



Book of Conference Proceedings*:

International Congress 2017

“International Administrative Cooperation in tax matters and tax Governance”

Barcelona, Wednesday **26th & 27th** of January 2017
 “Salón de grados”. Faculty of Law University of Barcelona

(*) Eva Andrés Aucejo (UB) & Robert Domingo (UB)

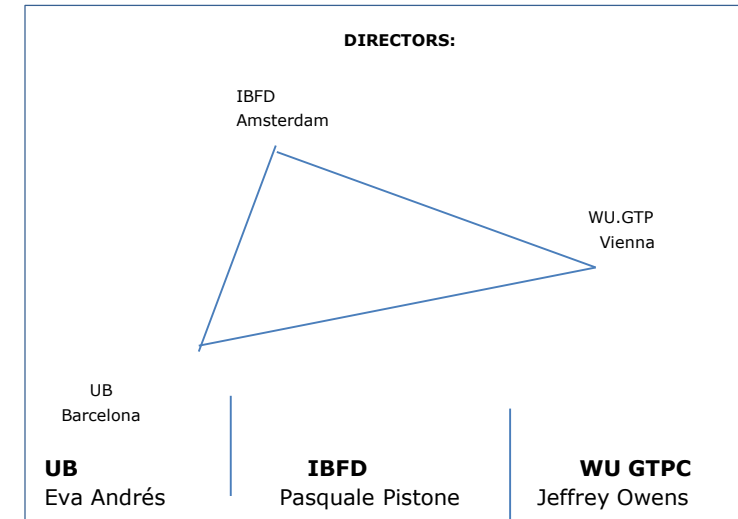
International Congress 2017

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University of Barcelona

International Administrative Cooperation in tax matters and tax Governance



DER2015-68768-P. TITOL: International Administrative Co-Operation in Tax Matters and ADR of Transnational Tax Disputes and Models for an Institutional Architecture from a European Perspective (EUDISCOOP) 2016-2019— MINISTERIO DE ECONOMÍA Y COMPETITIVIDAD DE ESPAÑA



Organising Committee:

João Félix Pinto Nogueira (IBFD)
Stella Raventós Calvo (Confédération Fiscale Européenne & ECIJA)
Ricardo García (IBFD)
AEDAF (Catalonian delegation).
Romina (WU World Center Policy)
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Transjus. UB (Dir. Julio Ponce)
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Robert Domingo (University of Barcelona)
Consol Carratala (AEDAF)
Eva Andrés Aucejo (University of Barcelona). Coordinator

EUDISCOOP PROJECT/DER2015-68768-P

PARTNERSHIP INSTITUTIONS:

INTERNATIONAL BUREAU OF FISCAL DOCUMENTATION:
Pasquale Pistone (Academic Director)

WU GLOBAL TAX POLICY CENTER:
Jeffrey Owens (Director)

CONFÉDÉRATION FISCAL EUROPÉENNE (CFE):
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ASOCIACIÓN ESPAÑOLA DE ASESORES FISCALES:
Jordi Baqués (Delegated by Catalonia)

DER2015-68768-P.

TITOL: International Administrative Co-Operation in Tax Matters and
ADR of Transnational Tax Disputes and Models for an Institutional
Architecture from a European Perspective (EUDISCOOP) 2016-2019—
MINISTERIO DE ECONOMÍA Y COMPETITIVIDAD DE ESPAÑA

(Principal Investigator: **Eva Andrés Aucejo**)

PARTNERSHIP MEMBERS:

- **Pasquale Pistone** (IBFD & Università Federico II. Napoli)
- **Jeffrey Owens** (WU Global Tax Policy Center)
- **Piergiorgio Valente** (CFE & Link Campus University)
- **Philip Baker** (University of London)
- **João Felix Nogueira** (IBFD)
- **Rita de la Feria** (University of Leeds)
- **Alessandro Turina** (University Bocconi of Milano)
- **Isabel Espejo** (+) [in memoriam] (Agencia Tributaria Española)
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- **Pietro Mastelone** (Università degli Studi di Firenze)
- **Ricardo García** (IBFD)
- **Eva Andrés** (University of Barcelona)

ASSOCIATED PROJECTS:

- Flexible Multi-tier Dispute Resolution in International Tax Disputes. Dir.: Jan de Goede and Diana Van Hout (IBFD)
- CertificaRSE project (Universidad Complutense de Madrid). Dir. Amparo Grau Ruiz
- International Project MCB 7053- Estado e Economia no Brasil (Mackency University). Felipe Chiarello de Souza Pinto
- International Project FONDECYT 1140290. Patricio Masbernat
- Transjus. Dir.: J. Ponce (UB)

SCHEDULE/PROGRAMA

Barcelona, Thursday 26th of January 2017

08.45 - 09.00 Registration

09.00 - 09.30 Welcome and opening speech

Oriol Escardibul. “Vicerector d’Economia”. *University of Barcelona*

Piergiorgio Valente. President of the Confédération Fiscale Européenne. Link Campus University

Xavier Pons i Rafols. Dean of the Faculty of Law. University of Barcelona

09.30 - 11.00 The Role of the Agents on Administrative Cooperation in Tax Matters: OECD, US and EU

Thomas Neale. Head of Unit: Direct Tax Policy & Cooperation. Dir. Direct taxation, Tax coordination, Economic analysis and Evaluation. **DG TAXUD.Commission (EU)**

Philip Baker. Professor of Tax Law. University of London. Barrister and QC practising from Field Court Tax Chambers

Paul Van Der Smitte. Legal and Strategic Advisor International Recovery of Tax Claims of the Central Liaison Office of the Netherlands Tax and Customs Administration

Eva Andres Aucejo. Professor of Tax Law. University of Barcelona

Amparo Grau Ruiz. Professor of Tax Law. Complutense University of Madrid

Stella Raventós Calvo. Abogado. Chair of the Fiscal Committee “Confédération Fiscale Européenne”. AEDAF. Moderator

11.00 - 11.30 Break-Coffee

11.30 - 13.30 International Administrative Cooperation and Tax Governance: concepts, principles, sources and costs

Rita de la Feria. Professor of Tax Law. Leeds University. UK

Isabel Espejo. Inspectora. Agencia Española de la Administración Tributaria (†) [in memoriam]

Alessandro Turina. Università Bocconi di Milano/IBFD

Peter Hongler. University of Zurich/ IBFD

Carlos L. Espadafor. Professor of Tax Law. University of Jaén

Andrés Sánchez Pedroche. Professor of Tax Law. “Ex Rector” de la Universidad a distancia de Madrid (Moderator)

15.00 - 17.00 Concerns and Limitations: The Taxpayers' Rights

Pasquale Pistone. Academic Chairman of IBFD. Jean Monnet ad personam Chair in European Tax Law and Policy at WU Vienna University of Economics and Business (Austria)

Philip Baker. Professor of Tax Law. University of London. Barrister and QC practising from Field Court Tax Chambers

Pietro Mastellone. Università degli Studi di Firenze

Luis Viñuales Sebastián. Abogado. Socio de Uría y Menéndez

Irma Mosquera. The Hague University of applied Sciences (former)/ IBFD

Santiago Ibáñez Marcilla. Universidad de Valencia. Moderator

17.00 - 18.00 Closure and homage act

17:00– 17:30. Néstor Carmona. *Inspector de Hacienda del Estado. Director de la Oficina Nacional de Fiscalidad Internacional. Agencia Tributaria (Elena de las Moreras, en representación).*

17:30– 18:00. Homage act in memory of Isabel Espejo Poyato

Barcelona, Friday 27th of January 2017

International Round Table: The new trends and challenging of the International Tax Cooperation in the wave of the new political Scenario: UNITED STATES (TRUMP) & UK (BREXIT).

9:00– 9:30. Welcome: Pasquale Pistone and Eva Andrés Aucejo

9:30– 10:30 Opening Lecture: Cesar Garía Novoa. Professor of Financial and Tax Law. University of Santiago de Compostela

10.30-12:00. Round table of the Members of the EUDISCOOP Project 2016/2019- DER2015-68768-P

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FIELD COURT TAX CHAMBERS

International Administrative Cooperation in Tax Matters and Tax Governance – University of Barcelona – January 26th 2017

Role and Responsibilities of Agents in Protecting Taxpayers Under AEoI

PHILIP BAKER QC

Field Court Tax Chambers
3 Field Court, Gray's Inn
London WC1R 5EP

Visiting Professor, Oxford University
e-mail: pb@fieldtax.com



Role of Agents in AEoI

- Who are the agents:
 - General Data Protection Regulation:
 - Art 4 - Definitions
 - (7) '**controller**' means the natural or legal person, public authority, agency or other body which, alone or jointly with others, **determines the purposes and means of the processing of personal data**; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law;
 - (8) '**processor**' means a natural or legal person, public authority, agency or other body which **processes personal data on behalf of the controller**;



Role of Agents in AEoI

- Who are the agents:
 - Art 4 - Definitions
 - (9) '**recipient**' means a natural or legal person, public authority, agency or another body, **to which the personal data are disclosed**, whether a third party or not. However, public authorities which may receive personal data in the framework of a particular inquiry in accordance with Union or Member State law shall not be regarded as recipients; the processing of those data by those public authorities shall be in compliance with the applicable data protection rules according to the purposes of the processing;
 - (10) '**third party**' means a natural or legal person, public authority, agency or body other than the data subject, controller, processor and persons **who, under the direct authority of the controller or processor, are authorised to process personal data**;



Role of Agents in AEoI

- Who are the agents:
 - General Data Protection Regulation:
 - Art 4 – Definitions
 - (22) '**supervisory authority concerned**' means a supervisory authority which is concerned by the processing of personal data because: (a) the controller or processor is established on the territory of the Member State of that supervisory authority; (b) data subjects residing in the Member State of that supervisory authority are substantially affected or likely to be substantially affected by the processing; or (c) a complaint has been lodged with that supervisory authority;



Role of Agents in AEol

- Who are the agents for AEol?
 - Financial Institutions
 - Sending Revenue Authorities
 - Receiving Revenue Authorities
 - OECD as Operator of Clearing House
 - Supervisory authorities



Role of Agents in AEoI

- *General Data Protection Regulation*
- **Article 79 Right to an effective judicial remedy against a controller or processor**
- 1. Without prejudice to any available administrative or non-judicial remedy, including the right to lodge a complaint with a supervisory authority pursuant to Article 77, each data subject shall have the right to an effective judicial remedy where he or she considers that his or her rights under this Regulation have been infringed as a result of the processing of his or her personal data in non-compliance with this Regulation.
- **Article 82 Right to compensation and liability**
- 1. Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.



Role of Agents in AEol

- Possible criminal liability
- *Article 83* **General conditions for imposing administrative fines**
- 1. Each supervisory authority shall ensure that the imposition of administrative fines pursuant to this Article in respect of infringements of this Regulation referred to in paragraphs 4, 5 and 6 shall in each individual case be effective, proportionate and dissuasive.



Role of Agents in AEoI

- **Article 84 Penalties**
- 1. Member States shall lay down the rules on other penalties applicable to infringements of this Regulation in particular for infringements which are not subject to administrative fines pursuant to Article 83, and shall take all measures necessary to ensure that they are implemented. Such penalties shall be effective, proportionate and dissuasive.



BARCELONA 2017

Paul van der Smitte

Exchange of information
the lost or lost by of traditions

The missing link

References and disclaimer



Tax and Customs Administration of the Netherlands
Central Liaison Office Almelo

Paul R. van der Smitte LL.M, MA

Strategic advisor of the Central Liaison Office

Netherlands Tax and Customs Administration

Phd-candidate at the University of Utrecht and the Complutense University of Madrid

Is Directive 2010/24/EU more effective and efficient than its predecessors? To what extent have Member States safeguard the enforcement of the provisions of the Recovery Directive in their national legal orders?"

This presentation reflects my own observations and in no way represents the views of the Netherlands Tax and Customs Administration nor the Netherlands Ministry of Finance.

If you refer to (parts or images of) this presentation I would appreciate it if you use the references that are in the slides.



Universiteit Utrecht

Doctoral advisor: Professor Linda Senden



Doctoral advisor: Professor Amparo Grau Ruiz

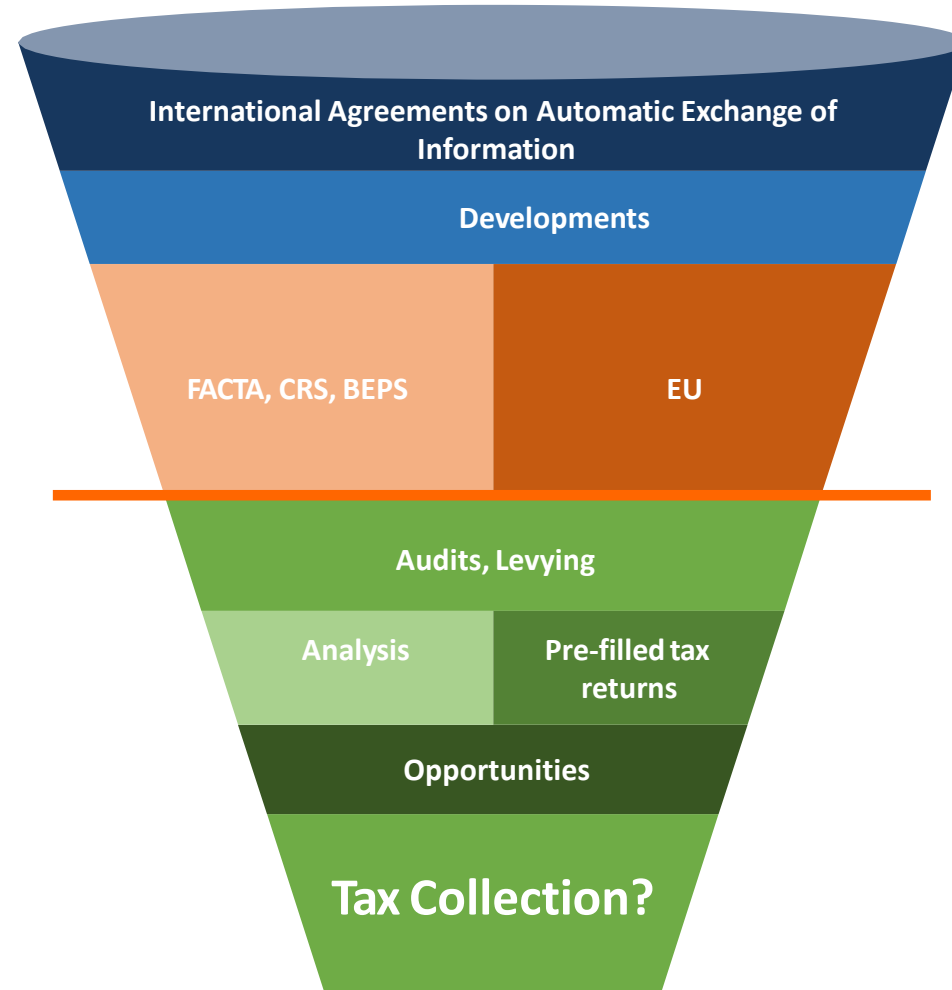


Audit and Levying

Information is mainly used for the purpose of audits and levying, i.e. contra information, avoidance of double taxation, tax evasion and tax fraud.

