. In most cases, this would lead to the result of the request being random or speculative. In order to fulfil the prerequisite of foreseeable relevance of the information and the request not being determined as a fishing expedition, it is necessary that the requesting state provides 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 shown that the requested information would lead to compliance by those taxpayers (para. 5.2 of the updated commentary). Various countries have already interpreted Article 26 to include group requests. However, for other countries, this represents a new interpretation.

2.2 Agreements on Mutual Assistance Modelled on OECD Model Convention 2002 (Tax Information Exchange Agreement: TIEA)

In order to regulate the informational exchange, bilateral mutual administrative and legal agreements exist besides the DTTs. Such Agreements concluded with European States mostly originate from times long before Directive 77/799/EEC was effective. With respect to the field of application, those agreements partially go further than the taxes mentioned in the DTTs.[8]

Beyond OECD Model Convention 2010, the OECD has published a model agreement about fiscal informational exchange in April 2002 – model of a so-called Tax Information Exchange Agreement – TIEA. It involves the exchange of fiscal information between OECD Member States and tax havens identified by the

[4] Council of Europe's Treaties (CETS) No. 127; see also the Protocol amending the Convention on Mutual Assistance in Tax Matters of 27 May 2010 (CETS No. 208).

[5] See *infra* under 3.

[6] Paragraph 19.10.

[7] Paragraph 5 of the updated commentary.

[8] Such agreements included often large information clauses, e.g.: Germany with Finland (from 17 Jan. 1936, Reichsgesetzblatt [Federal Law Gazette] Part II 1936, p. 37), Italy (from 20 Feb. 1939, Reichgesetzblatt Part. II 1939, 124), Austria (from 4 Oct. 1954, Bundesgesetzblatt Part II 1955, p. 833) and Sweden (from 23 Dec. 1935, Reichsgesetzblatt Part II 1935, p. 866).

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 multi- and bilateral agreements, whereby the agreement points out that it is not about traditional multilateral agreements, but an integrated bundle of bilateral agreements. Hence, it displays an extension of the available resources within the informational exchange. The first TIEAs were concluded by the United States with Antigua and Barbuda (2000), the Cayman Islands (2001), the Bahamas (2002), the British Virgin Islands (2002), the Netherlands Antilles (2002), Guernsey (2002), the Isle of Man (2002), Jersey (2002) and Aruba (2003) followed by the TIEA between the Isle of Man and the Netherlands in 2005 (list of TIEAs by date of signature by the OECD on: http://www.oecd.org).

The introduction refers to the importance for the informational exchange of the global compliance with the standards based on this agreement by financial centres. Thus, many of the aforementioned definitions of Article 4 TIEA Model Convention are concerned with specific terms of the banking sector. This could be a hint for the intended field of application of this model agreement. The designated disclosure type in Article 5 TIEA Model Convention is the request disclosure.[9] Spontaneous provision of information[10] and automatic provision of information[11] are not regulated in Article 5 paragraph 1 TIEA Model Convention, but after the opinion of the TIEA Model Convention commentary they can be included by the bilateral disclosure agreements if requested by the contracting parties.[12] Furthermore, Article 5 Paragraph 5 TIEA Model Convention contains a list of specifications which a request disclosure should include. Regarding the individual request disclosure, the model agreement is conform to Article 26 OECD Model Convention. In accordance with Article 6 TIEA Model Convention also, tax audits abroad are generally possible. Article 7 TIEA Model Convention deals with reasons to withhold information. Here, the usual clauses within the informational exchange can be found. For example, the right to withhold information if the requested state could provide the desired information only by violating national law or if the provision of information would contradict the public order of the requested contracting party. 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. According to this, the distinction between the protection of the bank secret and the protection of commercial secrets is also made in this model agreement. Towards the taxes included in the agreements (regulated in Article 3 TIEA Model Convention), the TIEA Model Convention commentary states that bilateral agreements cover at least the same four categories of direct taxes, that is, taxes on income or profits, taxes on capital, taxes on net wealth, and estate, inheritance or gift taxes, unless the contracting parties waive the inclusion of one or more tax types.[13]

Article 5 paragraph 6 TIEA Model Convention contains a rule to secure the provision of answers in the informational exchange process as soon as possible. Article 5 paragraph 6 sent. 1 TIEA Model Convention asks for the competent authority of the requested state to provide the requesting state with the requested information 'as promptly as possible'. This reminds of Article 5 of the EC Mutual Assistance Directive (77/799/EEC), where also a maximum acceleration is claimed for the provision of information (as swiftly as possible). In contrast to the EC Mutual Assistance Directive, Article 5 paragraph 6 lit. a) and b) TIEA Model Convention require 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 shortcomings of the request preferably within sixty days after receiving the request. Moreover, regarding lit. b), the requested contracting state has to inform the requesting contracting state promptly if the competent authority of the requested state could not obtain and provide or refuse to provide the information within ninety days after the receipt of the request. Herewith, the requested contracting state has to inform the requesting contracting state about the reasons for the failure or ref}usal of the request and the kind of obstacles. Through Article 5 paragraph 6 lit. b) TIEA Model Convention, a time limit of ninety days to answer incoming requests is set for the requested state.

