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## 23. Exchange of information and cooperation in direct taxation

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### 1. INTRODUCTION

Two main legal principles notably influence international taxation, although they seemingly interfere with each other. While in accordance with the worldwide income principle a state will impose taxes on the income of its citizens no matter where they earned it, the principle of formal territoriality restrains the authorities of the taxing state from undertaking any official investigations in foreign states.<sup>1</sup> To resolve this contradiction, it has long been common to include information exchange provisions in double taxation agreements. Article 26 of the OECD MC provides a template for respective agreements and, since its first implementation in 1963, has been the central provision regarding tax information exchange. However, while bilateral agreements provide a sufficient tool for particular inquiries, ever growing globalization and associated tax avoidance strategies by multinational enterprises call for a broader and more systematized approach to mutual information exchange.

Although within Europe efforts to implement systematic, multilateral and automatic information exchange date back as far as the 1970s, progress after this was hesitant. It has only recently gained new momentum as, in the midst of the financial crisis, crossborder and offshore tax evasion scandals garnered public attention worldwide.<sup>2</sup> In response, international political focus has shifted from bilateral assistance in individual cases towards a sectoral global administrative space, wherein data is universally exchanged. As the leaders of the G20 countries put it in a joint statement after the London Summit in 2009: the ultimate goal is a ‘new cooperative international tax environment’.<sup>3</sup>

While tax equity, national revenues and governmental transparency benefit from this ongoing structural development, it does not come without substantial legal concerns regarding personal data protection, entrepreneurial freedom and competitive equality. Furthermore, the variety of legal frameworks can cause uncertainty as to which of them is applicable in each individual case of information exchange. In addition to these legal issues, advancing obliga-

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<sup>1</sup> See Roman Seer, Recent Development in Exchange of Information within the EU for Tax Matters, *EC Tax Review* 2013 (Vol. 22), pp.66–76; Roman Seer, Overview of Legal Practices regarding Exchange of Information between National Tax Administrations in Tax Matters, Study, European Parliament, Oct. 2015, IP/A/TAXE/2015-04.

<sup>2</sup> See Itai Grinberg, The Battle over Taxing Offshore Accounts, *UCLA Law Review* 2012 (Vol. 60), pp.304–383, SSRN: <http://ssrn.com/abstract=2497998>.

<sup>3</sup> G20, Declaration on Strengthening the Financial System – London Summit (2009), available at [www.g20.utoronto.ca/2009/2009ifi.pdf](http://www.g20.utoronto.ca/2009/2009ifi.pdf); also see Jefferson P. VanderWolk: The New World of Tax Information Exchange, *Asia-Pacific Journal of Taxation* 2009 (Vol. 13), No. 2, SSRN: <https://ssrn.com/abstract=1582452>.

tions for public administrations to collect, store and share various information may lead to infrastructural and bureaucratic difficulties.

This chapter will discuss the outlined developments in more detail and reflect upon the related legal and practical issues.

## 2. BASICS OF TAX INFORMATION EXCHANGE

### 2.1 Background and Purpose of Tax Information Exchange

The first considerable attempt to create a global solution to the problem of acquiring extraterritorial tax information was made as early as 1927, by the League of Nations.<sup>4</sup> That year, the League's Committee of Technical Experts on Double Taxation and Tax Evasion presented a report that provided a Draft of a Bilateral Convention on Administrative Assistance in Matters of Taxation.<sup>5</sup> In its attached comment, the authors stressed that, besides the avoidance of double taxation, mutual assistance would be necessary to fight tax evasion.<sup>6</sup> It was therefore the League's goal to devise a scheme whereby all incomes would be taxed once, and only once. Remarkably, the report's authors considered such a scheme not only crucial to secure the revenue of its member states but also in the best interest of the taxpayers themselves, 'since any fraud which goes unpunished leads to an unfair distribution of the burden of public expenditure'. The last sentiment holds more true today than ever. Ongoing revelations such as the 'Luxembourg Leaks',<sup>7</sup> the 'Panama Papers'<sup>8</sup> and the 'Paradise Papers'<sup>9</sup> are major global news and undoubtedly play a part in the surge of distrust for national governments by their people. The comprehensively arising sentiment that wealth and political empowerment are a closed shop has fertilized the growth of rightwing populism in Europe and the US.<sup>10</sup>

Therefore, effective intergovernmental cooperation in the assessment and recovering of tax duties serves multiple existential purposes: improving fair taxation, securing appropriate revenue and stabilizing democratic legitimacy itself.<sup>11</sup>

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<sup>4</sup> S.A. Dean, *The Incomplete Global Market for Tax Information*, Boston College Law Review 2008 (Vol. 49), pp.33 ff. SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1078732](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1078732); Luzius Cavelti, Christian Jaag and Tobias Rohner, *Why Corporate Taxation Should Mean Source Taxation: A Response to the OECD's Actions against Base Erosion and Profit Shifting World*, Tax Journal 2017 (Vol. 9), No. 3, section 2.

<sup>5</sup> League of Nations Doc. C.216.M.85 1927 II, available at [http://biblio-archiv.unog.ch/Dateien/CouncilMSD/C-216-M-85-1927-II\\_EN.pdf](http://biblio-archiv.unog.ch/Dateien/CouncilMSD/C-216-M-85-1927-II_EN.pdf).

<sup>6</sup> *Supra* n. 5, pp.23ff.

<sup>7</sup> See Kanter and Higgins, *Top E.U. Official Faces Rising Furor over Luxembourg Tax Revelations*, New York Times (6 Nov. 2014), available at [www.nytimes.com/2014/11/07/world/europe/head-of-european-commission-under-pressure-over-luxembourg-tax-revelations.html](http://www.nytimes.com/2014/11/07/world/europe/head-of-european-commission-under-pressure-over-luxembourg-tax-revelations.html).

<sup>8</sup> See Fitzgibbon and Díaz-Struck, *Panama Papers Have Had Historic Global Effects – And The Impacts Keep Coming*, available at <https://panamapapers.icij.org/20161201-global-impact.html>.

<sup>9</sup> See Forsythe, *Paradise Papers Shine Light on Where the Elite Keep Their Money*, New York Times (5 Nov. 2017), available at [www.nytimes.com/2017/11/05/world/paradise-papers.html](http://www.nytimes.com/2017/11/05/world/paradise-papers.html).

<sup>10</sup> Also see Reuven Avi-Yonah and Haiyan Xu, *Global Taxation after the Crisis: Why BEPS and MAATM are Inadequate Responses, and What Can Be Done About It*, U of Michigan Public Law Research Paper No 494, p.1, SSRN: <https://ssrn.com/abstract=2716124>.

<sup>11</sup> For the political necessity of mutual anti-tax avoidance measurements also see Itai Grinberg, *Breaking BEPS: The New International Tax Diplomacy*, Georgetown Law Journal 2016 (Vol.

## 2.2 Types of Information Exchange

### 2.2.1 Exchange of information upon request (EOIR)

Exchange of information upon request provisions encompass situations where the competent authority of one state asks a foreign authority for particular information regarding a specific case. 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. If the requested authority does not already possess the desired information, it has to obtain it by its own means. Hence, EOIR can be classified as *passive exchange of information* because the requesting state has no control or influence over the actions of the requested state. Likewise, to obtain the requested information, the requested state will solely take measures in compliance with its domestic law.

### 2.2.2 Spontaneous exchange of information (SEOI)

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*.<sup>12</sup> Examples of circumstances in which SEOI can be appropriate include where there are reasons for the transferring authority to believe that the transferred information might prevent another state's loss of tax.

Information exchanged spontaneously represents a very effective manner of countering tax evasion and tax fraud, as it reports facts and information that another Member State could hardly or very seldom autonomously detect.

### 2.2.3 Automatic exchange of information (AEOI)

Automatic exchange of information involves the systematic and periodic transmission of 'bulk' taxpayer information between different states regarding various categories of income without a formal request being made.<sup>13</sup> In contrast to the spontaneous exchange of information, AEOI does not refer to a specific case. Rather, information referring to defined case groups is transmitted automatically. Article 9(3) of the EU Directive on Administrative Cooperation (see section 3.2.2.3) defines automatic exchange as 'the systematic communication of pre-defined information of residents in other Member States to the relevant Member State of residence, without prior request, at pre-established regular intervals'.