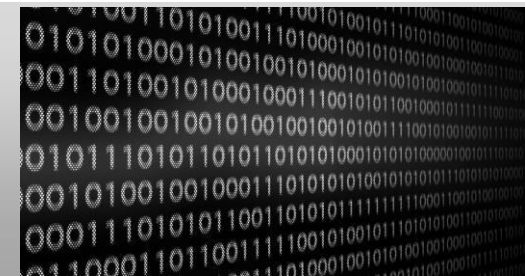
Tax collection

Information is limited used for tax collection purposes. What about payment thinking?

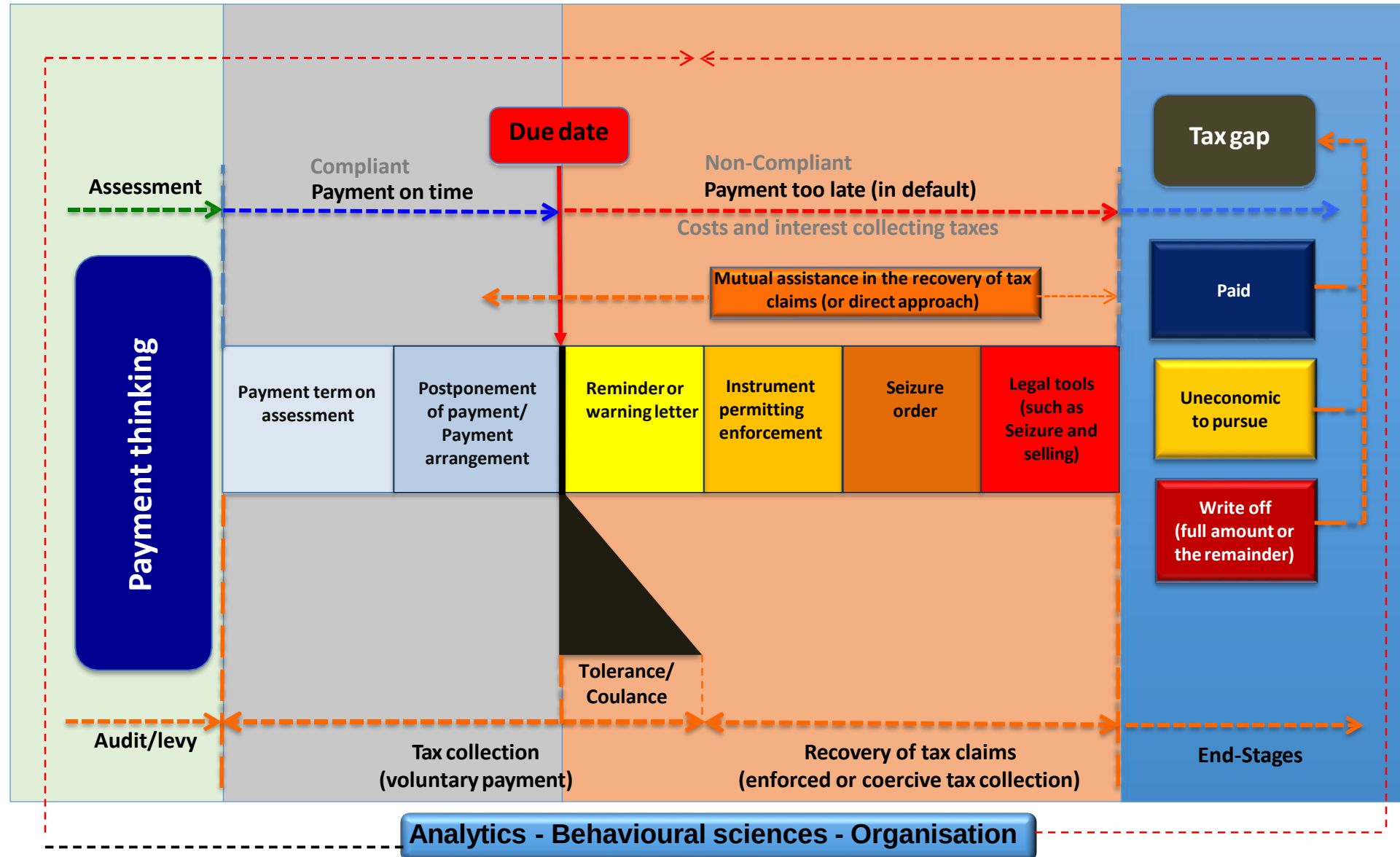


The objectives for obtaining information

Why are we exchanging information?



Tax Collection Chain



**WHAT DO YOU THINK PAYMENT
THINKING IS?**

question

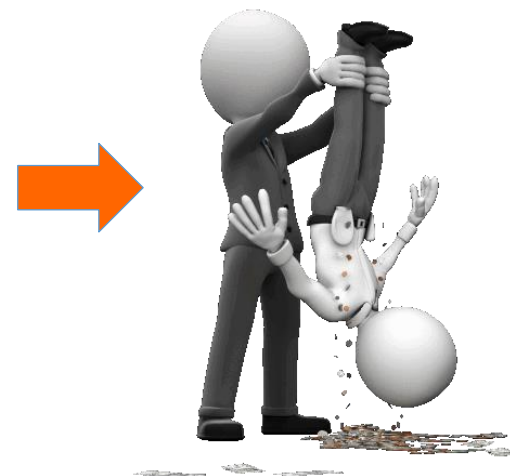
The auditor



The inspector



The tax collector



I am **happy** to
help you!

Questions?
Comments?

Paul van der Smitte L.LM, MA

+31 6 1860 4741

pr.van.der.smitte@belastingdienst.nl

LinkedIn



**International Administrative Cooperation in Tax Matters
and Tax Governance**

Barcelona, 26th January 2017

ROLE OF THE UNITED NATIONS

Prof. María Amparo GRAU RUIZ

PI CertificaRSE project (DER2015-65374-R MINECO-FEDER)

OUTLINE

OVERVIEW

Who and what goals? Objectives and means Where to gather?

TAX GOVERNANCE:

Why UN? Processes of revitalization and strengthening
Leadership role : promotion of international cooperation
“for (sustainable) development” Only? A matter of sense or sensibilities?

TAX COOPERATION

Work and structure at the UN
Changes needed to reach new goals ?

FINAL REMARKS

Taxation as instrument *De jure or de facto?*

TAX GOVERNANCE

The United Nations in global economic governance [Resolution 67/289 adopted by the General Assembly on 9 July 2013, A/RES/67/289]

IMP. Achieve internationally agreed development goals (urgent global challenges in increasingly interconnected world)

=> inclusive, transparent & effective multilateral system

- UN = universality + continued commitment to strengthen effectiveness & efficiency
 - intergovernmental groupings that make policy recommendations/take policy decisions (i.e. G20) + multilateral institutions
- 



Increased interaction (flexible and regular) => benefits (transparency, coherence, mutual understanding)

Central role of the UN system providing an intergovernmental forum
(international conferences & summits)
+ participation of private sector, civil society and academia

- GA authority on global matters of concern to the international community, as set out in the Charter
- ECOSOC principal body for policy review, policy dialogue & recommendations on issues of economic, environmental and social development

[Economic, Environment, Social, and Governance criteria = non revenue goal of the tax systems]

Substantive discussions with World Bank, IMF, WTO, UNCTAD: enhance the coherence and consistency of the international monetary, financial and trading systems (ensuring openness, **fairness** and inclusiveness)

(Informal briefings -President of GA practice: inviting appropriate representatives to an interactive dialogue with the membership of the Assembly. Participation of the Secretary-General in summits of intergovernmental groupings)

IMP. broadening and strengthening the participation of developing countries in international economic decision-making and norm-setting

(i.e. steps taken on the reform of the governance structures, quotas and voting rights of the Bretton Woods institutions)

Deliver more EFFECTIVE, CREDIBLE, ACCOUNTABLE AND LEGITIMATE institutions

Need to better incorporate regional and subregional organizations and arrangements into the framework of global governance

Imp. of integration processes for economic governance and development in pursuit of the **purposes and principles** of the United Nations

Encourages the regional commissions, to support and cooperate with them in their efforts to promote sustainable development

TAX COOPERATION

GA: Resolution 70/1 of 25 September 2015 “Transforming our world: the 2030 Agenda for Sustainable Development” Comprehensive, far-reaching and people-centred set of universal and transformative Sustainable Development Goals

ECOSOC: Resolution adopted by the Economic and Social Council on 5 October 2016, 29 December 2016 [E/RES/2017/2].

In the **Monterrey Consensus** of the International Conference on Financing for Development

Call made for the strengthening of international tax cooperation through enhanced dialogue among national tax authorities and greater coordination of the work of the multilateral bodies and relevant regional organizations concerned

giving special attention to the needs of developing countries and countries with economies in transition

In the **Doha Declaration** on Financing for Development and the Conference on the World Financial and Economic Crisis and Its Impact on Development

Request to examine the strengthening of the institutional arrangements to promote international cooperation in tax matters, including the Committee of Experts

In the **Addis Ababa Action Agenda** of the Third International Conference on Financing for Development, Member States

emphasized the importance of inclusive cooperation and dialogue among national tax authorities

decided to further enhance the Committee's resources to strengthen its effectiveness and operational capacity (frequency and duration of its meetings, engagement the Council through the special meeting on international cooperation in tax matters)

“Starting in 2017, one session of the Committee will be held in New York in the spring and one in Geneva in the autumn, with the session in New York held back to back with the special meeting of the Council on international cooperation in tax matters, in order to increase the Committee’s engagement with the Council with a view to enhancing intergovernmental consideration of tax issues”

Members of the Committee will continue to report directly to the Council
from the fields of tax policy and tax administration
reflect an adequate equitable geographical distribution
represent different tax systems

Support the Committee and its subsidiary bodies through the **voluntary trust fund**

“while each country is responsible for its tax system, it is important to support efforts in these areas by strengthening technical assistance and enhancing international cooperation and participation in addressing international tax matters”

“It is important for the Committee to enhance its collaboration with other international organizations active in the area of international tax cooperation, including the IMF, the World Bank and the OECD, and with relevant regional and subregional bodies”

progress made by the Financing for Development Office of the Department of Economic and Social Affairs of the Secretariat in developing, within its mandate, a capacity development programme in international tax cooperation aimed at strengthening the capacity of the ministries of finance and the national tax authorities in developing countries

The 2017 Economic and Social Council forum on financing for development follow-up will convene from 22 to 25 May, and will include the special high-level meeting with the Bretton Woods institutions, the World Trade Organization and the United Nations Conference on Trade and Development (E/2017/L.7)

Resolution 2004/69, the Economic and Social Council decided that the Ad Hoc Group of Experts on International Cooperation in Tax Matters would be renamed the **Committee of Experts on International Cooperation in Tax Matters** with a **mandate** to:

- (a) Keep under review and update as necessary the United Nations Model Double Taxation Convention between Developed and Developing Countries⁴ and the Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries;
- (b) Provide a framework for dialogue with a view to enhancing and promoting international tax cooperation among national tax authorities;
- (c) Consider how new and emerging issues could affect international cooperation in tax matters and develop assessments, commentaries and appropriate recommendations;
- (d) Make recommendations on capacity-building and the provision of technical assistance to developing countries and countries with economies in transition;
- (e) Give special attention to developing countries and countries with economies in transition in dealing with all the above-mentioned issues.

In his **2012 report** (E/2012/8), the **Secretary-General** noted additional **gaps in international tax cooperation**, such as:

insufficient participation by the least developed countries in tax cooperation forums; a lack of coordination and cooperation among different providers of technical assistance and donors; infrequent monitoring and evaluation of technical assistance received by developing countries that would be needed to formulate lessons learned for future activities; the often unsatisfactory availability of data on taxation that would assist developing countries in deciding on policy and administration aspects of their tax laws; the lack of technical skills in tax administrations, especially as they relate to tackling tax evasion and avoidance; the lack of information in tax administrations, for example, in the form of limited access to databases; and the frequent absence of an independent and competent judicial system outside the tax administration.

In his **2011 report** (E/2011/76), the **Secretary-General** identified the following three options for the purpose of strengthening institutional arrangements to promote international tax cooperation, including the Committee:

(a) Strengthening the existing arrangements within the United Nations while retaining the current format of the Committee of Experts;

(b) Converting the Committee of Experts into an intergovernmental commission on international cooperation in tax matters serving as a subsidiary body of the Economic and Social Council;

(c) Creating an intergovernmental commission and retaining the current Committee of Experts as a subsidiary body of that commission.