Article 5 paragraph 5 lit. a) to g) TIEA Model Convention also contain regulations concerning which written specifications information requests need to include. Hereafter, among other things, the person who is subject to investigations, the tax purpose for which the information is requested, the reasons for the assumption why the requested information concerning the designated person is substantial for the execution of tax law in the requesting state, the reasons for the assumption that the requested information is either available for the requested contracting state or a person within the jurisdiction of the requested state holds the information or has power of disposition, have to be named. In addition, it needs to be explained in written form that the requesting contracting state exhausted his given measures to obtain the relevant information within his territory to the full potential. The latter determines the *principle of subsidiarity*, which is common for informational exchange. Furthermore, the requesting

[9] To this see *infra* 3.2.2.
[10] To this see *infra* 3.2.3.
[11] To this see *infra* 3.2.4.
[12] Paragraph 39 of the commentary.
[13] Paragraph 9 of the commentary.

state has to name specified reasons for the request of information. The list of essential specifications of Article 5 paragraph 5 lit. a) to g) TIEA Model Convention forces the requesting state to formulate the request precisely and detailed and therewith to think through its request in advance. The EC Mutual Assistance Directive does not contain a comparable listing of essential specifications concerning informational requests. Merely Article 17 paragraph 1 of Directive 2011/16/EU (former Article 2 paragraph 1 sent. 2 of Directive 77/799/EEC) refers to conditional subsidiarity. The specification of the tax purpose in conjunction with Article 8 paragraph 3 of the TIEA Germany-Liechtenstein results in a tax secret that provides a higher protection against a multiple usage or change of the original purpose than Article 26 OECD Model Agreement. The use of the imported 'Liechtenstein DVD' as a piece of evidence in tax investigations is therefore forbidden as the information has to be submitted knowingly by the respective state.[14] An extension of the use is only possible if the requested authority gives its approval.[15]

In 2000, the OECD officially identified several jurisdictions as tax havens measured by certain criteria.[16] Followed by this, almost each of those jurisdictions implemented the international tax standards and have been removed from the list of uncooperative tax havens.[17] The OECD progress report of 18 May 2012 solely lists Nauru and Niue as tax havens.[18]

As a result of the increasing pressure on tax havens, the number of agreement conclusions modelled on this convention model rose significantly compared to previous years. There have not been as many TIEA conclusions ever since the TIEA Model Convention existed.[19] Herewith, a new development within informational exchange in tax matters can be identified. It should be noted that there exists neither a homogeneous definition of the term 'tax haven', nor a homogeneous handling of the term in the national tax laws throughout Europe. Thus, some Member States have legal definitions of this term within the national acts and others do not. Beyond that, some Member States publish 'white lists' of countries they do not classify as tax havens. Different Member States maintain 'black lists' which provide countries considered to be tax havens. Other countries concluded such agreement already earlier, for example, the USA with Guernsey in 2002. Furthermore, it is interesting that a TIEA has been signed between contracting parties, both considered as tax havens by the OECD. Liechtenstein and St. Vincent/Grenada concluded such agreements with each other on 2 October 2009. It is strictly based on the TIEA Model Convention; the extent of included taxes is very wide (see Article 3 of the Convention).

2.3 Assistance in Recovery of Claims Modelled on Article 27 OECD Model Convention

Article 26 OECD Model Agreement only regulates the exchange of information. It does not allow the requesting state to claim the recovery of taxes by the requested party. This is covered by Article 27 OECD Model Agreement. In 2003, the OECD Model Convention was amended by a rule for mutual assistance of the recovery of claims in Article 27. With Article 27 OECD Model Convention identical or comparable provisions are still rather seldom until now because many double tax agreements have been concluded before 2003 without any clause for the discovery of claims. Administrative assistance according to Article 27 can occur in two different ways. On the one hand, the contractual partners commit to recover the claims of the respective other contracting states if the prerequisites of Article 27 paragraph 3 OECD Model Convention are met and, on the other hand, to induce measures to secure these claims under Article 27 paragraph 4 OECD Model Convention.[20]

3 EU Directive on administrative cooperation (directive 2011/16/EU of 15 february 2011)

3.1 Basic Information

Informational exchange between EU Member States is not solely based on international law agreements. The progress of the European integration led to an internationalization of economic life. Already in the 1970s, the restriction of investigative measures on the own country (formal territoriality) resulted in difficulties for national tax administrations to control and collect taxes in relevant cross-border issues. This led to shortfalls in tax revenues and a distortion of the capital market and conditions of competition. Hence, the functioning of the European internal market was endangered. The result was the decision of the EC Council of Ministers from 10 February 1975 in which the commission was asked to take actions to fight

[14] *Andreas Schwörer*, Der Datenaustausch mit Liechtenstein und Jersey, Deutsche Steuerzeitung (German Tax Journal) 2010, p. 236 (240).

[15] No. 3 b] of the Protocol to the TIEA Liechtenstein-Germany, Bundesgesetzblatt (Federal Law Gazette) Part II 2010, 955.

[16] Org. Econ. Co-operation & Dev. Rpt. 2000, *Progress in Identifying and Eliminating Harmful Tax Practices*, p. 17.

[17] http://www.oecd.org/countries/monaco/jurisdictionscommittedtoimprovingtransparencyandestablishingeffectiveexchangeofinformationintaxmatters.htm

[18] OECD Progress report on the jurisdictions surveyed by the OECD global forum in implementing the internationally agreed tax standard, http://www.oecd.org/ctp/exchangeofinformation/43606256.pdf

[19] See the updated list of concluded TIEAs by date of signature on: http://www.oecd.org/ctp/exchangeofinformation/taxinformationexchangegeagreementstieas.htm (accessed 7 Mar. 2013).

