Chapter 26

Exchange of Information between Tax Authorities: Structures and Recent Developments

Roman Seer[1]

26.1. Introduction

To Jörg Manfred Mössner belongs all the credit for establishing an academic movement in European, international and comparative tax law research. Starting in a small group with colleagues such as Kees van Raad and Frans Vanistendael, he chartered the European Association of Tax Law Professors (EATLP), which gives academic scholars a perfect platform for discussing and elaborating on essential tax issues with a cross-border-relevance. Besides the huge annual Congresses of the International Fiscal Association (IFA), which are dominated by tax practitioners of worldwide tax consulting firms and large companies, the annual EATLP Congresses give academic scholars the opportunity to share ideas.[2] The author of this contribution has been deeply impressed and motivated by the international activities of Jörg Manfred Mössner, an inspiring example of a European tax professor in a rapidly globalizing world. Attempting to follow that example, the author has participated in every EATLP Congress since 2002 and has tried to contribute some of his own ideas in the environment of international and European tax law. One of these ideas is to raise awareness of the high relevance of tax procedure law for international taxation. The following contribution, dedicated to Jörg Manfred Mössner, is linked to two recent EATLP Congresses that dealt with information exchange between tax authorities.[3] It will give an overview of the development of international information exchange and raise some new issues that need to be discussed in depth.

1. Chair of Tax Law and Director of the Institute of Tax Law and Tax Procedure Law, Ruhr University Bochum.
2. The annual conferences are documented in the EATLP International Series, published by IBFD; 14 books have already been published. One example is Mössner (ed.), *Taxation of Workers in Europe*, vol. 6, 2010 (general topic of the Congress in Cambridge, 2008).
3. *See* Seer/Gabert (eds.), *Mutual Assistance and Information Exchange* (2009 EATLP Congress, Santiago de Compostela), EATLP International Tax Series, vol. 8, 2010; Marino, *New Exchange of Information versus Tax Solutions of Equivalent Effect* (2014 EATLP Congress, Istanbul), EATLP International Tax Series, vol. 14, 2015.

26.2. Different legal bases of information exchange in tax matters

26.2.1. Exchange of information on bilateral legal bases

26.2.1.1. Information clauses modelled on article 26 of the OECD Model Tax Convention

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

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

On 17 July 2012, the OECD approved an update to article 26 of the OECD MTC and its interpretation. Article 26(2) was amended to allow the use of information received for tax purposes for non-tax purposes as well, provided such use is allowed by the tax legislation in both states and the competent authority of the supplying state authorizes such use. This used to be an optional provision, according to paragraph 4.3 of the amended Commentary

4. Seer, *EC Tax Review* 2013, p. 66 (67).

on Article 26 of the OECD MTC. Furthermore, the Commentary expanded the interpretation of the standard of foreseeable relevance (article 26(1)) and of the term "fishing expeditions" to include 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 exist at the time the request is made, but once the information is received, it is immaterial whether the information is actually relevant. If the requesting state has clarified the relevance of the requested information explicitly, the information must be provided.[5] Requests for information cannot be declined solely because a final assessment of the relevance of the requested information is still ongoing. However, speculative requests (fishing expeditions) are still explicitly excluded.

The most significant amendment is the allowance for requests for information on a group of taxpayers (referred to in paragraph 5.2 of the Commentary on Article 26 of the OECD MTC), as there is no obligation to identify the group individually. Declining the request for information on the basis that it is not a fishing expedition will often be difficult, because the requesting state cannot refer to an ongoing investigation of a certain taxpayer as a mere justification.[6] In most cases, this would lead to random or speculative requests. In order to fulfil the prerequisite of foreseeable relevance of the information and the request not being determined as a fishing expedition, the requesting state must provide detailed information on the necessity of the request. This includes describing the group and specific circumstances explicitly, explaining the applicable law and why there is reason to believe that the taxpayers in the group have been non-compliant with this law. Furthermore, it has to be shown that the requested information would lead to compliance by those taxpayers. Various countries have already interpreted article 26 of the OECD MTC to include group requests. However, for other countries, this represents a new interpretation.

26.2.1.2. Tax information exchange agreements (TIEAs) modelled on the OECD MTC

Beyond the OECD MTC, the OECD published a model agreement on fiscal information exchange in April 2002 – the so-called Tax Information Exchange Agreement Model Convention (TIEA MC). It involves the exchange of fiscal information between OECD member countries and tax

5. Commentary on Article 26 of the OECD MTC, para. 5.
6. *See* Dourado, in Reimer/Rust (eds.), *Klaus Vogel on Double Taxation Conventions*, 4th edn., Kluwer Law International 2015, *Art. 26*, para. 187 et seq.

havens identified by the OECD and represents a result of the "Harmful Taxation Project" initiative. The TIEA MC is not a binding instrument. It can be the foundation for multilateral and bilateral agreements, whereby the agreement points out that it is not abont traditional multilateral agreements but an integrated bundle of bilateral agreements. Hence, it displays an extension of the available resources in information exchange.

The introduction refers to the importance for information exchange of global compliance by financial centres with the standards based on the agreement. This could be a hint regarding the intended field of application of the TIEA MC. The designated disclosure type in article 5 of the TIEA MC is the request disclosure. Spontaneous provision of information and automatic provision of information are not regulated in article 5(1) of the TIEA MC, but following the opinion of the Commentary on the TIEA MC, they can be included in bilateral disclosure agreements if requested by the contracting parties.[7] Furthermore, article 5 of the TIEA MC contains a list of specifications that a request disclosure should include. Regarding the individual request disclosure, the model agreement conforms to article 26 of the OECD MTC. In accordance with article 6 of the TIEA MC, tax audits abroad are also generally possible. Article 7 of the TIEA MC deals with reasons to withhold information. Here, the usual clauses regarding information 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. Information held by banks or other financial institutions has to be provided by both contracting parties. Accordiugly, the distinction between the protection of banking secrecy and the protection of commercial secrets is also made in this model agreement. Concerning the type of taxes included in the agreements (regulated in article 3 of the TIEA MC), the Commentary on the TIEA MC states that bilateral agreements cover at least the categories of direct taxes (taxes on income or profits), capital and wealth taxes, and real estate, inheritance or gift taxes, unless the contracting parties waive the inclusion of one or more tax types.[8]