AEOI can be classified as a means of crossborder risk management, as it offers a Member State the possibility to match the information transmitted with the particulars furnished to

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104), pp.1137–96 ff. SSRN: <https://ssrn.com/abstract=2652894>; Allison Christians and Stephen Shay, Assessing BEPS: Origins, Standards, and Responses, General Report, Cahiers de Droit Fiscal International 102A (2017), p.28, SSRN: <https://ssrn.com/abstract=2997548>.

<sup>12</sup> OECD Manual on Information Exchange, 2006, Module 2, p.3, available at [www.oecd.org/tax/exchange-of-tax-information/36647823.pdf](http://www.oecd.org/tax/exchange-of-tax-information/36647823.pdf); Roman Seer and Isabel Gabert, European and International Tax Cooperation: Legal Basis, Practice, Burden of Proof, Legal Protection and Requirements, Bulletin for International Taxation 2011 (Vol. 65), p.88 (94 f.), differentiating between the instruments of information exchange.

<sup>13</sup> OECD Manual (supra n. 12), Module 3, p.3; Roman Seer and Isabel Gabert (supra n. 12), p.88 (95).

them by the taxpayer.<sup>14</sup> The most cost-effective way to 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, be easily transmitted to local tax offices and automatically match with the data stored there. As will be shown, AEOI is currently the most talked about form of information exchange, since it has been rapidly advanced by international measures to counter offshore accounting. Thus, the focus of AEOI lies on the exchange on financial information. Additionally, accountancy information of big multinational corporations has recently become part of AEOI through the comprehensive implementation of country by country reporting (see section 3.5).

### **2.3 Basic Principles of Tax Information Exchange**

As information exchange is solely based on international treaties, no legal canon other than general international law applies to its implementation. Nonetheless, three basic principles of intergovernmental assistance are comprehensively recognized and regularly considered when developing new (model) regulations. Where the proportionality principle applies, as it does within the European Union, those principles directly derive from it since information exchange is exclusively executed by public authorities and any disclosing of information means a possible infringement of fundamental rights of the parties affected.

The Principle of Reciprocity states that information shall only be exchanged under comparable circumstances and to an equal extent in terms not of quantity but of quality.<sup>15</sup> That means the requested state does not have to carry out measures at variance with the laws and administrative practices of the requesting state. Hence, no state has to forward information which it conversely could not receive from the requesting state.

By the Principle of Equivalence, cooperating authorities shall treat incoming requests in the same manner as domestic cases. On the one hand, that means the requested authority does not have to carry out measures in variance with its own laws and practices. On the other, it shall not put less effort into administrative investigations than it puts into domestic cases.<sup>16</sup>

Finally, the Principle of Subsidiarity addresses the requesting authority. Thereby, it shall first exhaust its own instruments to examine facts before it forwards any request.<sup>17</sup> This conforms to the principle of proportionality since, where the requesting authority is able to obtain the desired information on its own, there is no need to hand over the case to an authority that is not subject to the taxpayer's state of residence's law.

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<sup>14</sup> Roman Seer, Study European Parliament 2015 (supra n. 1), under 6.

<sup>15</sup> Ana P. Dourado, in Ekkehart Reimer and Alexander Rust (eds), Klaus Vogel on Double Taxation Conventions, 4th ed. Wolters Kluwer 2015, Art. 26 No. 159, 290.

<sup>16</sup> See Commentary on Article 26 OECD MC, para. 16.

<sup>17</sup> Ana P. Dourado (supra n. 15), No. 212 ff.

### 3. FROM BILATERAL EOIR TO MULTILATERAL AEOI: AN ONGOING DEVELOPMENT

#### 3.1 **First Steps of International Assistance: Bilateral Information Exchange upon Request**

##### 3.1.1 **Article 26 OECD MC**

The oldest and most common form of intergovernmental tax information exchange is the reciprocal assistance provided by bilateral double tax agreements (DTAs). There are an estimated 3000 DTAs in effect globally.<sup>18</sup> Almost all of them are based on either the UN or the OECD Model Tax Convention (MC) and contain an information exchange clause based on Article 26 of one of the model conventions.<sup>19</sup> These MCs are classified as ‘soft law’ since they are in no way legally binding. However, the OECD MC and its accompanying commentary comprehensively serve as negotiating bases and many courts use them to interpret bilateral tax treaties.

Article 26 OECD MC provides for two different types of information exchange. While the so-called ‘minor’ information exchange shall serve to fulfil the provisions of the agreement itself, ‘major’ information exchange is completely detached from the purposes of the DTA and solely serves as a tool for the contracting states to pursue their national tax claims.<sup>20</sup> Thereby, upon request the contracting states shall exchange any information ‘foreseeabl[y] relevant’ to a taxation procedure of the requesting authority. The requirement of ‘foreseeable relevance’ – being the clause’s central requirement – shall prevent the contracting states from requesting information haphazardly without a specific occasion (so-called fishing expeditions). However, the information does not have to be actually necessary as long as the request is based at least upon the reasonable possibility of relevance.<sup>21</sup>

Different from ‘fishing expeditions’ are the so-called group requests.<sup>22</sup> With a group request, contracting states seek data of an unknown number of individual taxpayers belonging to an abstractly specified ‘group’. Such requests shall comply with the requirement of foreseeability as long as the requesting authority provides detailed information on the necessity of the request.<sup>23</sup> These group requests are useful to fight tax evasion conducted by using financial services offshore.

EOIR based on Article 26 OECD MC is restricted neither by the DTA’s personal nor by its material area of application. That means the requested information does not have to concern a resident of either contracting state. Furthermore, the information clause extends beyond the taxes covered by treaty and pertains to all taxes, except social security contributions.

According to its wording, Article 26 OECD MC only provides for information exchange upon request. However, in paragraph 9, the commentary suggests that the contracting

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<sup>18</sup> Miranda Stewart, *Transnational Tax Information Exchange Networks: Steps towards a Globalized, Legitimate Tax Administration*, *World Tax Journal* 2012 (Vol. 4), p.152 (159).

<sup>19</sup> Vito Tanzi and Howell Zee, *Taxation in a Borderless World: The Role of Information Exchange*, *Intertax* 2000 (Vol. 28), issue 2, p.58 (60).

<sup>20</sup> See Ana P. Dourado (supra n. 15), Art. 26 No. 187 ff.; Roman Seer and Isabel Gabert (supra n. 12), p.88 (90), use the terms ‘narrow’ and ‘broad provisions’.

<sup>21</sup> Commentary on Article 26 OECD MC, para. 5.

<sup>22</sup> See Ana P. Dourado (supra n. 15), Art. 26 No. 200 ff., in delimitation between both categories.

<sup>23</sup> Commentary on Article 26 OECD MC, para. 5.1.

parties may also base spontaneous and automatic exchange of information on the provision. Nevertheless, since this is a sole recommendation without an accompanying model provision, not many DTAs provide for automatic exchange of information.

### 3.1.2 Tax information exchange agreements and the ‘OECD Standard’

As shown, the scope of bilateral information exchange based on Article 26 OECD MC is, in principle, quite broad. Yet, as the MC is a nonbinding template, only few DTAs contain a major information clause and those that do are mostly concluded between OECD Members and/or members of the EU.<sup>24</sup> Furthermore, the need for extensive information exchange and DTAs in general becomes more urgent the bigger the economy of a state is. Therefore, the so-called tax havens – being mostly small and somewhat wealthy states – have little interest in agreements that they know will only theoretically be ‘reciprocal’.<sup>25</sup> Additionally, since most ‘tax havens’ gain substantial revenue by facilitating tax avoidance schemes through financial services, they usually offer strict bank secrecy.<sup>26</sup> Thus, DTAs cannot be regarded as an effective means to deal with tax evasion.<sup>27</sup>

In 1981, in response to a report on tax evasion, the US noticed the need for a reliable source of tax information from offshore jurisdictions. Subsequently, it began to conclude standalone tax information exchange agreements (TIEAs) with states regarded to be tax havens.<sup>28</sup> To incentivize compliance, the US Treasury provided several benefits to participating countries, such as making it easier for US taxpayers attending conventions in that jurisdiction to deduct expenses related to the convention.<sup>29</sup>

More than two decades later, the OECD followed this approach. Its 1998 Report ‘Harmful Tax Competition: An Emerging Global Issue’ identified the serious lack of effective information exchange, especially as a result of strict domestic bank secrecy laws, as a prime reason for harmful tax practices.<sup>30</sup> As a countermeasure, the OECD released its own version of a TIEA Model Convention in April 2002. The TIEA MC provided for an identical form of information exchange upon request as did Article 26 OECD MC. The main but substantial difference from the MC – besides its function as a special bilateral agreement between OECD Members

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<sup>24</sup> Between the EU Member States the Directive on Administrative Cooperation (DAC, see later 2.2.3), which provides a major information clause, overrules DTA’s minor clauses. Even the multi-lateral Joint Convention (see later 2.1) contains a major clause which binds the contracting states that have already ratified the Joint Convention. Under these circumstances, Germany – for example – still keeps only a few DTAs with minor clauses: with Bangladesh, Bolivia, Bosnia-Herzegovina, Ecuador, Egypt, Ivory Coast, Iran, Israel, Jamaica, Kenya, Kosovo, Kuwait, Morocco, Mongolia, Montenegro, Namibia, Pakistan, Serbia, Sri Lanka, Thailand, Trinidad/Tobago, Ukraine, Venezuela, Vietnam, Zambia, Zimbabwe. See Roman Seer, in Tipke/Kruse, *Commentary, Abgabenordnung*, Sec. 117, para. 37 (August 2019, German language).

