

Exchange of information and the cross-border cooperation between tax authorities

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Overview

- I. Horizontal exchange of information
(authorities)

- II. Limits to the exchange of information

I. Horizontal exchange of information (authorities)

Horizontal exchange of information (authorities)

1. Treaties (OECD)

- March 2009: Lux adopted OECD standard 2005
- Today: 44 Treaties out of 64 in force contain new information exchange clauses (art. 26 OECD-Model).
- July 2012: New reinforced OECD standards 2012 already accepted by Luxemburg, but „dynamic interpretation“ ?
- Tax administration treated 445 EoI requests (all types) in 2011. Since 2010: 150 requests based on new DTTs.

Horizontal exchange of information (authorities)

2. EU directives on *horizontal* Exchange of information

2008/55/EC = „*Tax collection*“ and
2011/16/EU= „*Administrative cooperation*“

- EU remains an „*association of sovereign states*“ (e.g. German Federal Constitutional Court, 30/06/2009, on *Lisbon Treaty*)
- *Difference* directive 2011/16/EU vs Treaties ? → No ratification (27 MS)
- *On demand*: Directive 2011/16/EU on administrative cooperation contains +/- *same rules* for exchange of information *than OECD*; *no retroactivity* before 2011.
- *Spontaneous*: 2011/16/EU in certain circumstances (notably companies)
- *Automatic* exchange mandatory for 3 *types of income* as from 2015 (on tax year year 2014), if available.

Horizontal exchange of information (authorities)

3. Horizontal vs *vertical* exchange of information

- *Directive 2011/16/EU* covers *horizontal* exchange of information on available data: info on investment income (of non-residents) generally not available.
- *Savings directive* (2003/48/EC) ensures *vertical* aspect of EoI. Recent decision of Luxembourg to switch to automatic EoI.
- *FATCA*: larger scope („all“ types of income, not only savings income) + account situation at the end of the year
- „*Retroactivity*“: account situation as of 31/12/2013 → *reported* in 2015)
- *Most favoured nation clause* in art. 19 of directive 2011/16.

Horizontal exchange of information (authorities)

3. Horizontal vs vertical exchange of information

- Scope of Savings directive on 01/01/2015 ?
- Version in place (2003/48/EC): only certain *interest* income
- Draft modifying proposal („*political compromise*“ of december 2009):
 - Enlarged interest definition (PRIPs)
 - Part II funds
 - Certain insurance products („no risk“)
 - „Look through“ to beneficial owners of certain companies
 - „Constructed“ loophole for discretionary trusts (10 years)
- Recent announcements (Commission): extension to *dividends + capital gains* (certain big MS)

Horizontal exchange of information (authorities)

4. Transmission to third parties

- *International Eol*: Tax administration acts „*on proxy*“ of foreign tax administration
- Centralized Eol „office“ in Lux: (Lux bank) information contained in requests *from* foreign tax administrations is *not* used for domestic tax purposes
- Information contained in replies to Luxemburg requests *are used* for domestic taxation purposes
- Art. 16 of Directive 2011/16: very large extension of scope of third parties compared old treaties / Mutual assistance directive of 1977 („may be used for the administration and enforcement of *all* taxes of *any* kind, for *social security* contributions, as well as in all *Court proceedings*“). With permission of communicating MS also for other purposes.

Horizontal exchange of information (authorities)

4. Transmission to third parties

- *Triangular sharing within the EU*: Directive 2011/16/EU (Art. 16(3)) also eases „triangular“ transfer of information compared to treaties: if it informs the MS from which the info originates of its intention to share and MS of origin does not oppose.
- *Sharing with third countries (outside EU)*: Art. 24 of Directive 2011/16/EU allows sharing under certain conditions (linked to *data protection directive*)

Horizontal exchange of information (authorities)

5. Electronic transmission of data

- ACD, AED, ADA use together electronic database.
- Information stored, if likely to be relevant for assessment or collection of taxes.
- International: Art 9 (1) Savings Directive (with consent of customer).

