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International and European Measures for De-offshoring: Global Ambitions and Local Hypocrisies

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This article discusses the most sophisticated measures put in place in recent years at international level and within the European Union, for de-offshoring the world. Most of them have a common ground in the automatic exchange of information among countries which certainly represents an unimaginable tsunami wave rapidly increasing in power due to the interconnections with anti-money laundering and terrorist financing legislations. However, whether it is more likely than not that in the long run the world will be affected by these innovative forms of cooperation (the sticks), many doubts arise on the rate of success of de-offshoring in the short term. Indeed, each single State of the international community still prefers to take care of its own interest with unilateral measures (the carrots) bringing back home alone its slice of the undeclared financial assets, and doing so, why not, trying to eat the revenue of other States, so inducing to offshoring again. The reality is a never ending story.

1 Introduction

The offshore centres are alive and in good health. They serve private individuals as well multinational corporations with great and reciprocal satisfaction.

As far as private individuals are concerned, recent studies show that in 2014 around 8% of households' financial wealth was held in tax havens. The financial wealth of households is the sum of all the bank deposits, portfolios of stocks and bonds, shares in mutual funds, and insurance contracts held by individuals throughout the world, net of any debt. At the beginning of 2014, global household financial wealth amounted to about USD 95.5 trillion, which means that USD 7.6 trillion was held in tax havens (USD 2.3 trillion in Switzerland and the rest spread over Singapore, Hong Kong, the Bahamas, the Cayman Islands, Luxembourg and Jersey).[1]

As far as corporations are concerned, there are a number of studies and data indicating that there is increased segregation between the location where actual business activities and investment take place and the location where profits are reported for tax purposes. For example, interesting information may be gathered from the OECD Investment Database: for certain countries (i.e. Luxembourg, the Netherlands, Hungary and Austria) the database breaks down foreign direct investments (FDIs) held through so-called special purpose entities (SPEs) with no or few employees, little or no physical presence in the host economy, whose assets and liabilities represent investments in or from other countries, and whose core business consists of group financing or holding activities.[2] Furthermore, by searching though the IMF Co-ordinated Direct Investment Survey (CDIS), it emerges that in 2010 Barbados, Bermuda and the British Virgin Islands received more FDIs than Germany (4.28%). On a country-by-country (CbC) position, in 2010 the British Virgin Island were the second largest investor for China (14%) after Hong Kong (45%) and before the United States (4%). For the same year, Bermuda appears as the third largest investor in Chile (10%). Similar data exists in relation to other countries, for example Mauritius was the top investor country into India (24%), while Cyprus (28%), the British Virgin Islands (12%), Bermuda (7%) and the Bahamas (6%) were among the top five investors into Russia.[3]

The scope of this article is to describe the most sophisticated measures put in place in recent years at international level and within the European Union, for de-offshoring the world. However, whether it is more likely

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1 Reference is made to the research of G. Zucman, *The Hidden Wealth of Nations* 35 (The University of Chicago Press 2015).

2 *See* the OECD Report, *FDI in Figures* (Apr. 2016).

3 *See* the OECD Report, *Addressing Base Erosion and Profit Shifting* 17 et seq. (Paris: OECD 2013). Only US Multinationals have 53% of their profits (USD 435 trillion) in six countries: The Netherlands (15%), Bermuda (11%), Ireland (10%), Cayman Islands (6%), Luxembourg (6%), Switzerland (5%). *See* the Report of the Joint Committee on Taxation at US Congress prepared by T. Down, P. Landefeld & A. Moore, *Profit Shifting of U.S. Multinationals* 23 (8 Jan. 2016), available at SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2711968.

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than not that in the long run the world will be indeed affected by these measures (the sticks), many doubts arise on the rate of success of de-offshoring in the short term, since each single State of the international community prefers to take care of its own interest with unilateral measures (the carrots) bringing back home alone its slice of the undeclared financial cake and, why not, trying to eat the portions of other States, so inducing to offshoring again. In reality, it is a never ending story.

