Harmful Tax Competition, International Exchange of Financial Information and Transnational Protection of Taxpayers

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Introduction; 1. Concept of harmful tax competition adopted; 2. The new paradigm on the automatic exchange of financial information; 2.1 Origins: FATCA and IGAs; 2.2 Global implementation: from the unilateral imposition of the US, to regional and then global implementation of the reporting standard; 3. Respect for private and family life and protection of personal data; 4. Due process of law and transnational protection of taxpayers; 5. Conclusion: democratic deficit, lack of legitimacy and the role of judicial dialogue.

Introduction

1. In his seminal article "A Pure Theory of Local Expenditures", C. TIEBOUT demonstrates that under certain assumptions, a competitive market of public goods may produce an efficient outcome. However, negative externalities, resulting from the lack of transparency of some jurisdictions produce harmful effects. The implementation of worldwide standards for the collection and automatic exchange of financial information (*FATCA and Common Reporting Standard*), implemented in the EU legal order through the amendment of the Administrative and Cooperation Directive, represents a relevant element for tackling harmful tax competition. However, serious doubts can be raised on the proportionality of the measures implemented and their compatibility with fundamental rights such as the right to privacy and to data protection. Moreover, the divergence resulting from the robust set of rules regarding the exchange of tax information and the absence of global instruments aimed to protect taxpayers' participation rights in the global arena emphasises the risk of fragmentation of the taxpayers' legal status. Furthermore, negative effects resulting from the more disadvantageous treatment of taxpayers in transnational circumstances may undermine the purpose of strengthen the internal market. We consider that the current EU/Global unbalanced legal framework on automatic exchange of financial information results from

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the democratic deficit that still exists at the EU and OECD levels. We advocate that, under this scenario, multilevel judicial dialogue will play an essential role in building a coherent and comprehensive transnational legal mosaic.

2. As identified by the European Commission in its 2016 Anti Tax Avoidance Package,[1] the lack of transparency of some European jurisdictions have proved to favour tax avoidance behaviours within the EU. Some relevant measures regarding this matter are being implemented such as the submission, by the European Commission, of a proposal of an Anti-Tax Avoidance Directive, the issuance of a Recommendation on the revision of tax treaties entered into by Member-States with third countries or the revision of the Administrative Cooperation Directive (implementing the automatic exchange of financial information and the country-by-country reporting).

3. We will focus on the impact of the implementation of worldwide standards for the collection and automatic exchange of financial information, particularly in the EU. We will argue that, although said standards may increase the level of transparency within the EU, some adverse effects deriving from the current legal framework may undermine the purpose of strengthen the EU internal market. In fact, not only the financial information collection and communication system implemented seems disproportional, severely harming taxpayers' fundamental rights, as those who exercise their rights of free movement will be subject to more aggressive control from the tax authorities than those who find themselves in purely domestic circumstances.

Consequently, questions regarding the legitimacy of the actors involved and the transparency of the procedures adopted may be raised. We advocate that, under this scenario, multilevel judicial dialogue will play an essential role in building a coherent and comprehensive transnational legal mosaic

1. Concept of harmful tax competition adopted

4. A clear distinction between *tax competition* and *harmful tax competition* between States must be drawn to fully understand the political and economic *rationale* of the rules at stake. In fact, the CJEU has consistently accepted tax competition between Member-States in

[1] *See* http://ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package_en.

non-harmonized[2] and harmonized[3] fields, limiting the scope of internal discriminatory rules designed to prevent abusive tax practices.

5. As demonstrated by C. TIEBOUT,[4] under certain assumptions, competition between jurisdictions may produce an efficient outcome. From a regulatory competition perspective, harmonization between Member-states is only required when externalities are produced at the domestic level: "these occur where a part of the cost of an activity is not taken into account in its production because the producer is able to "dump" that cost on someone else"[5]. Therefore, harmonization is perceived as a tool to establish a *level playing field* between Member-States when *market failures* occur, ensuring the correct functioning of the internal market.

6. Relevant international documents identify harmful tax practices as is the case of the 1998 OECD report "Harmful Tax Competition: An Emerging Global Issue", actions 2 and 5 of the recent anti-BEPS OECD project or the European Code of Conduct for business taxation.[6] Under the latter, harmful tax measures include: (i) an effective level of taxation which is significantly lower than the general level of taxation in the country concerned; (ii) tax benefits reserved for non-residents; (iii) tax incentives for activities which are isolated from the domestic economy and therefore have no impact on the national tax base; (iv) granting of tax advantages even in the absence of any real economic activity; (v) the basis of profit determination for companies in a multinational group departs from internationally accepted rules, in particular those approved by the OECD and (vi) lack of transparency.

