GENERAL REPORT

"NEW EXCHANGE OF INFORMATION VERSUS TAX SOLUTIONS OF EQUIVALENT EFFECT"

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1. BACKGROUND

It is never a rhetoric exercise to take a picture of the metamorphosis that societies have been facing when crossing from the XX century into the XXI era. The background of this research is to share that thanks to technological applications like internet, social networking, tablets, smartphones and credit cards, more information is being collected and stored about us than ever before, and everybody can now do things in prevention (think about health) or action (think about business) by having a large body of information that could not be done when only smaller amounts were available. The collection of information may be defined as "datafication" and it is not the same as digitalization, which takes analog content – books, films, photographs – and converts it into digital information, being the bone of a global digital economy. "Datafication" is a far broader activity: taking all aspects of life and turning them into data. Big data is the result of this activity: large pools of data, captured, communicated, aggregated, stored and analyzed. One example is location. It is always been a matter of information where somebody is resident (or something is situated). But it is only fairly recent that the location of people at all times everywhere in the world – certainly if they are holding a tablet or a smartphone – is "datified". Google is visited every day 2,5 billion times by 500 million users which clicks are automatically "datafied"; its augmented–reality glasses "datafy" the view. Facebook "datafies" relationships with more than 219 billion posted photos, and now also through the 19 billion dollars WhatsApp mobile platform acquisition. Wal-Mart "datafies" more than 1 million transactions per hour, increasing its data bank of 2,5 petabytes (2,5 million of billions of bytes) every year, 167 more times than the US Congress Library. Twitter "datafies" stray thoughts. Linkedin "datafies" professional networks. Financial Institutions "datafy" any money movement. Big data is a polyhedric phenomenon since it is, at the same time, evidence of an increasingly intrusive world into the daily life of human beings and a tool to create transparency, competition and growth. If information is power, big data is the accumulation of power[1].

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[1] For a better comprehension of the big data revolution, see K. Cukier and V. Mayer-Schonberger, *Big Data: A Revolution That Will Transform How We Live, Work and Think*, London, 2013; McKinsey Global Institute, *Big Data: The Next Frontier for Innovation, Competition, and Productivity*, June 2011; M. L. Mueller, *Networks and States, The Global Politics of Internet Governance*, The MIT Press, Cambridge, 2010; as far as the tax field is concerned, see R. van Brederode, *The Impact of Science and Technology on Taxation*, 41 Intertax 12 (2013), p. 633, Journals IBFD, which is based on the research and findings in *Science, Technology and Taxation*, in Series on International Taxation, 40 (Kluwer Law International 2012).

1.1. Adam Smith used to say that the (tax) law, contrary to all ordinary principles of justice, first creates the temptation, and then punishes those who yield to it[2]; well, "datafication" first creates the temptation to secretly manage big data but then is punished since the plurality of private and public interests inevitably brings us to the opposite edge of transparency. Words like "confidential", "strictly confidential", "secret" and "top secret", have been often used to qualify relationships, however they now seem sleeping, together with the word "privacy", in the current vocabulary. In the last James Bond movie "Skyfall", even MI6 is no longer safe.

1.2. There are many ways to approach the topic of "New Exchange of Information versus Tax Solutions of Equivalent Effect"; the easiest is to look at it with the eyes of the most prominent works which have been made during the recent past years. Reference could be made to the EATLP research on "Mutual Assistance and Information Exchange" of 2009 and to the IFA Cahier on "Exchange of Information and Cross-Border Cooperation Between Tax Authorities" of 2013.

1.3. Several issues were already clear at the beginning of the XXI century. The globalization of business has (i) considerably risen the number of tax relevant cross border transactions, as well as (ii) considerably increased the mobility of taxpayers, moving from one country to another, and of their capitals which are more often shifted overseas. The 2008 financial crisis brought clear statements by the Group of Eight (G8, now G7) and Group of Twenty (G20) in favor of fighting international tax fraud and securing tax revenue: a milestone was the G-20 statement at the London summit in April 2009 in order to intensify the pressure on tax havens by publishing a list of tax havens that are not compliant. Furthermore, the package of measures to stabilize the world economy and financial markets agreed upon at the G20 Finance Ministers meeting at the beginning of September 2009 also included the fight against uncooperative behavior regarding the exchange of information in tax matters. The need for academic comment and reflection was great at that time since neither national literature on mutual assistance and information exchange in tax matters as a whole, nor a Europe-wide comparison were available. Four levels of legal bases were individuated: (i) the European level; (ii) the multilateral agreements; (iii) the bilateral agreements; and (iv) the unilateral rules regulating administrative assistance in tax matters[3].

1.4. In 2013 it has been observed that the global evolution of transparency and exchange of information as of 2008 can be compared to the "big bang". As with the creation of the universe, before the concrete results of this initial expansion are seen, a "cooling-off" time is necessary. The general trends on most of the issues were clear but slowly evolving and, among them, new methods of cooperation, such as joint audits examinations, the "Rubik agreements" of Switzerland and the Foreign Accounts Tax Compliance Act (FATCA) of the United States, seemed to emerge as a prioritization by States rather than by International Organizations. Even though they were not widely applied at that moment, these forms of cooperation were skeptically accepted and were being implemented in many States. The level of acquiescence was slightly

[2] See A. Smith, *The Inquiry into the Nature and Causes of the Wealth of Nations*, (1776), reprinted by The Electronic Classic Series of the Pennsylvania State University (2005), pag. 677.

[3] R. Seer and I. Gabert (General Reporters), *Mutual Assistance and Information Exchange*, EATLP International Tax Series, vol. 8, 2010, pag. 24; also R. Seer and I. Gabert, *European and International Tax Cooperation: Legal Basis, Practice, Burden of Proof, Legal Protection and Requirements*, 65 Bulletin for International Taxation 2 (2011), pag. 88.

lower with regard to the current domestic practice. While some States have already adopted or were considering to adopt similar mechanisms, a general trend did not yet emerge on this matter[4]. However, at the same time these observations were being made, on 20th July 2013 the G20 Finance Ministers and Central Bank Governors endorsed the OECD proposals for a global model of automatic exchange on information (AEOI) in the multilateral context. On 6th September 2013 the G20 leaders reinforced this message and said: "Calling on all other jurisdictions to join us by the earliest possible date, we are committed to automatic exchange of information as the new global standard, which must ensure confidentiality and the proper use of information exchanged, and we fully support the OECD work with G20 countries aimed at presenting such a single global standard for automatic exchange by February 2014 and to finalizing technical modalities of effective automatic exchange by mid-2014". They also asked the Global Forum to establish a mechanism to monitor and review the implementation of the new global standard on automatic exchange of information and stressed the importance of developing countries being able to benefit from a more transparent international tax system.

1.5. 2013 is just behind the corner but looks like a century ago in this field, so another way to look at this topic is to describe the present time. In this respect, first of all, the feeling is that today the words "mutual assistance" are leaving the floor to the more stringent single term "cooperation". FATCA, which was aimed at ensuring that the US Internal Revenue Service could identify and collect the appropriate tax from US persons holding financial assets outside the United States, is now a cooperative tool in the hands of many European States to stay into the wave of getting from the rest of the world as much automatic information as possible on their own resident taxpayers from foreign financial institutions (FFIs). What kind of automatic information or, better, how deep the automatic information should be, is of course the question mark, and the clear feeling on this matter is that the Anti Money Laundering and Financing the Terrorism legislation approach to "Know Your Client" (AML/KYC) is overriding any imputation of income and assets according to traditional tax law principles. At the same time, nevertheless, as demonstrated already by the 2010 comparative analysis, guidance and policy advice of the OECD on offshore voluntary disclosure programs put in place by each single country playing in the International tax chessboard, unilateral mechanisms are always taken into account to enable non-compliant taxpayers to declare income and wealth that they have kept secret in the past by means of taking advantage of strict bank secrecy jurisdictions. And when voluntary disclosures and/or whistleblower programs are exhausted, then bilateral initiatives may take place like the Rubik style agreements that Switzerland and Liechtenstein have negotiated with several European countries. All these alternatives are officially in the tax policy agenda of many States, inside and outside the European Union. Tax policies seem to melt medium long term sticks with short term carrots[5].

[4] X. Oberson (General Reporter), *Exchange of Information and Cross-Border Cooperation Between Tax Authorities*, vol. 98b, Cahiers de droit fiscal international, International Fiscal Association, 2013, pag. 56.

[5] See A. Wanyana Oguttu, *A Critique on the Effectiveness of "Exchange of Information on Tax Matters" in Preventing Tax Avoidance and Evasion: A South African Perspective*, 68 Bulletin for International Taxation 1 (2014), pag. 1; A. G. Soriano, *Toward an Automatic but Asymmetric Exchange of Tax Information: the US Foreign Account Tax Compliance Act (FATCA) as Inflection Point*, 40 Intertax 10 (2012), pag. 540.

1.6. Last but not least, the challenging side of the research is to imagine the consequences of the going tax transparency in the future[6]. Two issues at stake. The first is related to the relation between unilateralism and cooperation, since the latter means to share the revenue related to "datafication" with other members of the International Community, while any unilateral initiative brings money straight to the domestic revenue. As "The Leopard" of Giuseppe Tomasi di Lampedusa warns, everything must change because everything remains as it is[7], and the feeling is that this ocean of information, cooperation and recommendation, risks to be useless in the long run or, better, could only be useful for large but not all taxpayers. The second has to do with the other face of transparency being the privacy. In principle, the United States and Europe have different views on what privacy means. While in the United States privacy is meant as the right of a consumer to know how and where his personal data are being held, and must be balanced with the interests of the business sector and the society as a whole, in Europe privacy is prominently a matter of dignity of the human being, hence a fundamental right of citizens within the society. So far, automatic exchange of tax information is an example of the growing State control on "datafication", like a fuel for impenetrable State authoritarianism, the need of future investigation is more perceived on the individual as taxpayer rather than on the individual as consumer. The confirmation of this feeling is the independent commission of international policy makers and politicians which has been unveiled at the World Economic Forum in Davos last January 2014 in order to open a two-year investigation into the way governments use technological applications with the scope to help lay down rules to protect online citizen rights more than consumers rights. The mission in this future scenario is probably to analyze how far supranational rules governing big data are being democratically developed, with the scope to go beyond the proportionality principle and tail some sustainable protection rules for the taxpayer.

1.7. The aim of the General Report is to lift the veil of hypocrisy which rolls up this argument, by mirroring the national reports which were prepared on the basis of a questionnaire, and to give a survey of the similarities and differences among the various topics concerned.

2. <u>The sources of the exchange of information system in European countries and the US</u>

There is still a common denominator with the researches made in 2009 by the EATLP and in 2013 by the IFA: it is the matrix of legal platforms involved with the exchange of information, whether national, international and European, and the extraordinary explosion of legal instruments dealing with the exchange of information. In theory this gives rise to hierarchies, concurrences and overlapping which need yet to be analyzed and solved. In practice, the effective use of these legal instruments must be understood to share information with the idea to reach their simplification.

[6] See J. Owens, *Tax Transparency: The "Full Monthy"*, 68 Bulletin for International Taxation 9 (2014), pag. 512; J. Owens, *The Role of Tax Administrations in the Current Political Climate*, 67 Bulletin for International Taxation 3 (2013), pag. 156; M. T. Soler Roch, *Forum: Tax Administration Versus Taxpayer – A New Deal ?*, 4 World Tax Journal 3 (2012), pag. 282; J. Owens, *Moving Towards Better Transparency and Exchange of Information in Tax Matters*, 63 Bulletin for International Taxation, 11 (2009), pag. 557.

[7] See G. Tomasi di Lampedusa, *The Leopard*, New York, 2007, originally published in Italy as *Il Gattopardo*, Milano, 1958.