2 The modern war against the offshore world

Several issues were already clear at the beginning of the twenty-first century. The globalization of business has (1) considerably risen the number of tax relevant cross-border transactions, as well as (2) considerably increased the mobility of taxpayers, moving from one country to another, and of their capitals which are more often shifted offshore. The 2008 financial crisis brought clear statements by the Group of Eight (G8, now G7) and Group of Twenty (G20) in favour 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 behaviour 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: (1) the European level; (2) the multilateral agreements; (3) the bilateral agreements; and (4) the unilateral rules regulating administrative assistance in tax matters.[4]

On 20 July 2013 the G20 Finance Ministers and Central Bank Governors endorsed the OECD proposals for a global model of automatic exchange of information (AEOI) in the multilateral context. On 6 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 on Transparency and Exchange of Information for Tax Purposes of the OECD, to establish a mechanism to monitor and review the implementation of a new global standard on AEOI and stressed the importance of developing countries being able to benefit from a more transparent international tax system.

2013 is behind the corner but looks like a century ago in this field, so another way to study 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'. The Foreign Accounts Tax Compliance Act (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). With the incredible exception of the United States, 101 jurisdictions have committed with the AEOI provided by the Global Forum, 54 jurisdictions undertaking the first exchanges by 2017 (early adopters), 47 jurisdictions within 2018 (late adopters). 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 whistle-blower programs are exhausted, then bilateral initiatives take place like the Rubik style agreements that Switzerland

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[4] *See* G. Marino, *General Report*, in *New Exchange of Information Versus Tax Solutions of Equivalent Effect*, EATLP International Tax Series, vol. 13 (Amsterdam: IBFD 2015); X. Oberson (General Reporter), *Exchange of Information and Cross-Border Cooperation Between Tax Authorities* vol. 98b, 24 (Cahiers de droit fiscal international, International Fiscal Association 2013); A. P. Dourado, *Exchange of Information and Validity of Global Standards in Tax Law: Abstractionism and Expressionism or Where the Truth Lies*, EUI Working Paper RSCAS 2013/11, 9 et seq.; R. Seer & I. Gabert (General Reporters), *Mutual Assistance and Information Exchange*, EATLP International Tax Series, vol. 8, 24 (Amsterdam: IBFD 2010); also R. Seer & I. Gabert, *European and International Tax Cooperation: Legal Basis, Practice, Burden of Proof, Legal Protection and Requirements*, 65(2) Bull. Int'l Tax'n 88 (2011).

and Liechtenstein have negotiated with several European countries. All these issues are officially in the tax policy agenda of international organizations (OECD), supranational bodies (EU) and single States. Again, tax policies seem to melt medium long term sticks with short term carrots.[5]

3 The sources of the exchange of information system at international level

As anticipated above, there is a matrix of legal platforms involved with the exchange of information, whether national, international and European, with an 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 analysed and solved. In practice, the effective use of these legal instruments must be understood with the aim to share information with the idea to reach their simplification.

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 AEOI. 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. An example of how fishing expeditions could work in the future comes from the decision 11 September 2016 of the Swiss Federal Supreme Court which ruled out in favour of a request from the Netherlands for information on Dutch account holders at Swiss banks without names, making use of the double taxation convention agreement which must ensure a broad exchange of information.

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 twelve TIEAs with member countries in order to appear on the white list. Just like Article 26(1) of the OECD Model, Article 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. In June 2015 the OECD Committee on Fiscal Affairs (CFA) approved a Modern Protocol to the Agreement which may be used by jurisdictions, in case they want to extend the scope of existing TIEAs to cover also the AEOI and/or spontaneous exchange of information. By June 2013 (latest OECD information available), 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.[6]

A strange destiny is related to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (OECD Multilateral Convention on MAATM) put forward by the OECD in cooperation with the Council of Europe, which opened for signature by

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[5] *See* J. E. Stiglitz & M. Pieth, *Overcoming the Shadow Economy* (Friedrich Ebert Stiftung Nov. 2016); 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(1) Bull. Int'l Tax'n 1 (2014); A. G. Soriano, *Toward an Automatic but Asymmetric Exchange of Tax Information: The US Foreign Account Tax Compliance Act (FATCA) as Inflection Point*, 40(10) Intertax 540 (2012).