[20] Roman Seer & Isabel Gabert, *European and International Tax Cooperation: Legal Basis, Practice, Burden of Proof, Legal Protection and Requirements*, Bull. Intl. Taxn. 88–98, 91 (2011).

international tax evasion and avoidance. Hereupon in 1976, the EC Commission submitted a proposal for a directive on mutual assistance between the competent authorities of the Member States in the field of direct taxes. Based on this proposal, the Council of Ministers enacted the so-called EC Mutual Assistance Directive in 1977.[21] In order to meet the needs of information exchange in a world of growing internationalization, the Commission published a Proposal for a Council Directive on Administrative Cooperation in the Field of Taxation.[22] The proposal was accepted by the Council of Ministers for Economic affairs and Finance (ECOFIN) on 15 February 2011 and has to be transformed into national law by 1 January 2013.[23] Its aim is to strengthen the cooperation between the tax authorities by common principles and rules within the European Union.[24] The directive gives a minimum standard for intergovernmental cooperation.

Intergovernmental mutual assistance becomes even more essential when the principle of formal territoriality does not comply with the principle of material territoriality. Material Territoriality forbids legal consequences after national law also to foreign issues. Even if good reasons exist to limit the national right of taxation on the territoriality principle, the universality principle (world income principle) replaced the territoriality principle (source principle) to a large extent. Due to fiscal reasons export oriented, comparatively highly taxed industrial states have a special interest in the perpetuation of the world income principle.

3.2 Types of Information

3.2.1 *General Information*

According to Article 1 paragraph 1 of the EU Mutual Assistance Directive, the precondition for the supply of information is that the requested information is foreseeably relevant to the enforcement of the domestic laws of the Member States. The fiscal authority checks incoming requests with respect to them being relevant from the point of view of an ex ante observer. This means the authority does not investigate explicitly if the requesting state actually possesses no tax claim. In doing so, it is assumed that the foreign state made already use of its investigation possibilities to the full extent before it asks for informational request (*subsidiarity principle*).[25] Generally, the fiscal authority assumes relevancy with requested and automatic information. With spontaneous information relevancy has to be investigated always.

A big step towards effective administrative assistance and exchange of information is the standardization of the submission of requests and information. Article 20 paragraphs 1 and 3 state that an information request or a spontaneous provision of information shall be sent by using the *standard form*. The automatic exchange of information shall be sent using a standard computerized format (Article 20 paragraph 4). Article 20 paragraph 2 states which specification the standard form used to send the request has to contain. This is 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 2.2). The use of these standard formats is accompanied by regulations concerning the use of the *Common Communication Network (CCN)* in Article 21. This shall make the information exchange faster and is already used successfully with regard to value added tax (VAT).[26] Another reason for less efficient information exchange between cooperating countries are *language problems*. Therefore, the new directive states that requests for cooperation, including requests for notification and attached documents may be made in any language agreed to between the cooperating parties (Article 21 paragraph 4). There exists no priority for a particular language.

3.2.2 *Information Request*

Article 5 of the Directive 2011/16/EU governs information upon request. Pursuant to this article, the requested authority shall communicate to the requesting authority any information referred to in Article 1 paragraph 1 that it has in its possession or that it obtains as a result of administrative enquiries. Under the new directive, the single central liaison office, liaison departments and the competent officials are also now allowed to make and answer a request directly (Article 4 paragraph 6). The requested authority takes care of the information request in the same way it provides information for national taxation issues (Article 6 paragraph 3). Article 20 paragraph 2 of Directive 2011/16/EU lists the information that must be contained in the standard form that is used to make a request for information. This information includes the identity of the person under examination or investigation and the tax purpose for which the information is sought. 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. Information shall be provided as quickly as possible,

[21] Directive 77/799/EEC of 19 Dec. 1977, OJ EC No. L 336, pp. 15–20.
[22] COM [2009] 29.
[23] Directive 2011/16/EU of 15 Feb. 2011, OJ EU No. L 64, pp. 1–12.
[24] Directive 2011/16/EU of 15 Feb. 2011, OJ EU No. L 64, p. 2, para. 7.
[25] Article 17 para. 1 of Directive 2011/16/EU.
[26] Isabel Gabert, *EU Council Directive 2011/16/EU on Administrative Cooperation on the Field of Taxation*, European Taxn. 342, 346 (2011).

and not later than six months from the day the request is received (Article 7 paragraph 1).

Article 4 paragraph 2 of Directive 2011/16/EU says that a central liaison office has to be designated by the competent authorities of each Member State.[27] Moreover, Article 4 paragraphs 3 and 4 allow the designation of liaison departments or officials with the competence to exchange information. These new regulations shall accelerate the process of answering incoming requests.

3.2.3 *'Spontaneous Information'/'International Control Notice'*

Article 9 paragraph 1 lit. a) to e) of the Directive 2011/16/EU lists *five circumstances* in which the competent authority of a Member State must communicate the information referred to in Article 1 paragraph 1 to the competent authority of another Member State without previous request. This list of circumstances relevant to the spontaneous exchange of information does not differ from the list in Article 4 paragraph 1 lit. a) to e) of the former directive.

– limited to the *five case constellations* of Article 9 paragraph 1 Directive 2011/16/EU:
  (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.

