The New World of Tax Transparency: Common Standard – Cultural and Legal Differences

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A. Introductory Remarks

The tax world is changing very rapidly. In 2009, not even a decade ago, Germany implemented a final withholding tax on interest income, dividends, and capital gains. At that time, this movement seemed to be the only way to collect tax revenue from capital income. Such capital income was commonly hidden in Switzerland, Luxemburg, and other small countries with strong banking secrecy and unwilling to co-operate and to exchange information. The withholding tax rate of 25% looks attractive compared with the regular top bracket tax burden of nearly 50%[1]. Therefore, the German legislator hoped that German taxpayers would legalize and repatriate their capital because taking the risk of continued tax fraud became less worthwhile considering the privileged taxation in Germany. Also from the perspective of the tax revenue, it seemed advantageous to waive some of the tax claim. Mr. Steinbrück who was the German Minister of Finance by then, was everywhere quoted with the slogan "Better 25% on x, than 50% on nix (nothing)".

It is an interesting question of fiscal psychology to find the right tipping point, where taxpayers prefer to pay taxes instead of living with the risk of being caught and accused of tax fraud[2]. However, we will never know whether Mr. Steinbrück's plan would have worked because since 2009 the environment changed dramatically. Hiding capital abroad and not declaring capital income for tax purposes became much more dangerous, if not almost impossible:

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1 Top bracket of the German Personal Income Tax of 45% (taxable income above 250,000 Euro) + 5.5% solidarity surcharge (= 47.47%).

2 See M. G. Allingham and Sandmo, A. (1972), 1 *Journal of Public Economics*, pp. 323-338; S. Yitzhaki, (1974), 3 *Journal of Public Economics*, pp. 201-202; J. Feinstein, (1991), 22 *RAND Journal of Economics*, pp. 14-35. For a survey of the literature, see J. Slemrod, (2007), 21 *Journal of Economic Perspectives*, pp. 25-48. See also K. Lee, (2015), 71 *Public Finance Analysis*, pp. 37-52.

Firstly, around ten years ago, German tax authorities started to acquire CDs with data of bank clients stolen by bank employees. Despite the highly questionable constitutionality of public authorities collaborating with criminals[3], this strategy has been very effective in pushing taxpayers to voluntary disclosure. Over time, the CD acquisition became an almost professional business. The data thieves fit the data perfectly to the needs of the tax authorities. In spite of generous standards of German evidence law, it is unclear, whether this practice can be continued. As in many countries, in Germany, the violation of procedural rules does not exclude the use of the evidence. Generally, the fruit of the poisonous tree doctrine is unknown in Germany. Nevertheless, compatibility with the rule of law is questionable if the acquisition of illegally procured data becomes a routine procedure. However, this might be only a temporary issue because the need for the CD acquisition is moot with the legal exchange of information.

Secondly, countries like Switzerland and Luxemburg, famous for their discretion, first have loosened, then abolished their banking secrecy traditions. The US FATCA legislation, the political pressure of G 20, OECD, and EU finally eroded their business model. The legislation on money laundering supported this trend.

Finally, accepting the new Common Standard for Automatic Exchange of Financial Information in Tax Matters[4], signed by more than 50 jurisdictions would have been impossible for countries with bank secrecy. Once fully implemented, we will face a steady flow of information. The new cross-border transparency will make it very hard to escape taxation, and continue fraudulent behavior, which was for a long time considered to be a rather riskless peccadillo.

Most scholars praise the new practice of transparency as a milestone towards tax fairness. So do we. However, in the following article, we need to pour some cold water on the matter, because it will not only take time to surmount technical and practical difficulties to establish a worldwide automatic exchange of information, but we also have to be aware of the limits which stem from the clash of very different domestic standards of taxpayer protection and data security. For this purpose, we will first explain the different legal sources of exchange of information. Secondly, it shall be shown how the new automatic exchange of information might broaden the leeway of the domestic tax legislators of taxing capital income more comprehensively again. This,

[3] The German Federal Constitutional Court accepted this instrument of investigation in its decision of 9 November 2010 - 2 BvR 2101/09, NJW 2011, p. 2417 et seq. However, at that time, it was a single event and not a common practice.

[4] See OECD (2014), Standard for Automatic Exchange of Financial Account Information in Tax Matters, OECD Publishing; available at: http://dx.doi.org/10.1787/9789264216525-en.

of course, requires awareness of the legal boundaries for the automatic exchange of information. In the third step, some consequences for the design of the domestic transformation of the international treaties and the usage of the automatically exchanged information will be developed.

B. Rapid Growth and Alignment of the instruments for exchange of information

The international exchange of tax information has made major advances in recent years. Thus, there are a number of instruments at different levels - the US, the OECD, and EU levels.

a) FATCA as instrument at the US level

aa) FATCA – first phase

The first fundamental instrument being discussed here, is the US Foreign Account Tax Compliance Act, commonly referred to as FATCA[5]. Originally thought to be launched as a pure US instrument of automatic exchange of information to target tax noncompliance by US taxpayers using foreign bank accounts, the US Congress enacted FATCA legislation in 2010 in response to the UBS offshore tax-evasion scandal.[6] The primary thrust of FATCA, which went into effect in 2014[7], requires foreign financial intermediaries around the globe to report information on financial accounts of U.S. residents and foreign entities in which U.S. residents hold a substantial ownership interest directly to the Internal Revenue Service ("IRS") beginning in 2015.[8] Only if foreign financial intermediaries do comply with FATCA's reporting obligations, will it be ensured that US withholding agents will not withhold a 30% US penalty withholding tax on certain payments to these entities.[9]

Recognizing the important legal and cost issues of this approach, the US developed in conjunction with France, Germany, Italy, Spain, and the United Kingdom two types[10] of models for the intergovern-

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[5] FATCA refers to Subtitle A, chapter 4 of the U.S. Internal Revenue Code, 26 U.S.C. §§ 1471-1474. It was enacted by the US Hiring Incentives to Restore Employment (HIRE) Act on 18 March 2010.

[6] See I. Grinberg (2013), 5 *World Tax Journal*, at 330.

[7] See IRS Notice 2013-43 (12 July 2013).

[8] See 26 U.S.C. § 1471 (b) and (c); 26 U.S.C. § 1472 (b).

[9] See 26 U.S.C. § 1471 (b)(3)(A).