Following intense discussions, Member States did not agree on the proposed conversion of the Committee of Experts into an intergovernmental commission. In the absence of such an entity, organizations active in this area must work together with a view to meeting common tax and development goals in the most efficient, responsive and participatory ways

Committee of Experts on International Cooperation in Tax Matters
Report on the eleventh session (19-23 October 2015)
Economic and Social Council Official Records, 2015 Supplement No. 25
E/2015/45-E/C.18/2015/6

Article 26 (Exchange of information)

Dispute resolution

Growing recognition of the importance of taxation as a means of mobilization of domestic resources (central to sustainable development)

Key areas, including tax administration, policy and incentives, as well as on increasing capacity-building and strengthening international cooperation on tax issues

United Nations **Code of Conduct on Cooperation** in Combatting International Tax Evasion and Avoidance

Update it to incorporate recent developments and to make a united statement in support of automatic exchange of information

it would make it clear that the United Nations, as a global body, supported automatic exchange of information to combat tax avoidance and tax evasion

The language of the text be revised to produce a text that was not made to appear legally binding for countries, given that this would unnecessarily hinder the wide support for such a document. Form of a Council resolution, with a draft to be included in the report of the Committee

Dispute resolution balanced paper on arbitration issues for developing countries

(a) Available data on MAP suggests that inventories of unresolved cases are increasing

(c) There is likely to be growing discussion of the arbitration issue in tax treaty negotiations

(d) Also addressing non-binding means of dispute settlement such as conciliation and mediation, as well as other binding means such as expert determination

(e) The paper examined some commonly expressed concerns such as the cost of “loss of sovereignty” and the issue of arbitrators’ independence

(f) Certainty for taxpayers was an important part of the consideration of dispute avoidance and resolution in tax matters, but also important were the issues of certainty for the revenue administration in terms of source taxation rights preserved in a treaty being upheld and certainty for the wider citizenry that multinational enterprises and others would pay the appropriate taxes

The **Platform for Collaboration on Tax**, bringing together the IMF, OECD, UN and WBG, is a significant new development to ensure effective international tax cooperation, to help realise the ambitions of Addis

More Information

<http://www.un.org/esa/ffd/ffd-follow-up/inter-agency-task-force.html>

❑ Unfinished business: **HOW TO IMPROVE INTERNATIONAL TAX COOPERATION** to achieve sustainable development in its three dimensions (economic, social and environmental) in a balanced and integrated manner?

❑ **THANK YOU**

❑ Proyecto CertificaRSE (DER2015-65374-R (MINECO-FEDER) <https://www.ucm.es/proyecto-certificarse/>

TOWARDS AN INTERNATIONAL ADMINISTRATIVE CODE IN TAX MATTERS. THE ROLE OF THE AGENTS ON ADMINISTRATIVE COOPERATION IN TAX MATTERS (EU; OECD, FATC, UN, ...).

Eva Andrés Aucejo.

Professor of Tax Law. University of Barcelona

The original version of this research was concluded in the International Bureau of Fiscal Documentation of Amsterdam in 2015 as a result of a Grant from the Economy and “Competitiveness” Spain Ministry (Herrero de Madariaga).

This article is the embryo of a macro research and development Project of the Ministry of Economy and “Competitiveness” of Spain (Excellence Projects, call 2015), which resulted in funding for four years. Reference: (EUDISCOOP) DER 2015-68768-P) <
<http://www.idi.mineco.ob.es/portal/site/MICINN>>.

This paper will be published in a scientific Review included in SCOPUS citation database in 2017. The pre-print version of this article will be published March 30th, 2017, in the digital repository of University of Barcelona.

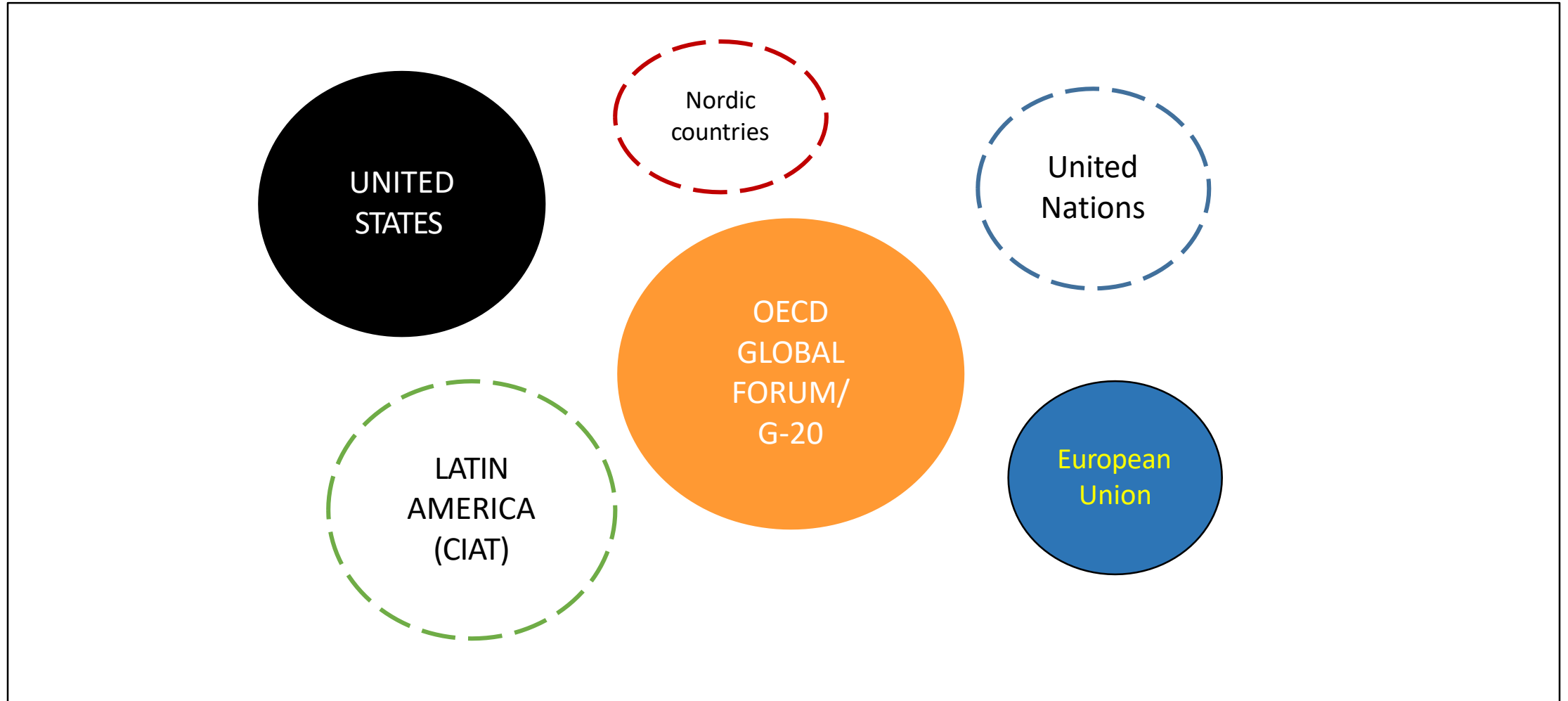
TOWARDS AN INTERNATIONAL ADMINISTRATIVE TAX CODE

1. The main considerations: (matter, Agents, Regulatory Instruments)
2. Consequences resulting from the lack of an International tax code in tax matters
3. Regulatory Instruments created by each different Institution or Country (the Agents)
4. Overlapping areas and Loopholes as a consequence of the separate Regulatory Instruments
5. Proposal of an International tax Code in Tax Matters

1. SECTION: The main considerations:

- a. Subject or matter: relationships between tax administrations worldwide
- b. Who are the Agents: The Agents are: international institutions (OECD, EU, UN, CIAT, ...) and Countries (U.S.)
- c. Legal Sources: Regulatory instruments of each one of these institutions or countries

The role of the different agents in the international framework



2. SECTION: Consequences of the lack of a concept of international tax cooperation

- a) Shifting from Bilateral treaties to Multilateral instruments (and returning to bilateral treaties once again by UK and US policies)
- a) The Role of art. 26 MC OECD nowadays
- b) The prominence of Soft Law in this matter
- c) The power of the UNITED STATES (FATCA)
- d) The risks of Economic Globalization
- e) The concerns and limitations in Taxpayers' Rights

3. SECTION: The regulatory instruments to achieve international administrative cooperation in tax matters

U.S.

- FATCA MULTILATERAL TREATIES IGA/I -II

O.E.C.D.

- MODEL CONVENTION OCDE on Income and Capital BILATERAL TREATIES
(art. 26 MCOECD)
- MODEL CONVENTION EXCHANGE INFORMATION BILATERAL TREATIES (TIEA)
- The Council of Europe/OECD CONVENTION MULTILATERAL TREATY
- STANDARDS of GLOBAL FORUM MULTILATERAL AGREEMENT

EUROPEAN UNION

- Council Directive 2003/48/EC of 3 June 2003 on taxation of savings (only regarding Austria)
- Council Directive 2011/16/EU of 15 February 2010 on administrative cooperation
- Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes
- Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax
- Council Regulation (EU) No 389/2012 of 2 May 2012 on administrative cooperation in the field of excise duties and repealing Regulation
- Communication from the Commission to the Parliament and the Council of March 18, 2015 COM (2015) 136 final on fiscal transparency to combat tax evasion and avoidance . RUBIK Agreements

UNITED NATIONS

- UNITED NATIONS MODEL CONVENTION ON INCOME AND CAPITAL

CIAT

- MODEL AGREEMENT ON THE EXCHANGE OF TAX INFORMATION DEVELOPED BY THE INTER-AMERICAN CENTRE OF TAX ADMINISTRATIONS (CIAT)

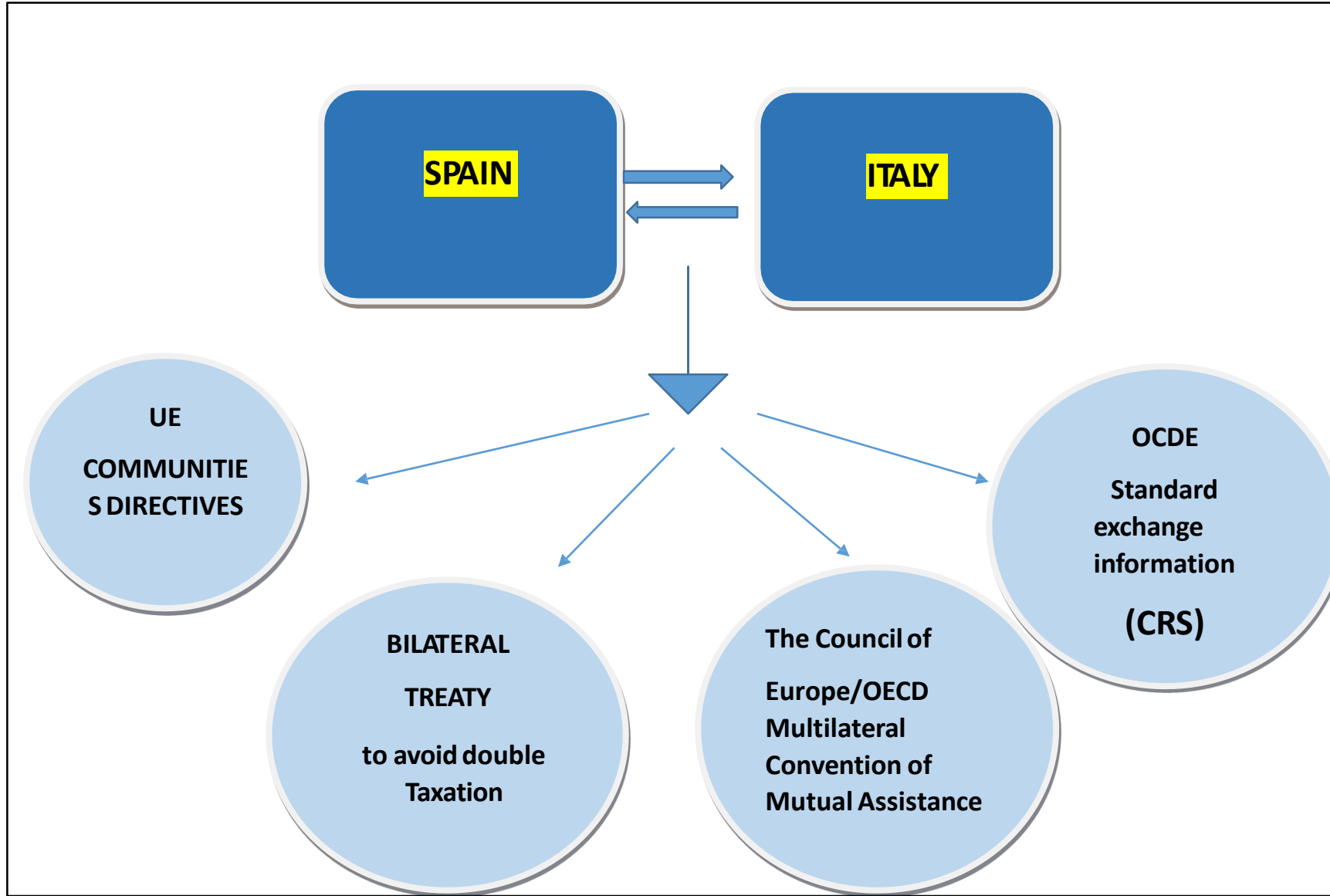
RUSSIAN FEDERATION

- MODEL AGREEMENT ON CO-OPERATION AND MUTUAL ASSISTANCE by the Russian Federation.