Article 5(5)(a) to (g) of the TIEA MC also contains regulations concerning which written specifications information requests need to include. Among other things, the requesting state needs to identify the person who is subject to investigation; the tax purpose for which the information is requested; the

7. Commentary on the TIEA MC, para. 39.
8. Id., para. 9.

reasons for the assumption why the requested information concerning the designated person is substantial for the execution of tax law in the requesting state; and the reasons for the assumption that the requested information is either available for the requested contracting state or that a person within the jurisdiction of the requested state holds the information or has power of disposition. In addition, it needs to be explained in written form that the requesting contracting state has exhausted its available measures to obtain the relevant information within its territory. The latter determines the principle of subsidiarity, which is common for information exchange. The requesting state has to name specified reasons for the request for information. The list of essential specifications of article 5(5)(a) to (g) of the TIEA MC forces the requesting state to formulate a precise and detailed request to be thought out well in advauce. The specification of the tax purpose results in a tax secret that provides a higher protection against a multiple usage or change of the original purpose than article 26 of the OECD MTC.

26.2.2. Information exchange based on EU law

26.2.2.1. From the EC Mutual Assistance Directive 77/799/EC[9] to the EU Directive on Administrative Cooperation (Council Directive 2011/16/EU of 15 February 2011) (DAC 1)[10]

Information exchange between EU Member States is not only based on international law agreements. The progress of European integration led to an internationalization of economic processes. Already in the 1970s, the restriction of investigative measures to the taxpayer's own country (according to the formal territoriality principle) resulted in difficulties for national tax administrations in controlling cross-border taxation and collecting the relevant taxes. This led to shortfalls in tax revenues and a distortion of the capital market, clearly hampering competition. Hence, the functioning of the European internal market was put at risk. The result was the EC Mutual Assistance Directive of 1977. Some 30 years later, the Commission considered that the Mutual Assistance Directive could no longer meet the present requirements for administrative cooperation.[11] The proposal for an EU Directive on Administrative Cooperation (DAC 1) was endorsed by the Economic and Financial Affairs Council on 15 February 2011 and had to be

9. Directive 77/799/EC of 19 December 1977, OJ EC No. L336, pp. 15-20.
10. Council Directive 2011/16/EU of 15.2.2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EC, OJ EU of 11.3.2011, No. L64/1.
11. COM (2009) 29, Explanatory Memorandum, Context of the proposal, General context.

incorporated into national law by 1 January 2013. Its aim was to strengthen the cooperation between the tax authorities of the European Union[12] by providing common principles and rules. The directive gives a minimum standard for intergovernmental cooperation on tax matters.

DAC 1 is an important step towards effective administrative assistance and exchange of information. The following amendments of the former Directive 77/799/EC can be emphasized:[13]

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

These measures – already used successfully with regard to VAT[14] – will make information exchange faster. Language still remains an issue for efficient information exchange between cooperating countries. Therefore, DAC 1 states that requests for cooperation, including requests for notification and

12. *Supra* n. 10, OJ EU No. L64, p. 2, para. 7.
13. *See* Seer, *supra* n. 4, p. 69 et seq.
14. *See* Council Regulation No. 904/2010 of 7.10.2010 on administrative cooperation in the field of VAT, OJ EU of 12.10.2010, No. L268/1.

attached documents, may be in any language agreed between the cooperating parties (article 21(4)).

26.2.2.2. From Council Directive 2003/48/EC of 3 June 2003 (the Savings Directive)[15] to Council Directive 2014/107/EU of 9 December 2014 (DAC 2)[16]

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

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

This information has to be transmitted at least once a year and within 6 months following the end of the tax year of the Member State of the paying agent. This AEOI has been undermined by the narrow scope of the Savings Directive, which is limited to the taxation of savings income in the form of interest payments on debt claims, while excluding the taxation of pension and insurance benefits.

Member States that exchange information pursuant to Directive 2003/48/EC were not permitted to rely on limits to the exchange of information as

15. 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. L157/38.
16. Council Directive 2014/107/EU of 9.12.2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ EU of 16.12.2014, No. L359/1.

set out in the former Directive 77/799/EEC.[17] However, Austria, Belgium and Luxembourg were allowed not to apply the automatic exchange during a transitional period. Instead of the information exchange, these Member States levied a withholding tax at a rate starting at 15% and ending at 35% (since 1 July 2011) of the interest amount (article 11 of Directive 2003/48/EC). Since 1 January 2011, Belgium has taken part in the automatic information exchange and has no longer levied the withholding tax. Luxembourg has followed this same tax policy change as from 1 January 2015. Only Austria has still refnsed the AEOI on savings interest.

Besides the field of interest taxation that has been covered by the Savings Directive, DAC 1 (*see* section 26.2.2.1.) has enacted an AEOI between the Member States for the following five predefined categories of income and capital (article 8(1) of DAC 1) from 1 January 2014 onwards:
- income from employment;
- directors' fees;
- life insurance prodncts not covered by other directives, such as Council Directive 2003/48/EC, amended by Council Directive 2014/48/EU (*see* section 26.2.2.2.);
- pensions; and
- ownership of and income from immovable property.

The Member States have to report the aforementioned information to the Member State of residence at least once a year, within 6 months following the end of the tax year of the Member State during which the information became available (article 8(6) of DAC 1).

Despite these further steps towards an AEOI in tax matters on the level of EU law, a wide range of cross-border financial investments and transactions were still not covered. In parallel, the US governinent exerted tremendous pressure on foreign financial industries by the so-called Foreign Account Tax Compliance Act (FATCA). FATCA requires foreign (non-US) financial institutions (FFIs) such as banks, funds, certain brokers, trusts and trust companies to disclose details of all reportable accounts to the US Internal Revenue Service (IRS). Reportable accounts are financial accounts maintained by the FFI where the account holder is either a specified person (i.e. any individual who is a citizen or resident of the United Sates) or is a non-US entity with controlling persons that include one or more specified US persons. Controlling persons are individuals who exercise control over an entity. If the financial institution does not comply with this obligation, it

17. *See* recital 16 of Council Directive 2003/48/EC, *supra* n. 15.

has to withhold a tax of 30% of payments from US sources and transfer this tax amount to the IRS as from 1 July 2014.[18] If the foreign state concludes a so-called intergovernmental agreement (IGA) with the United States, financial institutions resident in this foreign state are treated as "compliant financial institutions" and are exempted from the US withholding tax. With the IGA, the foreign state accepts the AEOI as the common reporting standard (CRS) for foreign financial accounts.[19] As of 11 July 2016, 101 States have signed an IGA type A and 11 states have signed an IGA type B. All EU Member States, as well as a nnmber of other states featuring strong bank secrecy (like Liechtenstein and Switzerland), are affected by this new financial legislation.