[10] The main difference between the two agreements is that Model 1 agreements allow the IRS to swap reciprocal tax information with another country, while the Model 2 agreement does not. See for further discussion M. Somare and Wöhrer, V. (2014), 68 *Bulletin for International Taxation*, Issue 8, pp. 395-403.

mental implementation of FATCA (hereafter referred to as "Model 1 IGA" and "Model 2 IGA").[11] As the Model 1 IGA allows minimizing and simplifying the compliance burdens on the financial institutions in a foreign jurisdiction, if such a country enters into an IGA to implement FATCA, as of 25 May 2016, 73 countries[12] (including Germany[13]) have signed bilateral agreements with the US, which are based on Model 1 IGA. Model 1 IGA requires reporting by financial institutions to their domestic tax authorities, which then exchange the information on an automatic basis with the U.S. tax authorities[14], whereas under Model 2 IGA[15] local financial institutions are allowed to directly report to the IRS.[16]

bb) FATCA – second phase – move towards GATCA[17]

Although the US enactment of FATCA was originally seen as a unilateral legislation effort to a standard of automatic exchange of information, it was the threat of 30% penalty withholding tax that caused FATCA to act as a catalyst for the move towards automatic exchange of information in a multilateral context.[18]

In order to avoid multiple standards across jurisdictions after the FATCA implementation, the OECD, supported by the G20[19], has endorsed[20] a single global standard for automatic exchange of financial account information in tax matters and released its main elements, namely a Model Competent Authority Agreement (hereafter referred

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[11] See C. P. Tello (2014), 68 *Bulletin for International Taxation*, Issue 2, pp. 88-95, at 92.

[12] See https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx. In general, it should be mentioned that any financial institution in a foreign jurisdiction that has not signed an IGA is subject to the 30% US penalty withholding tax for all revenue from U.S. sources.

[13] On May 31, 2013, Germany signed a FATCA agreement with the US. In response to this US-German agreement, Germany added section 117c to the German General Tax Code (Abgabenordnung).

[14] See M. Somare and Wöhrer. V. (2014), 68 *Bulletin for International Taxation*, Issue 8, at 399.

[15] Austria, Bermuda, Chile, Hong Kong, Japan, Moldova, San Marino, and Switzerland have signed Model 2 IGA agreements. See https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx.

[16] See C. P. Tello (2014), 68 *Bulletin for International Taxation*, Issue 2, at 94.

[17] Sometimes even referred to as "Global FATCA" or "OECD Global Standard" or "Standard for Automatic Exchange of Financial Account Information in Tax Matters."

[18] See C. P. Tello (2014), 68 *Bulletin for International Taxation*, Issue 2, at 88.

[19] See G20 Leaders' Declaration – St. Petersburg Summit (6 Sept. 2013) para. 51 (in which the G20 are stating that the G20 "fully endorse the OECD proposal for a truly global model for multilateral and bilateral automatic exchange of information.")

[20] See e.g., remarks by Angel Gurría, OECD Secretary-General, in Tax Analysts, OECD Takes Stand Against Tax Evasion at ECOFIN Meeting (14 Sept. 2013).

to as "MCAA"[21]) and a Common Reporting Standard (hereafter referred to as "Common Reporting Standard" or "CRS"), in February 2014.[22] In July 2014, the OECD Council released the full global standard, including its remaining elements, namely the Commentaries on the Model Competent Authority Agreement and Common Reporting Standard and the Information Technology Modalities for implementing the global standard.[23] In September 2014, the entire global standard package was endorsed by G20 Finance Ministers and Central Bank Governors.[24] At the Meeting of the Global Forum in Berlin, on 29 October 2014, 51 jurisdictions committed to sign a Multilateral Competent Authority Agreement[25] to automatically exchange information, which implemented the CRS and is based on Article 6 of the OECD Multilateral Convention[26] on Mutual Administrative Assistance in Tax Matters ("MAATM Convention").[27] The first exchanges of information under this agreement are expected as of 2017.

Putting technical differences between FATCA and the OECD CRS aside[28], the main thrust is the same. Financial institutions report information automatically on an annual basis.

b) Other OECD instruments of information exchange

In addition to CRS and against the backdrop that the OECD has a long history of fostering greater tax co-operation and improving all forms of exchange of information (on request, spontaneous and auto-

[21] The Model Competent Authority Agreement is designed so that it can be executed within existing legal frameworks such as Article 6 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters or Article 26 of an existing bilateral double taxation agreement.

[22] See OECD (2014), Standard for Automatic Exchange of Financial Account Information in Tax Matters, OECD Publishing; available at: http://dx.doi.org/10.1787/9789264216525-en.

[23] See http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/.

[24] See Directive 2014/107/EU, OJ No L359 of 16 December 2014, pp. 1-29, at 2.

[25] See OECD, Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information, available at: www.oecd.org/ctp/exchange-of-tax-information/multilateral-competent-authority-agreement.pdf. To date, 82 jurisdictions have signed the Agreement (Status as of 12 May 2016). For a list of jurisdictions that have signed the Multilateral Competent Authority Agreement, see http://www.oecd.org/tax/exchange-of-tax-information/MCAA-Signatories.pdf?.

[26] See OECD and Council of Europe (2011), The Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol, OECD Publishing, available at: http://dx.doi.org/10.1787/9789264115606-en. On February 8, 2016, Kenya signed and joined the Convention as the 94th jurisdiction.

[27] See German Ministry of Finance, press release (October 29, 2014), available at: http://www.bundesfinanzministerium.de/Content/EN/Pressemitteilungen/2014/2014-10-29-berlin-tax-conference-2014.html.

[28] See M. Sapirie (2015), *77 Tax Notes International, at* 558 (16 February, 2015).

matic), the OECD provides with its Article 26[29] of the OECD Model Tax Convention[30], its MAATM Convention, and its Model Tax Information Exchange Agreement ("TIEA")[31] an additional basis for information exchange.

Like Art. 26 of the OECD Model, the OECD MAATM Convention, as amended in 2011, provides for all possible forms of exchange of information.[32] It also contains strict rules on confidentiality and proper use of data.[33] The TIEA, instead, published by the OECD in 2002 and available in both bilateral and multilateral versions[34], provides only the possibility to exchange tax information "upon request" (see Art. 5 of TIEA). But, according to para. 39 of the TIEA Model Convention Commentary, it is up to the contracting parties to include provisions on spontaneous and automatic exchange of information in the bilateral disclosure agreements if this is requested by the parties. On August 7, 2015, the OECD presented a Model protocol for the purpose of allowing the automatic and spontaneous exchange of information under a TIEA, which amends 2002 TIEA by adding a new Article 5A (automatic exchange of information) and Article 5B (spontaneous information exchange) to the 2002 TIEA.[35] Besides all these instruments, finally, all kinds of bilateral agreements based on Art. 26 of the OECD Model have to be mentioned here which also regulate the information exchange.

c) *Exchange of information at the EU level/ information exchange under EU law*

In addition to the instruments developed within the OECD, and the US, the EU legislation as well provides for administrative cooperation between Member States' tax authorities, and sets out a series of European instruments (such as Directives and Regulations) to help them to

[29] For a detailed overview of Art. 26, see A. Rust, in Reimer/Rust (eds.), Klaus Vogel on Double Taxation Conventions (Kluwer Law International, 4th ed., 2015), Art. 26 OECD MC; E. Traversa and Cannas, F., Exchange of Information (Art 26 OECD Model Convention), in Lang et al (eds.), The OECD-Model-Convention and its Update 2014, (Linde, 2015), pp. 147-174, at 153.

[30] OECD, OECD Model Tax Convention on Income and on Capital, condensed version, July 2014.

[31] See e.g., R. Seer (2013), 22 *EC Tax Review*, Issue 2, pp. 66-77, at 67.

[32] See Art. 5-7 of OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters.