2.1. As far as the international legal base is concerned, exchange of information comes in different forms and includes exchange upon request, spontaneous information exchange and automatic exchange of information. The OECD has a long history of working on all forms of information exchange and Article 26 of the OECD Model Tax Convention (MTC) provides a basis for all three forms of information exchange with the scope to cover all tax matters without prejudice to the general rules and legal provisions governing the rights of defendants and witnesses in judicial proceedings. The OECD's work on exchange upon request and the more recent peer review work of the Global Forum on Transparency and Exchange of Information are well known. Based on these works, Article 26 of the OECD MTC was first updated in July 2005 when paragraphs 4 and 5 were added. They now make clear that a State cannot refuse a request for information solely because it has no domestic tax interest in the information (paragraph 4) or solely because it is held by a bank or other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interest in a person (paragraph 5). Then, in July 2012 an amendment to paragraph 2 specified that information received by a Contracting State may be used for other purposes (for example, may be remitted by the tax authorities to other law enforcement agencies and judicial authorities for high priority matters like money laundering, corruption and terrorism financing) when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorizes such use. At the same time, the Commentary was updated with regard to the interpretation of the standard of "foreseeable relevance" and the term "fishing expeditions" with respect to a group of taxpayers not individually identified. Almost all national reports (Czech Republic, Finland, France, Hungary, Italy, Netherlands, Norway, Poland, Portugal, Spain, UK) have shown an unprecedented evolution of their tax treaty network with the latest version of Art. 26 of the OECD Model Tax Convention (MTC), whether by negotiating a new treaty or by signing a protocol to the existing treaty. From a Swedish perspective, a reference to Art. 26, paragraph 5, is not necessary since Swedish domestic law already allows for that. Surprisingly enough, two exceptions are represented by Germany and the United States. Finally, from a tax policy point of view, it must be emphasized the turnaround made on March 13, 2009, by Austria, Belgium, Luxembourg and Switzerland who withdrew their reservations on Art. 26.

2.2. If Art. 26 is living a rapid evolution, the same does not seem to be true for Art. 27 related to the assistance in the collection of taxes which is a possible step forward of the exchange of information. Many European countries rarely have this Article in their treaty network (Czech Republic, Finland, Germany, Hungary, Luxembourg, Netherlands, Poland, Portugal, Spain, Sweden, United Kingdom), Switzerland only provides limited assistance in the notification of tax decisions in the treaty with Austria and France, the United States have Art. 27 in less than half of its treaties and, if it is included, its wording is different from that of the OECD MTC, as it is true for countries like Austria, France, and Italy.

2.3. Meanwhile, the OECD has been continuing to develop instruments which provide a legal framework for exchange of information, a charming one being the Tax Information Exchange Agreement (TIEA) of 2002, which gave a boost to relationships with non-cooperative countries as of 2009, when the London G20 summit of 2 April 2009 imposed them at least 12 TIEAs with member countries in order to appear on the white list. Just like Art. 26(1) of the OECD Model, Art. 5(1) of the OECD TIEA provides for information exchange for both civil and criminal tax matters irrespective of whether or not the conduct being investigated would also constitute a crime under the laws of the requested party. By June 2013, over 800 TIEAs have been signed, and among European countries, the longest lists, with more than 30 TIEAs, belong

to Finland, France, Germany, Netherlands, Sweden, as well as to the United States. It is worth noting the policy followed by Nordic countries (Denmark, Faroe Islands and Greenland, Finland, Iceland, Norway and Sweden) of recognizing each other any TIEA successfully negotiated by one of them with a tax haven. The impression is that although the OECD considers the signing of TIEAs as a key policy instrument in the fight against tax evasion, there is little evidence about their quality, more than quantity, effectiveness[8].

2.4. A strange destiny is related to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (OECD Mutual Assistance Convention) put forward by the OECD in cooperation with the Council of Europe, which opened for signature by member states of both organizations on 25 January 1988. The Convention is the most comprehensive multilateral instrument available for all forms of tax cooperation to tackle tax evasion and avoidance, a top priority for all countries.This sleeping beauty was amended on 31st March 2010, to respond to the call of the G20 at its April 2009 London summit to align it to the international standard on exchange of information upon request and to open it to all countries, in particular to ensure that developing countries could benefit from the new more transparent environment. Since then the G20 has consistently encouraged countries to sign the Convention including most recently at the meeting of the G20 Leaders summit in September 2013 where the declaration stated "We call on all countries to join the Multilateral Convention on Mutual Administrative Assistance in tax Matters without further delay"[9]. However, its media turnaround was when Switzerland signed it with no reservation on 15th October 2013. Currently over 60 countries have signed the Convention and it has been extended to over 10 jurisdictions. This represents a wide range of countries including all G20 countries, all BRICS, almost all OECD countries, major financial centers and a growing number of developing countries. The Convention has now taken an increasing importance with the G20's recent call for automatic exchange of information to become the new international tax standard of exchange of information. Beside the United States, European countries that have signed the Convention as amended by the Protocol of 2010 are Austria, Czech Republic, Italy, France, Germany, Netherlands, Portugal, Spain. Again it is worth noting that Nordic countries have a multilateral agreement on mutual administrative assistance which is similar to that of OECD and Council of Europe.

2.5. The Global Forum on Transparency and Exchange of Information for Tax Purposes was profoundly restructured in 2009 following the call from the G20 to ensure a rapid implementation of the standards through the establishment of a rigorous and comprehensive peer review process in two steps. During the first phase, an examination is conducted to check whether the legal instruments for the exchange of information are in place or they are just a collection. The second phase focuses on checking the effectiveness and efficiency of the exchange of information. The analysis of the national reports on this issue supports the feeling that this due diligence has created the conditions to accelerate many domestic changes in the field. Beside the Progress Report to the G20 leaders, "Global Forum Update on Effectiveness and On-going Monitoring", released in September 2013, it is worth noting that reports of Austria, Belgium, Czech Republic, Italy, France, Netherlands, Portugal, and Spain, made clearly reference to their peer

[8] See A. G. Soriano, cit. at note 5, pag. 542; also, J. G. Gravelle, *Tax Havens: International Tax Avoidance and Evasion*, Congressional Research Service, Library of Congress, 2009, pag. 22; T. Anamourlis and L. Nethercott, *An Overview of Tax Information Exchange Agreements and Bank Secrecy*, 63 Bulletin for International Taxation 12 (2009), pag. 616.

[9] See R. S. Avi-Yonah and G. Savir, *IGA vs. MAATM: Has Tax Bilateralism Outlived Its Usefulness?*, Public Law and Legal Theory Research Paper Series (Paper n. 384), Law & Economics Research Paper Series (Paper n. 14-002), February 2014, pag. 9.

reviews specifying the suggestions released by the auditors: i.e. (i) amendments to the wording of the exchange of information provisions (Austria); (ii) cutting the delays in the ratification of treaties (Belgium); (iii) eliminating the availability of bearer shares (Czech Republic); (iv) cutting the delays caused in the notification procedure as well as improving the identity information concerning the limited partners in fiscally transparent limited partnerships (Netherlands); and (v) improving the exchange of information network to international standards (i.e. implementing a system for advising requesting jurisdictions of the status of their request when the competent authority is not in a position to respond within 90 days) (Spain). Concerning the automatic exchange of information, the Finance Ministers and Central Banks stated in July 2013 that they are committed to it as the new, global standard and expect the Global Forum to establish a mechanism to monitor and review the implementation of the standard as well as to draw on the work of the FATF in connection with beneficial ownership[10].

2.6. Last but not least in the collection list is the adherence to the OECD Model Agreement for the Undertaking of Simultaneous Tax Examinations through which two tax administrations examine simultaneously and independently, each on its own territory, the taxation affairs of taxpayers in which they have a common or related interest, with a view to exchanging any relevant information which they so obtain. There is no homogeneity in this case among national reports, only few countries indeed seem to appreciate such possibility, and with legal instruments other than the OECD recommendation. For example, the Czech Republic has concluded 14 "Memorandum of Understandings" which enable the automatic information exchange and simultaneous tax examinations (with Slovak Republic, Hungary, Estonia, Denmark, Sweden, Lithuania, Latvia, Belgium, Canada, Netherlands, Germany, Australia, Portugal and Spain), while Italy has signed administrative agreements for the exchange of information and the undertaking of simultaneous tax examinations with 10 EU members, plus US and Australia.

3. The administrative cooperation in tax matters under EU law and its domestic implementation in European countries: for good and evil

The "big bang" at European level is represented by the adoption of Council Directives 2011/16/EU of 15 February 2011, on "administrative cooperation in the field of taxation and repealing Directive 77/799/EEC" (hereinafter DAC), which aim is to propose a new approach in order to overcome the negative effects of an ever-increasing globalization on the internal market. It is worth noting that the DAC makes reference to an "administrative cooperation" in the field of taxation which is coherent with Art. 197 of the Treaty on the Functioning of the European Union, while the repealed Directive 77/799/EEC was only concerning a "mutual assistance" by the competent authorities of the Member States in the field of direct taxation, which had consequences in terms of inefficiency and delays in communication, as if there were Chinese walls among tax administrations. Indeed, as clearly stated by the past EATLP research focusing on the previous standing framework, deficiencies in language and knowledge as well as a distrust of tax authorities and an "anti-mutual assistance mood", have been affecting Member States in their tax relationships. The hope for a more direct contact between Member States' local or national tax offices with communication between central liaison offices being the rule, is well explained in Preamble n. 8 and has an intrinsic value going beyond any technical improvement introduced by the new Directive. It is indeed obvious that

[10] See also A. Cracea, *OECD Actions to Counter Tax Evasion and Tax Avoidance (2013): Base Erosion and Profit Shifting and the Proposed Action Plan, Aggressive Tax Planning Based on After-Tax Hedging and Automatic Exchange of Information as the New Standard*, 53 European Taxation 11 (2013), pag. 565.

language skills, standardized electronic forms, clear office responses and the real practice of reciprocity, are important human and administrative preconditions for any effective cross border tax relationship. To this extent, while at present time the "administrative cooperation" is the right terminology to solve the described negative mood of the "mutual assistance", the future terminology to solve the possible obsolescence of this Directive will likely be "administrative integration". So far, from "mutual assistance" to "administrative integration" passing through "administrative cooperation".

3.1. The DAC is under many aspects revolutionary. First of all, it is designed to follow a more intrusive mechanism for the collection of tax information other than VAT, custom and excise duties, allowing rules that make possible to cover all legal and natural persons in the European Union, taking into account the ever-increasing range of legal arrangements, including not only traditional arrangements such as trusts, foundations and investment funds, but any new instruments which may be set up by taxpayers in the Member States (Art. 3). Second, Member States could not refuse to transmit information because they have no domestic interest or because the information is held by a bank, any other financial institution, nominee or person acting in an agency or fiduciary capacity or because it relates to ownership interests in a person (Art. 18). Third, time limits are laid down in order to ensure that the information exchange is timely and thus effective. Last but not least, among the classical alternatives, it is expressly recognized that the mandatory automatic exchange of information without preconditions is the most effective means of enhancing the correct assessment of taxes in cross border situations and of fighting fraud. To this extent, Art. 8 imposes the automatic exchange of available information (AEOI), from the Member State of source to the Member State of residence, regarding taxable periods as from 1st January 2014, on five initial categories of income and capital: a) income from employment; b) director's fees; c) life insurance products not covered by other Union legal instruments on exchange of information and other similar measures; d) pensions; and, e) ownership of and income from immovable property.

3.2. The analysis of national reports coming from most of EU Member States involved (Austria, Belgium, Czech Republic, Finland, France, Germany, Hungary, Poland, Portugal, Spain, Sweden, UK) shows a clear homogeneity in the implementation process of DAC contents. Nevertheless, few observations must be pointed out: i) Italy at February 2014 has not yet adopted the above mentioned EU law; 2) Luxembourg has opted to apply initially the automatic exchange of information on three categories out of the five listed by Art. 8(1), namely employment income, pensions and directors' fees; consequently, bank data are not falling under the European data flows until at least 2017; 3) Netherlands will not exchange information automatically with a Member State which has informed the European Commission about any single category in respect of which it has information available. It is also worth noting that the Russian Federation participates in the process of economic integration within the framework of the Custom Union and the Eurasian Economic Community (EurAsEC) which level of administrative cooperation in the tax field may be compared with that of the European Union.