Horizontal exchange of information (authorities)

6. Joint audits / multinational audits

- Luxembourg prepared to take part and accept
- Either on basis of DTT
- Or based on directive 2011/16/EU
- Various joint examinations in the field of VAT

Identification of the taxpayer and the holder of the information

- Art. 26(1) OECD-MC:
 - Information must be „forseeably relevant“
 - Request must be sufficiently detailed
- Exchanges of notes (new DTTs):
 - Identity of the person (name not necessary)
 - Content of the information sought
 - Taxation purpose
 - Reasons for believing that information is held in the requested State
 - Name and address of holder of the information, „to the extent known“
 - Confirmation of request's conformity with law of applicant State
 - Confirmation of exhaustion of all local means by applicant State

Fishing expeditions / group requests

- *Cour Administrative (CA)* (24 May 2012, No. 30251C):
 - Swedish request concerning Malaysian company: identification of financial flows between company's Luxembourg bank account and Swedish consultants requested
 - *CA: Request was not foreseeably relevant because :*
 - request did not specify why the Malaysian company, as foreign taxpayer, was subject to investigation in Sweden; and*
 - the actual purpose of request was the taxation of the Swedish consultants, who were neither named specifically in request nor referred to as taxpayers under investigation.*
- No fishing expedition, if:
 - request relates to one or several specific tax files or given taxpayers; and
 - request unequivocally identifies the taxpayer(s) under investigation.
- Possibility of group requests?
 - OECD-Commentary 2012 on Art 26 (MN 5.2)
 - Taxpayers not individually identified
 - Static vs. dynamic interpretation

II. Limits to the exchange of information

Right to privacy

1. Protection from disclosure to tax authorities
 - Only in case of specific secrets (professional confidentiality, bank secrecy, industrial/commercial/business secrets)
 - Otherwise obligation to disclose

2. Protection from disclosure by tax authorities to third parties
 - Fiscal secrecy in a narrow sense (as used hereinafter)
 - Disclosure by tax authorities to third parties only if specifically permitted by law

General fiscal secrecy

- Sec. 22 General Tax Law (GTL):
 - (1) „Fiscal secrecy is inviolable“
 - (2) Violation of fiscal secrecy by a public official
- Scope:
 - Personal: all public officials receiving information within tax procedure
 - Material: all information in the widest sense, obtained in the context of a tax procedure, e.g.: details of tax basis, aspects of private life
- Disclosure by public official constitutes no violation in case of:
 - Prior agreement by taxpayer
 - Express permission by law
 - Public interest
- Fines:
 - Monetary fine or max. 6 months prison (Sec. 412(1) GTL)
 - 1 to 5 years prison and/or prohibition to exercise a public office, potentially plus monetary fine (violation for personal gain or with intention to harm taxpayer; Sec. 412(2) GTL)

Bank secrecy

Domestic law:

- Art. 41 Financial Sector Law 1993
 - Professional secrecy of the financial sector
- Scope:
 - Personal: all Luxembourg financial sector professionals, their employees, managers, advisers, suppliers, consultants, etc.
 - Material: all information in relation to customer's assets and financial circumstances, including existence of banking relationship
- Violation as criminal offense:
 - Except in case of express legal provision allowing communication
 - Reference to Art. 458 Penal Code (Violation of professional secrecy)
 - Monetary fine or max. 6 months prison
- „Public policy“ (*ordre public*) nature of bank secrecy
- Art. 178bis GTL
 - Luxembourg tax authorities must not ask banks, financial sector professionals, etc. for information about taxpayer

DTT law:

- New Art. 26(5) OECD-MC

Lawyers' legal professional privilege

Domestic law:

- Art. 35 Law regarding the Profession of Attorney
- Sec. 177(1) GTL vis-à-vis tax authorities
- Violation as criminal offense (reference to Art. 458 Penal Code)
 - No infringement if asked to testify before court
 - However, lawyer does not have to testify against client (or even must not, according to Lawyers' Code of Conduct)
- Scope:
 - Personal: lawyers, lawyers' assistants
 - Material: lawyer's office, all lawyer-client communication, conversations, notes, names of clients, financial agreements with clients
- Exemptions:
 - No protection vis-à-vis tax authorities in case of representation/advice in tax matters (Sec. 177(2) GTL)
 - Lawyer's own taxation: communication of invoices obligatory, names of clients may be deleted (not for VAT purposes)
- Information of client if information is transmitted

Lawyers' legal professional privilege

DTT law:

- Art. 26(3)(c) OECD-MC
 - recognised to the extent provided under domestic law
- Exemptions:
 - Lawyers acting in another role (nominee shareholders, trustees, settlors, company directors, agents, fiduciaries)
 - Names of beneficial owners, directors

Commercial/industrial/business secrets

Domestic law:

- Sec. 22(1)(3) GTL: Public officials must not exploit business secrets
 - Supplements general fiscal secrecy
 - Same criminal penalties
- Potential other criminal offenses:
 - Embezzlement by a public official (Art. 240 Penal Code)
 - Violation of a commercial or industrial secret (Art. 309 Penal Code)
- Protection only against disclosure/use by tax authorities
 - Disclosure to tax authorities cannot be refused
- Civil damages in case of illegal disclosure by public officials

DTT law:

- Recognised by Art. 26(3)(c) OECD-MC

DATA PROTECTION

- **Art. 11(3) Luxembourg Constitution:**
L'État garantit la protection de la vie privée.
- **Data Protection Directive 95/46/EC**
- **Art. 7 and 8 Charter of Fundamental Rights of the EU:**
Everyone has the right to the protection of personal data concerning him or her.
Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

DATA PROTECTION

- **Schecke/Eifert** ECR 2010, I-11063:
The ECJ invalidated a Council regulation because it violated the right to the protection of personal data.
- **Information** of the taxpayer
If investigation is in peril?
- **Rectification?**
Taxpayer must be aware of investigation.

DATA PROTECTION

Protocol DTC Luxembourg/Germany:

- Incorrect data must be corrected.
- Illegally obtained data must be deleted.
- Data which is no longer needed must be deleted.
- Protection of the exchanged data against abuse or unauthorized disclosure.

TRANSMISSION OF DATA

Para 12.2 of Commentary to Art 26:

The information received by a Contracting State may not be disclosed to a third country unless there is an express provision in the treaty allowing such disclosure. => **triangular information exchange** not possible.

Art. 16 Directive 2011/16/EU:

The information received may be passed on to other MS unless the State of Origin opposes the sharing of information.

TRANSMISSION OF DATA

Art. 24 Directive 2011/16/EU:

The information received may be even be passed on to third states.

Data Protection Directive: A transfer to a third country is permissible only if such country ensures an adequate level of data protection.

PUBLIC POLICY CONSIDERATIONS

In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation: ...to supply information...which would be **contrary to public policy** (ordre public).

- Case of **stolen data**: *fraus omnia corrumpit*.
Case of Administrative Court 19 February 2009, no. 23487.

PROCEDURAL GUARANTEES

Rules for contesting the request are laid down in Law of 31 March 2010:

- Request may be contested within 1 month.
- Tax administration may answer within 1 month.
- Administrative Court has to come to a decision within 1 month.

- Appeal within 15 days.
- Response within 1 month.
- Decision of the Administrative Court of Appeal within 1 month.

PROCEDURAL GUARANTEES

Nemo tenetur principle (Art. 6 ECHR):

Once the information can be used in a criminal proceeding, cooperation by the taxpayer can no longer be required.

Chambaz Judgment of the ECtHR: The privilege against self-incrimination forms part of the fundamental right to a fair trial.

Conclusion and outlook