[33] See http://www.oecd.org/tax/exchange-of-tax-information/Automatic-Exchange-Financial-Account-Information-Brief.pdf, at 4.

[34] See T. Anamourlis and Nethercott, L., (2009), 63 *Bulletin for International Taxation*, Issue 12, pp. 616-621, at 618.

[35] See OECD, Model Protocol for the purpose of allowing the automatic and spontaneous exchange of information under a TIEA, available at: http://www.oecd.org/ctp/exchange-of-tax-information/Model-Protocol-TIEA.pdf.

cooperate in collecting their due revenues, including exchange of information.

aa) Savings Directive 2003/48/EC[36]

Building on the consensus reached at the Santa Maria da Feira European Council of 20 June 2000 that relevant information should be exchanged for tax purposes on as wide a basis as possible, the European Council adopted the EU Savings Directive (hereafter "SD") in June 2003. The SD can be seen as a compromise between the need to tackle the problem of cross-border tax evasion of interest income[37], while taking into account the domestic bank secrecy rules of some EU Member States and the level playing field with third countries.[38] The SD requires that EU Member States either collect and automatically[39] exchange information[40] on interest income earned by individuals residing in other EU Member States to their EU counterpart tax administrations or withhold[41] anonymously at a specific tax rate[42] on interest earned by EU residents in accounts held at an EU financial institution located outside the individual's EU resident state.[43] As the SD neither[44] covers interest payments made by non-EU paying agents to EU individuals nor payments made to most legal entities and arrangements, politicians, scholars, and stakeholders almost uniformly agree

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[36] Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments, OJ No L 157 of 26 June 2003, pp. 38-48. This Directive has been applicable since 1 July 2005 until the end of 2015. It has been abolished as of 1 January 2016.

[37] See Council Directive 2003/48/EC at 38 and http://ec.europa.eu/taxation_customs/taxation/personal_tax/savings_tax/index_en.htm.

[38] See X. Oberson, International Exchange of Information in Tax Matters (Elgar, 2015), at 81.

[39] The automatic exchange of information shall take place at least once a year, within six months following the end of the tax year of the Member State of residence of the beneficial owner (See Art. 9 para. 2 of SD).

[40] The minimum information to be reported by the paying agent (EU financial institution) to the tax authorities of its EU Member State is laid down in Art. 8 of SD.

[41] In view of structural differences, Austria, Belgium, and Luxembourg were allowed, during a transitional period, to apply a withholding tax on interest paid by a paying agent in their territory to an individual resident in another EU Member State. (see Art. 10 of SD).

[42] According to para. 1 of Art. 11 of SD, the withholding tax rate was 15% until 1 July 2008, 20% thereafter for three years, and 35 % after 1 July 2011.

[43] See I. Grinberg (2013), 5 *World Tax Journal*, at 338.

[44] See Art. 1, 2, and Art. 4 of SD.

on the limited[45] scope of the SD and, accordingly, on the existence of various reporting loopholes[46].[47]

Thus, on March 24, 2014, after almost a decade of negotiation, the EU Council of Ministers adopted a revised version of the SD, commonly referred to as amended Savings Directive 2014/48/EU[48], to address the existing loopholes[49] and better prevent tax evasion.[50]

Then, a few months later, with the adoption of Directive 2014/107/EU[51] in December 2014, the SD began to become almost obsolete, due to the fact that Directive 2014/107/EU contains a much broader scope of reporting than the SD, and provides[52] that in cases of overlap of scope, the Directive 2014/107/EU shall prevail. Even though there were still residual cases in which only the SD applies, its application would result in dual reporting standards within the Union, and, thus, in extra costs that outweigh the minor benefits of retaining such dual reporting.[53] Against this background, it is not surprising that the Council decided to repeal the SD as from January 1, 2016.[54] The re-

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[45] See T. Rixen and Schwarz, P. (2012), 50 *Journal of Common Market Studies*, Issue 1, pp. 151-168.

[46] See for a more detailed description of various ways to circumvent the reporting requirements of the SD, page 50 and 51 of the revised version of the SD, the Council Directive 2014/48/EU of 24 March 2014 amending Directive 2003/48/EC on taxation of savings income in the form of interest payments, OJ No. L 111 of 15 April 2014.

[47] See I. Grinberg (2013), 5 *World Tax Journal*, at 337.

[48] Council Directive 2014/48/EU of 24 March 2014 amending Directive 2003/48/EC on taxation of savings income in the form of interest payments, OJ No L 111 of 15 April 2014, pp. 50-78. The amendments to the SD were provoked by the results of the first Commission report of 15 September 2008 on the functioning of the SD. See Report from the Commission to the Council in accordance with Article 18 of Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, 15 September 2008, COM(2008) 552 final. In this report, the Commission argued that the extent of the SD's coverage appeared not to be sufficient in order to meet the SD's ultimate aim, and identified various loopholes.

[49] For instant, in order to cover interest payments made by EU-paying agents to certain intermediate structures outside the EU, the amended SD contains in Annex I a list of specific entities that are widely used as intermediate structures. See amended SD, at 67-70. The revised Art. 6, e.g., extends the scope to include income equivalent to interest payments.

[50] Under this Directive, EU Member States are to adopt and publish, by 1 January 2016, the laws, regulations, and administrative provisions necessary to comply with that Directive. Member States are to apply those provisions as of 1 January 2017.

[51] Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ No. L 359 of 16 December 2014, pp. 1-29.

[52] See Council Directive 2014/107/EU, OJ No. L 359 of 16 December 2014, at 5.

[53] See Council Directive 2015/2060 of 10 November 2015 repealing Directive 2003/48/EC on taxation of savings income in the form of interest payments, OJ No L 301 of 18 November 2015, pp. 1-4, at 2.

[54] Art. 1 para. 1 of Directive 2015/2060, OJ No L 301 of 18 November 2015. As to Austria, the SD should continue to apply for an additional one-year period; see Directive 2015/2060, OJ No L 301 of 18 November 2015, at 2.

peal was enacted by Directive 2015/2060[55] adopted by the Council on November 10, 2015.[56] Further to the abolition of the SD, the amended Savings Directive 2014/48/EU will no longer need to be transposed by the EU Member States.

bb) Directive 2011/16/EU (EU Mutual Assistance Directive)

In addition to the SD, and due to the EU Member States' rapidly growing need for enhanced mutual assistance in the field of taxation, in February 2011, the Council adopted Directive 2011/16/EU[57], commonly referred to as "DAC1" or "Mutual Assistance Directive." It established a step-by-step approach to broaden automatic[58] exchange of information among EU Member States by eventually going beyond the existing arrangement on interest income to other categories of income and capital.[59] During the last two years, the DAC1 has been amended twice, first by Directive 2014/107/EU[60] (referred to as "DAC2") in December 2014, and then by Directive 2015/2376[61] (referred to as "DAC3") in December 2015. The DAC2 aims at extending the automatic exchange of information already envisaged in DAC1 in accordance with the new Global Standard developed by the OECD in July 2014 and ensuring a coherent, consistent and comprehensive EU-wide approach to the automatic exchange of financial account information in the internal market.[62] The DAC3, in contrast, establishes mandatory automatic exchange of information on tax rulings and advance pricing agreements.[63]

[55] See Council Directive 2015/2060 of 10 November 2015 repealing Directive 2003/48/EC on taxation of savings income in the form of interest payments, OJ No. L 301 of 18 November 2015, pp. 1-4.