This US tax policy has been flanked by the OECD, which has published (21 July 2014) a Standard for Antomatic Exchange of Financial Account Information in Tax Matters. The OECD standard includes two elements to secure a proper exchange of information on financial accounts:
- a inodel agreement between the competent authorities of the contracting states on the automatic exchange of financial account information (AEFI) to improve international tax compliance (multilateral competent authority agreement (MCAA, *see* section 26.2.3.)); and
- a coinmon standard on reporting and due diligence for financial account information (common reporting standard (CRS)).

As of 29 October 2014, 51 states have signed an MCAA based on the OECD MCAA standard.[20] With this international standard for AEFI, the OECD sped up EU development on this inatter. In order to guarantee a unified common reporting standard between EU Member States, DAC 1 (*see* section 26.2.2.1.) had to be adapted to this new worldwide standard. This was realized by Council Directive 2014/107/EU of 9 December 2014 (DAC 2). DAC 2 enlarges 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. The CRS stipulates that the competent authority of each Member State is obliged, as from 1 January 2016, to communicate via automatic exchange specific information on financial

18. *See* secs. 1471-1473 US IRC: a US withholding agent has to deduct and pay 30% of the payments to non-compliant foreign financial institutions.
19. *See* the detailed list of IGAs, differentiated into a bilateral type A and a unilateral type B, at http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx (accessed 11 July 2016). *See also* Parada, *Intergovernmental Agreements and the Implementation of FATCA in Europe*, World Tax Journal 2015, pp. 201-240.
20. Meanwhile, the total number of signatories has increased to 83; *see* OECD, *Global Forum on Transparency and Exchange of Information for Tax Purposes, Automatic Exchange of Financial Account Information*, updated 28 June 2016.

accounts to any other Member State. For Austria, this obligation will start on 1 January 2017.

At the same time, the narrower Savings Directive became useless. Therefore, it was repealed by Council Directive 2015/2060/EU of 10 November 2015.[21] Furthermore, the intermediate amendment of the Savings Directive by Council Directive 2014/48/EU of 24 March 2014[22] did not come into force.

26.2.2.3. Council Directive 2015/2376/EU of 8 December 2015 (DAC 3)[23] and Council Directive 2016/881/EU of 25 May 2016 (DAC 4)[24]

DAC 3 is a consequence of the so-called Luxembourg Leaks scandal aud enlarges the mandatory AEOI on advance cross-border rulings (ACBRs) and advance pricing agreements (APAs). The scope of DAC 3 is far-reaching. It covers not only ACBRs that set regulatory law but also ACBRs that only interpret statutory law (article1(1)(b) of DAC 3). DAC 3 follows a two-step approach. As a first step, each Member State has to automatically send basic information about ACBRs and APAs to all other Member States. This gives the other Member States the opportunity to further examine whether an ACBR or APA affects its financial interests and its national tax law. After this evaluation of the basic data transmitted, in a second step, each Member State may have the ability to request further information in particular cases. This approach combines AEOI on general tax-risk-related matters with the exchange of information on request in specific cases. All Member States are to adopt DAC 3 by national laws, regulations and administrative provisions by 31 December 2016. The European Commission shall by 31 December 2017 develop and provide with technical and logistical support a secure Member State central directory where the given information will be stored with access available to all Member States.

21. Council Directive 2015/2060/EU of 10 November 2015 repealing Directive 2003/48/EC on taxation of savings income in the form of interest payments, OJ EU L 301/1 of 18.11.2015.
22. Council Directive 2014/48/EU of 24 March2014 amending Directive 2003/48/EC on taxation of savings income in the form of interest payments, OJ EU of 15.4.2014, No. L111/50.
23. Council Directive 2015/2376/EU of 8 December 2015, amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ EU L 352/1 of 18.12.2015.
24. Council Directive 2016/881/EU of 25 May 2016, amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ EU L 146/8 of 3.6.2016.

DAC 4 implements, as a further means of achieving transparency, the multinational country-by-conntry reporting (CbCR) standard (*see* section 26.2.3.) on the EU level. Multinational enterprise (MNE) groups with consolidated revenues of EUR 750 million or more have to report in an electronic format certain data about their main business activities. 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 eqnivalents with regard to each jnrisdiction in which the MNE Group operates" (*see* the new article 8aa of DAC 4). Further, DAC 4 stipulates that the communication take place within 15 months of the last day of the fiscal year (which begins 1 January 2016 or later) of the MNE group to which the CbCR relates. The national laws of the Member States have to be adapted by 4 June 2017.

26.2.3. Information exchange on a multilateral basis

The main multilateral legal source for information exchange on tax matters is the Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters (the Joint Convention), signed in Strasbourg on 25 January 1988.[25] The objective of the Joint Convention is to enable each party to counter international tax evasion and to better enforce its national laws, while at the same time respecting the rights of taxpayers. Meanwhile, all of the EU Member States and 37 further third states have signed and ratified the Joint Convention. The Joint Convention therefore applies to countries that are outside the scope of DAC (*see* sections 26.2.2.1. to 26.2.2.3.). In addition, administrative assistance under the Joint Convention covers all forms of compulsory payments made to governments, for example to social security agencies,[26] which are not covered by DAC. The amending protocol of 27 May 2010[27] aligns the Joint Convention with the recent internationally agreed standard on the exchange of information for tax purposes, for example by abolishing bank secrecy for tax purposes (article 21(4)). This is a sign that bank secrecy is no longer acceptable internationally. In addition, the amending protocol provides for the opening up of the Joint Convention to non-Council of Europe and non-OECD member countries. In this respect,

25. CETS No. 127.
26. Article 2(1)(b)(ii) of the Joint Convention enumerates in the list of covered taxes "compulsory social security contributions payable to general government or to social security institutions established under public law".
27. CETS No. 208.

the OECD hopes that the updated Joint Convention will become a powerful instrument in countering offshore tax evasion.