3.3. Notwithstanding DAC entered just into force the 1st January 2013, after few months, the 12th June 2013, the European Commission released a proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory AEOI in the field of taxation on dividends, capital gains, any other income generated with respect to the assets held in a financial account, any amount with respect to which the financial institution is the creditor or the debtor, including any redemption payments, and account balances (COM(2013) 348 final). Many events indeed occurred in a very short period of time. On 6th

December 2012, the EU Commission presented an Action Plan to strengthen the fight against tax fraud and tax evasion. This Action Plan highlights the need to promote AEOI as the European and international standard of transparency and exchange of information in tax matters. On 14 May 2013, the ECOFIN Council adopted conclusions welcoming the work by the Commission on developing measures to combat tax fraud, tax evasion and aggressive tax planning and recognizing the useful role the Commission Action Plan can play in this regard. On 22 May 2013 the European Council went even further, requesting the extension of AEOI at EU and global levels with a view to fight against tax fraud, tax evasion and aggressive tax planning. On that occasion, the Commission committed itself to proposing amendments to DAC in June 2013 in order to expand the scope of AEOI, in anticipation of the revision of DAC already foreseen for 2017. Certainly, the agreements that many governments have concluded or will conclude with the US as regards the US Foreign Account Tax Compliance Act (FATCA) have given further impetus to AEOI as a way of combating tax fraud and evasion. An expanded AEOI, indeed, would remove the need and incentive for EU Member States to invoke the “most-favored-nation” provision of Art. 19 of DAC, with a view to concluding bilateral or multilateral agreements that may be considered appropriate on the same subject in the absence of relevant Union legislation, but which could lead to difficulties for economic operators, if not to distortions and artificial flows of capital within the internal market.

3.3. In conclusion, behind DAC implementation in each Member State, there are going to be huge investments in information technology which costs will probably be shifted to the society. Indeed, it will never be possible to fulfill within the scope of the DAC without the reinforcement of domestic data banks collecting information being then used both for domestic and cross border assessments and/or investigations. In this respect, the role of the Assets Recovery Offices (AROs) which were imposed to all Member States with Council Decision 2007/845/JHA, should not be underestimated. The need of national central contact points to exchange information and best practices for the purposes of: (i) the facilitation of the tracing and identification of proceeds of crime and other crime related property which may become the object of a freezing; (ii) the seizure or confiscation order made by a competent judicial authority in the course of criminal or civil proceedings. While few Member States do not seem to have yet established an office (to be precise, there is little or no evidence in the national reports of Belgium, Czech Republic, Finland, France, Germany, Luxembourg, Poland, Portugal and Sweden), in the majority of them there are relevant differences in the structures, powers and access to information. For example, Austria designated the Federal Criminal Police Office (Bundeskriminalamt – Referat “Vermogensabschopfung”); Hungary designated the National Investigation Office (NemzetiNymozòIroda) being part of the Police Reserve Force (Készenléti Rendorseg); Italy indicated the Ministry of Justice, the International Police Cooperation Service and the Financial Information Unit; Netherlands designated the Criminal Assets Deprivation Bureau of the Prosecution Service (Bureau Ontnemingswetgeving Openbaar Ministerie); Spain has the Financial Ownership File (Fichero de Titularidades Financieras) under the responsibility of the Ministry of Economy while the Executive Service of the Spanish Commission of Prevention of Money Laundering and Monetary Infractions (SEPBLAC) is in charge of data processing; the United Kingdom designated the Financial Intelligence Unit which also processes non EU requests including the Egmont Group requests and Camden Assets Recovery Interagency Network (CARIN) channels. Nevertheless, according to the EU Commission report on AROs of last 12 April 2011 (IP/11/464), cross border requests for asset tracing have increased and information is usually provided within the given time limits (from 8 hours to 2 weeks in the UK). AROs are facing a number of common challenges, in particular regarding their capacity to access relevant financial information. By taking additional measures to equip AROs with the necessary resources, powers and training, Member States would enhance cooperation at EU level, enabling an even faster EU wide tracing of

assets derived from crime. At the very end, when each single Member State will dispose of a data bank compliant at European standards, it will probably be easier to build up one central data bank which will be fueled with information coming from local sources. In several national reports this idea is well coming out.

4. **<u>The collection and exchange of information under anti money laundering legislation: a real solution or just a new threat ?</u>**

Everything started after the 9/11 attacks when President Bush signed into law the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism of 2001", better known as the USA PATRIOT Act. In particular, Title III has designed the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 containing provisions to financial institutions for the identification of terrorists through an information compliance on anyone using US jurisdictional means (as any dollar denominated transaction could be). In theory, the PATRIOT ACT was the perfect tool to obtain significant information on beneficial owners being terrorists, from foreign institutions without the need of making a request of information in light of any bilateral treaty. In practice, it is the perfect tool to get as much information as possible on beneficial owners. By reading the US national report, there is clearly a link between the USA PATRIOT Act and the "Qualified Intermediary" policy first, and with the FATCA strategy afterwards. As a perfect tsunami, this initiative expanded all over the civilized world, for example, in Europe, where Directives 2005/60/EC of 26 October 2005, and 2006/70/EC of 1st August 2006, on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, provided for strong customer due diligence obligations on a large variety of intermediaries and professionals with the scope to intercept the "beneficial owner as the natural person(s) who ultimately owns or controls the customer and/or the natural person on whose behalf a transaction or activity is being conducted". Each single EU Member State must form a Financial Intelligence Unit (FIU) which has the power: (i) to control intermediaries and professionals in their customer due diligence obligations; (ii) to collect information on the above defined "beneficial owners"; (iii) to cooperate and exchange information with FIUs of other EU Member States. Since the area of the "beneficial owner" definition or, alternatively, the Know Your Client (KYC) approach, under the AML is by far larger than any "beneficial owner" perimeter under tax law principles, the level of information obtained is much broader and intrusive and could lead to problems in terms of taxpayers protection rights. It must be pointed out an everything but homogeneous approach in "beneficial owner" definitions which could have consequences in the correct flow of information.

4.1. The above tsunami wave is clear in the national reports: every single country involved does have an Anti-Money Laundering legislation (AML) and related organization. It is worth noting that for all countries concerned, AML is in essence a criminal law providing limitations to the individual freedom both on the side of intermediaries and professionals as well as on the side of beneficial owners (in this latter case either for money laundering tax related crimes, i.e. aggressive tax avoidance, tax evasion and fraud, or, in some cases, for the so called "self-money laundering"). The sole exception is with Switzerland who, as a member of Financial Action Task Force (FAFTF), has agreed on the principle that serious tax crimes become a predicate of money laundering. However, under current Swiss domestic law, tax fraud is still characterized as a minor crime and therefore cannot be an initial crime subject to AML rules. A pre-draft federal law has been submitted by the Federal Council, under which a new "qualified tax fraud" concept would be introduced when: 1) a tax evasion of at least 600.000 CHF of taxable amount is committed, and 2) such tax evasion

consists either: (i) of an astute behavior designed to deceit the tax authorities, or (ii) is realized by using false, falsified, or inaccurate official documents (such as books of accounts, profit and loss accounts, certificate of salary, or official certifications of third parties).

4.2. A very delicate issue coming from the general overview is that entities indicated to assemble and manage the information coming from AML sources (the Financial Intelligence Units or similar names) are administrative bodies which at the same time may respond to the public prosecutor as well as to the tax administration. For example, this is what happens in Belgium where the FIU is an independent administrative body with legal personality, supervised by the Ministers of Justice and Finance with the scope of handling suspicious financial facts and transactions related to money laundering and financing terrorism, which are reported by persons and firms designated by law. The interaction with the Belgian special tax inspection and with the public prosecutor has been increasing during the last three years. In the Czech Republic where information collected by the local FIU can be used both for administrative tax assessments and criminal tax investigations, although there are no special provisions or cases relating to the definition or identification of natural persons defined as "beneficial owner"; moreover the law of the Czech Republic does not recognize the relevant types of entities based on the Anglo-American law as trusts or partnerships. In France the mission of TRACFIN (Treatment of Intelligence and Action Against the Illegal Financial Circuits), being the French administrative AML authority, is to collect information on clandestine financial circuits and money laundering, to treat those information, to analyze them and to transmit them to other authorities. The information collected by TRACFIN may be exchanged and used both for administrative tax assessments and criminal tax investigations on the natural person defined as "beneficial owner" under AML. Under the Italian system the Unità di Informazione Finanziaria (FIU) is in charge of collecting AML information to pass to the criminal prosecutor as well as to the Guardia di Finanza (Tax Police) and to the Agenzia delle Entrate. The Dutch Fiscal Intelligence Unit collects information which can be used in principle in proceedings concerning administrative or penal sanctions, unless the use of such information would be contrary to what one should expect from a fair government to such an extent that such use is impermissible under any circumstance (this is the case if government officials have paid for information which was clearly obtained illegally in another country). In Poland, the General Inspector of Fiscal Information, supported by a unit of the Ministry of Finance-Department of Fiscal Information, pass relevant information to public authorities competent to instigate criminal proceedings and hands over the same information with a view of increasing the effectiveness of tax law enforcement. In Russia, banks, insurance organizations, and communication agencies should cooperate with the Federal Service of Financial Monitoring (Rosnifinmonitoring) acting as FIU and forwarding information to the tax authority. The Spanish system, besides the Financial Ownership File (Fichero de Titularidades Financieras, FTF) still not in force, provides the Executive Service of the Spanish Commission of Prevention of Money Laundering and Monetary Infractions (SEPBLAC) which is in charge of data processing for the benefit of any other national authority (i.e. the General Council of the Judiciary, in the Public Prosecutor's Office, the State Security Forces and the Spanish Internal Revenue Service) under the principle of cooperation between public administrations. In the UK system Her Majesty's Treasury (HMT) is the leading AML authority and is responsible for implementing the money laundering directives. HMT is the UK's Financial Action Tax Force (FATF) representative and has Her Majesty's Commissioners for Revenue and Customs (HMRC) as collector of information from taxpayers data, cross government data, other jurisdiction data and third party data, credit reference data, whistle-blower data and merchant acquirers data under Finance Act (FA) 2013.

4.3. On the other hand, there are countries where the use of information collected from AML authorities cannot be passed to tax authorities. This is the case of Austria where a discussion started as to what extent the collected data may be used in tax proceedings in presence of several provisions dealing with the inadmissibility of evidence gained from such data. According to these laws, data collected by the local FIU must not be used to the disadvantage of the accused or suspected defendant or any third party involved in criminal tax law proceedings carried out exclusively on grounds of fiscal offences, other than severe fiscal offences (i.e. smuggling or evasion of import or export duties). The same happens in Finland where under current legislation the information is not accessible for the Finnish Tax Administration (FTA) for tax purposes, maybe sometime in the future. Consequently, the powers vested in the Financial Intelligence Unit do not as such hazard the taxpayers' right to privacy. In Germany it is discussed whether these rules are in accordance with the right to informational self-determination and the principle of proportionality if the information is collected for AML reasons but used for purely tax reasons. In Hungary the local FIU forwards its reports to the investigating authority, the public prosecutor, the national security service as well as foreign FIUs in order to investigate on criminal offences. In Luxembourg, concepts and objectives in KYC and tax legislation are totally different, there exists no scope for any domestic information exchange between the units dealing with AML and tax authorities, not even in case of tax fraud. Last but not least, Sweden where information collected under AML can be used both for administrative tax assessments and criminal tax investigations regarding natural persons defined as "beneficial owners". In practice, however, it is difficult to pass the information on to other authorities, such as the Swedish Tax Authority, since the information is not efficiently collected in an electronic database. Improved databases are however under development, under the names of STUK and Cabra.