The implementation of automatic exchange of financial information between Member-States in order to increase the levels of transparency may therefore be qualified as a measure to tackle harmful tax competition between States.

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[2] *See,* e.g., *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue*, Case C-196/04, EU:C:2006:544.

[3] *See*, e.g., *A. Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2*, Case C-28/95, EU:C:1997:369.

[4] *See* TIEBOUT, CHARLES, "A Pure Theory of Local Expenditures." The Journal of Political Economy, 1956, 64(5), p. 416-424.

[5] See CHALMERS, DAMIEN, GARETH DAVIES, and GIORGIO MONTI, European Union Law, 2nd ed, Cambridge University Press, 2011, p. 683.

[6] See, http://ec.europa.eu/taxation_customs/business/company-tax/harmful-tax-competition_en#other_work.

2. The new paradigm on the automatic exchange of financial information

2.1 Origins: FATCA and IGAs

7. The emergence of the 2007 financial crisis raised questions about the lack of transparency of the financial sector and its role in tax fraud schemes. In fact, it was brought to the attention of the public that some financial institutions helped taxpayers to create structures capable of maintaining and generating considerable profits that escaped taxation. For instance, scandals like "Swiss Leaks" demonstrated that certain US persons were circumventing the tax legislation using Swiss bank accounts safeguarded by secrecy laws.

Under this environment, the US approved a statutory provision which generally requires foreign financial institutions and certain non-financial entities to report on the foreign assets held by US account holders. If said entities do not collaborate with the US Internal Revenue Services, withholding taxes (usually 30%) on every payment to such entities will apply. To implement FATCA, the US authorities developed the so-called *Intergovernmental Agreements Models* (IGAs) to negotiate and sign treaties based on such models at the intergovernmental level.[7]

2.2 Global implementation: from the unilateral imposition of the US, to regional and then global implementation of the reporting standard

8. As explained by P. BAKER,[8] the main impetus for the implementation of a global standard for the automatic exchange of financial information came from the massification of IGA-like agreements signed by the US: "spotting an opportunity to use this development to their advantage, the U.K. and several other European countries began concluding FATCA-like IGAs with various jurisdictions […] by the summer of 2013 it was clear that a new international standard for cooperation between revenue authorities had emerged based upon automatic exchange of financial account information. Within the OECD this was implemented through a common reporting standard (CRS) for automatic exchange of financial account information approved by the OECD Council on July 15, 2013 and endorsed by the G-20 shortly afterward."

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[7] *See* PARADA, LEOPOLDO, "Intergovernmental Agreements and the Implementation of FATCA in Europe"*,* World Tax Journal, June, 2015, 201-239, p. 204-205.

[8] BAKER, PHILIP, "Privacy Rights in an Age of Transparency: A European Perspective", Tax Notes International, 2016, 583-586, p. 583.

9. Although they differ on the details, the CRS standard developed by the OECD was based on FATCA. One of the main objectives was to create a global reporting standard to guarantee that the massive exchange of financial information could be effectively and efficiently collected and analysed by the tax authorities.[9] It is also worth mentioning the efforts of the OECD on the development of multiple legal instruments to ensure the coupling of the CRS to the different legal systems of the OECD Member-States, such as the redrafting of article 26 of the OECD Model Convention with Respect to Taxes on Income and on Capital or of specific bilateral, or the revision of multilateral instruments like the Tax Information Exchange Agreements (TIEA) and the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MCMAA).[10]

10. At the European Union level, the CRS was implemented through the amendment of the Directive on Administrative Cooperation (DAC) by the Directive 2014/107/EU, of 9 December 2014. In accordance with the latter's recital 8 "In order to minimise costs and administrative burdens both for tax administrations and for economic operators, it is also crucial to ensure that the expanded scope of automatic exchange of information within the Union is in line with international developments. To achieve this objective, Member States should require their Financial Institutions to implement reporting and due diligence rules which are fully consistent with those set out in the Common Reporting Standard developed by the OECD. Moreover, the scope of Article 8 of Directive 2011/16/EU should be extended to include the same information covered by the OECD Model Competent Authority Agreement and Common Reporting Standard. It is expected that each Member State would have only one single list of domestically-defined Non-Reporting Financial Institutions and Excluded Accounts that it would use both when implementing this Directive and for the application of other agreements implementing the global standard". Hence, favouring the EU internal market was an additional argument for the implementation of the CRS in the EU.