<sup>25</sup> S.A. Dean (supra n. 4), pp.50 ff; Avi-Yonah and Xu (supra n. 10), p.6.

<sup>26</sup> See Tony Anamourlis and Les Nethercott: *An Overview of Tax Information Exchange Agreements and Bank Secrecy*, *Bulletin for International Taxation* 2009 (Vol. 63), pp.616 ff.

<sup>27</sup> See OECD, *Harmful Tax Competition: An Emerging Global Issue*, para. 64.

<sup>28</sup> S.A. Dean (supra n. 4), pp.46 f.

<sup>29</sup> *Ibid.*

<sup>30</sup> Marta Pankiv, *Tax Information Exchange Agreements (TIEAs)*, in Oliver-Christoph Günther and Nicole Tüchler (eds), *Exchange of Information for Tax Purposes*, Linde Verlag Wien, 2013, p.5.

and ‘tax havens’ – was the removal of bank secrecy as a reason to deny the disclosure of tax information.<sup>31</sup>

The provisions of the TIEA MC were from then on called the ‘OECD Standard on Exchange of Information’ (OECD Standard), whereby all compliant states shall provide for full exchange of information on request in all tax matters without regard to a domestic tax interest requirement or bank secrecy for tax purposes.<sup>32</sup> Accordingly, Article 26 OECD MC was amended in 2005 to fully comply with the provisions of the TIEA MC. Thus, to the OECD, bank secrecy had officially become a thing of the past.<sup>33</sup> Nonetheless, in its first years, the implementation of the TIEA MC was not successful. In 2002, only eight TIEAs had been concluded, all of them by the United States. Even in 2008, only 44 TIEAs were in effect.<sup>34</sup> In 2009, the OECD published a ‘blacklist’ showing which countries comply to the ‘OECD standard’ and to what extent.<sup>35</sup> Although strongly criticized by some,<sup>36</sup> the public denunciation of noncompliant states seems to have been effective. From 2009 to 2012, 460 TIEAs were concluded.<sup>37</sup>

Like Article 26 OECD MC, the TIEA MC does not explicitly provide for spontaneous and/or automatic exchange of information, although the TIEA model commentary mentions the possibility of enhanced bilateral disclosure agreements.<sup>38</sup>

### **3.2 First Steps of Automatic Exchange of Information Based on Multilateral Agreements**

#### **3.2.1 The Joint Convention**

Even before the first implementation of TIEAs, the Joint Council of Europe and the OECD followed a multilateral approach to tax information exchange. On 25 January 1988, it signed the Convention on Mutual Administrative Assistance in Tax Matters (‘Joint Convention’).<sup>39</sup> The Convention’s approach was modern, containing EOIR, SEOI and AEOI,<sup>40</sup> as well as simultaneous tax examinations, examinations abroad and possible mutual assistance in the recovery of tax claims. However, even 20 years after its initial signing, only ten countries had put it into force.<sup>41</sup> Most other countries had not even signed it.

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<sup>31</sup> Pankiv, *ibid* p.4.

<sup>32</sup> OECD, *Countering Offshore Tax Evasion: Some Questions and Answers on the Project* (2009), p.10, available at [www.oecd.org/ctp/harmful/42469606.pdf](http://www.oecd.org/ctp/harmful/42469606.pdf).

<sup>33</sup> OECD, *The Era of Bank Secrecy Is Over* (2011), available at [www.oecd.org/ctp/exchange-of-tax-information/48996146.pdf](http://www.oecd.org/ctp/exchange-of-tax-information/48996146.pdf).

<sup>34</sup> See [www.oecd.org/ctp/exchange-of-tax-information/taxinformationexchangeagreementstieas.htm](http://www.oecd.org/ctp/exchange-of-tax-information/taxinformationexchangeagreementstieas.htm); also see Roman Seer and Isabel Gabert (*supra* n. 12), p.88 (92).

<sup>35</sup> Pankiv (*supra* n. 30), p.4. For the original ‘black list’ see [www.oecd.org/tax/exchange-of-tax-information/42497950.pdf](http://www.oecd.org/tax/exchange-of-tax-information/42497950.pdf); today, the OECD operates an interactive map providing detailed information on EOI compliance: see [www.oecd.org/tax/exchange-of-tax-information/international-tax-co-operation-map.htm](http://www.oecd.org/tax/exchange-of-tax-information/international-tax-co-operation-map.htm).

<sup>36</sup> See Alexander Neubacher, *Why the Fight against Tax Havens Is a Sham*, *Der Spiegel* No. 16/2009, available at: [www.spiegel.de/international/world/the-world-s-shortest-blacklist-why-the-fight-against-tax-havens-is-a-sham-a-618780.html](http://www.spiegel.de/international/world/the-world-s-shortest-blacklist-why-the-fight-against-tax-havens-is-a-sham-a-618780.html).

<sup>37</sup> [www.oecd.org/ctp/exchange-of-tax-information/taxinformationexchangeagreementstieas.htm](http://www.oecd.org/ctp/exchange-of-tax-information/taxinformationexchangeagreementstieas.htm).

<sup>38</sup> OECD, TIEA Commentary, para. 39.

<sup>39</sup> CETS No. 127.

<sup>40</sup> Although AEOI is only vaguely represented: Art. 6 of the Convention allows for contracting parties to provide for an automatic information exchange based on another mutual agreement.

<sup>41</sup> [www.oecd.org/tax/exchange-of-tax-information/Status\\_of\\_convention.pdf](http://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf).

Nonetheless, it seems that the distinct opposition to tax evasion and profit shifting by the OECD and the G20 following the financial crisis of 2007 has had its desired effects.<sup>42</sup> On 27 May 2010, the Joint Council amended the Convention to comply with the OECD Standard, especially by abolishing bank secrecy as a reason to deny a request.<sup>43</sup> As of June 2018, 107 states have signed and put it into force,<sup>44</sup> making it an important legal basis for information exchange in tax matters.

### **3.2.2 Early European efforts: from the Mutual Assistance Directive and the Savings Directive to the Comprehensive Directive on Administrative Cooperation**

#### *3.2.2.1 The Mutual Assistance Directive*

In Europe, multilateral cooperation in tax administration has a longer history than within the OECD. In 1977, the EC passed directive 77/799/EEC.<sup>45</sup> Although the directive provided for EOIR, AEOI and SEOI, the directives provisions were quite basic. This may be one of the reasons the directive never gathered much steam and, in 2011, the European Commission deemed it no longer suitable and called for a completely new directive on administrative cooperation.<sup>46</sup>

#### *3.2.2.2 The Savings Directive*

In the meantime, the EU implemented a somewhat pioneering system of automatic information exchange in form of directive 2003/48/EC (EU Savings Directive).<sup>47</sup> Its aim was to ensure accurate taxation where interest is paid crossborder. In order to do this, paying agents (financial institutions) based in the EU had to report to a competent authority of their state of residence any case where the beneficial owner of an interest payment was a resident of another Member State. The competent authority was then obliged to pass this information through to the competent authority of the beneficial owner's Member State.<sup>48</sup> This was the first legislation to provide mandatory automatic exchange of information in the history of EU tax law.<sup>49</sup> Notwithstanding, the savings directive only covered a small part of taxable income and was applicable only within the European Union.