It does, however, differ from what the proposal had in mind for the spontaneous exchange of information. Article 9 of the proposal stated that the Member States may, in any event, forward to each other any information that they are aware of where taxation is deemed to take place in the Member State of destination of the information. The abolition of this list of circumstances relevant to spontaneous exchange of information would have clearly extended the scope of spontaneous exchange of information. However, upon closer inspection, Directive 2011/16/EU has the potential to enlarge the scope of spontaneous information exchange in Europe since Article 9 paragraph 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. Herewith spontaneous exchange of information is an effective tool to fight tax fraud and has increased rapidly within the EU. Article 10 of the new directive 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. This may increase the speed of spontaneous information exchange and, therefore, its efficiency.[28]

The central liaison office shall decide about the submission of information according to its best judgment. The directive solely refers to information that 'may be useful' (Article 9 paragraph 2 Directive 2011/16/EU). So, the importance for the taxation in the foreign state is assumed for these case constellations. Actual indications have to justify the presumption.

3.2.4 *'Automatic Information'*

According to Article 8 paragraph 1 (a) to (e) of Directive 2011/16/EU, automatic exchange of information for taxable periods as from 1 January 2014 applies to *the following categories of income and capital*: income from employment, director's fees, life insurance products not covered by other EU legal instruments regarding exchange of information, pensions and ownership of income from immovable property.

It does not appear that this provision is as broad as the European Parliament provision contained in the resolution of 10 February 2010, which also proposed that dividends, capital gains and royalties be included.[29] This would have been remarkable and far-reaching and would have led to the Savings Directive (2003/48/EC) being overruled. It is possible, however, that automatic exchange of information will be extended to dividends, capital gains and royalties at a later date as part of a step-by-step-approach (see Article 8 paragraph 5 Directive 2011/16/EU). Member States should take care that they use the automatic exchange to transmit relevant information to another Member State and not just to 'produce paper'. In this regard, Article 8 paragraph 3 of the new directive may be helpful. The competent

[27] Also Art. 4 para. 2 of the Directive concerning Mutual Assistance for the Recovery of Claims, 2010/24/EU, and Art. 4 para. 1 of the Regulation on Cooperation in VAT matters, No. 904/2010; a list of the competent authorities is published in OJ EU No. C 177/4.

[28] See *Isabel Gabert* (footnote 26), European Taxn. 2011, p. 342 (344).

[29] Proposal of 16 Dec. 2010, OJ EU No. C341, E/90.

authority of a Member State may now indicate to the competent authority of another Member State that it does not wish to receive information on the categories of income and capital referred to in Article 8 paragraph 1 or that it does not wish to receive information on income or capital not exceeding a certain threshold. Member States can use this provision to ensure that the data received through the automatic exchange of information will actually be analysed and evaluated by their national risk management systems. Article 8 paragraph 6 Directive 2011/16/EU provides that the automatic exchange of information will take place regularly, namely at least once a year, within six months of the end of the tax year during which the information became available. As such, a time limit for the automatic exchange of information has been established. Article 8 also contains detailed provisions on how an evaluation of the automatic exchange by the Member States and the Commission should take place to further improve and strengthen automatic exchange within the European Union in coming years.

3.2.5 *Hierarchy of the Information Types*

With respect to the usefulness of the individual information types to fight tax fraud and evasion *no hierarchy* can be set up, because each kind of information pursues a different purpose and is only an adequate instrument to reach this goal within its specific area of application. This is widely recognized within Europe. The interaction of the different types of information represents an adequate information system to reach the aims of information exchange. Hence, information request and spontaneous request are individually aligned with reducing a concrete risk and therefore more specific. The *automatic information* is generally focused on reducing an abstract risk and therefore has a wider dispersion. Spontaneous and automatic information rather enable findings by chance. In contrast to this, the involved states have to make sure that the transmitted automatic information is not only used to 'produce paper' (see above 3.2.4).

Information request is always carried out by the initiative of the Member State that is interested in certain information to secure taxation in his country. Therefore, it addresses another Member State, and the information providing state only gets active after the request is filed. From this state, spontaneous and automatic information describe further development. The *information providing state gets active on its own initiative*, and therefore has to take action right from the start. The provision of information requires a high degree of anticipation about which information could be relevant for the other Member State. If states are proactive like this and provide other Member States with comprehensive essential information, the exchange of information reaches a whole new dimension. The information providing state actively helps the information receiving state.

The *transition of a passive to an active exchange of information* can also be defined on another level. According to the former Directive on Administrative Assistance (77/799/EEC), the requesting state takes over a merely passive position, because it has no power of execution concerning which investigation measures should be taken after the right of the requested state. The requesting state solely can be the initiator for the foreign financial authority to start with investigations. Only the requested administrative office has authority to decide which investigative measures are taken. According to Article 6 paragraph 1 Directive 2011/16/EU, Article 26 paragraph 4 of the OECD Model Convention investigations shall not be limited to a simple screening of documents. In fact, it has to take further adequate measures qualified to give clarification within its own judgment. The new Directive on Administrative Cooperation allows administrative officers to participate in administrative enquiries (Article 11 Directive 2011/16/EU). Officers of the requesting authority are not allowed to enact audit activities of the requesting authorities, but Article 11 paragraph 1 allows them to be present during administrative enquiries and paragraph 2 allows to interview individuals or examine records. In contrast, Directive 77/799/EEC did not provide any further binding possibility of participation for the requesting state. It rather referred to the consultation procedure in terms of Article 9 in Article 6, 8b of the Directive 77/799/EEG where Member States were also able to arrange the presence of tax inspectors of the requesting state at investigation procedures of the requested state and at the execution of coordinated, simultaneous field tax audits. But no active participation has been allowed.