11. Under article 8(3a) of the DAC, relevant financial information concerning accounts held by individuals, corporations and other entities will be automatically disclosed to the tax authorities, including not only income or payments received, but also the account balance

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[9] OECD, *Standard for Automatic Exchange of Information,* OECD - Organization for Economic Cooperation and Development, 2014, p. 9.

[10] Regarding MCMAA, the accession for Member states may be carried out by the submission of bilateral Competent Authority Agreements, in accordance with the OECD Model Competent Authority Agreement (MCAA).

or value. Furthermore, and as requested by the FATCA/CRS system, look through approach methods are applied in order to identify the beneficial owners of non-financial passive entities, in order to impede taxpayers from easily circumventing the reporting rules by investing through corporations or other legal entities.

12. In accordance with the CRS standard, the financial information will flow as follows: reporting financial entity – tax authorities from the reporting financial entity – tax authorities from the state of residency of the taxpayer.

On a global level, the interaction between FATCA, EU DAC and MCAA has created a worldwide system of automatic exchange of financial information. As of December 2016, and considering solely the CRS system, there are now over 1200 bilateral exchange relationships activated by more than 50 jurisdictions.[11]

13. Tackling opacity in financial transactions worldwide represents a common interest of the majority of states (with the exception of those jurisdictions that benefit from it). This circumstance may have created the necessary environment to develop a worldwide standard to collect and report financial information.

However, the fact that such standard was, to some extent, unilaterally implemented by the US cannot be ignored. Only afterwards, the most powerful economies followed the same pattern. One may, then, argue that we have actually observed the worldwide spread of the American FATCA paradigm. Hence, one may ask to what extent the exportation of a US standard on the automatic reporting of financial information may conflict with fundamental values of other legal orders, particularly, those protected by the EU law.

3. Respect for private and family life and protection of personal data

14. The adoption of CRS concerning accounts held by individuals or entities in countries different from the jurisdiction in which they are resident, has significantly undermined the bank secrecy right. In fact, the systematic and massive disclosure of financial information to the tax authorities, regarding not only the income and payments received, but also the total amounts or values held in the bank account should be qualified, in the authors' opinion, as an intrusive measure on the right to privacy (article 8 of European Convention on Human Rights (ECHR) and article 7 of the European Union Charter of Fundamental

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[11] *See* http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/exchange-relationships/#d.en.345426.

Rights (EUCFR)) and the right to protection of personal data as "any information relating to an identified or identifiable individual" (article 8 EUCFR)[12]. In fact, the European Court of Human Rights (ECtHR)[13] and Court of Justice of the European Union (CJEU)[14] case-law demonstrates that financial information is protected by the right to private life and protection of personal data.

15. Therefore, questions may be raised on the proportionality of the intrusive measure (i.e. the adoption of the CRS by the DAC), particularly regarding compliance with the principle of *necessity*.[15]

15.1. First of all, systematic collection and exchange of financial information will occur, concerning individuals' financial situations. For that purpose, no suspicion that a criminal offence or serious tax irregularity was committed is required. Furthermore, no taxpayers profiling measures will be implemented in order to limit the subjective scope of the collection and automatic communication. As M. Somare and V. Wöhrer wrote: "in the light of the criteria laid down by the CJEU it is highly questionable whether the significant amount of personal data required to be exchanged under the directive is the minimum necessary to reach the goal of fighting cross-border tax fraud and tax evasion. The aspect that a massive amount of data is collected from financial institutions and transferred to tax administrations of other

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[12] *See* WP29 Statement of 18 September 2014: *the adoption of a national or European law to approve inter-state automatic exchange of data must include substantive data protection safeguards. The practical roll-out of CRS in Europe based on existing FATCA IT solutions currently lacks adequate data protection safeguards, notwithstanding the EU proposed to amend the Directive 2011/16/EU regarding mandatory automatic exchange of information in the field of taxation. This Directive –which could be considered as transposition of the US FATCA and CRS in EU law -so far falls short of data protection safeguards*" (http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2014/20140918_letter_on_oecd_common_reporting_standard.pdf.pdf).