[6] *See* Soriano, *supra* n. 5, at 542; also, J. G. Gravelle, *Tax Havens: International Tax Avoidance and Evasion* 22 (Congressional Research Service, Library of Congress 2009); T. Anamourlis & L. Nethercott, *An Overview of Tax Information Exchange Agreements and Bank Secrecy*, 63(12) Bull. Int'l Tax'n 616 (2009).

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 31 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'*.[7] However, its media turnaround was when Switzerland signed it with no reservation on 15 October 2013, and deposited on 26 September 2016, through its Ambassador at OECD Urlich Lehner, the instrument of ratification with entry into force on 1 January 2017. Currently, 109 countries have signed the Convention, the latest being the United Arab Emirates on 21 April 2017, just after Panama the 27 October 2016, Pakistan on 14 September 2016, while on 25 August 2016, it was the turn together of Burkina Faso, Malaysia, Saint Kitts and Nevis, Saint Vincent and the Grenadines and Samoa. With the incredible exception of the United States, the Convention collects a wide range of countries including all G20 countries, all BRICS (Brazil, Russia, India, China and South Africa), almost all OECD countries, major financial centres and a growing number of developing countries. The Convention has taken an increasing importance with the G20's call for AEOI to become the new international tax standard of exchange of information. Strange but true, the Convention, by virtue of its Article 6, requires the Competent Authorities of the Parties to the Convention to mutually agree on the scope of AEOI and the procedure to be complied with. With that background, the OECD has approved on 15 July 2014, a Common Reporting Standard (CRS) which is based on (1) a model Competent Authority Agreement (CAA) providing the international legal framework for the automatic exchange of CRS information, (2) the CRS, (3) the Commentaries on CAA and CRS, and (4) the CRS XML schema user guide.

While the Multilateral Convention on MAATM sounds more adequate for de-offshoring the wealth of private individuals, as far as corporations are concerned, the Base Erosion Profit Shifting (BEPS) Action Plan adopted by the OECD and G20 countries in 2013 recognized that enhancing transparency for Tax Administrations by providing them with adequate information to assess high-level transfer pricing and other BEPS-related risks is a crucial aspect for tackling the BEPS problem. Specifically, BEPS Action 13 Report provides a template for multinational enterprises (MNEs) to report annually and for each tax jurisdiction in which they do business the information set out therein. This Report is called the CbC Report.[8]

Last but not least, 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. At today, the Global Forum exercises more than a moral suasion against participating countries through a due diligence activity: 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 offshore centres reports on this issue supports the feeling that this due diligence has created the conditions to accelerate many domestic changes in the field.[9]

4 The Automatic Exchange of Tax Information (AEOI) under EU Law

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 Article 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. The

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7 *See* R. S. Avi-Yonah & 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), 9 (Feb. 2014).

8 *See* OECD, *Action Plan on Base Erosion Profit Shifting* 23 (Paris: OECD 2013), and the interesting comments of A. P. Dourado, *International Standards, Base Erosion and Developing Countries*, in *Tax Design Issues Worldwide* 179 et seq. (Geerten M. M. Michielse & Victor Thuronyi eds, Kluwer Law International 2015).

9 *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(11) Eur. Tax'n 565 (2013).

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 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'. It could be proved that the integration of European tax systems is moving towards more through the level playing field of managing taxes than through the level playing field of their architectures (i.e. the CCCTB project).

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 (Article 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 (Article 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 AEOI 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, Article 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 1 January 2014, on five initial categories of income and capital: (1) income from employment; (2) director's fees; (3) life insurance products not covered by other Union legal instruments on exchange of information and other similar measures; (4) pensions; and, (5) ownership of and income from immovable property.