[56] See Council of the European Union, press release (November 10, 2015) available at: http://www.consilium.europa.eu/en/press/press-releases/2015/11/10-savings-taxation-directive-repealed/.

[57] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ EU No. L 64 of 11 March 2011, pp. 1-12. This Directive replaced Council Directive 77/799/EEC, OJ No L 337 of 27 December 1977, pp. 15-20.

[58] Besides the automatic exchange of information, the Directive also provides for exchange of information upon request (Article 5 to 7) and spontaneous exchange of information (Article 9 and 10).

[59] See Council Directive 2011/16/EU, OJ EU No. L 64 of 11 March 2011, at 2; para. 10, and Art. 8 of this Directive.

[60] Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ No L 359 of 16 December 2014, pp. 1-29.

[61] Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ No L 332 of 18 December 2015, pp. 1-10.

[62] See Council Directive 2014/107/EU, OJ No L 359 of 16 December 2014, at 2.

[63] See Council Directive (EU) 2015/2376, OJ No L 332 of 18 December 2015, at 2.

Recently, on May 25, 2016, the Council adopted a new Directive[64] to amend DAC1, which builds on the OECD's latest achievements concerning country-by-country reporting (Action 13 of the BEPS Action Plan), and, thus, provides for the introduction of the mandatory automatic information exchange on country-by-country reporting between EU Member States.[65]

cc) Directive 2010/24/EU[66] on Mutual Assistance for the Recovery of Tax Claims

In the end, even this Directive, agreed upon on 16 March 2010, provides, among other things, for a mandatory exchange upon request of information foreseeably relevant to the applicant authority in the recovery of claims (Art. 5) and a spontaneous exchange of information (Art. 6).

dd) Exchange of information rules in the field of indirect taxes

At this point it might be also worth mentioning that many important European rules of exchange of information also exist and are constantly developed and improved notably in the area of value added tax[67] and excise duty[68]. However, to describe those European rules in detail would go far beyond the scope of this article.

As you can see from the explanation above, we can conclude that the past seven years have seen an unprecedented development in the area of international information exchange for tax purposes. It is no

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64 See 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 No L 146 of 3 June 2016, pp. 8-21, at 9.

65 See European Commission, proposal, COM(2016) 25 final, at 10 ; see also Committee on Economic and Monetary Affairs, Report on the proposal for a Council directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (COM(2016)0025 – C8-0030/2016 – 2016/0010(CNS)), 28 April 2016, A8-0157/2016, pp. 1-26, amended recital 11, at 10, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2016-0157+0‡OC+PDF+V0//EN.

66 Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, OJ No L 84 of 31 March 2010, pp. 1-12.

67 See e.g., Art. 7 and Art. 13 of Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (recast), OJ No L 268 of 12 October 2010, pp. 1-18. This Regulation supplements the former Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92, OJ No L 264 of 15 October 2003, pp. 1–11.

68 See e.g., Council Regulation (EU) No 289/2012 of 2 May 2012 on administrative cooperation in the field of excise duties and repealing Regulation (EC) No 2073/2004, OJ No L 121 of 8 May 2012, pp. 1-15.

exaggeration to say that more has been accomplished by the OECD and the European Union concerning exchange of information in the last decade than in the preceding century.

C. Transparency and exchange of information – the key to tax fairness

Closely linked with exchange of information is the issue of tax transparency. Both are said to be critical components to enforce tax laws and, thus, are big steps towards equal treatment of similar taxpayers. Fairness[69] of a tax system cannot be measured only by the quality of the law in the books. The equal enforcement of tax law is as important.

In its 1991 landmark decision[70] on interest income, the German Federal Constitutional Court developed a doctrine of equal application of tax laws ("Rechtsanwendungsgleichheit"[71]). This doctrine says that declarations by the taxpayer always need to be accompanied by instruments of verification. Structural impediments to verification (like bank secrecy) render the normative basis of the taxation itself unconstitutional. As regards the taxation of capital income, the Court stated that the tax legislator has to ensure the collection of taxes either by a transfer of bank client's data to the tax authorities or by levying a withholding tax.

In reaction to this decision, the German tax legislator decided in favor of levying a withholding tax, which was at its beginning shaped as being creditable against the personal income tax, and since 2009 – as described above – shaped as final withholding tax with a flat rate of 25%.

The latter decision to move toward a schedular system of income from capital in combination with a final withholding tax became subject of a highly controversial debate. The main argument against the implementation of such a "box" system was that it would be a breakdown of the fundamental concept of a synthetic income tax[72], the German income tax system is traditionally based on.

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69 See in general, K. Gideon (1999), 25 *Ohio N.U. L. Rev.* 101; J. G. Head (1992), 9 *Austl. Tax F.*, 65; J. A. Schoenblum (1995), 12 *Am. J. Tax Pol'y*, 221.

70 See German Federal Constitutional Court, judgment of 27 June 1991 on interest taxation – 2 BvR 1493/89 –, BVerfGE 84, 239, at 268 et seq.; repeated in its judgment of 9 March 2004 on speculative transactions tax- 2 BvL 17/02 – BVerfGE 110, 94.

71 See R. Eckhoff, Rechtsanwendungsgleichheit im Steuerrecht, Die Verantwortung des Gesetzgebers für einen gleichmäßigen Vollzug des Einkommenssteuerrechts (Otto Schmidt Verlag, 1999), at 527 et seq.

72 See J. Englisch (2007), *Steuer und Wirtschaft*, pp. 221-240, at 222 et seq.; See for the Austrian Income tax system, e.g., Ubelhoer/Pfeiffer/Huisman/Schaffer, Introduction to Austrian Tax Law, (facultas, 2015), at 13 (stating that "Austrian Income Tax is based on the

Yet, the wind has changed again. In the light of the new international consensus on automatic exchange of information, the signing of the Multilateral Competent Authority Agreement in Berlin in October 2014, and the introduction of the German Automatic Exchange of Financial Account Information Act (Finanzkonten-Informationsaustauschgesetz (FKAustG)), a debate on abolishing the German final withholding tax on capital income started. In particular, Lisa Paus, member of the Green Party of the German parliament, is arguing that the sole justification for having introduced the final withholding income tax in 2009 and, thus, for tax-privileging capital income over labor income was that the German government was reputed to be unable to combat illegal capital flight at these times. But, nowadays, she further argues, with the introduction of the automatic exchange of information, it seems to be highly questionable if there is a basis for such an argument. Thus, she is claiming to turn back to progressive taxation of capital income.[73]

It is not clear whether a constant back and forth appears to be smart tax policy. Despite the flaws of the final withholding tax, financial institutions and capital holders got used to it. Therefore, such a step has to be considered thoroughly. Furthermore, in our view, it is too early to make such a momentous decision. It will take years until the automatic exchange will work with a sufficient number of countries.