Based on the Joint Convention, a further important multilateral agreement was concluded to establish the global AEOI standard on financial account information (Automatic Exchange of Financial Account Information (AEFI)) on 29 October 2014 (MCAA 1), already mentioned in the context of DAC 2 (*see* section 26.2.2.2.). MCAA 1 has been followed by MCAA 2, of 27 January 2016, which 31 states signed to establish a CbCR standard. As of 30 June 2016, 13 further states have joined MCAA 2. The CbCR standard of MCAA 2 matches with DAC 4 (*see* section 26.2.2.3.).

26.2.4. Concurrences of the legal bases

The variety of legal sources regulating international cooperation raises the question of concurrences between these legal sources. EU law is superior to national legislation. EU law is also superior to the exchange of information articles in tax treaties. Accordingly, EU Member States are bound by the principles of DAC (*see* sections 26.2.2.1. to 26.2.2.3.), as implemented into national law. This can result in overlaps/disagreements in relation to the exchange of information involving articles in tax treaties, especially if a tax treaty only contains narrow information provisions that are not up to the standard of DAC. In these cases, the standard of DAC that is implemented into national laws of the Member States displaces the narrower information provisions of bilateral tax treaties. Only if the obligation in a tax treaty to provide information goes further than that prescribed by DAC 1 do the provisions of the tax treaty apply. In this respect, DAC provides a minimum standard for the purpose of realizing the harmonized exchange of information between EU Member States. From the perspective of the individual taxpayer and private institutions, that can lead to a more intensive intrusion into private legal rights, as confirmed by the irrelevance of bank secrecy as a former impediment to a cross-border exchange of information.

The above-mentioned arguments also remain valid as regards the relationship between EU directives and multilateral sources like the Joint Convention. For example, DAC (also in its last version, *see* section 26.2.2.3.) sets a minimum standard of information exchange in EU tax matters internally that cannot be undercut by a multinational agreement. The European Commission only uses the infringement procedure of article 258 of the TFEU when a Member State does not implement the supremacy of EU law as such. Thus, article 26 of the DTT provisions and multinational agreements have little relevance in

the relationship between EU Member States compared to third countries. In particular, TIEAs (*see* section 26.2.1.2.) are focused on tax haven states and not on EU Member States, to which the directive would apply.

26.3. Different types of information exchange instruments

26.3.1. Exchange of information on request

Exchange of information on request describes a situation in which the competent authority of one state asks for particular information from the competent authority of another state with a special tax case in mind. The requested information typically relates to an examination, inquiry or investigation of the liability of a taxpayer for specified tax years. The requested authority clarifies the relevant facts and transmits the information to the requestiug state. Article 18(1) of DAC 1 and article 26(4) of the OECD MTC state that the requested authority should use its information-gathering measures to obtain the requested information, even though that state may not require such information for its own tax purposes. This can be classified as the passive exchange of information, because the requesting state has no control or influence over the actions of the requested state.[28] This method of exchange of information is also passive from the point of view of the taxpayer, as the taxpayer cannot require the state of residence to use the mutual assistance procedures (MAPs). It is a general subsidiarity principle of tax cooperation that a contracting party should nse all means in its own territory to obtain the information before sending a request, except where this would give rise to disproportionate difficulties. This principle is also to be found in article 17(1) of DAC 1 and in the OECD Manual on the Implementation of Exchange of Information Provisions for Tax Purposes (OECD Manual).[29] In general, a precondition for the supply of information is that the requested information is foreseeably relevant to the enforcement of the domestic laws of the requesting state. The fiscal authority checks incoming requests with respect to their relevance from the point of view of an ex ante observer. This means the authority does not investigate explicitly if the requesting state actually possesses no tax claim. In doing so, it is assumed that the requesting state has already made use of its investigative powers to the full extent.

A big step towards effective administrative assistance and exchange of information is the standardization of the submission of requests and information.

28. *See* Hendricks, *Internationale Amtshilfe*, Diss., 2004, p. 188.
29. OECD, *Manual on Information Exchange*, 2006, Module 1, p. 2 et seq.

Article 20(1) and (3) of DAC 1 states that an information request or a spontaneous provision of information (*see* section 26.3.2.) shall be sent using a standard form. The AEOI (*see* section 26.3.3.) shall be sent using a standard computerized format (article 20(4) of DAC 1). The standard form of the request has to contain specifics such as 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 under a TIEA, *see* section 26.2.1.2.). In addition, the requesting authority may, to the extent that it is known, provide the name and address of any person believed to be in possession of the requested information, as well as any element that may facilitate the collection of information by the requested authority. The use of standard formats is accompanied by regulations concerning the use of the CCN in article 21 of DAC 1. This will make the information exchange faster and is already being used successfully with regard to VAT. Another reason for less efficient information exchange between cooperating countries is linguistically driven. Therefore, requests for cooperation, including requests for notification and attached documents, may be made in any language agreed to between the cooperating parties (article 21(4) of DAC 1). There exists no priority for a particular language.

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

26.3.2. Spontaneous exchange of information

Spontaneous exchange of information is the provision of information in a singular case to another contracting party that is foreseeably relevant to that other party and that has not been previously requested. According to the OECD, spontaneous exchange of information relies on the active participation and cooperation of local tax officials.[30] Article 9(1)(a) to (e) of DAC 1 lists five circumstances in which the competent authority of a Member

30. Id., Module 2, p. 3.

State must communicate the information referred to in article 1(1) of DAC 1 to the competent authority of another Member State without prior request:

(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.

DAC 1 has the potential to enlarge the scope of spontaneous information exchange in Europe, since article 9(2) states that the competent authority of each Member State may communicate spontaneously to the competent authority of another Member State any information of which it is aware that may be useful to the competent authority of the other Member State. Identifying the existence of one of the aforementioned circumstances requires remarkable efforts by tax officials who are acting without a specific request. However, information exchanged spontaneously represents an effective tool for countering tax evasion and tax fraud, as it reports facts and information that another Member State could hardly autonomously detect. Spontaneous exchange of information, as an effective tool to fight tax fraud, has increased rapidly in the European Union. Relating to the former Mutual Assistance Directive 77/799/EC,[31] the Court of Justice of the European Union (ECJ) has ruled in favour of the obligation to spontaneously exchange information.[32] Article 10 of DAC 1 sets a time limit for the transmission of spontaneous information. Information shall be forwarded as quickly as possible, and not later than 1 month after it becomes available.