[13] *See* ECtHR cases *X v Belgium*, 4930/71, (information provided to the tax authorities to justify certain expenses); *Funke v France,* 10828/84, (search and seizure of financial documents carry forward by the tax authorities); *F.S. v Germany,* 30128/96, (the spontaneous exchange of financial information under the DAC); *Wyoych v Poland,* 2428/05, (disclosure of assets declaration for politicians and their spouses).

[14] *See Rechnungshof v Österreichischer Rundfunk*, Case C-465/00 EU:C:2003:294 (report on payments of salaries made by an employer to an administrative authority).

[15] See DEBELVA, FILIP and MOSQUERA, IRMA, "Privacy and Confidentiality in Exchange of Information Procedures: Some Uncertainties, Many Issues, but Few Solutions", Intertax, Vol. 45, Issue 5, 362-376, p. 371 ff, sustaining that it is clear that the current protection of the taxpayer's rights is insufficient in the area of protection of privacy and confidentiality.

Member States without any indication of non-compliant behaviour can be compared to the data collection under the Data Retention Directive which has been declared illegal due to disproportionality".[16]

It appears to be obvious that alternative, less intrusive, measures could be taken (e.g., the mere communication of the existence of a bank account, aggravated withholding taxes on payments for non-disclosed accounts, etc). As noted by M. SOMARE and V. WÖHRER, "whereas the aim of exchanging financial information is irrelevant for taxation in the receiving jurisdiction, e.g., because a country does not tax specific income under its domestic law, a less intrusive alternative would be an AEoI just about the existence of accounts (identification information). In the case that a taxpayer did not declare income of a specific account, or the tax authorities have reason to believe that the tax return that has been filed is incorrect, they could step request further information in a second from the financial institutions".[17] Hence, it is somehow ironic that the OECD CRS model fails the "collection limitation principle" that results from the recommendations of that same organization regarding the transborder flows of personal data, according to which there should be limits to the collection of data.[18]

15.2. Secondly, divergences will most certainly occur between the financial information reported and the income declared by the taxpayers in their annual tax returns, due to the lack of harmonisation on the tax qualification of income at the EU (and Global) level and to the *look through approach* on passive non-financial entities established (in any case, some level of horizontal harmonization is expected to occur).

15.3. Thirdly, one must not underestimate the risks concerning the mass collection and storage of financial information by the tax

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[16] See CJEU case *Digital Rights Ireland v Minister for Communications, Marine and Natural Resources* case C-293/12 and *Kärntner Landesregierung,* C-594/12 and *o.*, EU:C:2014:238, §58-60. *See,* also *Volker und Markus Schecke GbR,* Case C-92/09, *Hartmut Eifert,* Case C-93/09 v Land Hessen EU:C:2010:662. As stated by the WP29 (04.02.2015 Statement) "Following the recent ECJ decision on data retention (Decision of 8 April 2014 of the Grand Chamber3), the WP29 considers that in order not to violate the proportionality principle, it is necessary to demonstrably prove the necessity of the foreseen processing and that the required data are the minimum necessary for attaining the stated purpose and thus avoid, an indiscriminate, massive collection and transfer" (p. 3).

[17] SOMARE, MARTYE, and VIKTORIA WÖHRER, "Automatic Exchange of Financial Information under the Directive on Administrative Cooperation in the Light of the Global Movement towards Transparency", Intertax, 43, (12), 804-815, 2015, 813.

[18] *See* OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, p. 3 .

authorities. Regardless of all the security measures that may be taken, the risk of leakages or hackers' attacks should be considered. Furthermore, the vulnerability of the systems are certainly increased when the tax authorities' IT systems are converted into the most important interconnection platform for the state administrative authorities, as appears to be the case in Portugal.[19]

15.4. Fourthly, pursuant to article 16(2) of the DAC, the financial information exchanged may be used not only for tax purposes, but also for other ends, insofar as the communicating tax authorities give their permission (in accordance with the Member-state internal rules) and this is allowed under the legislation of the Member State of the competent authority receiving the information. The complete absence of substantive restrictions on what other admissible ends are allowed seems, once again, to violate the fundamental right to personal data protection, as interpreted by the CJEU in *Digital Rights Ireland*: "Furthermore, Directive 2006/24 does not contain substantive and procedural conditions relating to the access of the competent national authorities to the data and to their subsequent use. Article 4 of the directive, which governs the access of those authorities to the data retained, does not expressly provide that that access and the subsequent use of the data in question must be strictly restricted to the purpose of preventing and detecting precisely defined serious offences or of conducting criminal prosecutions relating thereto; it merely provides that each Member State is to define the procedures to be followed and the conditions to be fulfilled in order to gain access to the retained data in accordance with necessity and proportionality requirements" (§61).