3.3 Boundaries of Information Exchange

The limits of exchange of information are regulated in Article 17 of Directive 2011/16/EU. Paragraph 1 states that information does not need to be provided if there exists a reasonable cause to assume that the requesting state has not exhausted his investigation possibilities to the full extent, although it would have been possible. This means the *subsidiarity principle* has to be preserved and the usual source of information shall be exhausted first, but without running the risk of jeopardizing the achievement of its objectives. According to Article 17 paragraph 2 Directive 2011/16/EU, a requested state does not have to carry out enquiries or provide information if this is not compliable to its national law. Followed by this, paragraph 3 provides that financial authorities do not need to provide information if actual (factual, material) *mutuality* is not given at the same time. Thereby, the exchanged information does not have to be homogeneous, neither in their extent nor in their

content, but information comparable regarding nature and quality has to be possible to be acquired (principle of mutuality). Despite this, the Directive also *protects commercial, industrial or professional secrets* (paragraph 4) which is also referred to as *international tax secrecy*. If the request from abroad refers to a commercial, industrial or professional secret, provision of information can be refused. This shall cover economic and industrial espionage. Paragraph 5 ensures that the requesting authority gets notice of the refusal of provision of information and also about the reasons.

Directive 2011/16/EU introduces major changes concerning *bank secrecy*. As mentioned already above, the transmission of information can be refused if it would lead to the disclosure of commercial, industrial or professional secrets or if it violates the public order. This was also provided by Article 8 Directive 77/799/EEC. However, Article 18 paragraph 2 Directive 2011/16/EU states 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 completely different issues. Commercial secrets protect a country's companies, their inventions and investments and herewith strengthen economic competition. In contrast to this, bank secrets can hinder the competent authority of a Member State to determine the exact tax base of a taxpayer because it does not get the complete information regarding the relevant income (see under 2.1). This information lack supports tax fraud and 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 commercial secrets, this leads to a negative influence in competition in the internal market. Therefore, comparable provisions are found in Article 26 OECD Model Convention, Article 5 paragraph 4 a) TIEA Model Agreement (see above section 2.2) and Article 5 paragraph 3 of the Recovery of Claims Directive (see below section 4). The abolition of bank secrecy may in the future extend upon automatic exchange of information, until now it only covers information requests.[30]

3.4 Improvement of Effectiveness

In comparison to Directive 77/799/EEC, the new Directive 2011/16/EU aims to make information exchange more effective. First of all, it is no longer solely applicable for the information that enables a correct assessment of taxes on income and capital. Article 2 Directive 2011/16/EU states that it shall apply to *all taxes* of any kind levied by a Member State. Herewith, also inheritance tax is covered. Furthermore, the new directive aims at the shortening of cumbersome official ways of transmitting requests and providing information by introducing a *central liaison office, liaison departments* and competent officials (Article 4). The former Directive on Administrative Assistance did not contain such provisions.

Additionally, the usage of *standardized forms*, the *CCN* and the introduction of *explicit time limits* within requests have to be answered or further information has to be requested, make a major contribution to speed up the information exchange process. Besides these new regulations, some provisions were extended to ensure a better and wider field of application for the different request types and the improvement of a wider participation/supervision of the requesting authority (i.e., Article 9 paragraph 2 Directive 2011/16/EU gives the right to competent authorities to communicate any information they are aware of, and that may be useful to other Member States; Article 11 paragraph 1 Directive 2011/16/EU allows competent officials to be present during administrative enquiries and paragraph 2 to interview individuals or examine records). This situation was unsatisfying from the point of view of the requesting state under Directive 77/799/EEC. It did not provide any further binding possibility of participation for the requesting state. It rather referred in Article 6 of the Directive 77/799/EEC to the consultation procedure in terms of Article 9. As a result, Member States were able to arrange the presence of tax inspectors of the requesting state at investigation procedures of the requested state and at the execution of coordinated, simultaneous field tax audits.

The new directive on administrative cooperation follows the latest international standards and distinguishes between *commercial* and *banking secrets* (Article 17 paragraph 4 and Article 18 paragraph 2 Directive 2011/16/EU). It matches with Article 26 OECD Model Agreement (see above section 2.1) and the TIEAs (see above section 2.2.) and forbids declining to supply information solely because it is held by a bank. These amendments to Directive 77/799/EEC shall shorten the ways of information request by designating different contact departments and persons. Additionally, the usage of electronic and non electronic standard forms in a language both states agreed on, shall make this process even more effective.

4 Intergovernmental administrative assistance in tax collection (directive 2010/24/EU of 16 march 2010)

4.1 Legal basis

The legal basis of intergovernmental administrative assistance in tax collection derives from the Directive concerning Mutual Assistance for the Recovery of Claims,[31] which replaces the previous Directive 2008/

[30] Isabel Gabert (footnote 26), European Taxn. 2011, 342–347, at p. 345.

[31] Council Directive 2010/24/EU of 16 Mar. 2010, OJ EU No. L 84, pp. 1–12.

55/EC of 26 May 2008,[32] from the DTTs as well as from treaties about administrative and legal assistance in tax matters. The new Recovery of Claims Directive 2010/24/EU (RCD) is effective since 1 January 2012.