<sup>42</sup> See Christina HJI Panayi, Current Trends on Automatic Exchange of Information, Singapore Management University School of Accountancy Research Paper No. 2016-S-43, p. 3, SSRN: <https://ssrn.com/abstract=2748659>; Ana Paula Dourado, Exchange of Information and Validity of Global Standards in Tax Laws, EUI Working Paper RSCAS 2013/11, pp.6 ff.

<sup>43</sup> CETS No. 208.

<sup>44</sup> A further 16 states have signed but not yet ratified the convention. See [www.oecd.org/tax/exchange-of-tax-information/Status\\_of\\_convention.pdf](http://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf).

<sup>45</sup> OJ EC No. L 336, pp.15–20.

<sup>46</sup> COM (2009), 29.

<sup>47</sup> 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.

<sup>48</sup> According to Art. 8 (1) of the Directive, the minimum amount of information to be reported was: 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.

<sup>49</sup> See Roman Seer, Study European Parliament (supra n. 1), 2015, 3.2. However, Luxembourg, Belgium and Austria were initially exempted from the obligation to provide information and instead levied a withholding tax: see Art. 10 ff. of the directive.



### 3.2.2.3 *The Directive on Administrative Cooperation (DAC 1)*

Within the EU, the scope of automatic information exchange was broadened when, as already stated above, the EU recognized that it needed a more powerful legal basis for mutual assistance in tax matters. It determined that mandatory automatic exchange of information without preconditions would be the most effective means of enhancing the correct assessment of taxes in crossborder situations and of fighting fraud.<sup>50</sup> Therefore, on 15 February 2011, ECOFIN endorsed a proposal for an EU Directive on Administrative Cooperation (DAC), with Member States being obliged to incorporate it into national law by 1 January 2013. The directive's aim is to strengthen the cooperation between the tax authorities of the EU Member States by determining common principles and rules. Although the DAC in its initial form presented only a minimum standard for intergovernmental cooperation on tax matters, DAC 1 was an important improvement compared to the former Directive 77/799/EEC.

Like the savings directive, the DAC requires a central liaison office in every Member State, securing effective and pinpoint cooperation between Member States (Article 4(2) DAC). Furthermore, communication is standardized by demanding requests and their replies be sent using a standardized form adopted by the Commission (Article 20 DAC). Accompanying the use of this standardized form, Article 21 DAC regulates the use of the Common Communication Network (CCN).<sup>51</sup>

Article 7(1) DAC further enlarges the effectiveness of information exchange under the DAC by requiring Member States to disclose any requested information to the requesting authority within six months or, if the requested tax authority already possesses that information, within two months.

However, besides these progressive procedural provisions,<sup>52</sup> the most important aspect of the DAC is the scope of automatic and spontaneous information exchange. According to Article 8(1) DAC, every Member State has to inform every other Member State, as far as their residents are affected, about: income from employment; director's fees; life insurance products not covered by other Union legal instruments on exchange of information and other similar measures; pensions; ownership of and income from immovable property. The communication of information shall take place 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: Article 8(7) DAC.

Complying with the OECD Standard (see section 3.1.2), the DAC abolished bank secrecy as a limit for information exchange: Article 18(2) DAC. Only protected commercial, industrial or professional secrets are exempt from mandatory disclosure: Article 17 (4) DAC.

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<sup>50</sup> Recital 10 of Council Directive 2011/16/EU of 15.2.2011, OJ EU of 11.3.2011, No. L 64/1.

<sup>51</sup> For the implementation of the CCN see Decision No 253/2003/EC.

<sup>52</sup> The DAC also provides for physical administrative cooperation by allowing tax officers to be present in other Member States' offices and to witness administrative enquiries carried out in the territory of the requested Member State: Art. 11 DAC. Furthermore, simultaneous controls and tax audits can be conducted jointly by different Member States' authorities: Art. 12 DAC.

### 3.3 FATCA: Accelerating Automatic Information Exchange

With the Savings Directive and the DAC 1 in force, the EU had already established a strong network of AEOL within its jurisdiction. However, as with the development of TIEAs, the US accelerated worldwide efforts to improve on automatic information exchange.<sup>53</sup>

In 2009, with the repercussions of the financial crisis still considerable, the ‘UBS leaks’<sup>54</sup> led the US to realize it is losing billions of dollars in taxes every year due to offshore accounting.<sup>55</sup> The US legislators’ response was the Foreign Account Tax Compliance Act (FATCA), considered one of the most globally influential pieces of tax legislation of all times.<sup>56</sup> All the same, the basic mechanics of this legislation are simple.<sup>57</sup> The goal of FATCA is to provide the US Internal Revenue Service (IRS) with information on foreign bank accounts held by persons and entities taxable in the US (referred to as ‘reportable persons and entities’). Therefore, ideally, every foreign financial institution (FFI) shall disclose to the IRS the names of all reportable persons and entities and their Tax Identification Numbers (TIN), account numbers, addresses, gross receipts and gross withdrawals or payments from the account.<sup>58</sup>

To gain that information, FATCA presents two legal approaches. For one, FFIs can individually sign an agreement with the IRS whereby they bind themselves to disclose the required information on an automatic basis, directly to the IRS. For another, the FFI’s state of residence can conclude an intergovernmental agreement (IGA) with the US. Contracting states can conclude such an agreement independently or incorporate it into existing DTAs or TIEAs. With it, the contracting state either agrees to allow its financial institutions to comply with the requirements of an FFI Agreement (IGA Type 2) or to direct its financial institutions to disclose such information to the competent authority of the contracting state (IGA Type 1). Thereby the FFIs communicate with the IRS either directly (Type 2) or through their governments (Type 1). Additionally, reciprocal IGAs of Type 1, whereby the US will disclose analogous information to the contracting state, are possible.<sup>59</sup>

The US will impose a 30 per cent withholding tax on any monetary stream from US territory to any FFI that has neither signed an individual agreement with the IRS, nor resides in

<sup>53</sup> See also Joshua D. Blank and Ruth Mason: Exporting FATCA, NYU Law and Economics Research Paper No. 14-05, pp.1245 ff. (1248), SSRN: <https://ssrn.com/abstract=2389500>; Saturnina Moreno González, The Automatic Exchange of Tax Information and the Protection of Personal Data in the EU: Reflections on the Latest Jurisprudential and Normative Advances, *EC Tax Review* 2016, p.146 (152).

<sup>54</sup> Xavier Oberson, *International Exchange of Information in Tax Matters*, Edward Elgar, 2015, pp.43 ff.

<sup>55</sup> Blank and Mason (supra n. 53), pp.1245 f.

<sup>56</sup> William Byrnes and Robert Munro, *Background and Current Status of FATCA*, Texas A&M University School of Law Legal Studies Research Paper No. 17-31, § 1.01. SSRN: <https://ssrn.com/abstract=2926119>.

<sup>57</sup> See Susan Morse, *Ask for Help, Uncle Sam: The Future of Global Tax Reporting*, *Villanova Law Review* 2012 (Vol. 57), No. 3, pp.529 ff. (535 ff.), SSRN: <https://ssrn.com/abstract=1999101>; Luzi Cavelti, *Automatic Information Exchange versus the Withholding Tax Regime*, *World Tax Journal* 2013, pp.172 ff (183); see also from an European perspective: Giuseppe Marino, *New Exchange of Information versus Tax Solutions of Equivalent Effect*, *EATLP International Tax Series*, 2015 (Vol. 13), *General Report*, pp.22 ff.

<sup>58</sup> 26 U.S.C. § 1471 (c) (1).

<sup>59</sup> See for a more detailed overview on IGAs Leopoldo Parada, *Intergovernmental Agreements and the Implementation of FATCA in Europe*, *World Tax Journal* 2015 (Vol. 7), No. 2.

a jurisdiction where an IGA is in force. Thus, this withholding tax is not meant to increase US revenue, but is rather used as leverage to make FFIs or their states of residence sign an information exchange agreement.

This pressuring policy by the US seems to be successful. As of today, 113 states have signed an IGA; around 100 of them are already in force, most of them being Type 1 agreements.<sup>60</sup> Additionally, in most countries that have not signed an IGA, the IRS has signed individual agreements with the FFIs.<sup>61</sup> Thus, through the implementation of FATCA, the US has managed to receive financial information on taxable persons and entities from financial institutions all over the world.<sup>62</sup> FATCA can therefore be called the first global network of automatic tax information exchange, although its traffic is mostly oneway. To confront this imbalance, both the OECD and the EU subsequently put forward an astonishing amount of new (soft) legislation.