15.5. Fifthly, the DAC allows for the exchange of information with third states, provided that the competent authority of the Member State from which the information originates has consented to that communication and does not entail any obligation for the Member States to notify the taxpayers when a communication to third states occurs, and the third country concerned has given an undertaking to provide the cooperation required to gather evidence of the irregular or illegal nature of transactions which appear to contravene or constitute an abuse of tax legislation. However, the DAC does not establish any right of the taxpayer to be informed. Once again, the DAC seems to clash with the CJEU case-law, particularly its findings in *Smaranda Bara*[20]: "Articles 10, 11 and 13 of Directive 95/46/EC of the European

[19] Cf, Legal Opinion no. 43/2016 issued by the Portuguese Data Protection Authority.
[20] *Smaranda Bara and o. v Pre-edintele Casei Nationale de Asigurări de Sănătate,* Case C-201/14, EU:C:2015:638.

Parliament and of the Council of 24 October 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data, must be interpreted as precluding national measures, such as those at issue in the main proceedings, which allow a public administrative body of a Member State to transfer personal data to another public administrative body and their subsequent processing, without the data subjects having been informed of that transfer or processing" (however, see *Sabou* case,[21] analysed in paragraph 17, below).

15.6. Sixthly, in the author's opinion, there is no justifiable reason for the automatic communication to be made directly to the tax authorities. To a certain extent, the potential disproportionality of the massive collection of information could be mitigated if the exchange of information between independent bodies and tax authorities were only to enable access to financial information exchanged when reasonable doubts regarding the compliance with tax rules were raised. Furthermore, institutional dimensions, regarding the structure and culture of the different tax authorities at the EU level should not be disregarded. The negative impacts of the automatic exchange of information are certainly not similar, when the tax authorities are organized in accordance with a "basic taxpayer-tax authorities relationship" and not an advanced cooperative compliance model.[22]

15.7. Additional arguments may be found to support the invalidity of the automatic exchange of financial information mechanism implemented by the DAC for noncompliance with the necessity principle. In fact, the right of access to data collected by the taxpayers is not properly framed, and appears to allow Member States a significant degree of discretion to restrict the right to access collected and stored information (article 25(1) of the DAC). Once again, that approach seems contrary to article 8 EUCFR considering the CJEU ruling in *YS v Minister voor Immigratie*[23], according to which the right of access is integrated in the scope of the right to personal data

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[21] *Jiří Sabou v Finanční ředitelství pro hlavní město Prahu,* Case C-276/12), EU:C:2013:678.

[22] According to the first model, "the relationship is purely obligation based. There are no incentives to share additional information, except what is required under the statute […] this relationship, by its nature, has a more confrontational than cooperative character" while in the latter, significant advances are made in order to strengthen the cooperation between taxpayers and tax authorities. *See,* K. BRONZEWSKA, *Cooperative Compliance: A New Approach to Managing Taxpayer Relations*, IBFD, 2016, p. 59.

[23] *YS v Minister voor Immigratie, Integratie en Asiel,* Case C-141/12 and Minister voor Immigratie, Integratie en Asiel v M, S, Case C-372/12, EU:C:2014:2081.

protection. Therefore, restrictions on such right must respect article 52(1) EUCFR, under which "limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others". Furthermore, taxpayers' right to demand the correction of inaccuracies of personal data stored nor the personal data retention period are clearly enshrined (article 25(1) and (4) of the DAC).

4. Due process of law and transnational protection of taxpayers

16. The European (and transnational) system of automatic exchange of financial information demonstrates that there is a significant asymmetry between the robust set of harmonized rules on the exchange of financial information and the absence of global instruments aimed to protect taxpayers' rights, particularly, from a procedural perspective.

17. In fact, the exchange of financial information legal framework seems to have been created under the assumption that only data is being exchanged but not information (i.e., data subject to legal qualification).[24]

17.1. That assumption seems to have been accepted by the CJEU in *Sabou*[25]. The court ruled that "European Union law, as it results in particular from Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums, as amended by Council Directive 2006/98/EC of 20 November 2006, and the fundamental right to be heard, must be interpreted as not conferring on a taxpayer of a Member State either the right to be informed of a request for assistance from that Member State addressed to another Member State, in particular in order to verify the information provided by that taxpayer in his income tax return, or the right to take part in formulating the request addressed to the requested Member State, or the right to take part in examinations of witnesses organised by the requested Member State. Directive 77/799, as amended by Directive 2006/98, does not govern the question of the circumstances in which the taxpayer may challenge the accuracy of the information conveyed by the requested Member State,

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[24] TERRINHA, LUÍS, *O Direito Administrativo na Sociedade A Dimensão Societal do Direito Administrativo Entre a Autopoiese dos Sistemas Sociais e a Função Intersistemática do Sistema Jurídico*, Universidade de Lisboa Faculdade de Direito (Phd Thesis), 2014, p. 186-187.