Notwithstanding DAC entered just into force the 1 January 2013, after few months, the 12 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 6 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 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-favoured-nation' provision of Article 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.

The proposal COM (2013)348 final, has been adopted through Council Directive 2014/107/EU of 9 December 2014 (DAC 2), with the consequence that all financial flows shall automatically be exchanged with regard to taxable periods as from 1 January 2016 (Austria as from 2017). However, this is not the sole extension of DAC, since on 8 December 2015, the European Council adopted another extension with Directive 2015/2376/EU (DAC 3) aimed at improving tax transparency on tax rulings given by States to companies in specific cases about how taxation will be dealt with, while on 25 May 2016 the European Council adopted Directive 2016/881/EU (DAC 4) extending mandatory AEOI to CbC reporting in order to fight aggressive tax planning of multinational corporations following BEPS Action 13. Last but not least, there is in the pipeline also a proposed DAC 5 as regards to the access by Tax Authorities of anti-money laundering information.

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 fulfil within the scope of 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: (1) the facilitation of the tracing and identification of proceeds of crime and other crime related property which may become the object of a freezing; (2) 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 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.[10] 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 fuelled with information coming from local sources.

5 The Collection and Exchange of Information under Anti-Money Laundering Legislation (AML)

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. There is clearly a link between the USA PATRIOT Act and the 'Qualified Intermediary' (QI) 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 Directive (EU) 2015/849 of 20 May 2015, on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (replacing the old Directives 2005/60/EC of 26 October 2005, and 2006/70/EC of 1 August 2006) provides for a stronger 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 have a financial intelligence unit (FIU) with the power: (1) to control intermediaries and professionals in their customer due diligence obligations; (2) to collect information on the above defined 'beneficial owners'; (3) to cooperate and exchange information with FIUs of other EU Member States. Since the area of the 'beneficial owner' definition or, alternatively, the 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.

The above tsunami wave is clear at international and European level: all countries involved do have an 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 CHF 600,000 of taxable amount is committed, and (2) such tax evasion consists either: (a) of an astute behaviour designed to deceit the tax authorities, or (b) is realized by using false, falsified, or inaccurate official documents (such as books of accounts, profit

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[10] *See* Marino, *supra* n. 4, at 14.

and loss accounts, certificate of salary, or official certifications of third parties).

A very delicate issue coming from the general overview is that entities indicated to assemble and manage the information coming from AML sources (the FIUs 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 analyse 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 acquirors data under Finance Act (FA) 2013.[11]

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 FIU 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

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[11] *See Ibid.*, at 17.

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.[12]

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 re-educated, 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 with no breach of Article 8 of the European Convention of Human Rights (ECHR).

One outstanding 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. On top of this, the 5 July 2016 the EU Commission has proposed Council Directive COM(2016) 452 final (DAC 5), extending further the DAC by providing Tax Authorities with access to anti-money laundering information.

6 At the Origin of the Automatic Exchange of Information: The FATCA

There are many reasons behind the rise of the FATCA and there are many reasons behind the supremacy of FATCA over similar initiatives of AEOI.[13] Starting in 2001 the United States has undertaken a series of aggressive tax enforcement, the first being the 'Qualified Intermediary' agreements where 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 whistle-blower case of Bradley Birkenfeld, a former banker at UBS (Union Bank of Switzerland), and the Internal Revenue Service (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% 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.[14]

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 five 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 8 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

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12 *See Ibid.*, at 18.

13 *See* C. Tello, *FATCA: Catalyst for Global Cooperation on Exchange of Tax Information*, 68(2) Bull. Int'l Tax'n 88 (2014).

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

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 information to the US government. It would reduce the original estimated compliance costs of USD 50–100 million per FFI, although according to a recent literature, the upfront costs for the major banks equals more or less expected revenue for 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.[15] 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.[16] On 9 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 2013, Belgium, the Czech Republic, the Netherlands, Poland and Romania also expressed interest in this approach, which by 14 May 2013, had already been endorsed by seventeen countries, with Mexico and Norway joining the initiative in early June and Australia in July.