### **3.4 Following FATCA: The OECD Common Reporting Standard (CRS)**

#### **3.4.1 International implementation of CRS**

With the commencement of FATCA, FFIs willing to comply – or forced to by their state of residence’s IGA legislation – needed to implement sophisticated IT systems to assess which accounts had to be reported.<sup>63</sup> G20 finance ministers, Central Bank governors and several European countries seem to have seen a opportunity in this development to benefit from these comprehensive information-gathering efforts.<sup>64</sup> In its 2012 Report ‘Automatic Exchange of Information: What It Is, How It Works, Benefits, What Remains to Be Done’,<sup>65</sup> the OECD assessed recent developments in the global AEOI and identified certain areas where work needed to be done to ensure more countries would take measures to share tax information. Those areas included the implementation of a common standard on capturing information so that exchanging countries would always know what kind of data they receive and how to process it. Additionally, to improve the quality of the exchanged data, verification standards had to be established, technical formats standardized and IT systems as well as back office functions modernized.

In order to execute the information disclosure required by FATCA, financial institutions had to massively invest in their data processing systems; this made adjustments to conform

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<sup>60</sup> [www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx](http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx); that page also provides for model agreements for all types of IGAs.

<sup>61</sup> For example, more than a thousand institutions based in Russia have signed an agreement. In total, nearly 300,000 institutions and branches are registered by the IRS: <https://apps.irs.gov/app/fatcaFfiList/flu.jsf>.

<sup>62</sup> However, Byrnes and Munro (supra n. 56) consider the total amount of registered FFIs to be small, pointing out that from the Cayman Islands nearly 40,000 FFIs have registered while for many other countries, including Switzerland and the BRIC states, the numbers remain in the three to four digit range.

<sup>63</sup> Valuation of the necessary implementation costs vary but several hundreds of millions of dollars per financial institution seems to be common: see Byrnes and Munro (supra n. 56), § 1.19.

<sup>64</sup> OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters*, Second Edition (2017), p. 9.

<sup>65</sup> Available at: <http://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-of-information-report.pdf>.

to the above mentioned needs possible without too much additional cost.<sup>66</sup> Therefore, on 21 July 2014, the OECD published a ‘Standard for Automatic Exchange of Financial Account Information in Tax Matters’ (AEFI). 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 AEFI to improve international tax compliance (multilateral competent authority agreement (MCAA)); and
- a common standard on reporting and due diligence for financial account information (common reporting standard (CRS)).

The CRS defines, in significant detail, what financial information financial institutions have to collect, and on what circumstances.<sup>67</sup> The MCAA, meanwhile, shall ensure the exchange of such information between participating states. It is based on Article 6 of the Joint Convention (see section 3.2.1), where it is stated that parties may determine the scope of automatic information exchange by mutual agreement. In doing so, the MCAA, like the US IGA Type 1, obligates its signatories to collect financial information from their financial institutions through competent authorities and subsequently forward it to the competent authority of the account holder’s state of residence. More than 100 countries have signed the MCAA; 49 began the exchange information in September 2017 and 51 stated an intention to exchange information for the first time in September 2018.<sup>68</sup> Notwithstanding this far-reaching acceptance of the CRS, the multilateral information exchange system via the MCAA is only useful if actual compliance with the CRS’ provisions is ensured. Therefore, the OECD tasked the Global Forum on Transparency and Exchange of Information for Tax Purposes with the regular review of the signatories’ compliance to the CRS.<sup>69</sup> The Forum’s most important tool of assessment is an indepth peer review.<sup>70</sup>

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<sup>66</sup> OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters*, 2nd ed. (2017), p.10.

<sup>67</sup> The CRS contains numerous provisions, regarding, for example, when legal entities or their shareholders must be reported and what accounts or legal entities are exempt from reporting, as well as provisions for financial products and investment schemes. However, at its core, the information demanded by the CRS is mainly in line with that demanded by FATCA.

<sup>68</sup> [www.oecd.org/tax/automatic-exchange/Commitment-and-monitoring-process/#d.en.370898](http://www.oecd.org/tax/automatic-exchange/Commitment-and-monitoring-process/#d.en.370898): AEIOI: Status of Commitments, Sep. 2019.

<sup>69</sup> The OECD’s own definition of the Global Forum (available at [www.oecd.org/tax/transparency](http://www.oecd.org/tax/transparency)) reads as follows: ‘The Global Forum is the continuation of a forum which was created in the early 2000s in the context of the OECD’s work to address the risks to tax compliance posed by non-cooperative jurisdictions. The original members of the Global Forum consisted of OECD countries and jurisdictions that had agreed to implement transparency and exchange of information for tax purposes. The Global Forum was restructured in September 2009 in response to the G20 call to strengthen implementation of these standards. The Global Forum now has 157 members on equal footing and is the premier international body for ensuring the implementation of the internationally agreed standards of transparency and exchange of information in the tax area.’

<sup>70</sup> [www.oecd.org/tax/automatic-exchange/commitment-and-monitoring-process/#d.en.370898](http://www.oecd.org/tax/automatic-exchange/commitment-and-monitoring-process/#d.en.370898). The forum already conducts peer reviews assessing the compliance of the OECD Standard for EOIR. For an in-depth and critical analysis of the Forum’s respective practices see Leo Neve, *The Peer Review Process of the Global Forum on Transparency and Exchange of Information for Tax Purposes: A Critical Assessment on Authority and Legitimacy*, *Erasmus Law Review* 2017 (Vol. 10), No. 2, SSRN: <https://ssrn.com/abstract=3087255>.

### **3.4.2 Implementation of CRS within Europe (DAC 2)**

With this international standard for AEFI, the OECD has sped up EU developments on this matter. In order to guarantee a unified common reporting standard between the EU Member States, DAC 1 (see section 3.2.2.3) had to be adapted to this new worldwide standard. This has been realized by Directive 2014/107/EU of 9 December 2014 (DAC 2). The Directive broadens the scope of Article 8 of DAC 1 by a new paragraph 3a that obliges each Member State to take the necessary measures to require its financial institutions to comply with the CRS. As a result, the narrower Savings Directive became obsolete, and was therefore repealed by Council Directive 2015/2060/EU as of 10 November 2015.<sup>71</sup> Member States had to incorporate DAC 2 into domestic law by 31 December 2015 and execute its provisions as of 1 January 2016.<sup>72</sup> Therefore, adoption of the CRS within the EU began significantly earlier than the application of the MCAA.

### **3.5 Broadening AEOI: The Implementation of Country-by-Country Reporting (DAC 4)**

Parallel to the implementation of AEFI, the OECD and the G20 launched the BEPS (Base Erosion and Profit Shifting) project. The initiative aims to address the exploitation of mismatches in tax legislations. The G20 endorsed 15 Actions in 2013 and the final BEPS package was finalized and published in 2015.<sup>73</sup> The G20 leaders committed themselves to the implementation of the BEPS package at their summit on 15–16 November 2015 in Antalya.<sup>74</sup> One of the steps proposed to tackle the disadvantageous exploitation of tax rules by international company groups is Action 13 of the BEPS initiative, which addresses transfer pricing documentation and country by country reporting (CbCR).<sup>75</sup> By the CbCR Standard, multinational enterprise (MNE) groups exceeding a revenue threshold defined by domestic law of the signatories have to report through an electronic scheme certain data about their main business activities.<sup>76</sup> The CbCR shall cover aggregate information relating to the amount of revenue, profit (loss) before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees and tangible assets other than cash or cash equivalents with regard to each jurisdiction in which the MNE Group operates. The aim of the CbCR is to

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<sup>71</sup> Thus, the intermediate amendment of the Savings Directive by Council Directive 2014/48/EU of 24 March 2014 did not come into force.

<sup>72</sup> For Austria, this obligation started on 1 January 2017.

<sup>73</sup> [www.oecd.org/tax/beps/beps-actions.htm](http://www.oecd.org/tax/beps/beps-actions.htm).