[25] See, n. 21

and it does not impose any particular obligation with regard to the content of the information conveyed".

As X. OBERSON suggested "at the EU level, in the *Sabou* case, the ECJ confirmed that the right of defense, as a fundamental principle of EU law, is applicable but as a "minimal standard" and only at the end of the process, namely during the tax assessment by the requesting State. In other words, the ECJ has considered that EU Law does not require that the taxpayer should be informed of the request of information".[26] However, serious doubts may be raised on the correctness of such assertion.

As P. BAKER and PISTONE state "the fact that the request for information takes place during the investigative stage does not mean that the taxpayer has no rights at that stage. More specifically, most provisions of EoI, based either on tax treaties or on specific intergovernmental agreements, exclude from EoI any matter that would disclose any trade, business, industrial, commercial or professional secret or trade process or any information the disclosure of which would be contrary to public policy. How are these safeguards for the taxpayer to be enforced if the taxpayer is not made aware of the proposed exchange and given an opportunity to challenge on these grounds?".[27]

However, the findings of the CJUE in the subsequent case *Smaranda Bara* make it unclear as to what extent the *Sabou* case-law line will be maintained.

17.2. Beyond the "minimal standard" of defence rights, it is up to Member States to determine the degree of participatory rights, in accordance with the applicable internal procedural rules. Therefore, Member States are allowed to apply higher standards.[28] In any case, and for procedural rules only, the residency state rules will determine the applicable standard regarding participatory rights.

18. Nevertheless, it is our opinion that the absence of harmonized taxpayer's participatory rights in this matter determines the fragmentation of the taxpayer legal status, creating undesirable uncertainty. Furthermore, it is arguable that internal participatory rights are not properly structured for transnational situations. In fact, in

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[26] OBERSON, XAVIER, *International Exchange of Information in Tax Matters Towards Global Transparency*: Edward Elgar Publishing, 2015, p. 239.

[27] BAKER, PHILIP, and PISTONE, PASQUALE, General Report, in "The practical protection of taxpayer's fundamental rights", Vol. 100, Part II of Cahiers de Droit Fiscal International, 2015, IFA, p. 51.

[28] See, X. OBERSON, International Exchange of Information..., *supra,* p. 241.

contrast to the States, taxpayers do not have privileged communication channels with foreign tax authorities. For instance, if a divergence arises between income reported by the financial institution and the income declared in the annual tax return of the taxpayer, the latter should have the right to question the reporting tax authority about the legal qualifications made. It is the author's opinion that the legal status of taxpayers in the global arena is *per se* more fragile, and therefore, additional protection measures should be taken. However, there are no such measures established in the DAC, nor has the OECD recommended the implementation of participatory rights adjusted to the transnational nature of the tax procedures at stake.[29]

19. On the contrary, there are some disturbing facts regarding the OECD's orientation on taxpayers participatory rights. As explained by P. BAKER and P. PISTONE "in the context of cross-border EoIR, one negative development is noted by several branch reports which, quite exceptionally, points to a decrease in the protection of taxpayer's rights in this area. The branch reports for Austria, Liechtenstein, the Netherlands, Portugal and Switzerland all explain how, in very recent years, existing procedures for notifying taxpayers about cross-border EoIR, and for those taxpayers to challenge if appropriate, have been removed entirely or cut down […] it is, in our view, a poor reflection on the respect for taxpayers' rights of the Forum and the OECD in general that countries have been pressurised to reduce the protection for taxpayer's rights in this way. As will appear elsewhere from this General Report, the record of the OECD in giving priority to the rights of taxpayers is not a good one."[30]

5. Conclusion: democratic deficit, lack of legitimacy and the role of judicial dialogue

20. The concept of a Global Administrative Law seems particularly suitable to describe and analyse the worldwide implementation of an automatic exchange of financial information *standard* for tax purposes. Although it started as a unilateral policy of the United States, the impact of the Foreign Account Tax Compliance Act (FATCA), was soon converted into a global standard boosted by the G8/G20 and the OECD and its Member-States, with the power and the means to impose a *Common Reporting Standard* (CRS) upon the rest of the world. If one could argue that the implementation of these measures

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[29] See, advocating the need for a multilateral taxpayer bill of rights, COCKFIELD, ARTHUR J, "Protecting Taxpayer Privacy Rights Under Enhanced Cross-Border Tax Information Exchange: Toward a Multilateral Taxpayer Bill of Rights", U.B.C. Law Review, 42(2), p. 420-471.