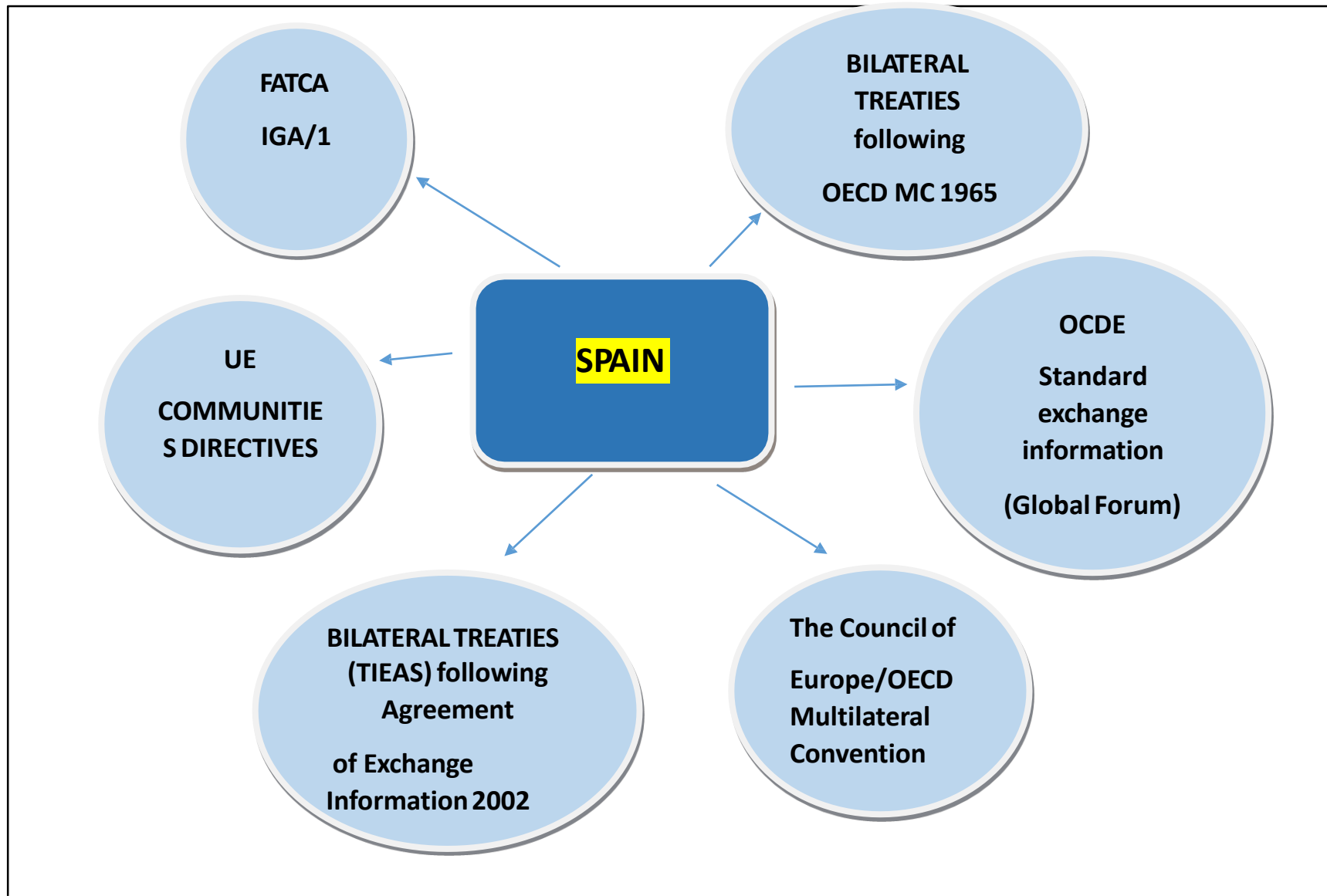
NORDIC COUNTRIES

- The NORDIC ASSISTANCE CONVENTION in tax matters

4. SECTION: OVERLAPS AND LOOPHOLS



4. SECTION: OVERLAPS AND LOOPHOLS



4. Section: OVERLAPPING SYSTEMS

- In the near future there will be, at least, three different but overlapping multilateral systems, dealing with the issue of automatic exchange of information*
- FATCA (U.S.)
- Common Reporting Standard (OECD)
- Cooperation Directive and others (UE)

(*) Altenburger, 2015: 337

- **EU:** The EU Directives
- **OECD/FATCA:**

OECE / STANDARD CRS (Common Reporting Standard)	UNITED STATES FATCA
Multilateral nature	FATCA has evolved from unilateral US legislation to a global cooperative agreement
Is based upon tax Residence	Does not refer to citizenship
No withholding tax	Presence of 30% withholding tax
Does not include the minimum US \$ 50.000	Pre-existing accounts under \$ 50.000 are excluded from review and reporting
Information is sent and received and information flows must pass through the tax administrations on both sides	Some FATCA Agreements provide only for sending information to the United States, which is done directly by the financial institutions.
In general financial institutions will have to collect and remit information on many more accounts under the CRS than under FATCA	

AN INTERNATIONAL ADMINISTRATIVE TAX CODE

(From Multilateral Instrument to Multilateral Agreement)

**CHAPTER I.
COOPERATION BETWEEN TAX
ADMINISTRATIONS**

**CHAPTER II.
COOPERATION BETWEEN TAX
ADMINISTRATION AND
TAXPAYERS**

**CHAPTER III.
CONFLICT RESOLUTION SYSTEMS
ADR
IN TRANSBORDER TAX MATTERS**

**CHAPTER IV.
THE FIGHT AGAINST TAX FRAUD
AT THE INTERNATIONAL AND EU
LEVEL**

SECTION 5. AN INTERNATIONAL ADMINISTRATIVE TAX CODE

- **TITLE I. COOPERATION BETWEEN TAX ADMINISTRATIONS**
 - Sec. 1. International and EU legal basis
 - Sec. 2. Principles of administrative cooperation in tax matters
 - Sec. 3. Concept and activities of administrative cooperation/mutual assistance
 - Sec. 4. Development of a general theory on good fiscal governance
 - Sec. 5. Standard administrative procedures for exchange of tax information and other cooperation activities
 - Sec. 6. The costs
- **TITLE II. COOPERATION BETWEEN TAX ADMINISTRATION AND TAXPAYERS**

AN INTERNATIONAL ADMINISTRATIVE TAX CODE

- **TITLE III. CONFLICT RESOLUTION SYSTEMS**
- **Sec. 1. Traditional systems to resolve transborder conflicts in tax matters (European Union Court, MAP). Statistics**
- **Sec. 2. Cross-border Alternative Tax Dispute Resolution systems**
- Arbitration, ombudsman, mediation, tax agreements, ...
- **Proposal of the creation of the International Body to resolve trans border tax disputes which includes the different alternative dispute resolutions cited.**
- **TITLE IV. THE FIGHT AGAINST TAX FRAUD AT THE INTERNATIONAL AND EU LEVEL**
- Statistics
- Indicators of international tax fraud. Sectors and causes
- Legal Sources: Soft Law and Hard Law. Regulatory instruments in the fight against tax Fraud.
- The fight against the Tax Havens
- Others

The "Variable Geometry" of the Costs of Exchange of
Information.
Different Approaches for Different Institutional Dynamics

Alessandro Turina

EUDisCoop Research Project

Barcelona, 26 January 2017

The Problem of Administrative Costs

- The Explanatory Report to the MCMAA acknowledges that «although a prosaic one, the problem of cost might be a serious obstacle to administrative assistance, as countries might desist from forwarding important requests for this reason»;
- The issue of the attribution and sharing of costs is thus one of the pillars of the sustainability of the architecture of international administrative co-operation in tax matters.
- Implicit question: Can the sharing of costs also play a role as an incentive to sustain co-operation besides complying with its fundamental “prosaic function”?

The Costs of EOI and the Perspective of a Developing Country

- Which costs are associated with exchange of information?The perspective of a low income country (Uganda):
 - (i) The creation and maintenance of exchange of information monitoring systems;
 - (ii) Gathering requested information;
 - (iii) Accessing relevant commercial websites;
 - (iv) Training officers involved in information exchange;
 - (v) Travel to obtain information;
 - (vi) Where necessary, obtaining translating services; and
 - (vii) In certain instances, non-recurrent costs such as those incurred to engage external advisors.

Cost Sharing: Blueprints derived from International Recommendations

- The pattern governing the sharing of EOI costs is shaped after the Commentary to Art. 9 of the OECD Model T.I.E.A. :
- **«Costs that would be incurred in the ordinary course of administering the domestic tax laws of the requested State would normally be expected to be borne by the requested State** when such costs are incurred for purposes of responding to a request for information.»
- Adjusting factors to be taken into consideration: the likely flow of information requests between the Contracting Parties; whether both Parties have income tax administrations; the capacity of each Party to obtain and provide information; the volume of information involved.

Cost Sharing: Blueprints derived from International Recommendations (Cont'd)

- A variety of methods may be used to allocate costs between the Contracting Parties:
 - case by case approach;
 - scale of fees (function of the amount of work involved in responding to a request).

In practice these criteria are not defined in actual agreements but typically left to MOUs between competent authorities.

This pattern is substantially replicated in the MCMAA (Art. 26) with **ordinary/extraordinary costs distinction as default rule** even though it can be superseded by bilateral MOUs arranging otherwise. According to the explanatory notes “**this follows the common practice, where a certain degree of reciprocity is assumed.**”

Cost Sharing: Blueprints derived from International Recommendations (Cont'd)

- The Explanatory Report to the MCMAA further elaborates on exemplifications of «extraordinary costs»:
 - costs incurred when a particular form of procedure has been used at the request of the applicant State;
 - costs incurred by third parties from which the requested State has obtained the information (**for example bank information**);
 - supplementary costs of experts, interpreters, or translators if needed, for example for elucidating the case or translating accompanying documents or *damages* which the requested State has been obliged to pay to the taxpayer as a result of measures taken on the request of the applicant State.

Cost Sharing: Survey of Current Practices

- Ordinary/extraordinary costs, how to draw a line?

Examples of **extraordinary costs** based on the Argentina/Uruguay minitreaty (Art. 8, 2013) would include:

- (a) reasonable fees charged by third parties for carrying out research;
 - (b) reasonable fees charged by third parties for copying documents;
 - (c) reasonable costs of engaging experts, interpreters, or translators;
 - (d) reasonable costs of conveying documents to the requesting party;
 - (e) reasonable litigation costs of the requested party in relation to a specific request for information; and
 - (f) reasonable costs for obtaining depositions or testimony. All requests for payment must be duly documented in written form.
- Typically these rules are defined in MOUs that are not publicly available, that is why the Argentina-Uruguay “minitreaty” is so interesting and remains the only publicly available positive source that concretely exemplifies this fundamental distinction.

Cost Sharing and the ordinary/extraordinary dichotomy

- Is the ordinary/extraordinary distinction really relevant?
- What is «ordinary» for a Country may be «extraordinary» for another country: this is due not only to disparity in economic development but also to the regulatory framework (e.g., Argentina and Uruguay)

Input and Output Exchange of Information

- Countries rarely release public statistics on the number of received and/or forwarded requests.
- The only available statistics are those included in the GF Peer Review Reports.
- Are there «next exporters» and «net importers» of information?

Embedding incentives in EOI cost sharing rules

- Possibly an issue only relevant in case of structural asymmetries between the involved parties (e.g. developed/developing; reliance on foreign source income; «opaque» heritage)
- Possible alternatives: «cost + sharing» and «revenue sharing»?
- «Cost+ sharing» may underestimate the contribution of the Country supplying information
- Revenue sharing possibly departs from the common understanding of administrative co-operation as the incentive rationale would be predominant.

Cost + Sharing/Revenue Sharing: Policy Perspectives

- What are then the possible alternative drivers for the «sharing»?
 - The portion of recovered revenue that is shared with the requesting state may be determined based on a combination of three factors:
 1. How material the information gathered by the requested state ended up being for the successful recovery in the requesting State;
 2. The nature of the efforts undertaken by the requested state (e.g., time consumed, cost of opportunity, financial and human resources, etc);
 3. The systemic asymmetries present between the requesting state and the requested state.

Different forms of EOI, different cost structures?

- EOIR is fundamentally driven by variable costs, AEOI lies to a greater extent on overhead costs: the accrual of expenses is fundamentally divergent (ex post Vs ex ante). Who shall take care of these «lump sum» overhead costs associated with the CRS?
- Distinction between «information reporting» (fundamentally outsourced to financial intermediaries: co-operation costs are basically permuted into compliance costs for intermediaries) and «information exchange» (lying on competent authorities).
- Is the ordinary/extraordinary cost dychotomy still relevant in the light of automatic exchange of information?

Different forms of EOI, different cost structures? General Criteria for Contribution

- In federal systems that adopt AEOI for domestic purposes, structural overhead costs are typically sustained by the federal government (e.g. Brazil).
- In the current multilateral framework it is foreseen (Sec. 8 MCAA) that all signatories to the MCAA share equally, on an annual basis, the costs for the administration of the Agreement (managed by the Co-ordinating Body Secretariat).
- Waiver for developing countries (Art. 11 Rules of Procedure): Countries qualifying for the flat de minimis fee of the Global Forum on Transparency and Exchange of Information for Tax Purposes (GDP < 35 bn USD) AND that have an annual GDP per capita that does not exceed the world average GDP per capita as published by the World Bank. If both conditions are met the signatory shall not be required to make an annual contribution

Different forms of EOI, different cost structures?

Relevance of the Ordinary/Extraordinary Dichotomy

- The Explanatory Report to the MCMAA mentions «bank information» as an exemplification of «extraordinary costs». To which extent is this characterisation relevant for AEOI? Should it be considered an anachronism?
- Probably so, as information gathering concerning financial accounts has typically been outsourced to financial institutions. Are there hidden costs that still lie on tax administrations? Possibly monitoring costs and the need to adapt to existing global standards in order to minimise compliance costs for intermediaries.

The EU Experience: Diverging Cost Attribution Rules

- Art. 21(2) of Directive 2011/16/EU adopts a somewhat different guiding principle towards the sharing of costs: «Member States shall waive all claims for the reimbursement of expenses incurred in applying this Directive except, where appropriate, in respect of fees paid to experts.» This approach is justified by historical, political and practical reasons (greater symmetry and consistency). Could this approach be transposed to a global multilateral setting?
- Concern with the efficiency of information exchange? Based on Art. 8 (also subsequently amended) MS have been required to gather data «on the administrative and other relevant costs and benefits relating to exchanges that have taken place.» Will these findings shape future developments in the policy of administrative co-operation?

THANK YOU FOR YOUR KIND ATTENTION

a.turina@ibfd.org

Is there a global fiscal constitution?

Dr. iur. Peter Hongler

Lecturer University of Zurich

Why bother?

- Increase in global tax legislation
- Influence on domestic law (shift in paradigm?)
- States are not anymore sovereign regarding their legislative power
- What is the value-based framework relevant for the international tax legislator?
- How is international tax governance regulated?

An international law perspective

- «Hot topic» in international law literature
- Existence of a global community?
- Specific constitutional-like documents? UN Charter?
- Is there an international agreement on certain values?
- Should we aim at a more integrated world comparable to a domestic constitutional framework?
- «constitution by analogy approach»

What is the purpose of a constitution?

- Constitution from German: rules and principles – agreed by members of a society
- the Validity of a legal order is derived from the constitution
- Main organizational rules (checks and balances)
- Sign for the level of integration and centralization
- A goal of a constitution is often to increase, establish or promote justice (and or legitimacy)

Main elements of a constitution

- Organizational rules
- Substantive rules

Organizational rules

- International tax governance and checks and balances?
- Legislative body? (OECD, G20?)
- Executive body? (Global Forum, Inclusive Framework?)
- Judicial body? (missing?)
- Relation between states? Use of coercive measures?
- Who is competent to define minimum standards?