<sup>74</sup> See [www.oecd.org/tax/g20-leaders-endorse-oecd-measures-to-crackdown-on-tax-loopholes-reaffirm-its-role-in-ensuring-strong-sustainable-and-inclusive-growth.htm](http://www.oecd.org/tax/g20-leaders-endorse-oecd-measures-to-crackdown-on-tax-loopholes-reaffirm-its-role-in-ensuring-strong-sustainable-and-inclusive-growth.htm). This endorsement, though, does not necessarily mean that all G20 states will adopt all measures developed within the BEPS package since the project distinguishes between minimum standards and mere recommendations. However, the country by country reporting laid out in BEPS Action 13 does belong to the minimum standards, see OECD, Inclusive Framework on BEPS – Progress Report July 2016 – June 2017, p.7, available at [www.oecd.org/tax/beps/inclusive-framework-on-BEPS-progress-report-july-2016-june-2017.pdf](http://www.oecd.org/tax/beps/inclusive-framework-on-BEPS-progress-report-july-2016-june-2017.pdf).

<sup>75</sup> OECD (2015), Base Erosion and Profit Shifting Project, Action 13, Final report of 5.10.2015, available at [www.oecd.org/tax/beps/country-by-country-reporting.htm](http://www.oecd.org/tax/beps/country-by-country-reporting.htm).

<sup>76</sup> 750 million € in the EU.

support tax authorities during respective tax audits and ensure a sufficient knowledge base for tax authorities to safeguard tax compliance.<sup>77</sup>

To implement the CbCR globally, the BEPS Action 13 Report contains another multilateral agreement based on Article 6 of the Joint Convention regime (see section 3.2.1). This ‘CbC MCAA’<sup>78</sup> works like the AEFI MCAA. However, instead of financial institutes, MNE groups shall report foreign tax relevant information to the competent authorities of their state of residence.<sup>79</sup> As of August 2019, 80 countries had signed the CbC MCAA. According to the OECD, an additional 2200 bilateral agreements have been activated with respect to jurisdictions committed to exchanging CbC Reports.<sup>80</sup>

The CbCR was incorporated into EU law on 25 May 2016 by Directive 2016/881/EU (DAC 4).<sup>81</sup> Member States had to adopt DAC 4 into their domestic law by 4 June 2017 and it has been applicable since 5 June 2017.

### 3.6 Further Amendments to the DAC

#### 3.6.1 DAC 3

As another measure to counter crossborder tax avoidance schemes through information exchange, the EU included Advance Cross-Border Rulings (ACBR) and Advance Pricing Agreements (APA) in its internal system of AEOI by broadening the scope of the DAC respectively. The application of the DAC 3 is far-reaching and covers not only regulatory ACBR, but also the law interpreting ACBR with a crossborder content (see Art. 1 par. 1 lit. b of DAC 3). DAC 3 follows a two step approach. As a first step, each Member State has to send basic information about ACBR and APA automatically to all other Member States: Article 8a DAC. This gives the other Member States the opportunity for further examination of whether the ACBR or the APA affects their financial interests and their national tax law. After this evaluation of the basic data is 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. All Member States had to incorporate the DAC 3 into domestic law by 31 December 2016. According to Article 21 (5) DAC, the EU Commission was required, by 31 December 2017, to develop and provide technical and logistic support to a secure Member State central directory where the given information will be stored, with access for all Member States. There is no publicly available information about the implementation or the technical details of the central directory.

#### 3.6.2 DAC 5

In 2016 the DAC was again amended by Directive 2016/2258/EU (DAC 5). As a result of this amendment, Member States are obliged to provide by law access for all tax authorities within

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<sup>77</sup> Roman Seer, *The Limitation of Tax Transparency of Multinational Companies*, in C. Jimenez, C. Novoa and J. Fernandez (eds), *New Taxation: Studies in Honor of Jacques Malherbe*, ICDT, 2017, pp.1131 ff. (1136).

<sup>78</sup> [www.oecd.org/tax/automatic-exchange/about-automatic-exchange/cbc-mcaa.pdf](http://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/cbc-mcaa.pdf).

<sup>79</sup> MNE groups can be financial institutions.

<sup>80</sup> [www.oecd.org/tax/beps/country-by-country-exchange-relationships.htm](http://www.oecd.org/tax/beps/country-by-country-exchange-relationships.htm).

<sup>81</sup> OJ L 146 of 3 June 2016, 8.

the EU to data collected under the regime of the Anti Money Laundering (AML) Directive (2015/849/EU<sup>82</sup>). The AML Directive obliges financial institutions to monitor certain transactions and business relations and report to a competent authority every suspected case of money laundering or terrorism financing. Additionally, under Article 13(1)(b) of the AML Directive, financial institutions shall identify the beneficial owners of legal entities using their services. This information must also be held in a central register in every Member State, as per Article 30(3) of the AML Directive. Therefore, DAC 5 serves two main purposes. First, the information about beneficial owners can be used to monitor financial institutions' compliance with the provisions of Article 8(3a) DAC. According to Annex I Section V and VI, where the obligations of Article 8(3a) DAC are further specified, financial institutions must report the beneficial owners of so-called passive entities, which, basically, means intermediary entities. Thus, information about beneficial owners obtained under the AML Directive can be compared to what financial institutions have reported under the regime of the DAC. As a second purpose, the Directive states in its recital No 4 that access to information gained through the AML Directive might in general help tax authorities to combat tax evasion and fraud more effectively in the EU. Through this amendment the EU legislator has linked AML instruments to the fight against tax fraud and tax evasion, which further emphasizes the importance of fair taxation.<sup>83</sup> DAC 5 had to be adopted into national law by 1 January 2018.

### **3.6.3 DAC 6: aggressive tax planning reporting**

Additionally, the Council recently adopted a new amendment to the DAC.<sup>84</sup> Thereby, so-called intermediaries have to report, in specific circumstances, certain 'reportable cross-border arrangements'. Intermediaries in this regard are – simply put – tax advisors, regardless of their title or profession, while the concept of 'reportable cross-border arrangements' aims to catch aggressive tax planning arrangements made in order to reduce the tax burden and to conceal money offshore. Thus, the amendment contains in an annex the general and specific 'hallmarks' that – when met – identify an arrangement as 'reportable'. Besides describing typical tax-saving schemes in abstract form, these hallmarks also include transactions involving countries in the 'EU list of non-cooperative jurisdictions', which is agreed upon by ECOFIN and reassessed regularly.<sup>85</sup>

Following financial institutions and MNEs, the amendment obliges a third group of private entities to cooperate with tax authorities on assessing someone else's tax burdens.

## **3.7 Summarizing the Legal Frameworks: Order of Priority**

As seen, the development of tax information exchange has accelerated significantly since the implementation of FATCA and has shifted the focus from individual exchange upon request to a globally applicable system of automatic exchange of information predefined in

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<sup>82</sup> OJ EC 2015, No. L 141/73.

<sup>83</sup> Also with a detailed analysis of DAC 5 with respect to its compatibility with the EU data protection provisions see Roman Seer, *The European AEOI: Risks and Opportunities of Anti-Money-Laundering Acts*, in Giuseppe Marino (ed.), *New Exchange of Information versus Tax Solutions of Equivalent Effect*, EATLP International Tax Series, Vol. 13 (2015), pp.57 ff (81 ff.).

<sup>84</sup> COM/2017/0335.

<sup>85</sup> For further information see [www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/](http://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/). See also the analysis in Chapter 6 of this book.

an abstract manner. The network of legal frameworks is large, overlapping and intertwining. However, within Europe, the DAC is the most important legal base for information exchange, since being an instrument of European Law it is superior to any bi- or multilateral agreement concluded by a single Member State. As for information exchange clauses in DTAs, TIEAs and the (CbC) MCAA, generally the most extensive provision takes priority over others. In general, since neither the OECD MC nor the TIEA MC explicitly provide for AEOI, AEFI or CbCR, the MCAA can be considered as the most important legal framework in that regard. From a US perspective, of course, that position is held by the respective IGAs.

## 4. LEGAL CONCERNS

### 4.1 Introduction

Without question, any type of information exchange presents a possible violation of the taxpayer's rights to data protection, be it in the form of personal data or commercial data that can contain business secrets. However, the variety of legal bases, their respective legal nature and the space limitations of this contribution make it impossible to address every data protection problem arising from the international exchange of information in detail. Therefore, the following section will present the main issues for future research in this area, with a focus on European Union law.