31. *See supra* n. 9.
32. NL: ECJ, 13 Apr. 2000, C-420/98, *W.N.*, para. 13.

26.3.3. Automatic exchange of information

AEOI involves the systematic and periodic transmission of "bulk" taxpayer information by the source state to the residence state regarding various categories of income, without a formal request being made.[33] This, therefore, represents the continuous exchange of information between states. In contrast to spontaneous exchange of information, AEOI is not based on a singular case but, rather, information referring to defined case groups is transmitted automatically. According to article 3(9) of DAC (in the last version amended by DAC 2-4): "'Automatic exchange' means the systematic communication of predefined information without prior request, at pre-established regular intervals". AEOI can be classified as a means of cross-border risk management, as it offers the information recipient state the possibility to match the information transmitted with the information contained in a tax declaration or return.[34] The most cost-effective way to process the information is to receive the foreign-source information in digital form, so that it can be fed into the recipient's tax database and automatically be matched against the income reported by taxpayers and, furthermore, can easily be transmitted to local tax offices if necessary. As already mentioned (*see* sections 26.2.2.2. and 26.2.2.3.), AEOI has gained relevance in the world of international cooperation on tax matters, with the common standard on financial account information[35] being adopted by the European Union.[36]

However, the recipient state is faced with the need to process a huge amount of data delivered by foreign states without prior specific risk examinations. The Member States have to ensure that the transmitted information be used in a proper tax risk management framework and not simply be archived. To avoid the risk of accumulatiug huge data sets 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 certain tax categories (*see* article 8(3) of DAC 2). Member States can use this provision to ensure that the data received through AEOI will be processed and evaluated by their national risk management systems.

33. OECD *Manual*, *supra* n. 29, Module 3, p. 3.
34. The function of an automatic exchange of information as a component of international tax risk management is emphasized by Seer/Gabert, Steuer und Wirtschaft 2010, p. 3 (p. 10 et seq.).
35. *See* OECD, *Standard for Information Exchange of Financial Information in Tax Matters – New single global standard for the automatic exchange of information between key authorities worldwide*, 2014.
36. *See especially* Directive 2014/107/EU (DAC 2), *supra* n. 16.

26.3.4. Concurrences of the different types of information exchange

Exchange of information on request always starts at the initiative of a state that is interested in securing its tax revenues and is therefore requesting specific information before another state has examined the case. From this perspective, spontaneous and automatic exchanges of information feature additional developments. Both instruments require activities by the Member State that transmits the information at its initiative. The requesting states decide what kind of information may be relevant to another Member State. International tax cooperation has progressed further, whereby states are proactive and transmit useful information. In general, TIEAs do not provide for the automatic sharing of tax information (*see* section 26.2.1.2.). Thus, the new common standard of automatic exchange of financial account information embodies a remarkable step towards proactive tax cooperation between countries, including former tax havens.

With regard to the usefulness of the individual information types in fighting tax fraud and evasion, there is no hierarchy between the various forms, as each information type is appropriate for pursuing a specific goal.[37] Therefore, the interaction of the different information types is widely recognized as an adequate system for the purpose of sharing/exchanging information on tax-related matters. Information on request and spontaneous information gathering are considered to be case-specific, as they contribute to reduce concrete risks. By contrast, AEOI contributes to reducing abstract risks. As already mentioned (*see* section 26.2.2.3.), the instruments of AEOI and single requests for information may be combined in a two-step approach.

26.4. Legal protection of taxpayers

26.4.1. Legal enterprise secrets

Article 17(4) of DAC 1 gives the Member States the right to refuse the provision of information where it would lead to the disclosure of a commercial, industrial or professioual secret or of a commercial process. Accordingly, article 26(3)(c) of the OECD MTC prohibits imposing on a contracting state the obligation "to supply information that would disclose any trade, business, industrial, commercial or professional secret or trade process". A trade or business secret is generally understood to imply facts and circumstances

37. Seer, *supra* n. 4, p. 72.

that are of considerable economic importance, that can be exploited practically and the authorized use of which may lead to serious damage (e.g. may lead to severe financial hardship).[38] However, article 18(2) of DAC and article 26(5) of the OECD MTC state that the provision of information shall not be refused solely because the information is held by a bank or other financial institution. This distinction makes sense, as the different secrets shall protect completely different issues. Enterprise secrets protect a country's companies, their inventions and investments, and they thereby strengthen economic competition. These secrets are part of the freedom to conduct a business (article 16 of the European Convention of Fundamental Rights (ECFR)), are often the result of this business and are protected as (intellectual) property (article 17 of the ECFR). In contrast to this, bank secrets are not results of the business. They stand apart from this and can rather hinder the competent authority of a Member State determining the exact tax base of a taxpayer, because it does not get complete information regarding the relevant income. This lack of information 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 enterprise secrets (as in article 17(4) of DAC 1), this leads to a negative influence in competition in the internal market.

26.4.2. Personal data protection by EU law and the ECJ

Article 25 and recital 27 of DAC 1 clarify that all exchange of information is subject to the provisions of implementing Directive 95/46/EC[39] and to Regulation (EC) No. 45/2001.[40] Recital 28 adds that DAC 1 respects the fundamental rights and observes the principles which are recognized, in

38. Commentary on Article 26 of the OECD MTC, para. 19.2.
39. Directive 95/46/EC of the European Parliament and of the Council of 24.10.1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ EU of 23.11.1995, L281/31. Directive 95/46/EC will be repealed by the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation (GDPR)), OJ EU of 4.5.2016, L119/1, with effect from 25 May 2018.
40. Regulation No. 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ EU of 12.1.2001, L8/1.

particular, by the ECFR. As part of primary EU law,[41] article 7 of the ECFR[42] demands respect for private and family life. Article 8 of the ECFR refers to the protection of personal data. Article 8(2) of the ECFR specifies that "such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified". Limitations on the exercise of the rights and freedoms granted by the charter have to be provided by law and have to respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others (article 52(1) of the ECFR).

This matches with the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ECHR).[43] Under the heading "Right to respect for private and family life", article 8 of the ECHR provides:

> Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 52(3)(1) of the ECFR provides that, as far as the EU Charter contains rights that correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR. Therefore, the ECHR sets on the level of the EU fundamental rights a kind of minimum standard, which can be enhanced by EU law (*see* article 52(3)(2) of the ECFR).