4.2 Scope of Application

According to Article 2 Directive 2010/24/EU, all taxes of any kind are covered as well as administrative penalties, fines and fees. Directive 2008/55/EC limited the application to taxes on income and capital, taxes on insurance premiums and VAT.

4.3 Request Types of Administrative Assistance

Directive 2010/24/EU distinguishes *four types of administrative assistance*: The request for information (Article 5), the request for notification (Article 8), the request for recovery or precautionary measures (Articles 10 and 16) and the exchange of information without prior request (Article 6).

According to Article 5, information can be requested for the purpose of recovering claims. Generally, this is not necessary if a request for recovery or precautionary measures can be submitted. The request for notification gives the foreign financial authority the right to request for notification of all documents relating to claims or their recovery, including those of judicial nature (Article 8) whereas Articles 10 and 16 state that any request shall be accompanied by an instrument permitting enforcement in the requested state. These articles ask for information to be requested generally, but Article 6 makes an exception for refunds of taxes or duties and allows the exchange of information without prior request.

The new directive concerning assistance for the recovery of claims implements several new instruments and regulations that intend to make the cross-border recovery of claims more effective and efficient. A *central liaison office* or liaison department has to be designated (Article 4 paragraphs 2 and 3), *banking secrets* do not give permission to decline the supply of information (Article 5 paragraph 3), authorized officials may be present in administrative offices of the requested Member State and participate in enquiries (Article 7) and a *uniform standard form* has to be used for the sending of instruments permitting enforcement or other documents via CCN (Article 21). These new regulations are in line with the innovations already described with the new directive for administrative cooperation 2011/16/EU (see above in section 3). However, regarding the use of electronic means of Article 21, the Recovery Assistance Directive goes further and makes the usage of electronic networks mandatory. Furthermore, Article 12 of Directive 2010/24/EU requires any request for recovery to be accompanied by a uniform instrument permitting enforcement in the requested state which is considered to be the essential advantage of the new directive.

4.4 Boundaries of Administrative Assistance

The limits of administrative assistance within the recovery of claims are basically in line with those ones of the Administrative Cooperation Directive (see above section 3.3). Article 11 paragraph 1, Article 5 paragraph 2a include the *principle of mutuality*, whereas a request shall not be made, if a claim/the instrument permitting its enforcement are contested except in cases where Article 14 paragraph 4 subparagraph 3 apply and the relevant laws and regulations allow such actions. Furthermore, the *subsidiarity principle* is preserved and the requesting authority has to apply the usual domestic recovery procedures (Article 11 paragraph 2). In contrast to the former directive, request without prior recovery procedures are allowed if there are no assets in the requesting state, or the recovery procedure will not result in full payment, and the respective person owns assets in the requested state (Article 11 paragraph 2a). Additionally, the *proportionality principle* has to be considered and the domestic recovery procedure does not have to be applied if this results in disproportionate efforts (Article 11 paragraph 2b). The Recovery of Claims Directive also protects *commercial, industrial or professional secrets* and the *public order* (Article 5 paragraph 2 lit. b] and c]) and as well forbids the withholding of information solely because it is held by a bank (Article 5 paragraph 3).

5 Rubik agreements

Switzerland used to be the prime example of a bank secrecy country and the debate about solving the problem of fulfilling requested tax compliance, on the one hand, and, on the other hand, preserve the bank secrecy to some extent has been a topic for a long time. The solving of this complicated situation is referred to as the Rubik Model (due to the famous Rubik's cube). In order to strengthen fiscal relations and to create bases of cooperation which has, with respect of taxation of capital income, an enduring effect *equivalent* to the outcome that would be achieved through an agreement to exchange information on an automatic basis Switzerland aimed to contract agreements with the United Kingdom, Austria and Germany about the cooperation in the area of taxation. The agreements with Austria[33] has been notified on 19 December 2012 and is in force since 1 January 2013[34] and the agreement with

[32] OJ EU No. L 150, pp. 28–38.

[33] Attachment to Bundesgesetzblatt of 28 Dec. 2012 (Austrian Federal Law Gazette) Part III 2012 No. 192.

[34] Bundesgesetzblatt of 28 Dec. 2012 (Austrian Federal Law Gazette) Part III 2012 No. 192.

the United Kingdom[35] was ratified on 15 June 2012 and is as well in force since 1 January 2013.[36] Due to resistance in Germany, especially by the majority of states that are governed by member of socialist party, the agreement between Germany and Switzerland[37] collapsed and has not been concluded.[38]

According to Article 1 paragraph 2 of the agreements, the contracting parties shall agree to provide assistance in the field of: (a) tax regularization of relevant assets held in Switzerland, (b) effective taxation of the income and gains of those assets and measures to ensure the agreement's purpose, and (c) further exchange of information regarding assets of Swiss residents in the UK. In order to determine the identity and residence of relevant persons, the Swiss banks will keep record of the name, first name, birth date, address and residence details when establishing business relationships. With respect to this, the 'Swiss Standard' was developed which generally includes two aspects: A solution for the past and for the future. According to Article 5 paragraph 1, the relevant persons have the option to choose between those solutions. The UK-Agreement also refers to non-UK domiciled individuals which have to undergo a special certification process (Article 4). Those taxpayers also have the possibility to choose between the above-mentioned options (Article 5 paragraph 2 lit. a] and b]), disclose all non-UK income and gains that has been transferred to the UK (Article 5 paragraph 2 lit. c] and also simply choose none of those three options (Article 5 paragraph 2 lit. d]).