### 4.2 Protection of Business Secrets in Contrast to Bank Secrecy

Both the OECD MC and the DAC openly address the possibility of harmful business secret disclosure. Article 17(4) DAC as well as Article 26(3c) OECD MC allow for requested states 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. In this context, a trade or business secret is generally understood to mean facts and circumstances that are of considerable economic importance and that can be exploited practically, and the unauthorized use of which may lead to serious damage.<sup>86</sup> As discussed earlier, in contrast to the protection of business secrets, bank secrets are not protected by any legal framework regarding tax information exchange. This is appropriate since business secrets protect a country's companies and their inventions and investments, and herewith strengthen economic competition. These secrets are part of the freedom to conduct a business (Article 16 of the Charter of Fundamental Rights of the European Union, ECFR) and are protected as (intellectual) property (Article 17 ECFR). In contrast, bank secrets are not derived from entrepreneurial freedom but are designed to prevent income (that has been earned under the protection of these freedoms) from being taxed.<sup>87</sup> While being able to save the revenue from one's work might be part of the freedom to conduct a business, that freedom must not hinder the assessment necessary to enforce tax obligations.

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<sup>86</sup> OECD, Commentary on Art. 26 OECD MC, No. 19.2.

<sup>87</sup> Roman Seer, Exchange of Information between Tax Authorities: Structures and Recent Developments (chapter 26), in Heike Jochum, Peter Essers, Michael Lang, Norbert Winkeljohann and Bertil Wiman, Practical Problems in European and International Tax Law, Essays in honour of Manfred Mössner, IBFD, 2016, p.453 (470).



If anything, by making tax fraud and tax evasion easier and by incentivizing investments in countries where bank secrecy applies, those secrecy regimes hamper fair competition and the functioning of the internal market. The precise nature of the differences and the appropriate way to address them in the regulation of information exchange merit much more detailed analysis in the future.

### **4.3 Protection of Personal Data**

Regarding the protection of personal data, all legal frameworks for tax information exchange provide for a protection clause that basically states that any information received by a competent authority shall be treated as secret in the same manner as information obtained under its domestic laws.<sup>88</sup> Although such provision may emphasize the importance of personal data protection, it only effectively fulfils its purpose if the domestic laws of the receiving state provide for sufficient protection. As appeals against the processing of personal data always have to be lodged in the disclosing authority's state of residence, the level of data protection required in the receiving state will depend on that of the disclosing state. Within the EU, a harmonised system of data protection is in place since 25 May 2018. The EU Regulation on Data Protection 2016/679 of 27 April 2016,<sup>89</sup> repealing Directive 95/46/EC, imposes a mandatory standard for data processing within the EU. Hence, equal protection of personal data within the European Union is ensured. The DAC already recognized the provision of Directive 95/46/EC in its Article 25(1) so it can be expected that it will soon be amended to correspond to the new regulation. The regulation – besides providing for an extensive and rigorous regime of data protection – acknowledges all forms of international tax information exchange as being in the most important public interest,<sup>90</sup> and explicitly allows both the Union and its Member States to restrict the scope of their obligations and rights when it is necessary and proportionate to safeguard taxation matters (Article 23(1)(e) GDPR). Interestingly, under Articles 44 and 45 GDPR, any forwarding of personal information to third countries and international organisations falls within the scope of the Regulation and shall only take place where the Commission has decided that the third country ensures an adequate level of protection. Very importantly, however, these provisions do not apply when the transfer is necessary for important reasons in the public interest, which – according to recital 112 of the regulation and Article 49(1)(d) GDPR – is the case with tax information exchange.

Hence, all forms of worldwide tax information exchange undertaken by EU Member States comply with the GDPR.

However, under European Union law, the right to the protection of personal data is derived from Article 8 ECFR and Article 16 of the Treaty on the Functioning of the European Union (TFEU) and is considered as a distinct and autonomous fundamental right.<sup>91</sup> Since any exchange of information conducted by an EU Member State for tax purposes is covered by the

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<sup>88</sup> See Art. 26(2) OECD-MC; Art. 22(1) of the Joint Convention; Art. 16(1) DAC; also see Oberson (supra n. 54), pp.214 ff.

<sup>89</sup> OJ L 119 of 4 May 2016, 1.

<sup>90</sup> Recital 112 of Regulation 2016/679.

<sup>91</sup> Gonzàles (supra n. 53), p.147.

GDPR, authorities have to comply with EU fundamental rights.<sup>92</sup> Thereby, although this right is not an absolute one, but must be considered in relation to its functions in society, any limitations on the exercise of the rights and freedoms recognized by the ECFR must be provided for by law that respects the essence of those rights and freedoms.<sup>93</sup> 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 (Article 52(1) ECFR). The Court of Justice has deemed tax legality and tax equality to be important public interests on numerous occasions.<sup>94</sup> Thereby, the fight against tax evasion and abusive tax planning can undoubtedly be considered as a general interest for the purposes of Article 52(1) ECFR. As for EOIR and SEOI, the requirement of ‘foreseeable relevance’ (see section 3.1.1 of this chapter) sufficiently represents the principle of proportionality. However, as automatic information exchange only requires ‘possible’ relevance, it remains to be seen if the massive scope of AEOI and AEFI can be constitutionally justified on the basis of proportionality.<sup>95</sup> In our opinion, though, as AEOI is an instrument of general abstract risk management, this system itself – instead of a case by case assessment – should be the object of constitutionality verification. Thereby, it does not matter if the processing of data is suitable and necessary to fight tax evasion *in every given case*. Rather, the question is if the general information exchange without specific reason is suitable, necessary and proportionate to fight tax abuse. As long as the transmitted facts are at least potentially relevant for the receiving competent authority and sufficient data protection by that authority is ensured, we submit that the information exchange is constitutional. In this regard, however, Article 49(1)(d) GDPR, which – according to the Regulation’s recitals – allows for tax information exchange with a third country, although data protection in that country is not officially ensured, is problematic and should be interpreted restrictively.<sup>96</sup>

Furthermore, since the recipient state is faced with the need to process a huge amount of data delivered by foreign states without prior concrete risk examinations, it has to ensure that the transmitted information will be used in a proper tax risk management framework and not simply be archived. Therefore, Article 25(4) DAC provides that collected data shall not be retained longer than necessary to achieve the DAC’s purposes. In order 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 Article 8(3) DAC).

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<sup>92</sup> See ECJ (Grand Chamber) of 26.02.2013 – C-617/10, ECLI:EU:C:2013:105, Åkerberg Fransson; ECJ (Grand Chamber) of 16.05.2017 – C-682/15, ECLI:EU:C:2017:373, Berlioz Investment Fund.

<sup>93</sup> ECJ (Grand Chamber) of 9.11.2010, Joint Cases C-92/09 and C-93/09, ECLI:EU:C:2010:662, Volker und Markus Schecke GbR und Eifert v Land Hessen.

<sup>94</sup> ECJ of 15.05.1997 – C-250/95, ECLI:EU:C:1997:239, Futura Participations SA and Singer v Administration des contributions; ECJ (Grand Chamber) of 27.01.2009 – C-318/07, ECLI:EU:C:2009:33, Hein Persche v Finanzamt Lüdenscheid; ECJ of 30.06.2011 – C-262/09, ECLI:EU:C:2011:438, Wienand Meilicke and Others v Finanzamt Bonn-Innenstadt.

<sup>95</sup> Serious doubts have already been expressed by the EU-Commission AEFI Expert Group in its First Report on the implementation of Directive 2014/107/EU for automatic exchange of financial account information, March 2015, pp.7 f., 24 ff.; see also Gonzales (supra n. 53), p.155 with further examination of recent ECJ rulings.

<sup>96</sup> Dealing with the specific needs of data protection against AEOI see Roman Seer (supra n. 87), pp.453 (475 ff.); Roman Seer (supra n. 77), 2017, pp.1131, (1137 ff.) regarding CbCR.

Besides these substantive legal problems, the realization of the taxpayer's right to appeal is highly problematic when it comes to EOI. As Article 47 ECFR grants that right to every EU citizen, one might argue that he must be notified about every disclosure of personal data in order to legally challenge the rightfulness of that disclosure.<sup>97</sup> On the other hand, this might present a threat to the purpose of EOI, since a notified taxpayer might, through a series of legal moves, defer the information exchange or even completely prevent it.<sup>98</sup> Additionally, by the time a request is made, the desired information might not have been obtained by the requested state and thereby, in the case of a criminal investigation, might be concealed by the taxpayer after being notified.