However, if we really reach a stage of functioning cross-border exchange of information and international co-operation, this might fundamentally affect the design of domestic tax systems as it would allow a turn back to taxation in accordance to the ability-to-pay principle[74], instead of, in accordance to the mobility of the income.

D. Any Objections?

In view of the above, one could be only enthusiastic about the recent developments in the field of exchange of information with transparency as the new spell. At first glance, transparency appears to have a very positive connotation. There is no justification to hide informa-

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synthetic notion of income."). In general, see K. Holmes, The Concept of Income: A Multi-Disciplinary Analysis, (IBFD, 2001), at 28.

73 See e.g., Petition of German members of the Bundestag Lisa Paus, Dr. Thomas Gambke et al. and the fraction of the Alliance 90/ The Green Party, 23 September 2015, BT-Drs. 18/6065, pp. 1-4, at 3.

74 The ability-to-pay principle is a concept of tax fairness stating that people with different amounts of wealth or different amounts of income should pay tax at different rates. See also J. Slemrod, Tax Progressivity and Income Inequality (Cambridge University Press, 1996) at 2 (stating that according to this principle, "tax burdens should be assigned, not on the basis of who benefits from government policy, but instead on the basis of who has the "ability to pay."").

tion necessary for taxation from the fiscal authorities. However, the automatic exchange of information cannot be regarded as a mere fact gathering, but is part of the administrative procedure and, therefore, has to be in line with fundamental principles of the rule of law. Major challenges of cross-border exchange of information concern data security, confidentiality, and tax secrecy. Furthermore, the automatic collection of data from third persons like banks interferes with the taxpayer's right of informational self-determination.

1. *Worldwide Standards – Cultural Differences*

Agreeing globally on a Common Standard for Automatic Exchange of Financial Information in Tax Matters is crucial for the functioning of the exchange. Information from abroad in a non-standardized manner is rather useless, especially thinking of the mass of data transferred by automatic exchange.

However, the standardization of the exchange process has no immediate impact on the domestic legal environment of the participating countries. Even though the OECD tries both to influence the technical framework and to establish a body of common taxpayer rights, this seems to be a rather slack framework regarding the varying domestic practices, which are deeply influenced by cultural idiosyncrasies. The Common Reporting Standard will connect countries with very different concepts of tax secrecy and taxpayers' protection.[75]

The all-transparent taxpayer ("gläserner Steuerzahler") is the nightmare in any political debate in Germany. Even though the German "bank secrecy" in section 30a Abgabenordnung (General Tax Act), which was never as strong as the bank secrecies in Switzerland or Luxembourg, lost its relevance due to the implementation of the final withholding tax, the German legislator did not dare to abolish this provision. Opposite to this, in other countries like the U.S.[76], or the Netherlands[77] it is normal that banks are reporting, at a large scale, tax-relevant information to the fiscal authorities.

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[75] See OECD, Commentary on Section 5 concerning Confidentiality and Data Safeguards, available at: http://www.oecd-ilibrary.org/docserver/download/2314131e.pdf?expires=1454655967&id=ID&accname=guest&checksum=C3E3617F14A837204071424ABC111C11 at 79.

[76] See IRS, IRS-Form 1099-INT available at: https://www.irs.gov/pub/irs-pdf/f1099int.pdf.

[77] See Wet op de Internationale Bijstandverlening bij de heffing van Belasting (WIB). See also special tax ruling of the Dutch Tax Authorities in consultation with the Association of Banks: Voorschrift informatie fiscus/banken, besluit van 28 januari 2011, nr. BLKB2011/109M, Stcrt. 2011, nr. 2078, BNB 2011/92. See G.J.M.E. De Bont and Van Der Hel-Van Dijk, E.C.J.M. (2013), Netherlands – Branch Report, in, Cahiers de droit fiscal international, Vol 98b (IFA, 2013), pp. 549-566, at 562.

These differences are not of a mere technical nature, but deeply enshrined in the culture of each country. The necessary translation of the common standard on reporting into domestic law can only provide the technicalities of the collection, preparation, and exchange of the data. However, it will not change these underlying fundamental legal principles.

Even though the standard itself, in section 5, refers to confidentiality rules and safeguards, it does not lead to an "alignment" of the domestic laws within the ordinary meaning of the expression. Assuming that domestic rules of confidentiality are less strict than the CRS rules, this will not provoke amendments of the domestic laws by adapting and modifying these laws to the stricter CRS confidentiality rules, but leads to an "alignment" insofar as the stricter CRS rules become the uniform standard that must be respected by all these countries. If, in contrast, the confidentiality provisions under the domestic laws are stricter than under the CRS, then paragraph 1 of Section 5 MCAA provides that "the supplying Competent Authority may, to the extent needed to ensure the necessary level of protection of personal data, specify in the Competent Authority Agreement the particular safeguards that must be respected, as required under its domestic laws."[78] In this case, this procedure will presumably leverage off the functioning and the importance of the CRS confidentiality provisions and will neither lead to an "alignment" of domestic laws.

Moreover, even if the statutory law looks pretty much alike, there might be quite different standards of compliance. For example, most countries' tax laws will provide for tax secrecy. However, it is far from clear that these are equally observed everywhere.

2. *How do different domestic standards of taxpayer protection interfere with the principle of reciprocity?*

Different domestic standards of taxpayer protection might jeopardize the whole concept of automatic exchange of information if they lead to the decision to only exchange information with a certain group of the signatory countries. This is Germany's approach. On July 15, 2015, the German Ministry of Finance has announced to lodge a reservation at the OECD regarding data security demanding that Germany will exchange information on the grounds of the CRS Multinational Competent Authority Agreement only if a country accepts to comply

[78] See OECD, Commentary on Section 5 concerning Confidentiality and Data Safeguards, at 80.

with the high German data protection standards.[79] Germany claims to specify the conditions and terms the other state has to observe regarding the handling of personal and company data.

Will all other 50 signatory countries accept the German conditions? We believe the answer to that question is "No." As a consequence, countries which do not get information from Germany, will also not transfer data to Germany. Country's reservations and the principle of reciprocity will quickly erode the network of automatic exchange of information.

E. The need to make use of the exchanged information

Collecting and exchanging tax relevant information is not yet tantamount to collecting the taxes which could be based on this information. On the other hand, the whole data collection and exchange is justified only if the information is systematically and adequately exploited by the tax authorities. The fact that data is collected and automatically transferred may have a disciplining and deterring effect supporting compliance. However, this is not sufficient to justify the intrusion against the right to informational self-determination. Furthermore, the mere deterrence effect would insinuate that every taxpayer is a potential tax dodger.

It has to be ensured that the information will only be used for the purposes it is exchanged for. However, at the same time it also has to be ensured, that it is actually used. Where a tax administration does not have the personnel and technical capacity to compare the data with the information received in tax returns and to convey it into tax bills, again the initial collection of data loses its justification.

F. Necessary restrictions of the exchange and use of data

1. *Right to informational self-determination: Constitutional and European guarantees*

The OECD's main concern regarding confidentiality[80] is addressed in detail in the Commentary to the OECD Model Convention to Art. 26. The importance of confidentiality and data safeguards in connection with the automatic exchange of financial information is also re-

[79] See German Ministry of Finance Press Release (July 15, 2015), available at: http://www.bundesfinanzministerium.de/Content/EN/Pressemitteilungen/2015/2015-07-15-fight-against-tax-evasion.html.