4.4. AML is essentially a criminal law aiming to restore the breach of a social equilibrium and its powers of investigation need to be much more intrusive than the powers of a simple tax assessment. On the other hand, since the use of these powers may ultimately deprive individuals of their freedom with the scope to be reeducated, they should be balanced with appropriate protection rights for the same individuals whose freedom might be jeopardized when under investigation. At the present time, the European Court of Justice in the Jyske case stated that legislation which requires credit institutions to communicate information, for the purpose of combating money laundering and terrorist financing, directly to the FIU of the Member State where those institutions carry out their activities is appropriate to achieving the above-mentioned aim. Furthermore, almost all national reports indicate that there is no breach of Art. 8 of the European Convention of Human Rights relating to the right to respect for private a family life, with the exception of Russia where operations of individuals, in regard to whom there is information of their involvement in extremist activity or money laundering, have to be blocked. For this it is necessary to communicate the list of such persons and their identifications to all the organizations performing operations with money and property. For this purpose the list of such persons becomes public and is put on the web page of the Rosfinmonitoring, all the organizations performing operations with money laundering and property have to take it into account. In the Polish report it is emphasized that the AML costs for the financial institutions, which shall be a burden for their clients, may result in an obstacle for a free flow of assets, services and people, while in the Spanish report it is envisaged the possibility that an individual's right to privacy might be affected by Spanish legislation on money laundering, therefore it will be necessary to carry out an analysis of proportionality in each case between the extent of the right to privacy and the public interest inherent in the fight against money laundering.

4.5. One final point of further investigation is the possible confusion between administrative cooperation in tax matters (less intrusive information balanced with less taxpayer protection) and the judiciary cooperation in tax matters (more intrusive information balanced with more taxpayer protection). The additional role of FIUs with reference to AML/KYC definitions which are not at all homogeneous all over European Member States may indeed contribute to this overlapping with the consequence to have an explosive cocktail of more intrusive information and less taxpayer protection. Also policy statements may contribute this confusion. The EU Commission Action Plan to strengthen the fight against tax fraud and tax evasion of 6th December 2012 (COM(2012) 722 final) states at point 18 that the Commission is considering to explicitly mention tax crimes as predicate offences to money laundering, in line with the 2012 recommendations of the Financial Action Task Force – FATF. This is said to facilitate the cooperation between tax authorities and judicial and financial supervisory authorities in order to tackle serious infringements of tax law. The enhancement of the AML customer due diligence procedures as well as increased transparency of beneficial ownership information collected for AML purposes within the framework of the review of the AMLD could also facilitate the use of relevant data for taxation purposes, e.g. to improve the effectiveness of the treatment of offshore investment structures under the EU savings taxation Directive. In addition, cooperation could be further facilitated by an EU-wide harmonization of the money laundering offence, its definition and related sanctions. Also the Resolution 21st May 2013 of the EU Parliament on the Fight against Tax Fraud, Tax Evasion and Tax Havens (2013/2060(INI)) calls, at point 29, on the proposal for a revision of the AML Directive to be complemented by introducing the obligation to create publically available government registers of the beneficial ownership of companies, trusts, foundations and other similar legal structures, but nothing is said about the above mentioned risk. Not even DAC contributes to solve this fear since, according to Art. 1, paragraph 3, it shall not affect the application in the Member States of the rules on mutual assistance in criminal matters. It shall also be without prejudice to the fulfillment of any obligations of the Member States in relation to wider administrative cooperation ensuing from other legal instruments, including bilateral or multilateral agreements.

5. <u>The exchange of information system in practice: numbers please…</u>

Surprisingly enough this time a lot of numbers are coming out from national reports. It is not yet possible to express an homogeneous appreciation on how the numbers are classified, nevertheless the transparency is arriving on the side of tax administrations as well. Here the most updated indications.

Automatic Exchange of information

	COUNTRY	INCOMING	OUTGOING
1	**Austria**	25	0
2	**Belgium*** **	660.000	1.330.000
3	**Czech Republic***	35.500	68.075
4	**Denmark**		
5	**Finland**	n.a.	n.a.
6	**France**	n.a.	2.000.000
7	**Germany****	1.174.053	565.999
8	**Greece**		
9	**Hungary**	n.a.	n.a.
10	**Italy**	n.a.	n.a.
11	**Luxembourg**	n.a.	n.a.
12	**Netherlands**	283.034	157.296
13	**Norway**		
14	**Poland**	n.a.	n.a.
15	**Portugal**	100.635	715.985
16	**Russia**		
17	**Spain**	n.a.	n.a.
18	**Sweden****	750.000	2.000.000
19	**Switzerland**	n.a.	n.a.
20	**Turkey**		
21	**UK**		
22	US		

*2011
**2012
***Avarage on period 2007-2009

Spontaneous Exchange of information

	COUNTRY	INCOMING	OUTGOING
1	**Austria**	n.a.	n.a.
2	**Belgium****	121	103
3	**Czech Republic**	n.a.	n.a.
4	**Denmark**		
5	**Finland**	n.a.	n.a.
6	**France**	n.a.	n.a.
7	**Germany****	307	1.781
8	**Greece**		
9	**Hungary**	n.a.	n.a.
10	**Italy*****	n.a.	200
11	**Luxembourg**	n.a.	n.a.
12	**Netherlands**	22.729	3.013
13	**Norway**		
14	**Poland**	n.a.	n.a.
15	**Portugal****	252	219
16	**Russia**		
17	**Spain****	n.a.	n.a.
18	**Sweden*******	1.500	1.100
19	**Switzerland**	n.a.	n.a.
20	**Turkey**		
21	**UK**		

22	**US**		

*2011
**2012
***Avarage on period 2007-2009
****2010

Exchange of information uponrequest

	COUNTRY	INCOMING REQUESTS	OUTGOING REQUESTS
1	**Austria**	410	874
2	**Belgium****	364	393
3	**Czech Republic****	400	400
4	**Denmark**		
5	**Finland**	250	more than 250
6	**France**	800	n.a.
7	**Germany****	1.099	884
8	**Greece**		
9	**Hungary**	n.a.	n.a.
10	**Italy*****	1.000	n.a.
11	**Luxembourg****	592	n.a.
12	**Netherlands****	712	343
13	**Norway**		
14	**Poland**	n.a.	n.a.
15	**Portugal****	132	294
16	**Russia**		
17	**Spain****	457	497
18	**Sweden***	80	n.a.
19	**Switzerland****	1.500	n.a.
20	**Turkey**		
21	**UK**		
22	**US**	963	204

*2011
**2012
***Avarage on period 2007-2009

6. The new era of the automatic exchange of information: huge investments, but are we sure on the return ?

There are many reasons behind the rise of the Foreign Account Tax Compliance Act (FATCA) and there are many reasons behind the supremacy of FATCA over similar initiatives of automatic exchange of information[11]. The US national report points out that starting in 2001 the United States has undertaken a series of aggressive tax enforcement, the first being the "Qualified Intermediary" (QI) agreements where foreign financial institutions (FFIs) had to determine the identity of their clients other than non–US clients, including corporations, trusts and other entities. However, the 2008 highly publicized whistleblower case of Bradley Birkenfeld, a former banker at UBS, and the IRS's related John Doe summonses, revealed that financial institutions encouraged US taxpayers to form foreign shell entities in order to open offshore accounts bypassing the QI duties. The Congress enacted FATCA in 2010 in response to the weaknesses of the QI regime leading to the offshore evasion epidemic and to the budgetary need to fund the controversial Obama's Healthcare reform. In essence, FFIs and foreign financial entities must agree to disclose information on US account holders or they become subject to a 30 per cent withholdable payment on any transfer made them out of the United States. FATCA has been characterized as "aggressive", "audacious", "egregious", "draconian" and "devastatingly destructive", it is not only unilateral but also extraterritorial since it requires FFIs to act like "US Treasury watchdogs" with billions of dollars of implementation costs, in one single message, FATCA will not survive. This prophecy seems to have been discharged by OECD who in 2012 delivered to the G20 the report "Automatic Exchange of Information: What it is, How it works, Benefits, What remains to be done", which summarizes the key features of an effective model for automatic exchange. The main success factors for effective automatic exchange of financial information are: 1) a common standard on information reporting, due diligence and exchange of information, 2) a legal and operational basis for the exchange of information; and 3) common or compatible technical solutions[12].

6.1. However, strange enough, the supremacy of FATCA over similar initiatives of AEOI seems to have more European than American origins, since it is largely related to the assumption of 5 European countries (France, Germany, Italy, Spain and the UK, known as the G5) that the US revolutionary scheme has the virtue to enhance multilateral cooperation in combating tax evasion, but the vice to disclose information protected under European and domestic law to the IRS. On 8th February 2012 a Joint Statement was issued by the G5 with the United States, stating the intergovernmental approach to be developed in close cooperation with other partner countries, the OECD and, when appropriate, the EU Commission, towards common reporting and due diligence standards in support of a more global approach to effectively combating tax evasion while minimizing the compliance burden. The Joint Statement changed the unilateral nature of FATCA, which will become an instrument for US bilateral AEOI, forwarding to multilateralism. The related Model Agreement to Improve Tax Compliance and Implement FATCA was published on 26 July 2012. It simplifies the administrative procedures so that FFIs will provide to the respective foreign government the required information, and the respective governments will provide that

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[11] See C. Tello, *FATCA: Catalyst for Global Cooperation on Exchange of Tax Information*, 68 Bulletin for International Taxation 2 (2014), pag. 88.

[12] See P. Radcliffe, *The OECD's Common Reporting Standard: The Next Step in the Global Fight Against Tax Evasion*, 16 Derivatives & Financial Intrusments 2 (2014), 160; also K. Marsoul, *FATCA and Beyond: Global Information Reporting and Withholding Tax Relief*, 16 Derivatives & Financial Instruments 1 (2014), pag. 3;

information to the US government. It would reduce the original estimated compliance costs of USD 50-100 million per FFI[13]. On the other hand, data protection issues are far to be solved, since it is not clear as to what extent the US will agree to provide reciprocal information to foreign countries[14]. To take just an example from the US report, if domestic FIs will be obliged to apply FATCA's pass-through rules for payments to entities, domestic FIs will face the problem of accounts held by Delaware LLCs for which they lack beneficial ownership information (and the Vice President of the United States of America, the lawyer Joe Biden, has been Senator representing Delaware from 1972 until 2009)[15]. On 9th April 2013, the Ministers of Finance of France, Germany, Italy, Spain and the UK announced their intention to exchange FATCA-type information amongst themselves in addition to exchanging information with the United States. On 13 April, Belgium, the Czech Republic, the Netherlands, Poland and Romania also expressed interest in this approach, which by May 14 had already been endorsed by 17 countries, with Mexico and Norway joining the initiative in early June and Australia in July.

6.2. There are 2 FATCA model intergovernmental agreements (IGAs): 1) IGA 1 negotiated with G5, provides that FFIs report certain financial account information to their respective tax authorities who share the information with the IRS through AEOI under existing bilateral tax treaties or TIEAs. There are 3 versions of IGA 1: (i) a reciprocal version; (ii) a non-reciprocal version where there is a pre-existing ITC or TIEA, and (iii) a non-reciprocal version where there is no pre-existing ITC or TIEA. The reciprocal version of the model also provides for the United States to exchange information currently collected on accounts held in US FIs by residents of partner countries, and includes a policy commitment to pursue regulations and support legislation that would provide for equivalent levels of exchange by the US. This version of the model agreement will be available only to jurisdictions with whom the US has in effect an ITC or TIEA and with respect to whom the Treasury Department and the IRS have determined that the recipient government has in place robust protections and practices to ensure that the information remains and that is used solely for tax purposes. The US will make this determination on a case by case basis. Finally, 2) IGA 2 provide that FFIs report directly to the IRS. There are 2 versions of IGA 2: one for a pre-existing ITC or TIEA, and one where no such arrangements are in place[16].