5.1 The Solution for the Past

The solution for the past maintains bank secrecy if required by the taxpayer and covers undeclared assets existing in Switzerland since 31 December 2010 (Article 7 Austrian Agreement, Article 9 UK-Agreement). Four (Article 2 paragraph 1 in conjunction with Article 5 paragraph 1 UK-Agreement) or five (Article 2 lit. j in conjunction with Article 7 Austrian Agreement) months after the agreements entered into force (1 January 2013; the Final Date), the taxpayer can choose between two options: He can either choose to stay anonymous and accept that tax liabilities are cleared by an anonymous one-off payment (Article 7 Austrian Agreement, Article 9 UK-Agreement) or declare those assets on a voluntary basis (Article 9 Austrian Agreement, Article 10 UK-Agreement). With the voluntary disclosure, the Swiss paying agent (a Swiss bank, Article 2 lit. e] of the agreements) is authorized by the taxpayer to give the relevant information to the competent Swiss authority (Swiss Federal Department of Finance – SFDF, Article 2 lit. d] of the agreements) which communicates this information to the competent authority of the residence state for all periods that are still open for assessment.[39] The so-called Abolition Tax depends on the assets still existing in Switzerland on 31 December 2010 – the Starting Date – or higher capital on 31 December 2012 but 120% of capital on 31 December 2012 at maximum (Article 7 Austrian Agreement, Article 9 UK-Agreement). The Abolition Tax will be calculated by a formula explained in the annexes of the relevant agreements and ranges from 19% to 34% depending on the holding time of the Swiss capital. The Swiss paying agent will collect the taxes and transfer them to the SFDF which will transfer the taxes to the respective tax authorities in the residence state on a monthly basis (Article 9 paragraph 5 UK-Agreement, Article 7 paragraph 4 Austrian-Agreement).

According to the *tertium non datur-principle*, the taxpayer has to remove the assets out of Switzerland if he/she is not willing to apply the Past Declaration or the Abolition Tax Solution.[40] It should be mentioned, that the Starting Date was introduced to avoid the movement of other assets to Switzerland by non-resident taxpayer to benefit from the comparably lower Abolition Tax. However, the addressed persons have time to remove their assets from Switzerland after the Starting Date until four or five months after the Agreements enter into force.[41] This represents a significant loophole. It is rational though, as Switzerland does not want to act as the tax collector of third countries by forcing Austrian or UK taxpayers to pay the Abolition Tax when they want to leave Switzerland. With the agreements, Switzerland actually solely commits to apply taxation of foreign assets in the future.[42] In order to fulfil the demands of the states to receive information to be able to pursue possible taxpayers who removed their assets from Switzerland at least to some extent, Article 18 of the UK-Agreement and Article 16 of the Austrian-Agreement state that the SFDF shall report automatically to the competent authority of the respective state the ten states or jurisdictions to which relevant persons who closed their account or deposit between the date of signature of the agreements the Final Date have transferred the largest volume of assets. The enlargement of the scope of information request of the OECD-commentary on Article 26 of the Model Convention (see above section 2.1) may be a useful tool of Austrian or UK tax authorities to negotiate with the states of destination.

If the relevant person chooses the second option and authorizes the Swiss paying agent to communicate the relevant data to the SFDF on a monthly basis starting

[35] Swiss AS 2013, 135.
[36] Swiss AS 2013, 133.
[37] German Official records of Parliament (Bundestag-Drucksache) 17/10059.
[38] German Plenary Protocol No. 906 of 1 Feb. 2013, p.21 (B).
[39] Alfonso Rivolta, *New Switzerland–Germany and Switzerland–United Kingdom Agreements: Does Anyone Offer More than Switzerland?* Bull. Intl. Taxn. 138–147, 139 (2012).
[40] *Alfonso Rivolta* (footnote 34), p. 140.
[41] *Alfonso Rivolta* (footnote 34), p. 140.
[42] *Alfonso Rivolta* (footnote 34), p. 140.

one month after the agreement entered into force with the last transfer six months after the agreement entered into force (Article 10 paragraph 1 UK-Agreement, Article 9 paragraph 2 Austrian Agreement). According to Article 10 paragraph 2 UK- and Article 9 paragraph 3 Austrian-Agreement, the SFDF shall transfer this information *automatically* to the competent authority of the respective state on a monthly basis starting two months and ending seven months after the agreement entered into force. Later disclosures shall be communicated without delay by the paying agent and the SFDF (Article 10 paragraph 2 sent. 2 UK- and Article 9 paragraph 3 sent. 3 Austrian-Agreement). The relevant information according to Article 10 paragraph 1 UK-Agreement and Article 9 paragraph 1 Austrian Agreement are as follows:

(a) the identity (full name and date of birth) and address of the relevant person;
(b) the tax reference number, if known;
(c) the name and address of the Swiss paying agent;
(d) the customer number of the account or deposit holder (customer, account or deposit number, IBAN-code);
(e) the yearly account balance and statement of assets at 31 December of each relevant year for the time of the account's/deposit's existence between 31 December 2002 and the date of entry into force.

If the identification of the relevant person is not possible from the information provided, the competent authority may request further information (Article 10 paragraph 4 UK-Agreement and Article 9 paragraph 5 Austrian Agreement).