As part of secondary EU law, the Data Protection Directive 95/46/EC of 24 October 1995[44] aims to protect the right to privacy with respect to the processing of personal data of natural persons. But the free flow of this data

41. Article 6(1) of the Treaty on European Union of 13 Dec. 2007 (TEU), consolidated version, OJ EU of 26.10.2012, C326/13.
42. Charter of Fundamental Rights of the European Union, OJ EU of 26.10.2012, C326/391.
43. CETS No. 5.
44. *See supra* n. 39.

shall neither be restricted nor prohibited (article 1). Pursuant to article 3(1) of Directive 95/46/EC, the directive is applicable for the processing of personal data, as defined in article 2(a), by automatic means. Personal data is defined as the information regarding identified or identifiable persons (identification by an identification number or other factors relating to his identity). In order to collect and process this personal data, a specified, explicit and legitimate purpose has to exist and the data has to be adequate, relevant and not excessive regarding those purposes (article 6(1)(b) and (c) of Directive 95/46/EC). Processing of personal data is only allowed under the circumstances listed in article 7 of Directive 95/46/EC. The relevant case here is stated in article 6(1)(e) and refers to the processing of data in order to fulfil a task carried out in the public interest or in the exercise of official authority.

On these legal bases, the ECJ has made paramount decisions in recent years dealing with the area of data protection. In the joined cases of *Schecke GbR* and *Eifert*, the Grand Chamber of the ECJ[45] examined whether the publication of information on beneficiaries of agricultural aid on the website of agricultural state agencies violates (primary) EU law, although the publication has been provided by EU regulations[46] as secondary law to realize the principle of transparency and the concept of an "open government". At first, the ECJ secured that even EU regulations have to be assessed in light of the provisions of the EU Charter, which has, after article 6(1) of the TEU, the same legal value as the treaties. However, the fundamental right of personal data protection is not an absolute right but must be considered in relation to its function in society.[47] Article 52(1) of the ECFR accepts limitations of fundamental rights, but any limitation on the exercise of the rights and freedoms recognized by the EU Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the prineiple of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or

45. DE: ECJ (Grand Chamber), 9 Nov. 2010, Joined Cases C-92/09 and C-93/09, *Volker und Markus Schecke GbR and Eifert v. Land Hessen*, (2010) ECR I-11063.
46. Council Regulation (EC) No. 1290/2005 of 21 June 2005 on the financing of the common agricultural policy, OJ EU of 11.8.2005, L209/1; Council Regulation (EC) No. 1437/2007 of 26 November 2007 amending Regulation (EC) No. 1290/2005 on the financing of the common agricultural policy, OJ EU 7.12.2007, L322/1; Commission Regulation (EC) No. 259/2008 of 18 March 2008 laying down detailed rules for the application of Council Regulation (EC) No. 1290/2005 as regards the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), OJ EU of 19.3.2008, L76/28.
47. ECJ, *supra* n. 45, para. 48.

the need to protect the rights and freedoms of others. In the specific context of the right of personal data protection, data processing is only permitted fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law (article 8(2)(1) of the ECFR). Regarding the personal scope of data protection, the ECJ differentiates between natural and legal persons. Legal persons deserve data protection only as far as the official title of the legal person identifies one or more natural persons.[48] On the other hand, it is not relevant in this respect that the published data concerns activities of a professional nature.[49] The publishing of the concrete amount of aid deriving from the EU Common Agricultural Policy violates the fundamental right of data protection of the beneficiaries, because this amount represents part of their personal income.

For the question of the justification of interference with the fundamental right of personal data protection, the ECJ examined the following touchstones in a three-stage check:[50]

(1) does a law exist that provides the interference of the fundamental right?
(2) does a general interest exist that is accepted by EU law and may justify the limitation of the fundamental right? and
(3) as one of the general priuciples of EU law, is the limitation of the fundamental right proportional in relation to the legitimate aim pursued?

In the specific cases, the ECJ saw a disproportional public transparency. The principle of proportionality requires that measures implemented by EU acts are appropriate for attaining the objective pursued and do not go beyond what is necessary to achieve it. The ECJ has pointed out that it is necessary to determine whether the European Council and Commission balanced the European Union's interest in guaranteeing the transparency of its acts and ensuring the best use of public funds against the interference with the right of the beneficiaries concerned to respect for their private life in general and to the protection of their personal data in particular. The court has held in this respect that derogations and limitations in relation to the protection of personal data must apply only in so far as they are strictly necessary.[51] The ECJ misses the consideration of the EU legislator to reduce the intrusion into the personal data rights of natural persons by limiting the publication of data by name relating to those beneficiaries according to the periods for which they received aid or the frequency or nature and amount

48. Id., para. 53.
49. Id., para. 59.
50. Id., para. 66 et seq.
51. Id., para. 77.

of aid received.[52] However, finally, the ECJ reduces the requirements of proportionality for the limitation of fundamental rights even of such legal persons as are titled by the name of a natural person. The ECJ argues that legal persons are already subject to a more onerous obligation in respect of the publication of data relating to them. Furthermore, the obligation on the competent national authorities to examine, before the data in question is published and for each legal person who is a beneficiary of aid, whether the name of that person identifying natnral persons would impose on those authorities an unreasonable administrative burden.[53]

In two further cases, the Grand Chamber of the ECJ[54] has taken the opportunity to set limits on the retention of personal data generated or processed in connection with the provisions of Directive 2006/24/EC.[55] The aim of Directive 2006/24/EC has been to ensure that data is available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law. The fight against serious crime and terrorism is an objective of a general public interest.[56] Such public interests have to be weighed against the offence to the fundamental right to privacy and the other rights laid down in articles 7 and 8 of the ECFR, measured according to the principle of proportionality. Due to article 7 of Directive 2006/24/EC, certain principles of data protection and data security must be respected by providers of publicly available electronic communications services or of public communications networks so that the retention of data does not affect the essence of the fundamental right to the protection of personal data enshrined in article 8 of the ECFR. According to article 5(4) of the TEU, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the treaties under the principle of proportionality. Under EU law, limitations to rights and freedom granted by the EU Charter have to genuinely satisfy an objective of general interest. According to settled case law of the ECJ, the principle of proportionality requires that actions of EU institutions shall be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those