6.3. Since the publication of the Model Agreement to Improve Tax Compliance and Implement FATCA on 26 July 2012, the number of countries signing up the G5 Model is rapidly increasing (including Luxembourg, Liechtenstein, Colombia, Greece, Iceland and Malta), confirming the evolution of FATCA from unilateralism to multilateralism. At the same time, more remarkable it is worth noting the adoption of FATCA-like legislation or treaties by other jurisdictions. For example, the UK national report describes the "sons of FATCA" signed with a number of its Crown Dependencies (Isle of Man, Guernsey, Jersey) and Overseas

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[13] Although according to a recent literature, the upfront costs for the major banks equals more or less expected revenue fo the first ten years. If the on-going costs for financial institutions and the cost of administration for the IRS and foreign tax authorities are included (insofar known), total cost are expected to exceed the revenue to be raised. See R. F. van Brederode, *A Normative Evaluation of Tax Law Enforcement: Legislative and Political Responses to Tax Avoidance and Evasion*, 42 Intertax 12 (2014), pag. 775.
[14] See S. C. Ruchelman and R. Shervashidze, *Exchanges of Information: What Does the IRS Receive ? With Whom Does the IRS Speak ?*, 42 Intertax 8/9 (2014), pag. 577.
[15] See also A. G. Soriano, at note 5, pag. 547.
[16] See M. Somare and V. Wohrer, *Two Different FATCA Model Intergovernmental Agreements: Which is Preferable ?*, 68 Bulletin for International Taxation 8 (2014), pag. 395.

Territories (Anguilla, Cayman Islands, Bermuda, Montserrat, Turks and Caicos, Gibraltar and the British Virgin Islands), while in the same vein France studies a “mini-FATCA”.

6.4. The majority of national reports confirms the adoption and/or negotiation of the FATCA Model IGA 1, with the exception of Austria who does not seem to participate yet the discussions and Switzerland who has signed a Model IGA 2 on 14 February 2013. According to the Swiss report IGA 2 is not formally a system of AEOI, however it is getting closer to that because in the case of recalcitrant taxpayers, Swiss FIs will communicate to the IRS, in an aggregate manner, the total amount of recalcitrant accounts. On that basis, the IRS will then be in a position to send a group request in order to get more precise information about the account holders. Procedural rights of the persons concerned are protected since the Swiss Federal Tax Administration has to render a final decision, which will be notified, without names, in the Official Federal Gazette and on its website, which decision is subject to an appeal. Under the Russian report, the only way to implement the FATCA rules according to the Russian legislation on personal data protection and bank secrecy is by means of a new protocol to the US-Russia ITC.

6.5. The legitimacy doubts of FATCA, i.e. its administrative nature and its intrusive potentiality in taxpayers privacy without legislative consent, seems to emerge under many perspectives[17]. Some national reports have shown some sensibility on the issues of FFIs FATCA implementation costs and of the data protection rights of the taxpayer since it is not yet clear how domestic legislation will be adequately amended to take care of FFIs/tax administrations FATCA obligations. Unless FFIs have a specific clause in terms of business they have signed with their existing clients, it is not possible to hand over information to the IRS, insofar as Directive 95/46/EC bars from transferring personal data to other entities without the explicit consent of the data subject. If a FFI breaches a contract without a contractual right, then they run the risk of legal action by the client for reinstatement of the contract and damages and sanctions by regulators. Under the Czech report it is expressed the concern that strong position of the domestic financial sector gives financial institutions the power to transfer any additional cost relating to FATCA influencing the profitability of the bank sector fully to their clients with low risk of clients’ discouragement. The same fear is in the Finnish report. In France, there could be a conflict between FATCA and the French national data protection law as this complies with directive 95/46/EC on the protection of individuals, and more specifically with regards to the free movements of the mentioned data, but international agreements always prevail on national laws. In Hungary, certain provisions if FATCA may be contrary to the Hungarian Acts on banking secret, data protection and payment services, and the latter must be amended. The enforcement of FATCA in Italy must be analyzed from the Italian, European and European Convention on Human Rights perspective, in order to ascertain that data transfer and processing shall be proportionate to the policy objectives of the agreement. The Polish report points out the concerns expressed by the European insurance industries on the relationship between FATCA and the provision of Directive 95/46/EC on data protection. Similarly to the Italian approach, in Spain it may be questioned whether a bulk transfer of financial data is a necessary and balanced measure in respect of the proportionality principle which would require the processed data be adequate, relevant and not excessive. Some commentators have indeed warned on the need to interpret Spanish tax legislation and the Organic Law on Data Protection in a more consistent way with the Spanish Constitutional Court’s doctrine, which would require that Spanish IRS obtains guaranties of

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[17] See A. G. Soriano, at note 5, pag. 552. See also T. Pediaditaki, *FATCA and Tax Treaties: Does It Really Take Two to Tango ?*, 53 European Taxation 9 (2013), pag. 426.

confidentiality and appropriate use of information transmitted according to the standard established by the corresponding instrument of information exchange.

6.6. The enthusiasm for FATCA seems contagious at the level of European Institutions[18]. On 12th June 2013, the European Commission released a proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory AEOI in the field of taxation on dividends, capital gains, any other income generated with respect to the assets held in a financial account, any amount with respect to which the financial institution is the creditor or the debtor, including any redemption payments, and account balances (COM(2013) 348 final); while another initiative which may soon come up in the same direction is the amending proposal to the saving Directive 2003/48/EC which was adopted by the EU Commission on 13 November 2008 (COM(2008) 727), when the financial crisis had just started. On 3rd May 2013, the EU Commission released to the Council of the European Union the final proposal for voting the amendments, which was adopted on 24 March 2014. The scope of the amendment is to close existing loopholes and better preventing tax evasion; among the proposed solutions there is also the obligation for the paying agents to AEOI (or to levy a withholding tax) on the "beneficial owner" of the interests and other financial income as defined under AML EC Directives. However, there is never a final destination in tax matters, since it is not realistic to expect an immediate multilateral convention requiring AEOI but, rather, step by step, it is possible to improve the current legal and operational framework and to transit toward a new model, based on AEOI, by always having in mind the Adam Smith assumption that tax related laws create first a temptation and then a possible violation. Total AEOI between European countries is yet to be reached since the transitional withholding regime will still exist until new agreements are established with Switzerland, Liechtenstein, San Marino, Monaco and Andorra. Luxembourg government has announced that it has decided to end the transitional period foreseen in the saving Directive and to introduce AEOI as of 1 January 2015, which date coincides with the date of entry into force of the AEOI under Art. 8 of DAC. Austria is the last European beneficiary of the withholding regime and is still vetoing this possibility in the Council.

6.7. Last but not least, none of the national reports mentioned the probably most intrusive instrument of exchange of information being the Swift Brussels Agreement which was formalized in late 2009 and provides the Central Intelligence Agency (CIA) with powers to access bank accounts held by individuals in the European Union[19]. The Brussels agreement requires that all 28 Member States grant requests of the CIA for banking information "as a matter of urgency" under terrorist finance tracking program. The banking records are to be kept for five years in a CIA database in Langley, Virginia, and it is not clear whether may be passed on to other authorities in the United States, such as the Federal Bureau of Investigation (FBI) and the Internal Revenue Service. One of the reasons for rushing through the Brussels agreement was the fact that Swift, at the end of 2009, moved part of its systems infrastructure and business operations to Switzerland, away from existing computing bases in Brussels and the United States. This placed significant data outside the EU and US jurisdictions, a change apparently demanded of Swift by Swiss banks and others concerned with the privacy of their client's information. A number of banks had threatened to stop using the Swift system if additional privacy protection was not put in place.

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[18] See Alicja Brodzka, *The Road to FATCA in the European Union"*, 53 European Taxation 10 (2013), pag. 517.

[19] See T. Anamourlis and L. Nethercott, *The EU-US ("Brussels") Agreement on European Banking Secrecy and the Effect on Tax Information Exchange Agreements*, 65 Bulletin for International Taxation 1 (2011).

7. Joint audits and multinational audits: two Tax Administrations are better than one ?

The 2010 OECD Joint Audit Report defines the "joint audit" as a new form of coordinated action between tax administrations which goes far beyond the traditional simultaneous tax examination procedures. Indeed, the cooperation does not take place simultaneously and independently but, rather, in an overlapping manner within the same team. Although the possibility of joint audits is accepted by most of the national reports, in practice the evidence is that there are still few experiments in that direction. It is worth noting the case of Belgium who is a member to multilateral audit for tax under the EU Fiscalis Program; the Czech Republic who has a pending request from Germany; Finland declares 5 to 10 joint tax audits every year, so it is more than a theoretical option, but of course in absolute numbers they still play a minor role in the Finnish tax administration tax enforcement activities; German tax authority is performing a pilot project with the Dutch tax administration, a first meeting was held at the end of 2012 between participating financial authorities of Bavaria, North Rhine, Westphalia and the Netherlands, in order to determine modalities and timing. Other agreements were signed by Bavarian authorities with the Netherlands and Italy, while with Croatia, Czech Republic and Hungary are to follow; Hungary has just an experience with Germany and Austria for a tax fraud case in connection with motor vehicle trading; Italy has many simultaneous agreements and has embraced the conclusions of the Joint Audit Report saying that "Italy will be a leading actor of this innovative form of control, also thanks to the wide net of treaties and international agreements signed, which is the legal basis necessary for enforcing this new form of control, and in the light of the experience in multilateral controls gained in the last 7 years"; Luxembourg has joint audit experience on VAT, most of the time with Germany and France, which take the form of an audit run by the Luxembourg tax authorities as directed by the foreign tax authorities on those points they are seeking additional comfort; Netherlands has a pilot project with Germany; no data for Poland, Portugal and Russia (there are draft amendments to the RF tax code to be ready with that procedure), Spain, Sweden, UK and US (here there is only an audit cooperation program called "Simultaneous Examination Program" and the "Criminal Investigation Program" (SCIP) under which authorities coordinate audit plans and information requests).

7.1. There are several obstacles toward an efficient joint audit procedure, the most important being the difficulty of allowing a foreign state's officers to perform their own tax examinations or exercise any kind of authority functions in the territory of the State concerned, and vice versa, according to its domestic law. This is the reason claimed by Sweden for not participating in joint audit procedures. This absence of authority constitutes a significantly frequent problem for most joint audits other than those conducted under the former Mutual Assistance Directive. Another main difficulty, as invoked by the Czech Republic and Italy, comes from the different languages used by the authorities of different countries. Joint audit procedures are considered to be financially more burdensome by Denmark and Czech Republic. In addition as mentioned in the Italian report, different procedures and rules followed by the various tax inspectors involved in the examination may create conflict situations. Furthermore, different domestic rules concerning the collection of information recovered are not usable for one participating country. Finally, all these discrepancies may result in excessive time consumption. Despite these obstacles, the interest in joint audits and similar forms of international cooperation, such as tax examination abroad, seems to be growing. Although, once the AEOI is going to become the ordinary regime, it is probably going to prevail on other instruments.

8. The “realpolitik”: tax solutions of equivalent effect alternative to exchange of information

Tax policy has been living all over the history of human beings among sticks and carrots[20], and if AEOI in its different perspectives, is a stick, it is now the time to show what the carrots are, and to expose the graduating level of fiscal sustainability from the best to the worse. On September 2010, the OECD released a comparative analysis, guidance and policy advice on offshore voluntary disclosure where Jeffrey Owens in the preface stated that for years the OECD has advocated a policy of improved international tax co-operation including better information exchange and transparency to counter offshore tax evasion. At the same time the OECD has been encouraging countries to examine voluntary compliance strategies to enable non-compliant taxpayers to declare income and wealth that they have in the past concealed by means of taking advantage of strict bank secrecy jurisdictions. Offshore voluntary compliance programs offer the opportunity to maximize the benefits of improvements in transparency and exchange of information for tax purposes, to increase short-term tax revenues and improve medium-term tax compliance. To succeed, they need to tread a fine line between encouraging non-compliant taxpayers to permanently improve their compliance (a balancing act in itself) and retaining the support and compliance of the vast majority of taxpayers who are already compliant. To do this, they need to form part of wider voluntary compliance and enforcement strategies. They also need to be consistent with relevant rules in the non-tax area, such as AML rules. On 6th December 2012, the EU Commission released the communication to the European Parliament and the Council related to an action plan to strengthen the fight against tax fraud and tax evasion where, among the guidelines to enhance tax compliance, it is suggested, on one hand, to develop common methodologies and guidelines to enhance educational measures with a view to raising taxpayers’ awareness on the powers of tax administrations to obtain information from other countries, and on the other hand, to develop motivational incentives by encouraging, through common methodologies and guidelines, voluntary disclosure programs.