Substantive rules

- Two (partly overlapping) categories of substantive rules:
 - Protection of individual rights
 - Protection of community interests

Protection of individual rights

- Protection of human rights
- Procedural rules
- Privacy rules
- Ability-to-pay principle?
- Equality principle?
- Prohibition of double taxation?

Protection of community interests

- Community interests are interests that can only be protected by international coordination and these interests are concerns of basically all states.
- Political agenda might be a sign for existing community interests
- The protection of these community interests might limit the de facto sovereignty of states
- At least two major elements can be identified:
 - Global community interest to extinct tax evasion
 - Global community interest to fight tax avoidance and base erosion

Biased protection of community interests

- The current protection of community interests seems mainly or almost exclusively in a state's – or to be more precise, in revenue services' – interests, such as the protection of tax revenue by limiting cross-border tax evasion or by limiting tax avoidance opportunities.

What can we learn from a constitutional debate?

• An attempt to understand the development of

integration in comparison to federal states (what are the deficiencies?)

- Reluctance is necessary not to use constitutionalism as a positive or negative goal
- There are imbalances in the system
 - Missing judicial body?
 - Biased community interests?

Taxpayers' rights in cross-border tax procedures: the EU primary and secondary law framework

Pasquale Pistone, IBFD Academic Chairman
Barcelona, 26 January 2017

Outline

1. Introduction
2. The principles and EU primary law framework
3. How to involve the taxpayer in the settlement of cross-border tax disputes (Baker-Pistone ECTax Review 5-6/2016)?
4. CJEU: from Sabou to the pending Berlioz case
5. COM (2016) 686 of 25.10.2016: the EU Commission Proposal for an EU Tax Arbitration Directive
6. Concluding remarks

1. Introduction

- ▶ *Ubi ius, ibi remedium*
- ▶ Fundamental right of persons to protection against measures that may adversely affecting his personal sphere
- ▶ Human rights, constitutional and supranational dimension
- ▶ Taxpayers are persons, but...children of a lesser God
- ▶ Protection of taxpayers' rights in purely domestic and cross-border scenarios
- ▶ Traditional vision: tax treaties as legal instruments to define the boundaries of tax sovereignty in mutual agreement
- ▶ Implications: taxpayers have no rights connected with treaties
- ▶ National procedural autonomy under European Union law subject to equivalence and effectiveness

2. The principles and EU primary law framework

- ▶ Persons as holders of rights under EU law
- ▶ Categories of rights: substantive, procedural and connected with the levying of penalties
- ▶ Supranational dimension of fundamental principle is determined by reference to EU principles and link with ECHR
- ▶ Right to an effective legal remedy and implications of right to fair trial in administrative and judicial tax procedures
- ▶ EU principles reflected in the EU Charter of Fundamental Rights (at least Arts. 8, 17, 20, 21, 41, 42, 43, 45, 47, 48, 49, 50)
- ▶ EU Charter: implementation of EU law and ECHR as minimum standard
- ▶ Interpretation by CJEU in tax matters: *Belvedere Costruzioni*, *Åkeberg Fransson*, *WebMindLicences*, etc.

European Union law requires protection of fundamental rights of taxpayers

=> Member States may not ignore their issues in cross-border situations

3. How to protect fundamental rights?

**Baker-Pistone EC Tax Review 5-6/2016:
Involvement of taxpayers in cross-border tax
procedures requires interventions in two main areas**

1. Cross-border exchange of tax information => ex ante protection (right to be informed, judicial protection and access)

and

2. Settlement of cross-border tax disputes => two-tier model with involvement of taxpayer during MAPs and a wide range of solutions for preventing and settling disputes

Establishment of IFA-IBFD Observatory on Taxpayers' Rights

3. CJEU: From Sabou to the pending Berlioz case

- Sabou (C-276/10): right to defence in cross-border mutual assistance between tax authorities under EU directive
 - No reference to EU Charter by national Court
 - CJEU 22.10.2013: EU mutual assistance tax directive does not confer taxpayers the rights to be informed about a request for assistance, participate to formulate questions or to examine witness

3. CJEU: From Sabou to the pending Berlioz case

- Berlioz (C-682/15 - pending): on the right to a legal remedy against request of information
 - Luxembourg tax authorities were asked to supply precise information about recipient of dividends, such as PoEM, staff, contracts, shareholdings with names, addresses and capital owned (not supplied for not being foreseeably relevant), assets. Penalty for not supplying information
 - National Court refers question also on Article 47 (effective remedy)
 - AG Wathelet 10.1.2017: Court must be able to verify legality of penalty on the basis of brief examination concerning the foreseeable relevance

5. COM (2016) 686 – Proposal for EU Arbitration Directive

- ▶ CJEU: acknowledges problem of double taxation, but excludes solution at interpretative level
- ▶ Proposal for positive integration on double taxation through harmonization (legal basis Art. 115 TFEU)
- ▶ Implications: EU secondary law secures effective protection of rights, thus also of taxpayers
- ▶ Art. 12 acknowledges taxpayers' rights to submit relevant documents and be heard before Advisory and Alternative Dispute Resolution Commissions: an important progress!
- ▶ Various measures secure effective protection against inaction of tax authorities with support by national Courts

6. Concluding remarks

- ▶ EU law requires protection of fundamental rights and gives legal remedies for it
- ▶ The protection of fundamental rights of persons, thus also of taxpayers, cannot be put under silence in the European Union
- ▶ Cross-border mutual assistance in tax matters is a tool to secure information, but must operate within the overall framework of legal standards of protection for taxpayers
- ▶ Cross-border settlement of tax disputes may not be handled by tax authorities without the involvement of taxpayers
- ▶ Undesirable scenario> the Proposal is not approved by EU MSs
 - ▶ Consequences: case-by-case patchwork of negative integration
- ▶ Observatory on the practical protection of taxpayers' rights and shift towards a transparent EU standard of protection
- ▶ Constructive dialogue with involvement of ombudsmen

Muchas gracias
Moltes gràcies

p.pistone@ibfd.org



FIELD COURT TAX CHAMBERS

International Administrative Cooperation in Tax
Matters and Tax Governance – University of
Barcelona – January 26th 2017

Privacy Protection and Data Protection In
Automatic Exchange of Information

PHILIP BAKER QC

Field Court Tax Chambers
3 Field Court, Gray's Inn
London WC1R 5EP

Visiting Professor, Oxford University
e-mail: pb@fieldtax.com



Exchange of Information, Privacy and Data Protection



~~Broader Considerations and~~ Safeguards

- AEol is not immune from general law protections for privacy and data processing



ECHR and ECFR

- Article 8, ECHR

Article 8 – Right to respect for private and family life

- “1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. 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 well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”



ECHR and ECFR

- Art. 7 European Charter of Fundamental Rights

Respect for private and family life

“Everyone has the right to respect for his or her private and family life, home and communications.”



ECHR and ECFR

- X (Hardy-Spirlet) v Belgium (7th December 1982 – European Commission on Human Rights)
- Funke etc v France (appln 10828/84, 25th February 1993, European Court of Human Rights)
- Note: other rights potentially engaged
 - Art 6 ECHR – right to a fair trial
 - Art 14 ECHR – enjoyment of rights to be non-discriminatory



ECHR and ECFR

Cases on cross-border exchange

- FS v. Germany (appln no 30128/96, 27 Nov 1996) – Art 8: exchange of information under Mutual Assistance Directive
- Janyr v Czech Republic (appln no 42937/08, 31st Oct 2013) – Art 6: inability to secure exchange of information
- Jiří Sabou v Finanční ředitelství pro hlavní město Prahu (Case C-276/12, 22nd Oct 2013, CJEU)



ECHR and ECFR

Summary

- All gathering, retention and exchange of information is prima facie a breach of Art 8 ECHR / Art 7 ECFR
- The gathering and exchange can be justified if:
 - In accordance with the law
 - Necessary in a democratic society – a fair balance
 - Not disproportionate
- Successful challenges will be rare



Exchange of Information and Data Protection



Data Protection

- **Article 16 Treaty on the Functioning of the EU**

- “1. Everyone has the right to the protection of personal data concerning them.
2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.”



Data Protection

- **Treaty on European Union (TEU): Article 39**

“In accordance with Article 16 of the Treaty on the Functioning of the European Union and by way of derogation from paragraph 2 thereof, the Council shall adopt a decision laying down the rules relating to the protection of individuals with regard to the processing of personal data by the Member States when carrying out activities which fall within the scope of this Chapter, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.”



Data Protection

- **Art 8, European Charter of Fundamental Rights**

“Everyone has the right to the protection of personal data concerning him or her.

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.

Compliance with these rules shall be subject to control by an independent authority.”

No ECHR equivalent – need to rely on right to privacy and national legislation



Data Protection

- **Convention 108 for the Protection of Individuals with Regard to Automatic Processing of Personal Data, 1981 (plus 2001 Protocol 181)**
- 50 Ratifications / accessions
- Standard guarantees
- New Draft Modernised Convention, 2016



Data Protection

- **Directive 95/46/EC** of the European Parliament and of the Council 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
- To be replaced by:
- **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, and repealing Directive 95/46/EC (**General Data Protection Regulation**)



Data Protection

- **Article 1 GDPR**

- “1. This Regulation lays down rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data.
2. This Regulation protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data. “



Data Protection

GDPR

- Art 13 and 14 – right of data subject to know of collection of data from third party
- Art 15 – right of access and to rectify the data
- These rights may be modified for important economic and taxation reasons, when it is a necessary measure
- Art 82 – right to compensation for unlawful processing of data



Data Protection

GDPR

- Art 44 et seq – transfer of personal data to third countries

- Art 45:

“1. A transfer of personal data to a third country or an international organisation may take place where the Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organisation in question ensures an adequate level of protection. Such a transfer shall not require any specific authorisation.”



Data Protection

Article 29 Data Protection Working Party (will become the European Data Protection Board)

- Letters of 21st June 2012 and 1st October 2012 with regard to FATCA and Directive 95/46

“16.1 The WP29 shares the concerns expressed by some in relation to dual compliance with FATCA and the Directive. Without an appropriate legal basis justifying both sets of obligations imposed on European FFIs would result in the unlawful processing of personal data.”



Data Protection

Article 29 Data Protection Working Party

- Letter of 18th September 2014 with regard to the OECD Common Reporting Standard (plus detailed Annex)

“The practical roll-out of CRS in Europe based on existing FATCA IT solutions currently lacks adequate data protection safeguards, notwithstanding the EU proposal to amend the Directive 2011/16/EU regarding mandatory automatic exchange of information in the field of taxation. This Directive – which could be considered as transposition of the US FATCA and CRS in EU law – so far falls short of data protection safeguards.”



Data Protection

Article 29 Data Protection Working Party

- Statement of the WP29 on automatic inter-state exchanges of personal data for tax purposes, 4th February 2015
 - 1. The automatic exchange of personal data for tax purposes should meet data protection requirements, namely the principles of purpose limitation and necessity
 - 2. Member States that roll out the model of automatic massive storage and then forward this data for tax purposes, should be aware that they may incur increased (security) risks and liability under EU data protection laws
 - 3. The WP29 confirms its approach on providing additional guidance to increase data protection safeguards in this area



Data Protection

Article 29 Data Protection Working Party

- Guidelines for Member States on the criteria to ensure compliance with data protection requirements in the context of the automatic exchange of personal data for tax purposes (175/16/EN WP 234)
- Lists safeguards: e.g.
 - Clear legal basis for exchange
 - Purpose limitation
 - Necessity and proportionality
 - Data retention and destruction
 - Data subject's rights



Data Protection

- How will this work in practice?
- What are the purposes for which information is exchanged?
- Can information be used for taxpayer profiling?
- For how long may data be retained?
- What about transmission of data to countries with inadequate data protection?
- What would happen if a country is denied data because of data protection legislation?
- What happens when there is a leak?



Exchange of Information – Challenges



Data Protection

Note:

- **Digital Rights Ireland Ltd** (Cases C-293/12 and 594/12) – CJEU, Grand Chamber, 8th April 2014
- The retention of and access data relating to telephone usage and internet access for anti-crime and anti-terrorist purposes
- Declared invalid Directive 2006/24/EC ... on the retention of data generated or processed in connection with the provision of publicly available electronic communications services
- Directive was a disproportionate interference with the right to privacy inter alia because it required retention and access to data of entirely innocent persons, not under suspicion



Data Protection

- **Schrems v Data Protection Commissioner** (C-362/14)
 - Transfer of Facebook data to the US
 - Invalidity of Decision 2000/520 – the safe harbour principles
 - Duty of national authorities to keep data transfer to third states under review
- **Bara** (Romania) (C-201/14)
 - Transfer of data between national authorities
 - Duty to notify data subject of transfer of data



Data Protection

- **Tele2 Sverige AB** (Cases C-203/15 and 695/15) –
- Judgment of 21st December 2016
- General data retention obligation for electronic data service suppliers
- Unlawful to require general retention of data from all subscribers
- Access by competent authorities to be limited to a) fighting serious crime; b) to be subject to prior review by a court or independent authority. Data to be retained in the EU



Data Protection

- **Possible / probable / certain tax challenges**

Safeguards for developing countries in automatic exchange of information

Dr. Irma Johanna Mosquera

AGENDA

1. Instruments
2. Problems in developing (and developed) countries
3. Specific for developing countries
 - ▶ Challenges
 - ▶ Initiatives and projects
4. Instruments with safeguards
5. Recommendations

1. Instruments

Confidentiality

- ▶ Article 26 OCDE: Confidentiality standard
- ▶ Other international instruments?
 - ▶ MAC
 - ▶ Instruments implementing automatic exchange of information: CRS and MCAA
- ▶ Domestic law e.g. Income Tax, Tax Administration Act

Privacy and data protection

- ▶ Right to privacy: International/ Regional Human Rights Conventions
- ▶ Data privacy: CoE Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data 1981 (Additional Protocol of 8 Nov. 2001). Adopted by countries members of the CoE and a few third countries
- ▶ Domestic Law (e.g. Privacy Acts and data protection laws)

2. Problems and solutions

- ▶ Different rules regarding the standard of confidentiality
 - ▶ Definition of taxpayer information subject to confidentiality rules: Broader, specific, or none (e.g. use of biometric information)
 - ▶ Access to Public Information: Asking for personal and business information including taxpayer information. Allowed insofar as the information does not constitute data processing (Satamedia Oy v. Finland)
 - ▶ Who has access to the data? All tax officials?
 - ▶ Commissions or administrative agencies (money laundering or corruption) and/or oversight authorities: Same duty of confidentiality than tax officials or not?
 - ▶ Third parties (with contracts with the tax administration e.g. software developers); What happens if duty is being breached?