52. Id., paras. 81 and 84.
53. Id., para. 87, citing the European Court of Human Rights, 2 Mar. 2009, 2872/02, *K.U. v. Finland* (HUDUC database).
54. AU: ECJ, 8 Apr. 2014, Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd. v. Kärntner Landesregierung and others*.
55. Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, OJ EU of 13.4.2006, L105/54.
56. ECJ, *supra* n. 54, para. 42.

objectives. The decision of the ECJ of 8 April 2014 states that clear and precise rules governing the scope and application of the measure in question must be laid down and minimum safeguards must be imposed so that the persons whose data has been retained have sufficient guarantees to effectively protect their personal data against the risk of abuse and against any unlawful access to and use of that data.[57] It furthermore stresses that this requirement is more important if the personal data is processed automatically and a significant risk of unlawful access to that data exists.[58] The ECJ misses clear and precise rules governing the extent of the interference with the fundamental rights enshrined in articles 7 and 8 of the ECFR.

26.4.3. Specific needs of data protection against automatic exchange of information

The AEOI as a tool of international tax risk management in an abstractly defined scope of cases (*see* section 26.3.3.) will grant the recipient states access to a large amount of data of individuals. As article 25 and recitals 27 and 28 of DAC 1 emphasize, each Member State has to observe the provisions of Directive 95/46/EC as well as the fundamental rights of the individual taxpayer. Article 6(1) of Directive 95/46/EC sets especially the following limitations for collecting and processing personal data:

- collection and processing of personal data are limited by specified, explicit and legitimate purposes, and its further processing is bound to those purposes (article 6(1)(b));
- collection and processing of personal data have to be adequate, relevant and not excessive in relation to the purposes for which it is collected and/or further processed (article 6(1)(c)); and
- personal data shall be kept no longer than necessary for the purposes for which the data was collected or for which it is further processed (article 6(1)(d)).

Article 12 of Directive 95/46/EC provides individuals a right of access to information about the collection and procession of their personal data. However, article 13(1)(e) of Directive 95/46/EC gives the Member States the discretion to restrict the scope of obligations and rights provided in favour of individuals when such a restriction constitutes a necessary measure to safeguard an important financial interest of a Member State or of the European Union, including taxation matters. This exception shows that

57. Id., para. 54.
58. Id., para. 55.

the EU legislator considers national tax matters as a legitimate public interest for restricting the personal data rights of individuals. In the light of the aforementioned jurisdiction of the ECJ (*see* section 26.4.2.), the restriction has to be set by parliamentary law and shall not go beyond that level which is necessary to pursue the public goal of tax supervision and enforcement. Article 25(2) of DAC 1, however, demands such restrictions to the extent required in order to safeguard the national tax interests.

The bulk of cross-border exchanged personal data will rapidly increase after implementation of DAC 2 (*see* section 26.2.2.3.) in Member States' uational laws. The scope of automatically transmitted financial account information will be by far broader than it has been before, according to article 8(1) of DAC 1. The European Commission's Expert Group on Automatic Exchange of Financial Account Information is concerned that DAC 2 may violate preconditions set by recent ECJ rulings about data protection (*see* section 26.4.2.).[59] The AEFI Expert Group argues that one of the fundamental principles governing the legitimacy of the collection of data is that indicia for incorrect behaviour of persons must exist. As these requirements are unalterable, data collections without cause, at random, may simply be unconstitutional.

However, AEOI is an instrument that is based only on general abstract risk management criteria. Therefore, it must be sufficient if the transmitted facts (such as the name of the account holder, the account's balance or value and the total gross amount of interests or dividends) are potentially relevant for the residence state of the account holder. Furthermore, the Member States have to guarantee that the information transmitted is not just stored but is used in matching systems to verify the incoming tax returns as a part of the international tax risk management. An important notification obligation is provided by the new article 25(3) of DAC 2. Each Member State shall ensure that each reporting financial institution (RFI) under its jurisdiction informs each individual reportable person concerned that the AEFI relating to him will be collected and transferred in accordance with DAC 2. Additionally, each Member State shall ensure that the RFI provides to that individual all information he is entitled to under its domestic legislation implementing Directive 95/46/EC in sufficient time for the individual to exercise his data protection rights and, in any case, before the concerned RFI reports the AEFI to the competent authority of its Member State of residence. The new article 25(49) of DAC 2 gives a hint as to the maximum

59. First Report of the Commission AEFI expert group on the implementation of Directive 2014/107/EU for automatic exchange of financial account information, March 2015, pp. 7 et seq. and 24-26.

safe-keeping period. The data shall be retained for no longer than necessary to achieve the purpose of DAC 2 and, in any case, in accordance with the domestic rules on statute of limitations.

The AEFI Expert Group also points out the need for appropriate protection of the personal data transferred under AEOI. However, DAC 2 does not have any effective mechanism to protect the data of account holders transferred outside of the European Union.[60] An example of a good practice is offered by article 22 of the Joint Convention.[61] This provision of secrecy demands the following:

> (1) Any information obtained by a Party under the Convention shall be treated as secret in the same manner as information obtained under the domestic laws of that Party, or under the conditions of secrecy applying in the supplying Party if such conditions are more restrictive.
>
> (2) Such information shall in any case be disclosed only to persons or authorities (including courts and administrative or supervisory bodies) involved in tbe assessment, collecting or recovery of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, taxes of that party. Only the persons or authorities mentioned above may use the information and then only for such purposes. Tbey may, notwithstanding the provisions of paragraph 1, disclose it in public court proceedings or in judicial decisions relating to such taxes, subject to prior authorisation by the competent authority of the supplying Party. However, any two or more Parties may mutually agree to waive the condition of prior authorisation.
>
> [...]
>
> (4) Notwithstanding the provisions of paragraphs 1, 2 and 3, information received by a Party may be used for other purposes when such information may be used for such other purposes under the laws of the supplying Party and the competent authority of that Party authorises such use. Information provided by a Party to another Party may be transmitted by the latter to a third Party, subject to prior authorisation by the competent authority of the first-mentioned Party.