8.1. There is a huge difference between voluntary disclosure and voluntary compliance. This latter is when taxpayers are motivated to comply with the tax rules since they are aware that tax authorities alternatively use their sovereign power to enforce their tax obligations through audits, penalties (criminal and/or administrative), interest charges and a number of other collection tools[21]. On the contrary, if taxpayers do not comply with (international more than domestic) tax rules, it is probably because they believe more likely that tax authorities will not be able to enforce their tax obligations. This behavior is always voluntary but with opposite sign. From time to time some events break this taxpayers’ assumption although they do not automatically imply an effective tax enforcement by tax authorities. Within this framework the idea of a voluntary disclosure may be taken into account: it is in essence an exceptional program which allows taxpayers to disclose voluntarily undeclared income and wealth upon granting a substantial reduction of penalties (criminal and/or administrative). Of course there is a fine line to be struck between presenting the program as both “business as usual” and as a “special opportunity”. Ideally, there should be enough of a perceived incentive for the targeted population to take part, without so much of a real incentive as to alienate the majority who are already compliant.

[20] See the illuminating and enjoyable book of C. Adams, *For Good and Evil, the Impact of Taxes on the Course of Civilization*, Lanham, Maryland, 2001.

[21] See R. Seer, *Voluntary Compliance*, 67 Bulletin for International Taxation 11 (2013), pag. 584.

8.2. Whether a voluntary disclosure program is an example of realpolitik is arguable. Much depends on the penalties reduction granted and measures to ensure sustainable compliance in the future. To a certain extent, even to the thief who gives back the stolen property criminal law generally provides for a lower punishment on the assumption that there has been a form of redemption. There seems to be little tax morale issue to be addressed to legislators and governments. Many national reports have confirmed the adoption of voluntary disclosure programs. In the Belgian report, a "permanent tax regularization" program granting criminal tax immunity upon the payment of taxes plus a 10% penalty for undeclared income in the period from 2006 to 15 July 2013 granted to the Treasury more than 500 million euros, and when it was announced that the regime would have been abolished and a new and more expensive scheme would have been introduced from 15 July 2013, the first six and a half months of 2013 brought the Belgian State more than 1 billion euro. In the Finnish report it is stated that the Finance Committee of the Finnish Parliament has recently guided the Ministry of Finance to review in co-operation with the Ministry of Justice whether it would be possible and desirable to include provisions on voluntary disclosure to the Finnish tax legislation. Because many European countries have this type of legislation already in force and because the fiscal impact in those countries has been positive, there is no reason to believe that the Ministries will find insurmountable obstacles in this matter. Within a very repressive tax policy, France created in 2009 a "cellule de régularisation": all the repented individual taxpayers who wanted to repatriate their hidden money could enter into negotiation with the tax administration and try to find a compromise. Usually they had to pay income tax, wealth tax or inheritance tax related to this hidden money, but were exempted of one part of the penalties they should have paid. As more than 8500 taxpayers were registered from July to December 2013, the French government may publish a circular to reiterate the program. In Germany the voluntary disclosure of tax evasion is an actual and important issue, especially as data of tax evaders has been bought by the German tax authorities. A voluntary disclosure in terms of Section 371 of the Fiscal Code leads to exemption from punishment for tax evasion in the sense of Section 370 of the Fiscal Code. The conditions for the criminal exemption effect are an appropriate declaration to the tax authorities with all relevant facts, the payment of the evaded tax and the absence of a reason for exclusion as per the list of Section 371, para 2, of the Fiscal Code. In Italy, the recent Decree Law 28 January 2014, n. 4, which needs to be converted into Law by the end of March, introduced a voluntary disclosure program which excludes criminal prosecution in case of tax evasion for those taxpayers who return unpaid taxes on foreign income and assets, plus administrative sanctions, for the period 2005-2012. According to the Dutch report, on 2nd September 2013, the State Secretary for Finance has decided that the rules for voluntary disclosure will be relaxed temporarily. The reason is the government's submission to Parliament of new rules on the imposition of additional tax assessments. If the taxpayer has acted in bad faith, the statutory time limit for the imposition of an additional tax assessment will be extended from five to twelve years. As a transitional measure, taxpayers are provided with the opportunity to "come clean" before 1st July 2014. This means that no penalties will be imposed if a taxpayer voluntarily discloses previously non-disclosed facts which are relevant for a correct tax assessment process (the tax itself will, of course, be imposed). Between 1st July 2014 and 1st July 2015, the current voluntary disclosure rules will apply again. This means that a taxpayer will not be fined if he voluntarily discloses previously non-disclosed facts within two years starting from the date on which the false tax return was submitted but before the taxpayer knows or reasonable should have known that the tax inspector is aware – or will be aware – of the incorrect statements. If the taxpayer voluntarily discloses after two years, the penalty will be moderate to 10-30% of the minimum penalty which can legally be imposed. After 1st January 2015, a voluntary disclosure within two years starting from the date on which the false tax return was submitted will lead to a moderation of the maximum penalty

which can legally be imposed to 20-60%. In Spain, Article 179.3 of the General Tax Act (GTA) excludes any sanction if the taxpayer voluntarily regularizes his situation before the initiation of any kind of tax proceeding. This regularization will mean that the taxpayer will pay the unpaid tax debt, including other applicable tax surcharges and interests (depending on the time when the tax is declared); but in no case will be imposed any sanction. Something similar happens in the case of tax crimes according to the Organic Act 7/2012 (Ley Orgànica). In Sweden, the opportunity to voluntary disclosure for people taxable in Sweden is therefore an incentive to declare income even before the authority has started an investigation. Hidden assets abroad can thus be brought back to Sweden without an effort being made by Swedish authorities. In 2012 approximately 110 voluntary disclosures were made. Also in Switzerland a voluntary disclosure program is in force: the tax that should have been declared will be levied retroactively, during a period of 10 years (plus late interest), but no fines related to the tax will be due. In case of deceased persons, the heirs have the possibility to make a voluntary disclosure and the tax will be calculated only for the last 3 years. Under the UK report, it is described the Crown Dependency Disclosure Facilities which provide an opportunity for eligible "customers" with assets or investments held in the various jurisdictions to bring their UK tax affairs up to date by fully disclosing all outstanding liabilities and paying any amount due. Last but not least, the voluntary disclosure programs offered by the US government since 2009, just after the UBS scandal; under the current program, which has no deadline, individuals who disclose their offshore bank accounts are subject to a civil tax penalty of 27.5 % of the highest aggregate balance in foreign bank accounts or value of foreign assets during the eight full tax years prior to the disclosure. Individuals who participate in this program are not subject to criminal tax evasion charges, which could result in prison. Also some US states offer similar programs, which is important since the federal and state governments share information, so any offshore information obtained by the US can be made available to the US person's residence state.

8.3. A step below in terms of fiscal sustainability is assigned to the tax amnesty mechanism which occurs when a voluntary disclosure program also grants a reduction of taxes that should have been declared. Although in the majority of countries the taxpayer must pay the amount of tax he or she would have owed in the absence of a voluntary disclosure, some experiences of dubious fiscal sustainability are present. Belgium, for example, has a long standing tradition of (offshore) amnesty programs. In 2004, the so called "one-off liberating declaration" provided that every Belgian taxpayer regularizing his capitals (bearer securities or assets in offshore accounts) through the payment of 6% or 9% would have enjoyed a limited triple immunity: in fiscal, social and criminal matters. This tax amnesty brought the Treasury in a year 498 million euros. According to the Hungarian report, the government in 2010 introduced a tax holiday that allowed profit/assets repatriated to Hungary to be taxed at a reduced rate of 10%. The measure led to the return of HUF 67 billion to the country and generated HUF 6,7 billion tax revenue for the State. On the summer of 2013 law n. T/11398 was passed by the Hungarian Parliament containing European questionable provisions on the introduction of the Stability Savings Account ("SSA") which works as a bridge to get undeclared income clear from any tax and criminal consequence after 5 years the deposit is made. Italy has often approved offshore amnesty programs aimed at stimulating taxpayers to declare foreign assets illegally held abroad and ignored by tax authorities. These programs, also known, as "tax shields" have been introduced in 2001, in 2002 and in 2009. The third edition allowed taxpayers to disclose, through a tax agent, their financial activities and properties held abroad by paying a lump sum tax of 5% of their value, with the guarantee of anonymity and without being subject to certain administrative and criminal sanctions. According to the Ministry of Treasury, the third tax shield led to the repatriation of approximately 95 billion euro. Poland also attempted to introduce a tax amnesty granting non

criminalization upon a decreased tax rate of 12% (average rate of effectively collected income tax amounted to less than 10% at that time) on global undeclared wealth, but the Constitutional Tribunal dismissed the idea on the ground of a violation of the principle of proportionality since taxpayers would have been forced to declare all their assets obtained in the process of their life. In 2007 the Russian Federation announced a tax amnesty which did not result in a success, while at present there is a discussion of announcing another one which will take into account the experience of the previous one and will be aimed, first of all, at recovery of taxes on income and capital which fled to tax havens jurisdictions. However, so far no concrete parameters or conditions of such amnesty have been disclosed.

8.4. A nature more similar to a tax amnesty rather than a voluntary disclosure, is attributable to the so called "Rubik" agreements which have been proposed by Switzerland in the past years and which were only concluded with Austria and United Kingdom (negotiations with Germany and Italy have failed). In essence, it provided a withholding tax mechanism clearing any administrative and/or criminal sanction, as a waiver of the exchange of information since Switzerland agrees to have its own financial institutions to register the assets belonging to clients resident in the other State and the final withholding tax is levied at an agreed rate. Once this procedure is carried out, the tax arising from future assets of the taxpayer is collected by the Swiss FI, passed to the revenue of the other State through the Swiss federal tax administration, while the client's name and details are not disclosed. The tax privacy of the bank's client is therefore safeguarded. On the Austrian side, a similar Rubik has also been signed with Liechtenstein in order to recapture bankable assets managed by Liechtenstein trustees or fiduciaries, and held by anstalts, foundations or other similar entities. According to the Austrian Ministry of Finance, the agreement with Switzerland fulfilled the expectations with regard to the fiscal result of the regularization of the past: in July 2013, Swiss authorities transferred 416,7 million euro as the first tranche payment to Austria while in September 2013, the second tranche amounted to 254,7 million. On the side of the UK, the agreement has been described as the "largest ever tax evasion settlement in UK history", but current data appears to suggest that the estimation of £ 5 billion was overoptimistic. According to the Swiss report, Rubik agreements have the merit of combining confidentiality and compliance with different tax obligations, however, following the refusal of the German Parliament to ratify the Rubik agreement and the recent evolution of tax information exchange, especially in Europe, which indicates a significant rise of AEOI, one may wonder if Rubik agreements constitute a sustainable solution for Switzerland in the long term. This does not change the usefulness of these agreements, which can function as a transitory solution by regulating the past and forming the basis for a future regime, which will most certainly arise within the following years as Switzerland continues to develop its exchange of information system in accordance with the international standards. Indeed, following the "Brunetti Report" published in June 2013, Switzerland is willing to discuss the adoption of an AEOI in the event that this latter becomes a worldwide standard applied to all important financial centers, in respect of a level playing field.