All in all, one can say that the automatic exchange of information regarding past assets since the time they were deposited is an 'extraordinary *una tantum* measure' which has never occurred before.[43]

5.2 The Solution for the Future

The solution for the future also preserves *bank secrecy* if the taxpayer so wishes. He may opt to be subject to a final withholding tax levied by a Swiss paying agent on income on capital (Article 19 UK- and Article 17 Austrian-Agreement). The competent authority of the respective state shall without delay inform the SFDF in writing about changes to domestic law regarding the tax rates applicable to income and gains on relevant assets (Article 20 paragraph 1 UK- and Article 18 paragraph 1 Austrian-Agreement).

Alternatively, the relevant person can authorize a Swiss paying agent to disclose to the competent authority of the residence state the income arisen and capital gains realized on an account or deposit, which is a form of automatic exchange of information (Article 22 UK- and Article 20 Austrian-Agreement). Within this disclosure, the following information is provided by the competent authority of the residence state:

(a) the identity (name, first name and date of birth) and address of the relevant person;
(b) the tax reference number, if known;
(c) the name and address of the Swiss paying agent;
(d) the customer number of the account or deposit holder (customer, account or deposit number, IBAN-code);
(e) the tax year concerned;
(f) the total amount of income and capital gains.

Article 32 UK-Agreement give accompanying measures to safeguard the agreements' purposes. In relation to this purposes, the competent authority of the respective state is allowed to request information if the identity of a resident taxpayer and plausible grounds are provided. However, the name of the Swiss bank does not have to be included which means that the information holder, has only to be submitted if it is known (Article 32 paragraph 1; see also paragraph 5.1 of the Commentary on Article 26 OECD Model Convention) and the request may only refer to taxable periods beginning on or after the date of entry into force of these agreements (Article 32 paragraph 11,13). For the purpose of identifying the taxpayer, the competent authority of the residence state shall provide name, address, and, if known, date of birth, professional activity and other information (Article 32 paragraph 2). The request is seen as reasonable if the competent authority of the residence state has identified on a case-by-case basis a tax risk and sees plausible, non-arbitrary grounds for checking the tax position. These grounds shall be based on an analysis of a range of information such as previous tax returns, level of income, third-party information and knowledge of the persons who were involved in completing a tax return (Article 32 paragraph 3).

The already in section 2.1 mentioned *fishing expeditions* are excluded (Article 32 paragraph 3). The competent authority of the requesting state informs the taxpayer in advance about the intended request for information. Within the UK-agreement, the competent authority may deny this procedure if it has reasonable grounds for believing that this might seriously prejudice the assessment or collection of tax. The legal basis for Swiss financial institutions to provide the information requested (the existence of accounts and deposits) is given with Article 32 paragraph 6, and where the taxpayer subject to this request has an account or deposit in Switzerland in the time period referred to in the request; the competent authority of Switzerland shall provide the name of the institution concerned and the number of existing accounts and deposits to the competent authority – further details like the account's balance is not provided (Article 32 paragraph 7). The joint commission shall determine the *maximum number of admissible requests per calendar* year and shall not

[43] *Alfonso Rivolta* (footnote 34), p. 143.

exceed 500 per year in the UK which seems to be quiet low as there are more assets expected to be held in Switzerland by UK residents. In case, further information than the ones covered from these articles is required, the competent authority of the respective state may request administrative or judicial assistance (Article 32 paragraph 9).

The above-mentioned exchange of information is limited and not applicable to assets that were subject to the one-off payment and the withholding tax (Article 33 paragraph 8). This means total bank secrecy maintains! Furthermore, this limited measure is more a deterrent instrument which gives the residence states the opportunity to use the means of mutual assistance by the OECD Model Convention.

The solution for the future is, in principle, equivalent to automatic exchange of information with regard to: (1) authorization of disclosure of all relevant information to assets held in Switzerland, and (2) final withholding tax, for new assets, starting from when the assets are moved to Switzerland and, for old assets, once they have been regularized through one of the two possible solutions for the past. However, the final withholding tax solution is *not equivalent to automatic exchange of information* on the origin of new assets that were purchased by a taxpayer in a third country during tax periods when those assets were still in the third country. But it shall be pointed out that the Swiss Standard is more effective than the usual automatic exchange of information as foreign taxes are applied directly from the Swiss paying agents, and the relevant tax authorities will receive those taxes automatically. From this point of view, the limited exchange of information according to the Swiss Agreements can be seen as an equivalent to automatic exchange of information if accompanied by an exchange of information clause in the relevant OECD tax treaty, plus, it is more efficient with respect to the enforcement and collection of taxes.[44]

6 Outlook and open question

The new Directives 2010/24/EU and 2011/16/EU are important steps to improve tax enforcement within the EU. To achieve the goal of a European administrative area, the Member States have to invest in staff, education and technology to implement mutual assistance in tax administration reality. It is still an open question if the Member States will fully realize an information exchange system regarding income of capital. From the point of the Savings Directive (2003/48/EC), it is coherent to enlarge automatic information exchange on the whole range of capital income and capital gains. However, the Rubik Agreements and national final withholding systems lead the way in the opposite direction. If the majority of Member States prefer a final withholding tax, an automatic reporting system is not necessary, and Rubik Agreements with third countries are appropriate. In this case, it makes sense that the source state transfers a certain portion of the withholding tax revenue to the states of residence. However, if Member States prefer to tax capital investors with their individual income, a cross-border reporting system based on automatic information exchange will be inevitable. This general decision has to be made.

[44] *Alfonso Rivolta* (footnote 34), p. 146.

Author Guide

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