2. Problems and solutions

- ▶ Differences regarding the standard of privacy
 - ▶ Not clear how to protect privacy and data during exchange of information.
 - ▶ Information (data) privacy:
 - ▶ Westin: Information privacy: subject has a claim to determine for themselves when, how and to what extent information about them is communicated to others?
 - ▶ Cockfield: Tax information: Taxpayer's income and other details about an individual personal circumstances is a particular sensitive form of personal information
 - ▶ Due to the rules dealing with Access to Public Information : risk using data for profiling which may not be protected under the data protection laws. Profile individual's entity: beliefs, political alliances, personal behaviour

2. Problems and solutions

- ▶ Differences regarding the standard of data protection

- ▶ Data protection laws

- ▶ EU: old rules vs. new rules

- ▶ What happens if the country does not have data protection laws or the data protection laws are obsolete? See item 3 below.

3. Developing countries

▶ Challenges

- ▶ Implementation EOI and AEOI
- ▶ Standard of confidentiality
- ▶ Update of privacy and/or data protection laws

▶ Initiatives and projects

3.1. Challenges developing countries

- ▶ Implementation of standard of automatic exchange of information: early adopters, and late adopters (some developing countries)
- ▶ Problems implementation standard of EoI on request not yet addressed. Most of developing countries are largely or partially compliant: peer review forum compliant ratings in Annual Report 2016
- ▶ Review on the standard of confidentiality by the OECD (announced to be available by the end of 2016 – no yet published) will affect developing countries since these countries may have more problems than developed countries.

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3.1. Challenges developing countries

▶ Differences regarding the standard of data protection

▶ Data protection laws

What happens if the country does not have data protection laws or the data protection laws are obsolete?

- ▶ Sometimes data protection laws are difficult to be approved (e.g. Brazil)
- ▶ EU: old rules vs. new rules
- ▶ Some countries implement the data protection rules based on the EU rules but the adoption takes time, so will the non-EU countries adopt the new EU rules?

3.1. Challenges developing countries

- ▶ Developing countries: request, use and process tax information
 - ▶ Rules: training, sanctions and publicity of the sanctions
 - ▶ Use appropriate software: Common Transmission System (encryption)
 - ▶ Who has access to the software? Limited? And any mechanisms to monitor the access to the documents?
 - ▶ Prevention of leak or misuse of information (sanctions and remedies)
 - ▶ Prevention of identity fraud and protection of business and personal information of taxpayer (incl. biometric data)

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3.2. Initiatives and projects

- ▶ AEOI implementation projects with technical specific assistance, but resources limited, thus closer international collaboration with international (e.g. WB) and regional (tax) organizations (ATAF; CIAT) Role of the United Nations (observer)?
- ▶ The African initiative: engaging with African countries on tax transparency and EOI (October 2014)
 - ▶ Enhance participation by African countries
 - ▶ Ensure tools for EOI
 - ▶ Build EOI capacity within African regional organisations
- ▶ Pilot projects: Partnering developed and developing countries
 - ▶ More pilot projects needed?
 - ▶ Open to all developing countries: why so limited participation?
 - ▶ Usefulness – project assessment?

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4. Instruments with safeguards

▶ Non-binding

- ▶ The 2006 OECD Manual on Information Exchange
- ▶ The 1980 (updated in 2013) OECD Guidelines on the protection of Privacy and Transborder Flows of Personal Data
- ▶ The 2013 OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax purposes
- ▶ UN 1990 Guidelines on Privacy and Data Protection
- ▶ 2005 Asia-Pacific Economic Cooperation (APEC) Privacy Framework

▶ Binding

- ▶ CoE Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data 1981 and its Additional Protocol of 8 Nov. 2001. Adopted EU countries and Uruguay (2013); Mauritius and Senegal (2016).

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4. Instruments with safeguards

- ▶ Safeguards:

- ▶ EOI: the 2006 OECD general and legal aspects of exchange of information including confidentiality and tax secrecy (Section 13).

- ▶ Data protection: the 1980 Guidelines (with the 2013 update)

- ▶ collection limitation (ii) data quality principle; (iii) purpose specification principle; (iv) use limitation principle; (v) security safeguards principle; (vi) openness principle; (vii) individual participation principle; and (viii) accountability principle.

- ▶ Confidentiality: the 2013 OECD Guide

- ▶ Best practices adopted by tax administrations to protect the tax confidentiality of the information exchanged.
 - ▶ Recommendations to help tax authorities to ensure that confidential taxpayer information is being adequately safeguarded.

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4. Instruments with safeguards

- ▶ Safeguards:

- ▶ Privacy and Data Protection: The UN 1990 Guidelines

- ▶ Principles concerning the minimum guarantees that should be provided in national legislation. These principles are (i) lawfulness and fairness; (ii) accuracy; (iii) purpose-specification; (iv) interested-person access; (v) non-discrimination; and (vi) security
 - ▶ Also in OECD security and purpose specification
 - ▶ Not in OECD the principle of accuracy that provides for “the duty of data controllers to carry out regular checks of the quality of personal data.

This principle of accuracy can be useful when dealing with bulks of information as a result of automatic exchange of information.

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4. Instruments with safeguards

- ▶ Safeguards:

- ▶ Privacy: 2005 Asia-Pacific Economic Cooperation (APEC)

- ▶ Information privacy principles (i) preventing harm; (ii) providing notice; (iii) collection limitations; (iv) use of personal information; (v) mechanisms to exercise choice; (vi) integrity of personal information; (vii) security safeguards; (viii) access and correction; (ix) accountability.
 - ▶ The framework is inspired on at that time OECD 1980 Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (para. 5 preamble). The content of the multilateral instrument also addresses some of the 1980 (updated in 2013) OECD Guidelines and the UN 1990 Guidelines.

5. Recommendations

- ▶ AEOI and safeguards require adequate protection. It is the responsibility of the tax administrations to ensure that the exchange of information has sufficient safeguards to protect the confidentiality and privacy of the information exchange
 - ▶ To develop more partner projects which are properly assessed and adjusted in accordance to the needs of the countries
 - ▶ Regional organizations also a relevant role e.g. Pacific Alliance, ECOWAS, SADC, EAC, African Union. To follow APEC example in privacy?
 - ▶ To provide a multilateral framework that protects the automatic processing of personal data.
 - ▶ To sign and ratify the CoE Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data 1981 and its Additional Protocol of 8 Nov. 2001.
 - Also referred by the OECD and the MAC.

5. Recommendations

Multilateral instrument with safeguards: The exchange of information will result in sending of data by the supplying State if the following cumulative conditions are being met:

- ▶ (i) similar data can be received from the receiving State (reciprocity) ;
- ▶ (ii) the receiving State ensures adequate protection of confidentiality and data privacy that is guaranteed by a follow up by the supplying State to guarantee the respect of such confidentiality in the receiving State (security safeguards) ;
- ▶ (iii) the exchange is adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed (purpose specification) ;

5. Recommendations

International instrument with safeguards (cont.)

- ▶ The sending of data does not constitute an excessive burden for the tax administration that lacks of administrative capacity or technical knowledge to develop a secure electronic system to exchange data (proportionality).
- ▶ The data controller has the duty to carry out regular checks of the quality of personal data. (accuracy)

See also: Privacy and confidentiality in exchange of information procedures: some uncertainties, many issues, but few solutions. Filip Debelva and Dr. Irma Johanna Mosquera Valderrama. Forthcoming 2017.



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Exchange of information and taxpayers' rights protection A comparative overview

Avv. Pietro Mastellone LL.M., Ph.D.

International Administrative Cooperation in Tax Matters and Tax Governance

University of Barcelona

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Instruments for exchanging tax relevant information

- a) **Tax Treaty EoI clauses** based on Art. 26 OECD MTC (last version issued on 15th July 2014)
- b) **Tax Information Exchange Agreements (TIEAs)** based on the so-called *Model agreement on exchange of information on tax matters*, issued by the OECD on 18th April 2002
- c) **Arts. 5-6-7 of the CoE/OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters (as amended by the 2010 Protocol)** → enforced by 81 States
- d) **EU law** → Directive no. 2011/16/EU (as amended by Directive no. 2014/107/EU); Council Regulation (EU) no. 904/2010; Council Regulation (EC) No. 2073/2004 (administrative cooperation in the field of excise duties); Council Regulation (EC) no. 515/97 (mutual assistance on customs and agricultural matters); Convention on mutual assistance and cooperation between customs administrations (so-called *Naples II*).

Which protection of taxpayers' rights during exchange of information procedures?

Art. 26 OECD MTC:

- The text does **not** expressly mention any taxpayer's right
- we may imply taxpayers' rights "in negative" from the **counterlimits to the exchange** laid down by para. 3
- para. 5.3 of the 2014 Commentary to Art. 26 → «*The scope of exchange of information covers all tax matters without prejudice to the general rules and legal provisions governing the **rights of defendants and witnesses in judicial proceedings***»
- para. 10 of the 2014 Commentary to Art. 26 → «*Contracting States which are required, according to their law, to observe data protection laws, may wish to include provisions in their bilateral conventions concerning the **protection of personal data exchanged**. Data protection concerns the rights and fundamental freedoms of an individual, and in particular, the right to privacy, with regard to automatic processing of personal data*»
- para. 12 of the 2014 Commentary to Art. 26 → «*the information **MAY also be communicated to the taxpayer***»
- para. 14.1 of the 2014 Commentary to Art. 26 → «***Some countries' laws** include procedures for **notifying** the person who provided the information and/or the taxpayer that is subject to the enquiry prior to the supply of information. Such notification procedures may be an important aspect of the rights provided under domestic law*»

Which protection of taxpayers' rights during exchange of information procedures? (follows)

Exchange of information in the MAAT Convention:

➤ Preamble:

- No. 4 → «Considering that a co-ordinated effort between States is necessary in order to foster all forms of administrative assistance in matters concerning taxes of any kind whilst **at the same time ensuring adequate protection of the rights of taxpayers**». Among the rights that deserve such “adequate protection” also during tax administrative and criminal procedures, the 2011 version of the Commentary to the MAAT Convention indicates also «rights secured to persons that may flow from applicable international agreements on human rights»;
- No. 5 → «Recognising that international co-operation can play an important part in facilitating the proper determination of tax liabilities and in **helping the taxpayer to secure his rights**»;
- No. 6 → «Considering that **fundamental principles entitling every person to have his rights and obligations determined in accordance with a proper legal procedure should be recognised as applying to tax matters in all States and that States should endeavour to protect the legitimate interests of taxpayers**, including appropriate protection against discrimination and double taxation»;
- No. 7 → «Convinced therefore that States should carry out measures or supply information, having regard to the **necessity of protecting the confidentiality of information**, and taking account of international instruments for the protection of privacy and flows of personal data».

Which protection of taxpayers' rights during exchange of information procedures? (follows)

- Art. 21 (*Protection of persons and limits to the obligation to provide assistance*) of the MAAT Convention: «1. **Nothing in this Convention shall affect the rights and safeguards** secured to persons by the laws or administrative practice of the requested State. [...]».

Which protection of taxpayers' rights during exchange of information procedures? (follows)

Exchange of information in Directive No. 2011/16/EU:

- Preamble, no. 28 → «This Directive respects the fundamental rights and observes the principles which are recognised in particular by the Charter of Fundamental Rights of the European Union»
- Art. 16 → information may be used «in connection with judicial and administrative proceedings that may involve penalties, initiated as a result of infringements of tax law, without prejudice to the general rules and provisions governing the rights of defendants and witnesses in such proceedings»
- Art. 25 → «Member States shall, for the purpose of the correct application of this Directive, restrict the scope of the obligations and rights provided» by the Privacy Directive (Directive no. 95/46/EC)

Taxpayers' rights during exchange of information procedures are *fragmentarily* regulated by national laws

It is clear that the international community decided to stimulate as much as possible the global circulation of tax relevant information, while totally ignored taxpayers' rights, which receive only through declarations of principle → the *effective* regulation is left to domestic rules (harmonisation of exchange of information *vs* fragmented taxpayers' right protection).

From a comparative analysis, it emerges that the rights to an active involvement of taxpayers during mutual administrative assistance procedures may be divided in three categories:

- a) **NOTIFICATION RIGHTS** → allow the taxpayer to have knowledge of the requested of information from another State;
- b) **CONSULTATION RIGHTS** → allow the taxpayer to be heard before the final transmission to the other State of the information requested, although the tax authorities of the requested State remain absolutely free in their decision to exchange;
- c) **INTERVENTION RIGHTS** → they represent the highest level of safeguard, since they recognise to the taxpayer the right to check before a third party (*i.e.* an administrative or judicial body) the legitimacy of the request of assistance and the correctness of the information requested for the exchange.

Comparative remarks on taxpayers' rights guaranteed (or not) during *incoming* requests of information

- 1) ITALY → no notification, consultation nor intervention rights;
- 2) FINLAND → no notification, consultation nor intervention rights;
- 3) BELGIUM → no notification, consultation nor intervention rights.
Nevertheless, if the request of assistance refers also to the third tax years before, then the Belgian tax authorities shall notify to the taxpayer the decision to transmit the information (only notification right);
- 4) POLAND → no notification, consultation nor intervention rights: only notification right in case of mutual assistance in the recovery of foreign tax claims;
- 5) SPAIN → in case of request for information made by another State, the Spanish taxpayer may not be informed about the incoming request, but may be aware of particular proceedings carried out by the Spanish tax authorities in order to accomplish the transfer of information

Comparative remarks on taxpayers' rights guaranteed (or not) during *incoming* requests of information (follows)

- 6) GERMANY → Full notification, consultation and intervention rights. Tax authorities shall communicate to the taxpayer the incoming request of information, in order to permit to block the administrative decision to exchange by obtaining from the judge an injunction or a judgement;
- 7) SWEDEN → only notification right once the information requested is transmitted;
- 8) LUXEMBOURG:
 - a) **Loi 31 March 2010.** The tax authorities that receive a request of information, first check that the latter are foreseeably relevant, then shall inform the taxpayer, who may appeal the decision to transmit (within 30 days). If the information requested is banking data, the notification is made to the financial institution, which shall inform its client. In any case, after 30 days from the notification, the taxpayer may impugn the decision to transmit information before the administrative judge (*i.e.* the Tribunal Administratif);
 - b) **Loi 25 November 2014.** The owner of information (*i.e.* the taxpayer or the financial institution) is obliged to make them available to the tax authorities (within 30 days), the taxpayer (or the financial institution) will face an administrative penalty of maximum € 250.000 (see *Berlio*). Such penalty may be appealed regarding only its amount.