8.5. An interesting alternative to the Rubik agreement for solving the past is represented by the Liechtenstein Disclosure Facility (LDF) program, which is governed by a TIEA and a Memorandum of Understanding (MOU) signed on 11th August 2009, and which is addressed to persons with UK tax liabilities that have connections with Liechtenstein. In broad terms, the arrangements contemplate that at the end of the five-year taxpayer assistance and compliance program (April 2015) and the five-year disclosure facility afterward, there will be no "relevant persons" (as precisely defined in the MOU) who are UK taxpayers and

are continuing to maintain connections to Liechtenstein but are not in compliance with their UK taxpaying obligations. This assurance by the Liechtenstein Government to HMRC is the first of its kind relating to tax information exchange and tax compliance. Liechtenstein financial intermediaries must review and identify clients that may have UK tax liabilities and ask those clients to certify that they are fully UK tax compliant. Disclosure of tax irregularities is authorized during a period of 10 years prior to 6th April 1999 and for settlement on beneficial terms (a simplified single composite rate of tax of 40% on the income and a reduced penalty of 10%) with a guarantee of no prosecution except in exceptional circumstances. LDF applies to all the main UK taxes. It is worth noting that the Liechtenstein Government has agreed with HMRC that not only existing clients of Liechtenstein financial intermediaries can make use of the special disclosure arrangements agreed with the UK, but also new clients who establish relevant connections with Liechtenstein. All of these arrangements have been designed to meet the objectives of parties to ensure a win-win-win approach that benefits individual taxpayers connected to the UK, the Liechtenstein financial center, and the HMRC. As a result of the LDF, there have been more than 4000 registrations. It is estimated that up to 5000 people are liable to UK tax rate that have assets in Liechtenstein. The UK anticipated that up to £ 3 billion will be recovered through the facility by 2016.

8.6. The idea of a tax solution Rubik style is not original, since the saving Directive 2003/48/EC already introduced something similar with the mechanism of a withholding tax on the interest payments to EU resident taxpayers instead of exchanging information from Switzerland, Liechtenstein, San Marino, Monaco and Andorra, on one side, to European countries (other than Luxembourg and Austria, in the short future only Austria), on the other side, as a second best temporary option on the way towards AEOI and the abolition of banking privilege. Preamble (8) of the Directive clarifies that its ultimate aim is to enable savings income in the form of interest payments made in one Member State to beneficial owners who are individuals resident in another Member State to be made subject to effective taxation in accordance with the laws of the latter Member State. Countries adopting the Rubik had to convince the EU Commission that the saving Directive main scope was not undermined, and they did it by providing that the Rubik withholding is levied on interest only to the extent they have not been subject to the saving Directive 35% withholding tax, otherwise a Rubik difference will be added to the latter. The real issue is the potential asymmetry of the two instruments on the AML/KYC definition of beneficial owner being resident in the EU who should suffer such a burden. An amending proposal to the saving Directive 2003/48/EC was adopted by the EU Commission on 13 November 2008 (COM(2008) 727), when the financial crisis had just started. On 3rd May 2013, the EU Commission has released to the Council of the European Union the final proposal for voting the amendments, which was adopted on 24 March 2014. The scope of the amendment is to close existing loopholes and better preventing tax evasion; among the proposed solutions there is also the obligation for the paying agents to levy the withholding tax on the “beneficial owner” of the interests and other financial income as defined under AML EC Directives. The same is not true for the Rubik agreements signed up to now.

8.7. On the lowest side of the fiscal sustainability scale there are alternative sources to collect information, specifically the whistleblower programs and the acquisition of stolen bank data. From national reports it appears that several countries adopt these underground spying methods. In Austria, for example, since the activation of the whistleblower website on 20th March 2013, anyone can actively participate in the fight against corruption. The whistleblower system has been designed to ensure a secured communication

platform between informants and the public prosecution office. It provides both the confidentiality of the reports provided as well as the anonymity of the informants. Incoming reports are handled in the same way as complaints. Rewards for providing information do not exist. In France, the law concerning *“la lute contre la fraude fiscale et la grande délinquance économique et financère”* that has been adopted on 6th December 2013 has also created a special and new statute to the whistleblower, but does not concern taxation. If this law introduced some articles in different codes, as for example the Labor Code which organizes now a protection for the whistleblower, any disposal of this law is related to taxation. However, because there is no provision concerning a reward, it does not seem that it is permitted to give a reward to the whistleblower whose action must not be for profit. The Dutch policy for reward money dates back to 1985. In 2010 and 2014 the State Secretary for Finance reiterated that his policy is still based on the resolution of 1985. A decision to pay for information will not be taken lightly and tax authorities apply a very strict policy in this respect. This should be expected from a government which is integer, diligent and reliable. The conditions to be met for payments are: 1) a considerable financial interest should be at stake; 2) tax authorities are satisfied that the information is reliable; 3) an assessment should be made with respect to the risks associated with the information for the involved civil servants as well as for the person providing the information; 4) reward money will only be paid after the extra tax revenue has been paid to the treasury; 5) no concessions will be made in the area of penalties, or the imposition or collection of taxes; 6) under no circumstance immunity from criminal prosecution will be granted. In Poland, under the Act on King’s Witness, individuals cooperating or taking part in preparation to crimes may legally apply for public protection in criminal proceedings. The institution may be thus utilized in the case of crimes connected with tax evasion but only those committed or being planned to be committed by a group of at least 3 individuals united in the pursuit of criminal activities of specified or non-specified nature. Whistleblowing is also rewarded on the ground of substantive criminal law. Self-declaration and amendment of previously lodged wrongful tax declaration causes a non-criminalization of this method of tax evasion. Such a wrongful act is not punished on the ground of art. 16A of the Fiscal Criminal Code. Spain has recently adopted some legislative changes to encourage informers and to offer some non-economic reward to the whistleblower. In particular, the 25% penalty for cash payment over 2500 euro is not imposed in case one of the parties involved in the operation reports to the Spanish tax administration the content of the operation and the identity of the participants. Similarly, the recent amending reform of the Spanish Criminal Code on 2012 includes in Art. 305.6 a new reduction of the penalty of the tax crime when a person involved in the tax offense other than the author actively collaborates (i) to obtain decisive evidence to capture other responsible, (ii) to find the facts, or (iii) to find the offending taxpayer’s assets. The collaboration and the attitude of those who betray other taxpayers is rewarded with a reduction of one or two degrees in tax fraud penalty. According to the Spanish Ministry of Finance, the number of informers about tax offenses has increased by 50% in 2012 compared to 2011. Last but not least, in the US the Internal Revenue Service is authorized to pay whistleblower awards to individuals who report acts of tax noncompliance. If the IRS uses the information provided to detect underpayment of taxes, it may pay the whistleblower up to 30% of the additional tax, penalty, and other amounts it collects. Whistleblower awards are fully taxable as gross income and are subject to withholding. In 2012, the IRS Whistleblower Office issued administrative guidance describing a process by which award recipients may apply for a reduced withholding rate. Whistleblower Bradley Birkenfeld was awarded USD 104 million for his assistance in building the case against UBS which he will benefit once after out of jail.

8.8. To a certain extent something similar to a whistleblower program is the duty involving financial intermediaries as well as professionals when facing with the so called “suspicious operations” under AML.

They are obliged to make a notice to the FIU and such obligation overrides any professional and banking secret.

8.9. About the stolen bank data, here the discussion is the legitimacy to buy, more than to use, stolen bank data. The case regards Germany where official statistics on the acquisition of stolen bank data do not exist. In the famous LGT case, German authorities purchased in January 2006 a CD with stolen bank data from Heinrich Kieber, a former LGT employee, paying around 6 million euro (minus a 30% withholding tax) to his offshore bank account. In the following years, further acquisitions of stolen data from Switzerland and Luxembourg followed, and the legality and the legitimacy of the acquisition still is a controversial topic of discussion in politics and jurisprudence.

9. <u>The legitimacy of tax solutions other than exchange of information: where do we stand ?</u>

There are a number of rule of law issues regarding the above mentioned tax solutions other than exchange of information and being crucial for any tax realpolitik measure. The fil rouge is related to the use of information, whether illegally obtained or whether obtained through a legal instrument which would require alternative instructions for their use. As far as the use of illegally obtained data (i.e. the LGT Bank case, the HSBC case and the UBS case) it is not clear and homogeneous whether a public authority could profit of information acquired and/or received to support both an administrative tax assessment and a criminal tax investigation. The Austrian Supreme Administrative Court ruled out that the use of illegally obtained data in administrative tax proceedings is admissible as long as it is suitable for determining the relevant facts or circumstances. Therefore, such evidences may be used even if the authorities derived it by i.e. infringing the banking secrecy. The decision is based on the Austrian Federal Fiscal Code which, in contrast to the Criminal Tax Law Act, does not contain restrictions with respect to the admissibility of evidence. This, however, does not mean that all kind of illegally obtained evidence is admissible in administrative tax proceedings, since there is an absolute restriction if the illegally obtained evidence infringes a constitutional right or contradicts the aim or purpose of the law that was infringed in the course of obtaining the respective evidence. In Belgium law 24th October 2013, which has secured the so called “Antigoon” case law developed by the Supreme Court since 2003, provides three cases in which irregularly obtained evidence is invalid and cannot be used: 1) if the legislator has expressly provided that the evidence is invalid because a formal requirement is not met (such is the case with the procedural conditions for wiretap, intrusive surveillance and mail confidentiality); 2) if the irregularity affects the reliability of the evidence, the unlawfully obtained evidence is void (such is the case when a given statement is made under torture, for example); 3) improperly obtained evidence is also void if its use is contrary to the right to a fair trial. In all other cases, the evidence obtained improperly is not void and can be used to prove a crime, i.e. a tax crime, and even more so to prove a tax violation. In the KB-Lux affair where turbid contracts between the police investigators, former bank employees and the informant, the Supreme Court on 31st May 2011 confirmed that the claim of the prosecution had to be declared inadmissible because of the tampering by the police and the courts. In Czech Republic, according to Art. 93, para 1, of the Act 280/2009 Coll. Tax Administration Procedure Code, the evidence against the taxpayer can be used only in case the evidence is acquired legally regardless the evidence is obtained during the process or before the first step of the process. On the other hand such originally obtained data can be considered as indices. The German Constitutional Court in 2010 decided that criminal proceedings’ utilization of data derived from such an acquisition is constitutionally permissible. Use of data for criminal

tax assessments should also be possible if data is unlawful under domestic law or is in violation of international agreements. This applies for both administrative tax assessments and criminal tax investigations. Therefore the taxpayer does not have the possibility to reject the use of data. Despite the Court's decision, the legality and the legitimacy of the acquisition remain a controversial topic of discussion in politics and jurisprudence. In Italy, the practice linked to the LGT Bank and the Falciani cases raises many issues of compatibility with taxpayers' rights and the absence of specific norms regulating such "unorthodox" acquisition of information is generating a great confusion in Italian case law. While criminal courts considers that a citizen cannot be condemned for a tax crime since such illegally obtained information are unusable and need to be destroyed, tax courts are divided between an approach more respectful of taxpayers' rights protection and another that consider such information valid for supporting a tax assessment, given that the Italian "segment" of evidence acquisition is perfectly lawful and renders irrelevant potential violations made abroad in relation to the original acquisition. This is also true from the European Court of Human Rights perspective in the decision N.K.M. v. Hungary of 14 May 2013, n. 66529/11, concerning confiscatory taxation, where it has been stated that "an interference (…) must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights". It is hard to see a "fair balance" between the public interest to the collection of taxes and taxpayers' rights: in this sense, it is perfectly comprehensible that in literature this practice is considered a receiving of stolen information rather than a proper exchange of information. While obtaining illegally bank account information in Italy would inevitably lead to an unlawful tax assessment, it is not logic that the same method of evidence collection carried out abroad (and, then, transferred to Italian tax authorities) would not bring to the same result. In the Netherlands information can be used in principle in proceedings concerning administrative or criminal sanctions, unless the use of such information would be contrary to what one should expect from a fair government to the extent that such use is impermissible under any circumstance. This is the case if government officials have willingly broken the law to obtain information (i.e. if they would have paid for information which was clearly obtained illegally in another country). Portuguese tax authorities may use all forms of evidence insofar as they are admissible by the law (Art. 72 of General Tax Law and Art. 50 of Code of Tax Process and Procedure). So, if the evidence is not legally admissible, namely because it is obtained in violation of criminal legislation or in violation of the fundamental rights of the Portuguese Constitution, in principle, tax authorities cannot use it. In Spain, the Constitutional Court decision of 29 November 1984, n. 114, stated that the admission in the process of illegally obtained evidence will involve infringement of the fundamental right of defense and due process, because evidence so obtained is not a relevant evidence. Instead of this, if the offence does not affect those fundamental rights, the constitutional doctrine considers that any irregularity in the way of doing a search diligence does not deny probative force to do it, since the extended effect of Art. 11.1 of the Organization of Justice Act does not reach the procedural violations of ordinary legality. Within the case of Hervé Falciani who was arrested on Barcelona on 1st July 2012, the National Anti Fraud Office (ONIF) considered that his list of bank clients was legally seized at Falciani's home by a house search ordered by a French judge. Notwithstanding bank secrecy cannot protect the commission of a crime, the Falciani list has motivated the most important regularization process in the history of Spanish Treasury. In Sweden, according to the national reporters the use of stolen tax information may be very efficient, however un-ethic, way to achieve an efficient tax administration. Given that a great confidence in the work of the tax administration makes the taxpaying morale higher, there is a risk that the taxpaying morale in general gets lower if the tax administration (indirectly) is involved in criminal acts. Even if it is in the short run tempting an efficient using illegal sources of information, in the long run it is important that the tax administration uses legal sources of information. Finally, according to the opinion of the Swiss reporter, the use of stolen data obtained within the framework of an exchange of

information under a DTC, violate the good faith principle granted in Art. 26 of the Vienna Convention, and as of now their use is prohibited in Swiss law.