[30] BAKER, PHILIP, and PISTONE, PASQUALE, General Report, *supra,* p. 51.

would always require the intervention of national legislators, the international environment significantly limited its leeway. As commented by B. KINGSBURY, N. KRISCH, and R. STEWART, "important regulatory functions are no longer exclusively domestic in character and have become significantly transnational, or global. This is especially true in the area of rulemaking, in which genuinely international action combines with action by national regulators in networks of global coordination to supplement, and often determine, domestic action, thus penetrating deeply into domestic regulatory programs and decisions".[31]

20.1. Some legal scholars identify the emergence of a Global Administrative Law based on two pillars: (i) the idea that global governance is driven by other actors beyond the States (such as individuals, international organizations, transnational networks of administrative of governmental actors, private self-regulating bodies, corporations), and (ii) that said actors may be acting without proper control, which gives rise to deficits regarding accountability and legitimacy. Hence, the scope of Global Administrative Law is to identify, analyse and increase instances of accountability and control of global administration.[32] Global Administrative Law comprises "the mechanisms, principles, practices and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decisions, and legality, and by providing effective review of the rules and decisions they made […] it includes rulemaking, not in the form of treaties negotiated by states, but of standards and rules of general applicability adopted by subsidiary bodies. It also includes informal decisions taken in overseeing and implementing international regulatory regimes. As a matter of provisional delineation, global administrative action is rulemaking adjudications, and other decisions that are neither treaty-making nor simple dispute settlements between parties".[33]

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[31] KINGSBURY, BENEDICT, KRISCH, NICO and STEWART, RICHARD B, "The Emergence of Global Administrative Law", Law and Contemporary Problems, 2015, 68, 15-61, p. 25.

[32] See, ANTHONY, GORDON, AUBY, JEAN-BERNARD, MORISON, JOHN and ZWART, TOM, "Values in Global Administrative Law: Introduction to the collection" in Values in Global Administrative Law, edit. GORDON ANTHONY, JEAN-BERNARD AUBY, JOHN MORISON and TOM ZWART, Hart Publishing, 2011, p. 4 and 5.

[33] KINGSBURY, BENEDICT, KRISCH, NICO and STEWART, RICHARD B, "The Emergence of Global…", *supra*, p. 17.

20.2. In any case, we do not see Global Administrative Law as an alternative to constitutionalism. With G. ANTHONY et al. we agree that "post-national constitutionalism can best be conceived of in terms of "constitutional pluralism". This approach holds, at its most basic, that there are a range of overlapping constitutional orders in globalising post-State society and that these are to be regarded as interdependent rather than mutually exclusive. These multiple sites of constitutionalism can, moreover, either be established or emerging, and they are taken to interact with one another on a basis of heterarchy and accommodation […] Constitutional pluralism, in this way, thus envisages a dialogue between systems that are linked together by global processes that allows them to act as 'checks and balances' on 'one another'. In other words, the emphasis is less on the pursuit of an elusive foundational constitution for the globe and more on the potential that is offered by a multifarious 'power limiting constitutionalism' that is focused upon the 'rule of law', 'rights' and 'review' ".

21. The absence of adequate substantive and procedural guarantees established at the EU level and the reported pressures from the OECD on Member States to diminish taxpayers' rights, raises some questions on the democratic deficit concerning the global implementation of the CRS. The outcome of the OECD recommendations in this matter reflects, in our opinion, participatory rights deficits both at the OECD and EU level resulting from institutional flaws that raise serious legitimacy issues. As stated by S. CASSESE, "participation has a legitimacy-building function. Global regulatory agencies are like self-contained machines; but, through participation, civil society can get closer to the workings of power".[34]

22. In fact, the worldwide implementation of a reporting standard based on the US standard, seems to ignore the historical EU-US collision from a substantive privacy and data protection standpoint regarding the right to private life and personal data protection.[35] Furthermore, recent events demonstrate that the US are refusing to implement some of FATCA/CRS methods concerning the *look through approach,* therefore benefiting from the lack of opacity that said instrument was designed to tackle. As reported by The Economist,

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[34] CASSESE, SABINO, "A Global Due Process of Law" in Values in Global Administrative Law, edit. GORDON ANTHONY, JEAN-BERNARD AUBY, JOHN MORISON and TOM ZWART, Hart Publishing, 2011, p. 53.