Comparative remarks on taxpayers' rights guaranteed (or not) during *incoming* requests of information (follows)

- 9) PORTUGAL → tax authorities shall notify the decision to transmit the information requested and the taxpayer may appeal the decision within 30 days: if the taxpayer gives convincing arguments, the judge is able to impede the transmission;
- 10) HUNGARY → only notification rights;
- 11) SWITZERLAND → in case of incoming requests, the Federal Administration of Contributions (FAC) makes a preliminary assessment of admissibility and then notifies to the taxpayer (and to the financial institution owner of the information) its decision to obtain and transmit such information, unless the requesting State expressly ask to omit the notification in order to avoid that the taxpayer “pollutes” the tax investigations. Once the FAC has obtained the information and decided to transmit them, notifies its decision to the taxpayer, who may appeal it within 30 days before the Federal Administrative Tribunal: a) decision to block the transmission and impose to the FAC to close the case; or b) authorise the transmission of the information to the requesting State.

Comparative remarks on taxpayers' rights guaranteed (or not) during *incoming* requests of information (follows)

- 12) UNITED KINGDOM → the HMRC is obliged to inform the taxpayer only of an “instrument or decision” issued by another Member State and concerning taxes covered by Directive no. 77/779/EEC.

Section 68, Finance (no. 2) Act 2005:

«(1) This section applies where, in accordance with Article 8a of the Mutual Assistance Directive, the competent authority of another member State (“the applicant authority”) requests the Commissioners for Her Majesty’s Revenue and Customs to notify an instrument to the person to whom the instrument is addressed.

(2) The Commissioners must take the necessary measures to notify the instrument to that person.

(3) The notification shall be given in accordance with the law applicable to notification of similar instruments in the part of the United Kingdom in which it is given.

(4) The Commissioners must:

(a) inform the applicant authority immediately of their response to the request, and

(b) confirm to the applicant authority, as soon as is reasonably practicable, the date on which the instrument was notified to the person concerned.

(5) The Commissioners may request additional information from the applicant authority for the purpose of giving the notification.

[...]»

Comparative remarks on taxpayers' rights guaranteed (or not) during *outgoing* requests of information

- 1) POLAND → only notification rights;
- 2) AUSTRIA → only notification rights, if the information object of the request has banking nature;
- 3) LUXEMBOURG → no notification rights if the tax authorities decide to make a request of information;
- 4) GERMANY → no notification rights. The taxpayer may request a precautionary order;
- 5) BELGIUM → tax authorities shall notify to the taxpayer their decision to request information only if functional to determine the income of at least four tax years subsequent to the one which the tax return refers. The taxpayer may request a precautionary order;
- 6) SWEDEN → no notification, consultation nor intervention rights;
- 7) HUNGARY → no notification, consultation nor intervention rights;
- 8) ITALY → no notification, consultation nor intervention rights.

CJEU, Grand Chamber, 22 October 2013, case C-276/12 *Sabou*

- **FACT** → Mr. Sabou, a Czech footballer player, claimed in his Czech income tax return for 2004 expenditures incurred in other EU Member States with a view to a possible transfer to another football club in the future. The Czech tax authorities had doubts and requested information from the tax authorities of those Member States. Indeed, they received the information that the clubs in question did not even know Mr. Sabou. Furthermore, there were a number of invoices for services provided by a company in Hungary; upon requests for information, the Hungarian authorities informed the Czech authorities that the company was only an intermediary of a company established outside the EU and that only an inspection in that non-Member State could produce reliable answers. Based on all this information, the Czech authorities reassessed Mr. Sabou's amount of tax. Mr. Sabou appealed against the decision and claimed during the procedure before the Supreme Administrative Court that the information obtained against him had been acquired illegally, since he had not been informed of the requests for information and not been able to take part neither in formulating the questions to the foreign tax authorities nor to take part in the examination of witnesses in the other Member States. In his view, this violated his rights of defense, also in comparison to the rights he would have been granted in the Czech Republic.

CJEU, Grand Chamber, 22 October 2013, case C-276/12 *Sabou* (follows)

➤ REASONING OF THE COURT:

- a) para. 38 → *«the rights of the defence is a general principle of European Union law which applies where the authorities are minded to adopt a measure which will adversely affect an individual (see Sopropé, paragraph 36). In accordance with that principle, the addressees of decisions which significantly affect their interests must therefore be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision (see, inter alia, C-32/95 P Commission v Lisrestal and Others [1996] ECR I-5373, paragraph 21, and Sopropé, paragraph 37)»;*
- b) paras. 44-45 → *«respect for the rights of the defence of the taxpayer does not require that the taxpayer should take part in the request for information sent by the requesting Member State to the requested Member State. Nor does it require that the taxpayer should be heard at the point when inquiries, which may include the examination of witnesses, are carried out in the requested Member State or before that Member State sends the information to the requesting Member State. None the less, there is nothing to prevent a Member State from extending the right to be heard to other parts of the investigation stage, by involving the taxpayer in various stages of the gathering of information, in particular the examination of witnesses»*

CJEU, Grand Chamber, 22 October 2013, case C-276/12 *Sabou* (follows)

➤ **DECISION** → EU law «*must be interpreted as not conferring on a taxpayer of a Member State either the **right to be informed of a request for assistance** from that Member State addressed to another Member State, in particular in order to verify the information provided by that taxpayer in his income tax return, or the **right to take part in formulating the request** addressed to the requested Member State, or the **right to take part in examinations of witnesses** organised by the requested Member State*»

“Pathological” aspects of exchange of information

KREDIETBANK LUXEMBOURG (1994) → stolen microfiches containing bank information of 10.400 taxpayers, obtained by the Belgian tax authorities, which then transmitted them to the Dutch authorities according to Art. 4 of Directive no. 77/799/EEC.

LIECHTENSTEIN LGT BANK (2008):

- in May 2006, the German secret services (Bundesnachrichtendienst) met in Strasbourg a former employee of LGT Bank of Vaduz, Mr. Heinrich Kieber, and paid him € 5 million for a DVD containing data and names of approximately 1400 taxpayers of various nationalities having accounts opened in such bank;
- the stolen data contained in the DVD represented a serious infringement of Liechtenstein criminal law, but the DVD was regularly purchased by Germany, subject to a withholding tax of € 377.198,00 and Mr. Kieber entered into the witness protection program;
- information started to circulate among EU tax authorities through “ordinary” mechanisms of exchange of information.

FALCIANI LIST (2009):

- Hervé Falciani made a backup of the data contained in the Geneve HSBC bank (approx. 127.000 clients, among which Mexican narcos and terrorists linked to Al-Qa`ida);
- the data were seized by the Public Prosecutor of Nice (France) and, subsequently, transmitted to foreign Public Prosecutors and tax authorities.

The approach of domestic Courts on unlawfully obtained information received by other tax authorities

Belgian case law (on the *Kredietbank Luxembourg* case):

- a) **Rechtbank van Eerste Aanleg te Brussel, Sec. XXXIII, 28 June 2002, no. 02/23379** → *«the documents in the administrative file (microfiche) do not carry any logo and not even a reference to a bank, so that their origin is completely unclear. With good reason the plaintiffs refer to case law that states a document of which the origin is unverifiable and of which the administrative authorities admit that it is an analysis and a summary of unproduced documents, do not constitute a known fact that can be used as a basis of a presumption of fact, especially with regard to determining the amount of the sums placed on a Luxembourg bank accounts»;*
- b) **Correctionele Rechtbank van het arrondissement Hasselt, Sec. XVIII, 30 April 2003, no. 78.97.1357-00** → *«the necessary documents for verification of the regularity of the submitted microfiche as evidence, and the prosecutor of the State does not deny the claim of the accused that the information was obtained unlawfully»;*
- c) **Rechtbank van Eerste Aanleg te Brussel, Sec. XLIX (criminal), 8 December 2009, no. 78.97.2825-96** → *the information contained in the microfiches was obtained unlawfully and, therefore, cannot be used by Belgian tax authorities.*

The approach of domestic Courts on unlawfully obtained information received by other tax authorities (follows)

Dutch case law (on the *Kredietbank Luxembourg* case):

- a) **Gerechtshof Amsterdam, Sec. IV (tax), 18 January 2006, no. 03/04509 (LJN n. AU9845)** → information from the Kredietbank Luxemburg has been transmitted from the Belgian Government according to a specific EU instrument (*i.e.* Directive no. 77/799/EEC) and it does not have relevance what happened before;
- b) **Hoge Raad, Criminal Chamber, 15 November 2006, no. 023245/05 (LJN n. AX7471)** → confirmed this approach regarding a tax violation having criminal relevance. In the same sense, see **Rechtbank Alkmaar, Criminal Section, 12 March 2004, no. 14.060137-02 (LJN n. AO5509)**; **Rechtbank Groningen, Criminal Section, 20 October 2003, no. 18/076010-01 (LJN n. AM1882)**; **Rechtbank 's-Gravenhage, Criminal Section, 17 November 2004, no. 09/755055-02 (LJN n. AR5793)**;
- c) **Hoge Raad, Tax Chamber, 21 March 2008, no. 43050 (LJN n. BA8179)** → confirmed this approach regarding a tax violation having merely administrative relevance.

The approach of domestic Courts on unlawfully obtained information received by other tax authorities (follows)

German case law (on the *Liechtenstein* case):

- Federal Constitutional Court (Bundesverfassungsgericht), 9 November 2010, case n. 2101/09:
 - a) according to criminal procedure rules German law, the prohibition to use evidence unlawfully obtained applies only in case of «*serious, intentional or arbitrary violations, which imply a planned or systematic infringement of rights constitutionally guaranteed*»;
 - b) evidence obtained by «*privates – and not by a German authority – shall be considered usable, also if they have been obtained through the commission of a crime*».

The approach of domestic Courts on unlawfully obtained information received by other tax authorities (follows)

Italian case law (on the *Liechtenstein* case):

- Tax Court of First Instance of Mantua, Sec. I, 27 May 2010, no. 137 → «In case of exchange of information between Member States of the European Union, according to Directive no. 77/799/EEC, the Italian tax authorities shall attach to the tax assessment the documents concerning the modalities through which it obtained information on the assessed taxpayer. Lacking the attached documents on exchange of information with a foreign tax authority, the tax assessment shall be considered invalid, since, although Art. 7 of Law no. 212/2000 – providing that all the acts of the Italian tax authority shall be grounded – does not provide any form of invalidity, the judge is nevertheless obliged to declare it invalid, being this a peremptory rule of law»;
- Tax Court of First Instance of Milan, Sec. XL, 15 December 2009, no. 367 → «In compliance with the principle of transparency and clarity that characterize the administrative activity, tax assessments not attaching the documents obtained through exchange of information with a foreign tax authority are considered invalid, since that fulfillment is a burden of proof for the Italian tax authority. Consequently, in absence of these documents attached in official copy or in original, the mere “qualified report” of income owned abroad obtained by a foreign tax authority, which does not identify the source and the amount, is not a sufficient presumption to support a tax assessment, since it would impose on the taxpayer a disproportionate burden of proof.».

The approach of domestic Courts on unlawfully obtained information received by other tax authorities (follows)

Italian case law (on the *Falciani list*):

- Tax Court of First Instance of Genoa, Sec. IV, 5 June 2012, no. 193 → the exchange of information concerning data contained in the *Falciani list* is able to successfully ground an Italian tax assessment, since the information has been transmitted by a foreign tax authority: the formally correct exchange of information is able to “heal” the *ab origine* crime;
- In the same sense, see Tax Court of First Instance of Lucca, Sec. IV, 18 July 2012, no. 103; Tax Court of First Instance of Treviso, Sec. V, 28 June 2012, no. 59; Tax Court of First Instance of Treviso, Sec. I, 5 June 2012, no. 64;
- Supreme Court, Tax Chamber, orders of 28 April 2015, no. 8605 and no. 8606 → the data contained in the *Falciani list* may successfully ground a tax assessment.

The approach of domestic Courts on unlawfully obtained information received by other tax authorities (follows)

French case law (on the *Falciani* list):

- Cour d'Appel de Paris, Pôle 5 – Chambre 7, ordonnance 8 February 2011 → information that grounded the tax assessment was *ab origine* stolen, therefore «*obtenues par la commission d'une infraction pénale*». And, in any case, «*la transmission de ces données par le Procureur de la République de Nice à la DNEF au titre de l'article L 101 du LPF est irrégulière puisque cet article vise la communication par l'autorité judiciaire à l'administration des finances de toute indication qu'elle peut recueillir de nature à faire présumer une fraude en matière fiscale*»;
- Cour de Cassation, Chambre Commerciale, Financière et Économique, 31 January 2012, no. 141 (case no. P 11-13.097) → confirmed such approach.