Article 22 of the Joint Convention provides the international tax secret standard by enlarging the national tax secret standard of the submitting state upon the information-receiving states. Concurrently, it expresses the principles of equivalence and reciprocity as general principles of international information exchange. These preconditions may be patterned to safeguard personal data protection between the Member States as well as in the relationship to third countries. The EU standard of data protection has to be

60. Id., p. 26.
61. *See* section 26.2.3.

observed not only by each Member State but also by third countries that have been provided with personal data of a Member State of the European Union. Every EU citizen needs the confidentiality to be assured that his personal data will be transmitted to other fiscal authorities only for tax purposes and under the precondition of EU data protection.

26.4.4. Effective procedural instruments of legal protection of taxpayers

The fundamental right of data protection is mainly reserved for natural persons (*see* section 26.4.2.). Legal persons deserve data protection only as far as the official title of the legal person identifies one or more natural persons. This remains a severe lack of legal protection of legal entities whose business or commercial secrets are jeopardized by the exchange of information. Thus, article 17(4) of DAC is the key (*see* section 26.4.1.). Enterprise secrets are less jeopardized by AEOI but more so by spontaneous exchange of information or by information transmittal on request. The last-mentioned cross-border transmittals of information are always based on examinations in single concrete cases. The legal protection of the taxpayer still depends on the national laws in the Member States. In respect of incoming requests, we find a clear relationship between notification, consultation and intervention rights. National legislation of the Member States differs greatly in this respect. Member States with no notification rights, such as Belgium, Finland, Spain and the United Kingdom, do not have consultation rights.[62] Consequently, if taxpayers are not aware of a request, they cannot intervene. In Member States without notification rights, taxpayers may only intervene when they "exceptionally" become aware of the request, e.g. when the tax authorities are not in the possession of the necessary information and have to request it. The right to intervene more or less depends on random events. Overall, it can be said that the level of taxpayer rights at this stage of the process of the exchange of information depends on notification rights. However, taxpayer rights are only effective with regard to the legal protection of taxpayers if they are informed of the request before the information is transmitted to the other state. In other circumstances, taxpayers have no possibility of appeal.

In the OECD's opinion, national law can help to prevent mistakes and facilitate the exchange of information.[63] Clearly, however, notification rights

62. *See* Seer/Gabert, *supra* n. 3, pp. 23-54.
63. Commentary on Article 26 of the OECD MTC, para. 14.1.

should not give rise to delays in the exchange of information or make it ineffective. It is the task of the law, on the one hand, to protect the taxpayer and, on the other, to create rules that permit the effective and swift exchange of information between states. With regard to consultation rights, there are opinions of tax administrators who state that hearings may not have a positive effect on the result of the investigation in all cases because, if taxpayers are warned in advance, they may be able to defeat the objective of the request by adopting counteractive measures. This may be the case for tax fraud investigations. Consequently, it is advocated that, in emergencies, a hearing should not take place, as this could endanger the exchange of information. Generally, extensive legal protection may block the exchange of information. As a result, the public interest in the executable exchange of information must be balanced against the individual's rights to legal protection. Accordingly, taxpayers must provide convincing evidence to verify the risk of violating their individual rights, e.g. with regard to enterprise secrets (*see* section 26.4.1.). If there is no relevant likelihood that the tax authorities could use enterprise secrets for purposes other than lawful taxation, the information should be exchanged without delay.

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

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

26.5. Summary

This contribution has shown the high relevance of establisbing a tax procedure law in the international tax law context. The following results can be summarized:

(1) Exchange of information between national tax admiuistrations is based on several legal sources that can be distinguished in bilateral treaties, multinational conventions and EU law. Concerning EU law in direct taxation matters, the OECD standard is defined by the Directive on Administrative Cooperation in direct taxation (DAC 1). Besides the Savings Directive of 2003, DAC 1 has taken the first step to an automatic exchange of information (AEOI) standard in five predefined groups of tax-relevant facts. However, the DAC 1 standard, applicable from 1 January 2014, has been overruled in a very short time by the rapid development of Foreign Account Tax Compliance Act (FATCA) agreements and the multilateral establishing of a further standard of automatic exchange of financial account information (AEFI). Thus, DAC 2 has adopted the common standard on reporting and on due diligence for financial account information, applicable from 1 January 2016. DAC 2 sets an automatic exchange of information of financial accounts in a much wider range than the former Savings Directive.

(2) We have to differentiate fundamentally between three types of information exchange instruments: information exchange on request, spontaneous exchange of information and automatic exchange of information. Between these types, no clear hierarchy exists, because they are all part of an effective international tax-risk management and all have a specific function. Information exchange on request and spontaneous exchange of information are both tools that are focused on single cases after an (at least first) examination. Spontaneous exchange of information is a further action that is taken by a tax administration not in favour of its own state but in favour of a foreign state. In contrast to this, AEOI and the AEFI are measures of an abstract general tax risk management, since they are focused on a multitude of predefined cases without a concrete suspicion of a violation of tax law or tax losses. In light of this difference, it may be possible to combine these instruments by establishing an AEOI system to give the recipient state the possibility to make a further request in a single case. This two-step approach is now part of the new directives DAC 3 and 4 regarding tax rulings and country-by-country reporting (CbCR) to achieve transparency.

(3) The intensifying of exchange of information between national tax administrations triggers the call for an effective legal protection of affected taxpayers. EU legal sources provide a legal protection of personal data of natural persons by primary law (article 8 of the ECFR) as well as by secondary law (Directive 95/46/EC and, in advance, the General Data Protection Regulation (GDPR) of 17 April 2016). Meanwhile, the ECJ has ruled in several cases regarding the data protection of individuals. Intrusions on data protection rights have to be founded by parliamentary law and be proportional in relation to the public interest pursued. Important public interests include the State aid control of article 108 of the TFEU and national taxation interests (e.g. tax supervision and the prevention of tax fraud and tax avoidance). They have to be clearly identified by the provisions, and the intervention shall not go beyond the level that is necessary to achieve its goal.

(4) Weighing the public interest with protection of private data, an EU standard of international tax secrecy has to be established. A lack of legal protection can be found regarding legal entities that are not fully covered by the EU data protection law. A legal entity's commercial, industrial, business and professional secrets shall be protected in the same way as personal data of natural persons. At present, these enterprise secrets are protected by the freedom to conduct a business (article 16 of the ECFR) and the right to property, including intellectual property (article 17 of the ECFR). Thus, article 17(4) of DAC has to be read as an obligation to refuse the disclosure of these secrets.