[35] *See* SCHWARTZ, PAUL M., "The EU-U.S. Privacy Collision: A Turn To Institutions and Procedures" Harvard Law Review, 126, p. 1966-1995.

"having launched and led the battle against offshore tax evasion, America is now part of the problem".[36]

23. Administrative efficiency seems to have overridden substantive and procedural fundamental rights, mirroring a unidimensional approach that certainly lacks constitutional support (at the EU and national levels). Moreover, and from the EU standpoint, it is somehow perverse that international bank account holders are subject to a much more intrusive control system that those who hold national bank accounts. The restrictive effects on the freedom to provide services (if not discriminatory) undermine the correct functioning of the EU internal market. The contradiction between the alleged purpose of reinforcing the internal market and the real obstructive effects of the CRS/DAC seems obvious.

24. Under this scenario, the role of national and international courts will be, in our opinion, vital to shape the legal framework regarding the global automatic exchange of financial communications. In fact, as it becomes clear that the CRS paradigm may fail enormously due to its disregard for fundamental rights, avoiding the overall collapse of the system will only be possible if national and international courts can create bridges between the different legal orders: "Many authors have sought to discover the reasons for which judges are being asked to carry out an ever-more extensive range of functions. Jürgen Habermas has observed that courts "speak" and "listen" as equals, and are at once authors and addressees of norms. In particular, he argues that judges interact with each other on the basis of the discursive method and the proceduralist paradigm. The democratic State, indeed, can be defined as the institutionalization of procedure an of communicative presuppositions that enables discursive opinion – and will – formation".[37]

25. We advocate that this might be achieved if: (i) from a substantive standpoint, effective limitations on the collection and communication of information are demanded by courts, and (ii) procedural *due process* values are respected, particularly, regarding participatory rights.

26. The dialogue between jurisdictions may occur and therefore appropriate conditions for a cross-fertilization between legal orders may take place.

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[36] See, http://www.economist.com/news/international/21693219-having-launched-and-led-battle-against-offshore-tax-evasion-america-now-part.

[37] CASSESE, SABINO, When Legal Orders Collide: The Role of Courts, Global Law Press, 2010, p. 113.

26.1. At the EU level, the effective implementation of FATCA and CRS will most certainly be examined by the CJEU, particularly, their compatibility with the rights to privacy and personal data protection. At this level, the primacy of the EUCFR will be determinant.[38] Furthermore, we highlight the importance of internal Supreme and Constitutional courts in the dialogue concerning the protection of the referred fundamental rights.

26.2. From a procedural perspective, although the CJEU has applied a minimalist standard regarding participatory rights, higher standards may be applicable by Member States. Furthermore, the most qualified legal doctrine has drawn attention to the fact that said CJEU approach is based on wrong assumptions. We therefore anticipate that the dialogue between national courts and the CJEU may result in the raising of the minimum standard. As S. CORREIA noted "in the field of transnational regulatory systems, the subject matters are extremely diverse and the organisation tends to be fluid. The fields where the convergence of basic criteria is easiest is therefore that of techniques for action or decision-making processes in the light of the shared imperatives of good governance […] the universal acceptance of basic administrative process requirements has moved fastest in the field of protection of the individual from governmental power. Centred on due or fair process with the essence of an administrative procedural structure affording guarantees for individuals, we are today witnessing the gradual formation of a *jus commune*".[39]

27. We then believe that courts may play an important role by ensuring the coherence of the global legal framework through the adoption of a comprehensive (and, consequently balanced) approach to potential collisions between legal orders.

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[38] *See* Berlioz Investment Fund SA v Directeur de l'administration des contributions directes, Case C-682/15, EU:C:2017:373.

[39] CORREIA, SÉRVULO, "Administrative Due or Fair Process", in Values in Global Administrative Law, edit. GORDON ANTHONY, JEAN-BERNARD AUBY, JOHN MORISON and TOM ZWART, Hart Publishing, 2011, p. 353.