[80] Paras 11-13 of the Commentary to Art. 26 OECD Model Convention.

flected in the fact that Section 5, together with Section 7[81] and the fourth clause in the preamble of the CRS MCAA, deal with this topic.[82] Confidentiality is, of course, the most important condition for any exchange of information, especially if it comes to business-related data, which in the wrong hands can cause severe damage to the data holder.

As fundamental as confidentiality is the respect for the privacy of taxpayers[83]. This goes far beyond the protection of the integrity of a person's private home, but includes the fundamental right of informational self-determination. The significance of this guarantee may differ in different legal systems. Without denouncing the Germans as a particularly clandestine people, the right of informational self-determination plays a particularly important role in the case law of the German Federal Constitutional Court. This right was first defined by the German Federal Constitutional Court in its 1983 landmark decision "population census"[84]. In this decision, the Court held that Articles 1 and 2 of the German Constitution, when construed together, guarantee a right of informational self-determination, meaning that every individual has the right to determine by oneself what personal data are disclosed, to whom, and for which purposes these data are used.[85] Justification is possible, but only if the following cumulative conditions are met: (i) the restriction follows a legitimate goal; (ii) is capable of achieving that goal; (iii) it does not go beyond what is necessary to achieve that aim, and (iv) the aims achieved are more important than the damage caused by the measure.[86]

Notwithstanding that the exchanged information has to be provided by the taxpayer himself for purposes of taxation anyhow, it makes a difference that a third party discloses a taxpayer's full pecuniary circumstances to the government.

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[81] In case of non-compliance with confidentiality and data safeguard provision of the MCAA, the competent authorities have the right to suspend the exchange of information. (See Section 7, para. 2 MCAA).

[82] See OECD, Commentary on Section 5 concerning Confidentiality and Data Safeguards, at 79.

[83] See OECD Committee of Fiscal Affairs Forum on Tax Administration, General Administrative Principles GAP002 Taxpayer's Rights and Obligations – Practice Note, at 5 (Paragraph 2.25) available at: http://www.oecd.org/tax/administration/Taxpayers'_Rights_and_Obligations-Practice_Note.pdf.

[84] German Federal Constitutional Court, decision of 15 December 1983, - 1 BvR 209/83, 1 BvR 484/83, 1 BvR 440/83, 1 BvR 420/83, 1 BvR 362/83, 1 BvR 269/83, BVerfGE 65, p. 1, at 42. For a more thorough analysis and an English translation of this decision, see E. Riedel (1984), 27 *Human Rights Law Journal*, at 94 et seq.

[85] See X. Oberson, International Exchange of Information in Tax Matters (Elgar, 2015), at 234.

[86] See A. Rust, in Rust/Fort (eds.), Exchange of Information and Bank Secrecy (Kluwer, 2012), at 178.

The right of informational self-determination restricts the handling of private data in multiple ways. First, the purpose of the data collection has to be precisely defined by law. Secondly, data may be collected and used only for the defined purpose and only if the information leads to any clear-cut governmental action, in our context – to the assessment and collection of tax. Thirdly, data may be not stored longer than necessary. For example, the data has to be deleted after the (regular) limitation period of the tax claim. Finally, the taxpayer needs to be notified, not only of the mere fact of data collection but also of the content of the information transferred/received.

By itself automatic exchange of information jeopardizes the right of informational self-determination just because of the mass of data[87] collected, stored and sent around the globe. Different to the exchange of information on request which always involves individual representatives of the tax authorities, the automatic exchange can technically work only without intermediate control mechanism. This is especially true the more countries are involved and in the absence of any thresholds, foreseen in FATCA but not in CRS. It is also far from certain, whether and in which way the receiving jurisdiction will actually make use of the data. Furthermore, once data are sent abroad they are excluded not only from the control of the jurisdiction where the information was collected but also from the individual data holder.

Besides the constitutional right to informational self-determination in Germany, at the EU level, Article 16 of the Treaty on the Functioning of the European Union ("TFEU"), Articles 7[88] and 8[89] of the Charter of Fundamental Rights of the EU[90] ("Charter")[91], and Article

[87] For the specific issue of automatic exchange of information on a large scale, see P. Baker and Pistone, P., (2015), General Report, in cahiers de droit fiscal, Vol. 100B (IFA, 2015), pp. 17-68, at 64.

[88] Art. 7 of the Charter protects the right to respect for private and family life.

[89] Article 8 para. 1 of the Charter provides that "everyone has the right to the protection of personal data concerning him or her." Para. 2 and 3 of Article 8 of the Charter specify 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, that everyone has the right of access to data, which has been collected concerning him or her, and the right to have it rectified, and compliance with these rules shall be subject to control by an independent authority.

[90] Charter of Fundamental Rights of the European Union (2000/C364/01), OJ No. C 364 of 18 December 2000, pp. 1-22.

[91] According to Art. 51 para. 1 of the Charter, limitations on these rights must be provided by law, in respect to the essence of those rights and freedoms, and in accordance with the principle of proportionality. See also X. Oberson, International Exchange of Information in Tax Matters (Elgar, 2015), at 228. The ECJ highlights the importance of Article 7 and 8 of the Charter as well; see e.g., ECJ judgment of 7 May 2009, C-553/07, Case *Rijkeboer*, EuZW 2009, p. 546, para. 47; ECJ judgment of 8 April 2014, joint cases C-293/12 and C-594/12, Case *Digital Rights Ireland*, EuZW 2014, p. 459, para. 53; ECJ judgment of 13 May 2014, C-131/12, Case *Google Spain SL*, EuZW 2014, p. 541, para. 74.

8[92] of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") also provide for fundamental rights that guarantee the protection of personal data, and influence and limit the scope of exchange of information.[93]

In addition to these fundamental rights, the European Directive 95/46/EC[94] (commonly referred to as "Data Protection Directive" or "DPD"), the central piece of legislation on the protection of personal data in Europe, imposes strict requirements on the processing[95] and transmission of personal data. To be precise, Article 6 para. 1 lit. a and b of the DPD stipulates that data must be fairly and lawfully processed and may solely be collected for specified, explicit, and legitimate purposes and not further processed in a way incompatible with those purposes. Furthermore, data must be adequate, relevant, and not excessive in relation to the purposes for which they are collected/processed (Article 6 para. 1 lit. c)[96] and must be kept in a form which permits identification of the subject of that data for no longer than is necessary for the purposes for which the data was collected (Article 6 para. 1 lit. e of the DPD). Taxpayers (data subjects) must be informed about the data processing or the transfer of the data (Article 11 of the

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[92] Art. 8 of the European Convention protects the right to respect for private and family life.

[93] See X. Oberson, International Exchange of Information in Tax Matters (Elgar, 2015), at 227 et seq.; A. Rust, in Rust/Fort (eds.), Exchange of Information and Bank Secrecy (Kluwer, 2012) at 189 et seq.