There are two 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 three versions of IGA 1: (a) a reciprocal version; (b) a non-reciprocal version where there is a pre-existing International Tax Convention (ITC) or TIEA, and (c) 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 (however, the reciprocal version is never. reciprocal, since the United States require information but does not give back exactly the same quality of information). 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 two versions of IGA 2: one for a pre-existing ITC or TIEA, and one where no such arrangements are in place.[17]

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 (more than 100 jurisdictions, including Luxembourg, Liechtenstein, Colombia, Greece, Iceland and Malta, excluding Russia which agreement at stage could only be achieved by means of a new Protocol to the US/Russia tax treaty), 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 implemented the 'sons of FATCA' signed with a number of its Crown Dependencies (Isle of Man, Guernsey, Jersey) and Overseas 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'.

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.[18] There is 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.

Last but not least, it must be 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)

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15 *See* R. F. van Brederode, *A Normative Evaluation of Tax Law Enforcement: Legislative and Political Responses to Tax Avoidance and Evasion*, 42(12) Intertax 775 (2014).

16 *See* S. C. Ruchelman & R. Shervashidze, *Exchanges of Information: What Does the IRS Receive? With Whom Does the IRS Speak?*, 42(8/9) Intertax 577 (2014).

17 *See* M. Somare & V. Wohrer, *Two Different FATCA Model Intergovernmental Agreements: Which is Preferable?*, 68(8) Bull. Int'l Tax'n 395 (2014).

18 *See* Soriano, *supra* n. 5, at 552. *See also* T. Pediaditaki, *FATCA and Tax Treaties: Does It Really Take Two to Tango?*, 53(9) Eur. Tax'n 426 (2013).

with powers to access bank accounts held by individuals in the European Union.[19] The Brussels agreement requires that all twenty-eight 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.

7 The 'realpolitik': de-offshoring solutions of equivalent effect other than 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 6 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.

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 behaviour 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.

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

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19 *See* T. Anamourlis & L. Nethercott, *The EU-US ('Brussels') Agreement on European Banking Secrecy and the Effect on Tax Information Exchange Agreements*, 65(1) Bull. Int'l Tax'n (2011).

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

21 *See* R. Seer, *Voluntary Compliance*, 67(11) Bull. Int'l Tax'n 584 (2013).

to legislators and governments. Many countries have adopted voluntary disclosure programs. In Belgium, 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 EUR 500 million, 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 EUR 1 billion. In Finland 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 8,500 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, paragraph 2, of the Fiscal Code. In Italy, Law 15 December 2014, n. 186, introduced a voluntary disclosure program (VD1) 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. This program has been prolonged until 31 July 2017 (VD2). In the Netherlands, on 2 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 1 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 1 July 2014 and 1 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 1 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 ten 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 three 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.[22]

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 EUR 498 million. In Hungary, 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 five 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 EUR 95 billion. 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.[23]

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 EUR 416.7 million as the first tranche payment to Austria while in September 2013, the second tranche amounted to EUR 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 GBP 5 billion was overoptimistic. According to the Swiss scholars, 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.[24] An interesting alternative to the Rubik agreement for solving the past was

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[22] *See* Marino, *supra* n. 4, at 32.

[23] *See Ibid.*, at 34.

[24] *See* X. Oberson, *The 'Realpolitik' of Tax Solutions of Equivalent Effect: Alternative or Accessory to AEOI?*, in *New Exchange of Information Versus Tax Solutions of Equivalent Effect*, EATLP International Tax Series, vol. 13, 119 (G. Marino ed., Amsterdam: IBFD 2015).

represented by the Liechtenstein Disclosure Facility (LDF) program, which is governed by a TIEA and a Memorandum of Understanding (MOU) signed on 11 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 ten years prior to 6 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 centre, and the HMRC. As a result of the LDF, there have been more than 4,000 registrations. It is estimated that up to 5,000 people are liable to UK tax rate that have assets in Liechtenstein. The UK anticipated that up to GBP 3 billion will be recovered through the facility by 2016.