This conflict between the purpose of tax information exchange and the taxpayers' rights is insoluble. Baker and Pistone suggest a general obligation to notify the taxpayer unless the requesting state asks, on reasoned grounds, that the taxpayer should not be informed.<sup>99</sup> However, this would only *seem* to solve the problem. If the requested state accepts the requesting state's appeal for secrecy, it is the legitimacy of *that* request that would never be challenged, although it might violate the taxpayer's rights nonetheless. We thereby argue that with regard to EOIR and SEOI, the taxpayer's right to appeal is – by nature of these instruments as measures of a criminal investigation – restricted to a collateral appeal against tangible measures taken against the taxpayer eventually (that is, a subsequent tax bill or a criminal trial within which the taxpayer could plead in their defence that the obtained information may be deemed inadmissible evidence). This is in line with respective rulings of the Court of Justice, which provide that the mutual exchange of tax information is a pure administrative procedure and does not thereby confer specific rights on the taxpayer.<sup>100</sup>

As for AEOI, however, the main concerns regarding notification of the taxpayer do not apply since there is no substantiated suspicion of tax evasion or fraud when the information is exchanged. By contrast, AEOI might significantly jeopardize the taxpayer's safeguard, that is, when a taxpayer is planning on leaving an oppressive regime and therefore transfers money to their destination in advance. It is therefore gratifying that within the EU, Article 25(3) DAC obliges the reporting FFI to inform each Reportable Person before their data is being collected or transferred. It remains to be seen if that obligation will be sufficiently complied with. The details of applying such requirement in the different tax information exchange procedures are yet unclear and should be a focus of further research.

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<sup>97</sup> See Roman Seer and Isabel Gabert, Mutual Assistance and Information Exchange, General Report, EATLP International Tax Series, Vol. 8 (2010), pp.46 ff; for the insufficient acknowledgement of that problem by the OECD see Oberson (supra n. 54), pp.230 ff.; Niels Diepvens and Filip Debelva, The Evolution of the Exchange of Information in Direct Tax Matters, EC Tax Review 2015, pp. 210 ff. (216).

<sup>98</sup> Philip Baker and Pasquale Pistone in Cahiers de droit fiscal international, Vol. 100B, 2015, pp.49f.

<sup>99</sup> Ibid.

<sup>100</sup> ECJ (Grand Chamber) of 22.10.2013 – C-276/12, ECLI:EU:C:2013:678, Sabou. Although the applicable law in the case was the repealed Directive 77/799/EC, the Court of Justice recently confirmed that it does also apply to the DAC in its decision of 16.05.2017 – C-682/15, ECLI:EU:C:2017:373, Berlioz Investment Fund. In that decision the Court of Justice granted the right to be heard to a third party that was affected by the tax information exchange procedure to the extent that the third party was required to grant information about the taxpayer to the requested authority. The distinction made by the Court of Justice is valid: where the taxpayer will eventually be subject to 'actual' taxation measures, the third party is subject to the information request as a final administrative decision enacted against him.

## 5. PRACTICAL CONCERNS: ASSESSING THE EFFECTIVENESS OF TAX INFORMATION EXCHANGE

On 18 December 2017, the European Commission published a report on the application of the DAC.<sup>101</sup> The report is based on Article 27 DAC and only assesses the application so far of the original directive, without its subsequent amendments. Nonetheless, one key finding of the report is that many tax authorities are overwhelmed by the amount of incoming information and unable to properly process it because of lack of capacity and technical resources. These findings *only* consider the basic forms of information exchange and completely leave out AEFI, CbCR and any incoming information based on DTAs, TIEAs, IGAs or the MCAA.

In addition, the report remains mostly silent on the success of the implementation of the DAC. It simply states that ‘little is known about the actual effects of DAC implementation’. Similarly, Byrnes and Munro state that, with regard to closing tax gaps, FATCA has proven to be unsuccessful.<sup>102</sup>

On 17 December 2018, the European Commission published a second report containing an overview and an assessment of the statistics and information available on the automatic exchanges in the field of direct taxation.<sup>103</sup> The report takes into account the information exchange as foreseen by DAC 1–3. The report shows that files containing automatically exchanged information are, at the very least, opened by the receiving tax authorities. However, the received data still seems to be of remarkably marginal benefit. For example, only 2 per cent of the exchanged income information (DAC 1) contained the tax identification number of the respected taxpayer, and 15 Member States do not even include a TIN in any exchanged information.<sup>104</sup> The report states that, without the TIN, matching received data to an identified taxpayer record is difficult. It subsequently quotes matching rates of ‘Member States for which matching results were available’ without naming these Member States or the actual amount of available matching results.<sup>105</sup> Since there is no Commission Staff Working Document accompanying the report, it is unclear to what extent the information exchanged is actually used.

Financial account information (DAC 2) seems to be a bit easier to process, at least when it comes to matching the received information.<sup>106</sup> However, nine countries, including Germany, stated that, as of 2017, they did not use received financial account information at all.<sup>107</sup>

As for DAC 3, the report states that 18,000 rulings were recorded in the central directory in 2017, but that the use of this information cannot yet be assessed.

Finally, the report concludes that ‘it is very difficult to quantify the benefits of AEOI in terms of additional tax revenues’, meaning that no such benefit can be measured yet. The report thereby sees the main benefit of AEOI for now as lying in ‘the increased tax compliance and in the deterrent effect for taxpayers’.<sup>108</sup>

<sup>101</sup> COM/2017/0781.

<sup>102</sup> Byrnes and Munro (supra n. 56), § 1.01.

<sup>103</sup> COM/2018/844.

<sup>104</sup> COM/2018/844, p.6.

<sup>105</sup> COM 2018/844, p.7.

<sup>106</sup> COM/2018/844, p.10.

<sup>107</sup> COM/2018/844, p.10. Five of these countries, again including Germany, also did not use any information received under DAC 1.

<sup>108</sup> COM/2018/844, p.15.

The report is, in any case, worrying. For one thing, it may contradict political reasoning to implement comprehensive information exchange networks in the first place. Not only does the report show that DAC may not help in collecting additional tax revenues, but the obviously uneven implementation of the DAC's rules by the Member States may also actually harm the Single Market, which requires legal uniformity and legal certainty. Second, the potential ineffectiveness of the DAC may challenge the legality of the information exchange in Europe as far as data seems – for now – rather to be archived than properly processed. If this turns out to be a permanent issue, the automatized collection and sharing of information by tax authorities might, at least in its current extent, prove to be an unnecessary ‘data cemetery’ and thereby violate the proportionality principle.

## 6. CONCLUSION AND FUTURE TRENDS

The development of information exchange has been drastic. In general, the development is welcomed since in a globalized world, effective, transparent and thorough cooperation in tax matters is essential for tax authorities to be able to tax fairly and accurately. However, as regards the variety of legal frameworks as well as their rapid and frequent amendments, many legal questions, especially those relating to data protection, remain unsolved. What is most challenging to an effective information exchange system is its conformity to the ever evolving data protection law which has recently been fundamentally amended by the GDPR. It seems like national tax authorities are currently overwhelmed by the sheer amount of tax data collected and automatically processed. It is crucial for Member States to provide their tax authorities with the necessary financial and human resources to enable them to actually deal with the data received in a way that justifies its collection. In contrast, instead of taking a much needed pause from extending the objects and instruments of tax information exchange and focusing on the actual execution of the numerous existing legal provisions, it seems like the international community keeps inventing new forms of information exchange.

Besides the above mentioned DAC 6, the European Commission has proposed an amendment to the Accounting Directive (2013/34/EU) by which multinational enterprises would be required to publicly disclose in a specific report the income tax they pay together with other relevant tax-related information.<sup>109</sup> On 4 July 2017, the European Parliament adopted the proposed amendment,<sup>110</sup> though this has not yet been approved in Council. In January 2019, the Romanian EU Presidency published a presidency compromise text relating to the proposal for public country by country reporting in the EU.<sup>111</sup> The proposal does not introduce significant amendments. The fact that this proposal is even debated at the level of the EU institutions, when it was fervently rejected during the discussions on the BEPS project,<sup>112</sup> shows the level of activism that has been generated in this area. Although this initiative belongs more in the field of initiatives furthering tax transparency rather than as part of the global tax information exchange system, this name and shame approach by the EU demonstrates its intention to

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<sup>109</sup> COM/2016/0198.

<sup>110</sup> 2016/0107 (COD).

<sup>111</sup> <https://data.consilium.europa.eu/doc/document/ST-5134-2019-INIT/en/pdf>.

<sup>112</sup> See Christiana HJI Panayi, *Advanced Issues in International and European Tax Law*, Bloomsbury, 2015, chapter 4, part 4.3.

further extend the scope of tax information exchange. Rapid developments in this field are likely to continue.