[94] Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ No L 281 of 23 November 1995, pp. 31-50, as amended by Annex II No 18 of Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003, OJ No L 284 of 31 October 2003, at 16. On December 2015, the European Parliament and Council have reached agreement on the data protection reform proposed by the European Commission in 2012. The reform is seen as an essential step to strengthen citizens' fundamental rights in the digital age and facilitate business by simplifying rules for companies in the Digital Single Market. The data protection reform package includes the General Data Protection Regulation ("Regulation") and the Data Protection Directive for the police and criminal justice sector. See European Commission, press release (December 15, 2015), available at: http://europa.eu/rapid/press-release_IP-15-6321_en.htm. Following the political agreement reached in December 2015, the official texts of the Regulation and the Directive have been published in the EU Official Journal on May 4, 2016. As the new rules will become applicable two years thereafter, we base our discussion on the current DPD rules.

[95] The DPD sets strict requirements on data processing. See e.g., ECJ judgment of 16 December 2008, C-73/07, Case *Satakunnan Markkinapörssi* Oy, [2008] ECR I-9831; ECJ judgment of 9 November 2010, joint cases C-92/09 *Schecke* and C-93/09 *Eifert*, EuZW 2010, p. 939 et seq.

[96] See e.g., also ECJ's recent judgment of 19 June 2014, C-683/13, Case *Pharmacontinente;* ECJ judgment of 30 May 2013, C-342/12, Case *Worten,* available at: http://curia.europa.eu/juris/liste.jsf?num=C-342/12.

DPD).[97] Article 12 lit. a of the DPD provides for the data subject's right to access the personal data, while Article 12 lit. b of the DPD requires that incorrectly processed data must be rectified, and data which is no longer necessary for the original purposes must be erased.[98] As a corollary to this relatively high level of data protection in all Member States of the European Union, Article 1 para. 2 of the DPD provides that Member States are no longer allowed to refuse an exchange of information request by arguing that the protection of the data in the requesting Member State is not assured.[99] Finally, with Article 25, the DPD foresees a specific rule for the transfer of personal data to third countries. According to this rule, such a transfer is permitted only if the third country in question guarantees an adequate level of protection of the information to be transferred.[100] In the recent *Schrems*[101] case from October 2015, the ECJ had for the first time to deal with the question whether a third country, the US, provides an adequate level of data protection. Article 25's strict regime for personal data flows to third countries was meant to prevent data holders from taking advantage of disparate levels of protection and from transferring personal data to "data havens." The power to assess the level of protection surrounding a set of cross-border data transfers was given to both national Data Protection Authorities (DPAs) when examining specific requests from data holders, and the European Commission through "Adequacy Decisions," which are binding on EU Member States. In July 2000, as the US privacy framework did not meet EU standards, the European Commission released a specific US

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97 See also ECJ's recent judgment of 1 October 2015, C-201/14, Case *Smaranda Bara and Others*, available at: http://curia.europa.eu/juris/liste.jsf?num=C-201/14, in which the ECJ held that the DPD precludes the transfer and processing of personal financial data between two public administrative bodies within the same European Member State without the persons concerned (data subjects) having been informed in advance.

98 See ECJ judgment of 17 July 2014, joint cases C-141/12 *Ys* and C-372/12 *M and S*, available at: http://curia.europa.eu/juris/liste.jsf?num=C-141/12, in which the ECJ clarified that a data subject's right of access under the DPD does not necessarily require access to the actual records containing personal data. As regards the interpretation of Art. 12 lit. b of the DPD, see ECJ judgment of 13 May 2014, C-131/12, Case *Google Spain SL*, EuZW 2014, p. 541.

99 See A. Rust, in Rust/Fort, Exchange of Information and Bank Secrecy (Kluwer, 2012), at 191.

100 See A. Rust, in Rust/Fort, Exchange of Information and Bank Secrecy (Kluwer, 2012), at 191.

101 In the *Schrems* case, Max Schrems, an Austrian citizen and EU privacy activist, decided to lodge a complaint with the Irish DPA in order to stop the transfer of his data from Facebook's Irish subsidiary to servers located in the US. The Irish DPA rejected the complaint, on the ground, in particular, that in the Safe Habor Decision the European Commission considered that the US ensures an adequate level of data protection. Schrems then referred the case to the Irish High Court which decided to request a preliminary ruling on the question of whether national DPAs are absolutely bound by Commission's Decisions. See ECJ judgment of 6 October 2015, C-362/14, Case *Schrems*, EuZW 2015, at 881 et seq.

Adequacy Decision[102] (commonly referred to as "the Safe Harbor decision") in which the Commission considered that the US ensures an adequate level of data protection provided by safe harbor privacy "principles." In its recent landmark decision of October 6, 2015, the ECJ found that the Commission's Safe Harbor decision is invalid. (The Court further held that the ECJ alone has the jurisdiction to declare an adequacy decision invalid and that national DPAs may, even though such an adequacy decision exists, examine whether the transfer of a person's data to the third country complies with the requirements of the EU data protection legislation, and bring the matter before the national courts, in order that the national courts make a reference for a preliminary ruling for the purpose of examination of that decision's validity.)[103] De facto, this judgment marks the beginning of a new era in terms of EU-US data exchanges and protection. The US (as a third country) is now faced with the hard task of finding a new political agreement with the Commission which will guarantee an adequate level of data protection in line with the DPD and the ECJ's judgment.

2. *Some practical consequences*

a. *Data Control – The need of notification*

Article 1 para. 5 lit. b of the EU Mutual Assistance Directive on the Exchange of information requires the financial institutions to inform their clients that they collect and report data. Banks might comply with this obligation by including in their general contractual term the information that certain data of the bank client will be transferred to (foreign) tax authorities. However, the primary responsibility to keep the taxpayer informed falls to the government, and not to private institutions. So far the consequences of any violation of duties to information by the bank towards the account holder are unclear. The bank might be liable for compensation. Nevertheless, most likely the data will still be used for tax purposes by the tax authorities.

The large scale of exchanged information under the new automatic exchange mechanism may make it difficult to give the taxpayer detailed notification. However, it is not sufficient that the taxpayer knows *that* data is exchanged. Legal protection requires that he knows

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[102] See European Commission, Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce, OJ No L 215 of 25 August 2000, pp. 7-47.

[103] See for further information ECJ, press release (October 6, 2015), available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-10/cp150117en.pdf.

the content of the information exchanged and the purpose, for which it is exchanged.

The ongoing automatization of the whole tax administration process should allow at least an online access for taxpayers to their data. In general, there is no reason to keep a taxpayer's tax file secret towards himself. Participation rights might be suspended in cases of tax evasion and fraud[104]. However, even then, there is no justification of an all arcane investigation. To defend himself, the taxpayer has – at least at a certain point of the investigation – the right to know the facts, the accusation is based on.

b. *Restrictions to Retaining and Saving Data*

The longer data are retained and saved, the more difficult it is to keep control over them. Therefore, time limits for saving of data and a legally enforceable right of deletion of data is inevitable. Again, to be able to make use of this right, the taxpayer needs to have, at any time, access to his data saved by the tax administration.