The idea of a tax solution Rubik style is not original, since the saving Directive 2003/48/EC (abolished on 15 November 2015) 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), on the other side, as a second best temporary option on the way towards AEOI and the abolition of banking privilege.

On the lowest side of the fiscal sustainability scale there are alternative sources to collect information, specifically the whistle-blower programs and the acquisition of stolen bank data. It appears that several countries adopt these underground spying methods. In Austria, for example, since the activation of the whistle-blower website on 20 March 2013, anyone can actively participate in the fight against corruption. The whistle-blower 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. Further 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 6 December 2013 has also created a special and new statute to the whistle-blower, but does not concern taxation. If this law introduced some articles in different codes, as for example the Labour Code which organizes now a protection for the whistle-blower, 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 whistle-blower 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 three 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 Article 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 whistle-blower. In particular, the 25% penalty for cash payment over EUR 2,500 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 Article 305.6 a new reduction of the penalty of

the tax crime when a person involved in the tax offence other than the author actively collaborates (1) to obtain decisive evidence to capture other responsible, (2) to find the facts, or (3) 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 offences has increased by 50% in 2012 compared to 2011. Last but not least, in the US the Internal Revenue Service is authorized to pay whistle-blower 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 whistle-blower up to 30% of the additional tax, penalty, and other amounts it collects. Whistle-blower awards are fully taxable as gross income and are subject to withholding. In 2012, the IRS Whistle-blower Office issued administrative guidance describing a process by which award recipients may apply for a reduced withholding rate. Whistle-blower 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.

To a certain extent something similar to a whistle-blower 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.

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 Liechtenstein Global Trust (LGT) Bank case, German authorities purchased in January 2006 a CD with stolen bank data from Heinrich Kieber, a former LGT employee, paying around EUR 6 million (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.

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. theLGT Bank case, the Hong Kong & Shangai Bank Corporation (HSBC) case and the UBS case, the Falciani case, and more recently the Panama papers and the Bahamas leaks[25]) 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. 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.[26]

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).

8 Conclusions

The dilemma is where does the International tax policy stand between the edge of AEOI for de-offshoring and the edge of any other tax solution of equivalent effect, which maybe inducing to other offshoring, 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.[27] AEOI seems an irreversible trend and none of the countries involved wants to give the impression to

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25 All infos on these scandals are published in the website www.taxjustice.net.

26 *See* T. Schenk-Geers, *International Exchange of Information and the Protection of Taxpayers* 235 (Alphen aan den Rijn 2009); also J. M. Calderòn Carrero & A. Quintas Seara, *The Taxpayer's Right of Defence in Cross-Border Exchange-of-Information Procedures*, 68(9) Bull. Int'l Tax'n 498 (2014).

27 Reference is made to P. Essers, *International Tax Justice Between Machiavelli and Habermas*, 68(2) Bull. Int'l Tax'n (2014).

suspect on the fairness or effectiveness of its democratic development. The OECD is pressing quite hard on the accelerator, as the acquitted recommendation on CRS 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. To make it simple to understand, different interpretations of the tax residence, inducing to double or triple residences, jeopardizes AEOI (if an individual is both resident in Italy and in Switzerland, and has financial assets in Switzerland, the Swiss bank shall not send financial information to Italy).