9.1. In case illegally obtained data are used to support an administrative tax assessment and a criminal tax investigation, there are a number of questions involved: 1) whether the taxpayer is informed and/or allowed to be involved in the due course of inbound or outbound information procedure; 2) whether the taxpayer has the possibility to reject the request and/or the use of inbound or outbound data; and 3) whether the taxpayer can refuse to collaborate with his tax administration without jeopardizing his position[22]. Few national reports enter into these details. According to the Czech report, on the ground of the Sabou v. Financial Authority case, as also confirmed by ECJ (C-276/12of 22nd October 2013), the taxpayer is not generally informed or is not involved in the due course of procedure. Moreover the taxpayer does not have any possibility to reject the request or the use of data. But according to one of the basic principles of tax administration the taxpayer who refuses to collaborate with the tax administration jeopardizes his position as stated in Art. 5, para 3 of the Act n. 280/2009 Coll. Tax Administration Procedure Code. In France, in case illegally obtained data are used to support an administrative or criminal tax assessment, the tax administration has to respect the principle of equality of arms. This forces the administration in all procedural steps to inform the taxpayer before the revealing all the information and documentation. If the taxpayer requests it, the tax administration has to inform him about all data and documentation it used to do its procedure and must always inform the taxpayer about the nature and the origin of the documents it uses. Therefore, if a taxpayer asks to the administration to give information it used, the administration cannot refuse and has to give it to him. But if it appears that the tax administration used illegally obtained data, the taxpayer does not have the possibility to request it on that ground. In the Netherlands, in case the information is to be obtained from the taxpayer himself, the Dutch Supreme Court has formulated a number of cases. First, a taxpayer can be forced to provide all information which may be relevant for a correct tax assessment process, irrespective of whether this information is dependent on his will. If, however, the information depends on his will it can only be used for the tax assessment process but not for the imposition of administrative sanctions or in a criminal procedure. Secondly, if the taxpayer fails to provide the required information, penalties may be imposed. In a procedure against the imposition of the penalty, the State has to prove that the taxpayer is actually capable to produce the information. In Spain the experience is still related to the Falciani list, when taxpayers have been informed about the source of this tax information and the way it has been obtained. Taxpayers have been involved in criminal tax proceedings with all guarantees. They have been able to raise the rejection of the use of such information, although Spanish courts considered that information could be used both in administrative and criminal tax proceedings. In any case, taxpayer may always refuse to testify against himself in a criminal tax proceeding if he considers that it would worsen his defense (right against self incrimination). Finally, the US Constitution offers protections for criminal defendants, including the right to confront witnesses and the right against self incrimination. Thus, a taxpayer would, in a criminal case, have the opportunity to challenge evidence obtained from a whistleblower (or any other evidence in the government's case). With a court order, the US can compel taxpayers to consent to FFIs disclosure of account information, including in cases where the government otherwise would be unable to obtain records. Compelled consent to disclosure pursuant to a court order has been held not to violate the

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[22] See T. Schenk-Geers, *International Exchange of Information and the Protection of Taxpayers*, Alphen aan den Rijn, 2009, pag. 235; also J. M. Calderòn Carrero and A. Quintas Seara, *The Taxpayer's Right of Defence in Cross-Border Exchange-of-Information Procedures*, 68 Bulletin for International Taxation 9 (2014), pag. 498.

constitutional right against self incrimination because such consent is non testimonial. Perhaps, more importantly, compelled production of financial account records (i.e. through a subpoena), even where the records themselves or the act of producing them are self incriminating, has been held to fall under the "required records" exception to the privilege against self incrimination. This exception applies in cases where the government seeks to compel production of documents kept pursuant to a valid regulatory regime.

9.2. The legitimacy of interference, public interest and proportionality principles applied to administrative tax assessment and criminal tax investigations may be analyses on the ground of the ECHR sentence N.K.M. v. Hungary 14 May 2013, n. 66529/11, where it is stated that, in addition to being in accordance with the domestic law of the Contracting State, including its Constitution, the legal norms upon which the deprivation of property is based should be sufficiently accessible, precise and foreseeable in their application. As the notion of "foreseeability", its scope depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed. In particular, a rule is "foreseeable" when it affords a measure of protection against arbitrary interferences by the public authorities. Similarly, the applicable law must provide minimum procedural safeguards commensurate with the importance of the principle at stake (point 48 of the sentence). Only three reports have made remarkable comments. In France, the law concerning "la lute contre la fraude fiscal et la grande délinquance économique et financière" adopted on 6th December 2013 which authorizes administrative tax assessments conducted on the basis of illegally obtained data, grants a legal basis which is sufficiently accessible, precise and foreseeable in its interference in the rights of a taxpayer, the fight against tax avoidance is a respectful reason of public interest, while the intrusive use of illegally obtained data is balanced with more procedural guarantees respecting the principle of contradictory, hence it is proportional. According to the Italian report, while obtaining illegally bank account information in Italy would inevitably lead to an unlawful tax assessment, it is not logic that the same method of evidence collection carried out abroad (and, then, transferred to Italian tax authorities) would not bring to the same results. Finally, about the proportionality principle, under Chapter 2, Section 5 of the Swedish tax procedural act, every measurement the Swedish tax authority makes towards an individual must be proportionate compared to the intrusion it brings. The intrusion must not be greater than necessary to retrieve the wanted information. In accordance with the principle of independent assessment of evidence the principle of proportionality does not affect illegally obtained evidence. None of the reports, nevertheless, provide for comments on whether the intrusive use of illegally obtained data can also be balanced with the right of the taxpayer to remain silent or, even more so, whether any financial AEOI could be balanced with a refusal of the taxpayer to cooperate since bank data, which are requested directly to FFIs, have not been given to FFIs under restraint. Data so obtained from voluntary disclosure can be exchanged with other tax administrations.

10. Discussion points for conclusions

The dilemma is where does the International tax policy stand between the edge of new exchange of information and the edge of any other tax solution of equivalent effect or, to put it in another way around, where does the International tax justice stand between the Machiavellian pragmatism to challenge fundamental principles, on one hand, and the deliberative democracy, eventually in a transnational

perspective, promoted by Jurgen Habermas, on the other hand[23]. AEOI seems an irreversible trend and none of the countries involved wants to give the impression to suspect on the fairness or effectiveness of its democratic development. The OECD is pressing quite hard on the accelerator, as the last recommendation on the Standard for Automatic Exchange of Financial Account Information demonstrates: the advantage of standardization is process simplification, higher effectiveness and lower costs for all stakeholders concerned. A proliferation of different and inconsistent models would potentially impose significant costs on both government and business to collect the necessary information and operate the different models. **Topic 1 of the Congress ("FATCA and AEOI: A New International Tax Order ?)** has the ambition to monitor this evolution by focusing more on the underground difficulties rather than on the well-known benefits, i.e. the lack of democratic control on the way supranational rules are being developed may lead some countries to do their best to slow down and hinder the process as much as possible. Is it ready the time to think a Global Tax Forum (other than the United Nations ?) governing the coordination of all this initiatives, or the "lex americana" will still push further for a while ? In this context, the European Union is, on one hand, very much involved with the need to make the DAC compatible with FATCA and, on the other hand, is putting many AML ingredients on its internal AEOI with many unpredictable consequences. **Topic 2 of the Congress ("The European AEOI: risks and opportunities of the money laundering sauce")** has the ambition to explore this development in order to evaluate the risk of a confusion between the (administrative) cooperation in tax matters (less intrusive information balanced with less taxpayer protection) and the (judiciary) cooperation in criminal tax matters (more intrusive information balanced with more taxpayer protection) which could bring to more intrusive information and less taxpayer protection. Meanwhile, **Topic 3 of the Congress ("The Realpolitik of Tax Solutions of Equivalent Effect: Alternative or Accessory to AEOI?")** has the duty to answer to the following questions: is it really possible to declare that alternative solutions, i.e. voluntary disclosures and the like, are the last station ? Is it globally true that AEOI is the best tool of democratic control over countries and their citizens ? It is hard to find out a definitive solution without being rhetoric since history of taxation, as well as history of economy, is too long to be minimized with a conclusion. To give just an example, according to the majority and minority staff report "Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts" released on 26th February 2014, by the Permanent Subcommittee on Investigations at the United States Senate, FATCA's disclosure requirements have been limited and weakened by its implementing regulations, and may allow many US taxpayers to continue to conceal their accounts in Switzerland and elsewhere (part V, B (3)(b)(iii)). Last but not least **Topic 4 of the Congress ("The Legitimacy of AEOI and Measures Other Than AEOI")** is going to analyze the tension between the legitimate rights of States to protect their tax base by collecting information of taxpayers as much as possible to guarantee taxation and the legitimate rights of taxpayers on privacy and to be protected against the almighty power of these States. It seems to find more Machiavelli in Austria, Germany, Switzerland and the United States, while more Habermas in Belgium, Czech republic, Finland, France, Italy, Poland, Portugal, and Sweden. In between Luxembourg, Netherlands, Russia, Spain and UK. If a future development can be drawn, this has to do, within some country reports "Habermas – related", with the need for a sustainable balance among AEOI and the taxpayer right to ask for protection before any technological intrusion in his personal sphere. To this extent, Preamble 27 of DAC does not promise anything good since, notwithstanding all types of subjects to the provisions of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, it declares appropriate to consider that limitations of certain rights and obligations laid down in the Directive

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[23] Reference is made to P. Essers, *International Tax Justice Between Machiavelli and Habermas*, 68 Bulletin for International Taxation 2 (2014).

are necessary and proportionate in view of the potential loss of revenue for Member States and the crucial importance of information covered by DAC for the effectiveness of the fight against fraud. The confirmation of this feeling is the independent commission of international policy makers and politicians which has been unveiled at the World Economic Forum in Davos last January 2014 in order to open a two-year investigation into the way governments use technological applications with the scope to help lay down rules to protect online citizen rights. The mission in this future scenario is probably to analyze how far supranational rules governing big data are being democratically developed, with the scope to go beyond the proportionality principle and tail some sustainable protection rules for the taxpayer. Belgium, Finland, Italy, Switzerland and UK are proposing this horizon in which whilst AEOI would appear to be keeping on with transparency and open data initiatives, the danger with pushing this agenda is that it has significantly more potential to make too much personal data freely and quite possibly permanently available than alternative more targeted solutions. Whether the right to privacy should trump the right for governments to freely monitor and access information regarding many of the activities of its citizens and the citizens of other countries is a moral dilemma that should be debated more outside before than inside the tax arena. Unless it is believed that alternative methods of equivalent effect to AEOI would better protect taxpayers rights, a necessary paradox which would confirm that everything must change because everything remains as it is…