As Panayi[105] points out, a timely deletion of the data is not only a question of protecting taxpayer's right to informational self-determination, but also to keep the data manageable for the tax authorities.

3. *May the automatically exchanged information also be used for criminal tax matters?*

Information exchanged automatically might be used not only in the tax assessment but also for criminal tax matters. Criminal investigation, often, may be just a by-product of the tax assessment. However, from the perspective of the taxpayer, there is a categorical difference whether information received by the tax authority results only in a (higher) tax burden or can put him or her into jail.

a. *What are criminal tax matters?*

Especially in the context of the BEPS debate, the lines between (legal) tax avoidance and (illegal) tax evasion are blurring. In addition, each involved country will apply different concepts[106]. However, the distinction is crucial because of the different legal position of the taxpayer. Therefore, we need to establish a reliable demarcation line be-

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[104] See J.M. Calderón (2000), 28 *Intertax,* Issue 12, pp. 462-475, at 462.

[105] See C. HJI Panayi (2015), Current Trends on Automatic Exchange of Information, SSRN Working paper of 4 December 2015, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2692057, at 31.

[106] See J.M. Calderón (2000), 28 *Intertax*, Issue 12, at 472.

tween the tax assessment procedure and the criminal prosecution of a tax offense.

A reference point can be found in the TIEA Model Commentary on Art. 4, para. 34, sub-paragraph o). Criminal tax matters are defined as all tax matters involving intentional conduct, which is liable to prosecution under the criminal laws of the applicant party. Criminal law provisions based on non-intentional conduct (*e.g.*, provisions that involve strict or absolute liability) do not constitute criminal tax matters for purposes of the Agreement. A criminal tax matter involves "intentional conduct", meaning either a willful failure to file a tax return or a willful omission or concealment of tax sums.

However, especially in the mass procedure of automatic exchange of information, it will be impossible to draw the line on the material substance. More reliable is a distinction by the procedure whether it is a general tax assessment or a criminal investigation.

But even a more formalistic approach is faced with the problem of different rules in the involved states. There are differences in both the organization and the qualification. In some countries tax administration has a dual role, being also in charge of criminal investigation. This makes it difficult to discern the function in which the tax administration is acting. In the beginning, the information often will be neutral, only later on will it turn out that what is of use in the assessment procedure can also be used in a criminal procedure. Therefore, some of the mutual assistance instruments for general tax matters (especially the MAATM Convention) do include criminal tax matters, but draw a line between criminal investigations and the criminal procedure before judicial bodies. Furthermore, there might be differences in the qualification between the country providing the information and the country receiving the information. In some countries non-compliance results only in administrative surcharges, in others in criminal surcharges[107].

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[107] See G. Marino (2015), Thematic Report – "Limitation on administrative penalties by the European Convention of Human Rights and the EU Charter of Fundamental Rights," paper prepared for section 4 of the EATLP 2015 Milan Congress on "Surcharges and Penalties in Tax Law", pp. 1-26, at 5 et seq., available at: http://www.eatlp.org/uploads/public/2015/Section4_Marino.pdf. In the *Engel* case in 1976, the ECtHR has set forth certain requirements (commonly referred to as "Engel criteria") which have to be fulfilled in order determine whether a sanction can be qualified as "criminal": (i) the legal classification of the offence under domestic law; (ii) the nature of the offence; and (iii) the nature and degree of severity of the possible penalty. See ECtHR, *Engel and Others v the Netherlands*, No 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, Series A n. 22, 8 June 1976.

b. The specific situation of a taxpayer in a criminal tax investigation

Boundaries for the usage of exchanged information can arise from the special protection of the taxpayer in criminal tax procedures. The main difference between the general tax procedure and the criminal tax procedure (even if executed in the hands of tax authorities and not of prosecuting authorities) is that the taxpayer in the criminal procedure is not obliged to co-operate. There is no obligation to provide information after the start of the criminal procedure. Information only collected for the purposes of a criminal tax procedure can only be used if the procedural protections of the taxpayer in criminal investigations are respected. On the other hand, information collected in the general tax procedure can always be used in a subsequent criminal tax procedure.

The tension between the aim of efficient collection of taxes and the legal protection of the taxpayer suspect of a tax crime (or tax offense) is also expressed in para. 11 of the preamble to the Council framework decision 2006/960/JHA:

"The common interest of Member States in fighting crime of a cross-border nature must strike the appropriate balance between fast and efficient law enforcement cooperation and agreed principles and rules on data protection, fundamental freedoms, human rights and individual liberties."

Of special importance are the guarantees of a fair trial, granted by Article 6 ECHR, and of effective legal protection and effective remedy, laid down in Art. 13 ECHR. In recent years, after a long line of cases, in which the ECtHR said that an individual challenging tax does not have the right of fair trail, the ECtHR has already recognized that the right of fair trial is applicable in proceedings for criminal taxes.[108] This includes pre-trial measures.[109] In line with Oberson, we see no reason why Art. 6 ECHR should not apply in the context of exchange of information, at least when the process pertains to tax evasion cases, which, according to Art. 6 ECHR, appears to correspond to "criminal penalties."

c. Specific conditions of the automatic exchange of information

How can the use for criminal tax matters affect the automatic exchange of information? The information is gathered from a third person, the bank, and not from the taxpayer himself. Furthermore, the

[108] See X. Oberson, International Exchange of Information in Tax Matters (Edgar, 2015) at 226 and 249.

[109] See ECtHR, *Ravon and Others v. France*, No 11849/03, 21 February 2008.

automatic exchange is different from any individual requests. It is not the outcome of a special investigation, but rather, a sort of baseline procedure. The information might later on be used also for criminal tax matters, but it is not specifically ascertained for the punishment of illegal behavior.

The taxpayers do not need to co-operate with the fiscal authorities. However, they need to co-operate with the financial institution, because otherwise the bank will not be able to fulfill its reporting requirements correctly. Information from the taxpayer is required regarding his status of residency/non-residency and his personal tax identification criteria (Tax Identification Number or "TIN"). On the other side, the bank requesting this information from the taxpayer has no knowledge whether this information will be used in a criminal tax procedure. Therefore, it seems unlikely that the taxpayer in a criminal investigation can claim that the information may not be exploited.

However, since a blanket automatic exchange of financial data will bring up not only actual non-compliance, but will in many cases also give rise to criminal investigations regarding the past, it seems to be worth a debate to accompany the start of the automatic exchange by the chance of voluntary disclosure of tax liabilities, may be even by a broad tax amnesty. Surely, a tax amnesty has negative impact on honest taxpayers who have been compliant in the past. On the other hand, it might be almost impossible to conduct criminal proceedings in all cases of non-compliance many years back.

G. Conclusions

The signature under the CRS Multilateral Competent Authority Agreement in October 2014 was a milestone in fighting tax evasion. The new spirit of co-operation lays the groundwork for taxing capital income on a world-wide basis. By solving some of the problems of cross-border enforcement tax legislators regain flexibility in the design of their domestic income tax systems. However, to make the common standard of automatic exchange of information work, taxpayer rights have to be taken into consideration thoroughly.

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