However, 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 26 February 2014, by the Permanent Subcommittee on Investigations at the United States Senate lead by Carl Levin, FATCA's disclosure requirements have been limited and weakened by its implementing regulations, and may allow many US taxpayers to continue concealing their accounts in Switzerland and elsewhere (part V, B (3) (b)(iii)). At the same time, according to the Financial Time Report *'The New Switzerland?'* by K. Scannell and V. Houlder¸ published last 9 May 2016, in South Dakota financial assets held by local trusts increased from USD 32.8 trillion of 2006 to USD 226 trillion of 2014, and the number of trust companies increased from twenty to eighty-six in the same period. This is possible because the United States is strong enough to pretend worldwide financial information on its citizens, but it is zero generous in outbound transparency: i.e. under IGA 1 concluded between Italy and United States 10 January 2014, at Article 2, paragraph 2, let. a), number 1), Italy is obliged to give information on:

> *name, address, and US TIN of each Specified US Person that is an Account Holder of such account and, in the case of a Non-US Entity that, after the application of the due diligence procedures set forth in Annex I, is identified as having one or more Controlling Persons that is a Specified US Person, the name, address, and US TIN (is any) of such entity and each such Specified US Person*

While at Article 2, paragraph 2, let. b), number 1), the Unites States is only obliged to give information on *'name, address, and Italian TIN of any person that is a resident of Italy and is an Account Holder of the account'*. And if Italy is going to receive this small amount of information it is because Florida Bankers Association and Texas Bankers Association lost the case where they pretended not to give information at all to the IRS by claiming that IGAs would breach the *Administrative Procedure Act* and the *Regulatory Flexibility Act*, imposing to their members additional compliance costs.[28] Hence, a company under the laws of Delaware, a trust under the laws of South Dakota, Nevada or Florida are enough for an Italian resident citizen to safely shelter financial assets to the Italian Revenue. Las but not least, H.J. Res. 41 through Public Law 115-4 of 14 February 2017 has been approved (first signature of President Trump) which nullifies the 'Disclosure of Payments by Resource Extraction Issuers' rule finalized by the Securities and Exchange Commission on 17 July 2016 (the rule, mandated under the Dodd-Frank Wall Street Reform and Consumer Protection Act, requires source extraction issuers to disclose payments made to governments for the commercial development of oil, natural gas, or minerals).

If the United States, Europe and Japan, together holding 92% of the world financial wealth of households (USD 88 trillion), decide to introduce a withholding tax on outgoing interest, dividend and royalties, following the old solution of the EU Savings Directive and the Rubik Agreements, most of the offshore appeal would be over.[29] And the same could be achieved with an international coordinated approach to taxation of multinational corporations.[30] Utopia? More likely than not. President Trump is better promising a 10% one-off tax levy on overseas earnings (standing around USD 1.2 trillion) to encourage US companies to bring them home.

Another issue is to analyse 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,

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[28] *See* Florida Bankers Association et al. (DC Dist Col 01/13/2014) in *Federal Taxes Weekly Alert* (23 Jan. 2014).

[29] *See* G. Zucman, *supra* n. 1, at 36.

[30] *See* R. S. Avi-Yonah & H. Xu, *Global Taxation After Crisis: Why BEPS and MAATM Are Inadequate Responses, and What Can Be Done About It* 45 (15 Jan. 2016), available at SSRN, http://ssrn.com/abstract=2712124.

Czech republic, Finland, France, Italy, Poland, Portugal, and Sweden. In between Luxembourg, Netherlands, Russia, Spain and UK.[31] If a future development can be drawn, this has to do 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.[32]

Two concluding remarks on de-offshoring. 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,[33] 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 mission in this future scenario is probably to analyse 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.

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31 *See* Marino, *supra* n. 4, at 45.

32 *See* J. Owens, *Tax Transparency: The 'Full Monty'*, 68(9) Bull. Int'l Tax'n 512 (2014); J. Owens, *The Role of Tax Administrations in the Current Political Climate*, 67(3) Bull. Int'l Tax'n 156 (2013); M. T. Soler Roch, *Forum: Tax Administration Versus Taxpayer – A New Deal?*, 4(3) World Tax J. 282 (2012); J. Owens, *Moving Towards Better Transparency and Exchange of Information in Tax Matters*, 63(11) Bull. Int'l Tax'n 557 (2009).

33 *See* G. Tomasi di Lampedusa, *The Leopard* (New York 2007), originally published in Italy as *Il Gattopardo* (Milano 1958).