Future perspective on taxpayers' rights protection during mutual administrative assistance

In 2012, the European Commission has drawn a roadmap aimed at achieving efficiency and effectiveness in the enforcement of taxes (*An Action Plan to strengthen the fight against tax fraud and tax evasion, COM(2012) 722 final, Bruxelles, 6 December 2012*), composed by 34 steps, one of which is the creation of “a European taxpayer's code” → *«in order to improve tax compliance, the Commission will compile good administrative practices in Member States to develop a taxpayers' code setting out best practices for enhancing cooperation, trust and confidence between tax administrations and taxpayers, for ensuring greater transparency on the rights and obligations of taxpayers and encouraging a service-oriented approach. [...]*

By improving relations between taxpayers and tax administrations, enhancing transparency of tax rules, reducing the risk of mistakes with potentially severe consequences for taxpayers and encouraging tax compliance, encouraging Member States' administrations to apply a taxpayers' code will help to contribute to more effective tax collection»

Future perspective on taxpayers' rights protection during mutual administrative assistance (follows)

The Guidelines on the “European taxpayer’s code” have been published on **24 November 2016**. Although nothing specifically referable to the exchange of information is contained in such document, certain principles may be applicable in this respect. For example, the Guidelines provide that taxpayers can expect:

- a) at the beginning of or when notified of an audit process, to ask or be informed about their rights and obligations;
- b) tax administrations to communicate to them the character of the tax audit to be informed if the tax administrations review or adapt the overall scope of an audit;
- c) to be able to give information in order to explain and better clarify their position, in accordance with law;
- d) in general, to have the opportunity to discuss the results of the audit before the final report;
- e) tax administrations to communicate clearly to them the conclusions and consequences of a tax audit;
- f) tax administrations to inform them about the possibility to apply for a review of the consequences of a tax audit

→ These general indications, transported in the field of exchange of information procedures, may imply the need that the taxpayer deserves ***notification, consultation and intervention rights***.

The pending *Berlioz Investment* case

Nowadays, the international enforcement of taxpayers' rights – being the regulation *fragmented* among national legislations – may find an international “umbrella” in the field of human rights laid down in the ECHR and in other instruments, such as the Charter of Fundamental Rights of the European Union.

In this respect, it is actually pending before the CJEU a request for a preliminary remark lodged by the Cour administrative Luxembourg, of which is one of the few important rights to tax jurisdiction recognising international exchange of information → Request for a preliminary ruling from the Cour administrative (Luxembourg) lodged on 18 December 2015 – *Berlioz Investment Fund S.A. v Directeur de l'Administration des Contributions Directes* (Case C-682/15)

The pending *Berlioz Investment* case (follows)

- A French company decided to pay a dividend to its Luxembourgish parent company, the Berlioz Investment Fund.
- The French company somehow escaped the withholding tax at source on the dividend paid.
- French tax authorities pointed out that, in order to make the dividend exempt from tax, French law sets down a number of requirements that need to be satisfied. Nevertheless, considering that the French controlled company did not provide any information, the French tax officers could not tell if the requirements of French law were met.
- Request to the Luxembourgish tax authorities concerning the parent company that received the dividend and the percentages of the shares
- According to the post-2014 Luxembourgish legislation, tax authorities wrote to Berlioz requesting its director to provide the information requested by France.
- The director of Berlioz cordially declined to provide such information, remarking that: a) the principle of non-taxation at source was an “EU legal creature” identified by the CJEU from decision in Case 170/05 *Denkavit* onward; b) that information concerning names and addresses of subjects that received the dividend and the percentages of their shareholdings, were irrelevant to any investigation by the French tax authorities.
- The response of the Luxembourgish tax authorities was to apologise and then slap a ‘failure to cooperate’ penalty on the Berlioz Investment Fund of € 250.000
- Following an appeal made by Berlioz, the Luxembourgish administrative court of first instance lowered the fine to € 150.000
- Nevertheless, such decision did not take position on the alleged violation of EU law nor whether the information requested to the taxpayer was effectively relevant to the purpose of the French tax authorities’ investigation

The pending *Berlioz Investment* case (follows)

The six questions referred to the Court:

- 1) Is a Member State implementing EU law and thus rendering the Charter [of Fundamental Rights of the European Union] applicable in accordance with Article 51(1) thereof in a situation such as that in the main proceedings when it imposes an administrative pecuniary penalty on a person on account of that person's alleged failure to fulfil his obligations to cooperate pursuant to an order requiring him to provide information ("information order") made by the competent national authority of that State under national procedural rules introduced for that purpose, in the context of that Member State's execution, in its capacity as the requested State, of a request for exchange of information from another Member State that is based by the latter State, inter alia, on the provisions of Directive 2011/16 on the exchange of information on request?
- 2) In the event that it is established that the Charter is applicable to the present case, can a person rely on Article 47 of the Charter if he takes the view that the aforementioned administrative pecuniary penalty imposed on him is designed to place him under an obligation to provide information in the context of the execution, by the competent authority of the requested Member State of which he is a resident, of a request for information from another Member State for which there is no justification as regards the actual fiscal aim, there being therefore no legitimate aim in the present case, and which is intended to obtain information that has no foreseeable relevance to the tax case concerned?
- 3) In the event that it is established that the Charter is applicable to the present case, does the right to an effective remedy and to a fair trial as laid down by Article 47 of the Charter require – without the possibility of restrictions being imposed under Article 52(1) of the Charter – that the competent national court must have unlimited jurisdiction and accordingly the power to review, at least as a result of an objection, the validity of an information order made by the competent authority of a Member State in the execution of a request for exchange of information submitted by the competent authority of another Member State, inter alia, on the basis of Directive 2011/16 in an action brought by the third party holder of the information, to whom that information order is addressed, such action being directed against a decision imposing an administrative pecuniary penalty for that person's alleged failure to fulfil his obligation to cooperate in the context of the execution of that request?

The pending *Berlioz Investment* case (follows)

- 4) In the event that it is established that the Charter is applicable to the present case, are Articles 1(1) and 5 of Directive 2011/16, in the light, on the one hand, of the parallels with the standard of foreseeable relevance arising out of the OECD Model Tax Convention on Income and on Capital and, on the other, of the principle of sincere cooperation laid down in Article 4 TEU, together forming the objective of Directive 2011/16, to be interpreted as meaning that the foreseeable relevance, in relation to the tax case referred to and to the stated fiscal purpose, of the information sought by one Member State from another Member State constitutes a condition which the request for information must satisfy in order to trigger an obligation on the part of the competent authority of the requested Member State to act on that request, and in order to justify an information order issued to a third party by that authority?
- 5) In the event that it is established that the Charter is applicable to the present case, are the provisions of Article 1(1) in conjunction with Article 5 of Directive 2011/16, and Article 47 of the Charter to be interpreted as precluding a legal provision of a Member State that generally limits the examination by its competent national authority, acting as the authority of the requested State, of the validity of a request for information to a review as to whether the request is in order, and as requiring a national court seised of court proceedings such as those described in the third question above to verify, in the context of those court proceedings, that the condition of foreseeable relevance of the information requested has been satisfied in all its aspects regarding the links to the particular tax case in question, the stated fiscal purpose and compliance with Article 17 of Directive 2011/16?
- 6) In the event that it is established that the Charter is applicable to the present case, does the second paragraph of Article 47 of the Charter preclude a legal provision of a Member State that precludes a request for information made by the competent authority of another Member State from being submitted to the competent national court of the requested State in court proceedings before it such as those described in the third question above; and does it require that document to be produced to the competent national court and access to it to be granted to the third party holding the information, or, indeed, that document to be produced to the national court without access to it being granted to the third party holding the information, owing to the confidential nature of that document, provided that any difficulties caused to the third party by a limitation on his rights are sufficiently counterbalanced by the procedures followed by the competent national court?

Conclusive remarks

- Procedural rules providing mutual assistance have become the real “engine” for making national substantive tax provisions effective abroad
- The positive attempts towards global fiscal transparency and against the abuse of “tax havens” are partially frustrated by new *waves of bilateralism*:
 - a) “Rubik” Agreements;
 - b) Brexit;
 - c) Donald Trump election (e.g. no TTP agreement)
 - d) growing populist and Euro-skeptic movements, which prefer bilateral rather than multilateral instruments
- Taxpayers’ rights protection still remain too vague → economic globalisation has so far not been paralleled by a global recognition of (tax) human rights
 - a) The “commerce” of unlawfully obtained lists containing potential tax evaders is expression of:
 - the failure of legal instruments for tax cooperation;
 - the infringement of taxpayers’ rights, since information illegally collected abroad are “washed”, exchanged and used for tax assessment purposes (*fruit of the poisonous tree doctrine?*)
 - b) Italian Supreme Court no. 38753/2012, no. 8605/2015 and no. 8606/2015 → the data contained in the *Falciani list* may successfully ground a tax assessment;
 - c) Italian Supreme Administrative Court no. 6472/2011 → the taxpayer has no right, during the tax audit, to have access to the *Falciani list*, since it is covered by the tax investigation secrecy

THANK YOU FOR YOUR ATTENTION

AVV. PIETRO MASTELLONE, LL.M. TAX (Amsterdam), Ph.D. (Bergamo), Post-doc (Firenze)

Tax Associate

STUDIO LEGALE CORDEIRO GUERRA & ASSOCIATI

Via De' Bardi, n. 28

50125 Firenze (Italy)

tel.: (+39) 055 2001611 – fax: (+39) 055 2008485

Foro Buonaparte, n. 12

20121 Milano (Italy)

tel.: (+39) 02 76023340 – fax: (+39) 02 76281417

pmastellone@cordeiroguerra.it

www.cordeiroguerra.it



**CORDEIRO GUERRA
& ASSOCIATI**



“Fishing expeditions” and rights of tax payers as regards mutual administrative assistance on tax matters

URÍA
MENÉNDEZ

Luis Viñuales Sebastián

Barcelona, 26 de enero de 2017

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1. International context; OECD standards on transparency and exchange of information
 - Automatic exchange of information; Common Reporting Standard (CRS) 2014
 - (i) 2017 information to be exchanged in 2018
 - (ii) Low value accounts and Entity accounts
 - Exchange of Information on Request (EOIR); Terms of Reference 2016 (ToR)
 - The Global Forum OECD
 - (i) monitoring of compliance by means of peer reviews
 - (ii) black lists of non-cooperative jurisdictions

1. International context; OECD standards on transparency and exchange of information



AEOI: STATUS OF COMMITMENTS (101 jurisdictions have committed)

The table below summarises the intended implementation timelines of the new standard.¹

JURISDICTIONS UNDERTAKING FIRST EXCHANGES BY 2017 (54)
Anguilla, Argentina, Barbados, Belgium, Bermuda, British Virgin Islands, Bulgaria, Cayman Islands, Colombia, Croatia, Curaçao, Cyprus, Czech Republic, Denmark, Estonia, Faroe Islands, Finland, France, Germany, Gibraltar, Greece, Greenland, Guernsey, Hungary, Iceland, India, Ireland, Isle of Man, Italy, Jersey, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, Montserrat, Netherlands, Niue, Norway, Poland, Portugal, Romania, San Marino, Seychelles, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Trinidad and Tobago, Turks and Caicos Islands, United Kingdom
JURISDICTIONS UNDERTAKING FIRST EXCHANGES BY 2018 (47)
Albania, Andorra, Antigua and Barbuda, Aruba, Australia, Austria, The Bahamas, Bahrain, Belize, Brazil, Brunei Darussalam, Canada, Chile, China, Cook Islands, Costa Rica, Dominica, Ghana, Grenada, Hong Kong (China), Indonesia, Israel, Japan, Kuwait, Lebanon, Marshall Islands, Macao (China), Malaysia, Mauritius, Monaco, Nauru, New Zealand, Panama, Qatar, Russia, Saint Kitts and Nevis, Samoa, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Singapore, Sint Maarten, Switzerland, Turkey, United Arab Emirates, Uruguay, Vanuatu

2. Prohibition of random and speculative requests under article 26 of the OECD Model Tax Convention

OECD Commentary on art. 26

- *No obligation of the requested State to provide information in response to requests that are “fishing expeditions”, i.e. speculative requests that have no apparent nexus to an open inquiry or investigation*
- *The standard of “foreseeable relevance” can be met both in cases dealing with:*
 - (i) *one taxpayer (whether identified by name or otherwise); or*
 - (ii) *several taxpayers (whether identified by name or otherwise)*

3. A fine line between fishing expeditions and group requests

- OECD Commentary on art. 26
- *Where the request relates to a group of taxpayers not individually identified, it will often be more difficult to establish that the request is not a fishing expedition.*
 - (i) Detailed description of the group
 - (ii) Facts, circumstances, applicable law
 - (iii) Reasons to believe non-compliance with the law
- *A group request that merely describes the provision of financial services to non-residents and mentions the possibility of non-compliance by the non-resident customers does not meet the standard of foreseeable relevance.*

4. Taxpayers rights and safeguards - OCDE Multilateral Convention on administrative assistance

- *Article 21 – Protection of persons and limits to the obligation to provide assistance*

1 Nothing in this Convention shall affect the rights and safeguards secured to persons by the laws or administrative practice of the requested State.

- Right of appeal and notification procedures. Exceptions:

(i) information request is of a very urgent nature; or

(ii) the notification is likely to undermine the chance of success of the investigation

5. The debatable use of conventions on administrative cooperation to fight tax crimes

- Multilateral OECD. Commentary.

- (i) 10. *The present Convention accordingly covers administrative assistance in all tax matters without prejudice to the general rules and legal provisions governing the rights of defendants and witnesses in judicial proceedings. Exchange of information for criminal tax matters can also be based on bilateral or multilateral treaties on mutual legal assistance (to the extent they also apply to tax crimes), as well as on domestic legislation for the granting of such assistance.*
 - (ii) 279. *Paragraph 7 states that, notwithstanding paragraph 6, for tax matters involving intentional conduct which is liable to prosecution under the criminal laws of the applicant Party, the provisions of this Convention, as amended by the 2010 Protocol, shall have effect from the date of their entry into force in respect of a Party in relation to earlier taxable periods or charges to tax.”*

5. The debatable use of conventions on administrative cooperation to fight tax crimes

- European Convention on Mutual Assistance in Criminal Matters (1959)
 - (i) *Mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party (art. 1).*
 - (ii) Assistance may be refused in cases of fiscal offences (art. 2).
 - (iii) Reservations and dual incrimination as condition precedents for international cooperation (art. 23).

5. The debatable use of conventions on administrative cooperation to fight tax crimes

- Privilege against self-incrimination

- (i) European Convention on Human Rights. Art.6.

- Right of silence/freedom against self incrimination in tax investigations. JB v. Switzerland (2001); Chambaz v. Switzerland (2012).

- (ii) OECD Commentary on art. 26 Model Tax Convention

- A requested State may, therefore, decline to provide information if the requesting State would have been precluded by its own self-incrimination rules from obtaining the information under similar circumstances.*

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