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*Exchange of information in the EU
(some remarks on Directive 2011/16/EU)*

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SUMMARY

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2. Why the EU tax cooperation network needed to be reformed
3. The new Information Exchange Directive no. 2011/16/EU
4. Which future in tax cooperation?
(the EU exchange of information between FATCA and RUBIK)



1. Tax Cooperation within the EU

TAX COOPERATION WITHIN THE EU (AN OVERVIEW)



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1. Tax Cooperation within the EU

Tax evasion, avoidance and tax frauds are an **obstacle to the single market** (unfair competition).

Fiscal transparency and exchange of information have become even more the only means by which evasion, avoidance and frauds of taxes can be counteracted in an international environment.

To do that , States must sign an agreement based on **reciprocity**.

If there is not an **“internal” reciprocity** , an **“external” reciprocity** can be pursued.



1. Tax Cooperation within the EU

Also **cooperation in tax recovery** is needed even more within the EU. Aggressive tax planning arrangements are often based on shifting companies in other jurisdictions.

Bank secrecy is the fundamental mean used to carry out behaviours aimed at hiding the tax base, because it **prevents tax cooperation to be effective**.

Italian tax authorities are **not bind to bank secrecy** by January 1992 and, by October 2007, they can have access through electronic means to all data registered by banks in the name of all taxpayers.



1. Tax Cooperation within the EU

Pre-existing measures:

- **Directive 77/799/EEC:** Mutual assistance in the field of direct taxation and taxation of insurance fees. **Scope of the Directive** (art. 1): “Member States shall exchange any information that may enable them to **effect a correct assessment** of taxes on income and capital”
- **Directive 76/308/EEC:** Mutual assistance in recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance
- **Directive 2008/55/EC:** Mutual assistance for the recovery of claims to certain levies, duties and other measures (modifies Directive 76/308/EEC as amended several times, but its object remains limited)



1. Tax Cooperation within the EU

Recent trends in improving international tax transparency:

1. **Monti Package (EU 1997)**: Counteracting harmful tax practices based, among others, on lack of transparency .
2. **Harmful Tax Competition. An Emerging Global Issue” (OECD 1998)**: Countries are classified as “tax havens” when lack of transparency and exchange of information are provided.
3. **Agreement on Exchange of Information in Tax Matters (OECD 2002)**: Non-directly reciprocal agreements;
4. **G-7, G-8, G-20 (especially as from 2008)**: The international standard on transparency and exchange of information, provides for full exchange of information on request **without regard to a domestic tax interest or bank secrecy for tax purposes**. New Directives go straight in this direction.



2. Why Reforming Tax Cooperation

WHY THE EU TAX COOPERATION NETWORK NEEDED TO BE REFORMED



2. Why Reforming Tax Cooperation

The the Existing Directives are **very old** (about 35 years)

For many reasons, the need for transparency and exchange of information has increased in the EU and in the whole world, as well.

In the view of the EU Commission, the existing directives must have been changed fo the following reasons:

- Achieving the internal market**
- Improving EU harmonization**



2. Why Reforming Tax Cooperation

Achieving the internal market:

The ECJ case-law stated that an efficient cooperation and recovery system in the field of taxation **proves to be one of the cornerstones** of the internal market in nowadays economy.

Dating from the enactment of the first tax cooperation Directives 76/308/EEC (assistance in recovery) and 77/799/EEC (exchange of info), **ways of avoiding, evading and removing taxes have deeply changed and increased.**



2. Why Reforming Tax Cooperation

EU harmonization:

In this new environment guarantees for a deeper harmonization inside the EU are needed, according:

- a) to the principle of **proportionality** (the Directives **cannot go beyond what is strictly necessary** in order to carry out mutual assistance and tax recovery in the EU)
- b) to the principle of **non discrimination** (tax cooperation allows Member States to **remove discriminatory protective measures** in trans-frontier transactions which they have adopted for fear of tax evasion and tax losses (exchange of info helps States which make use of **worldwide method** to know taxpayers' situation abroad))



2. Why Reforming Tax Cooperation

EU Commission, **Proposal 2-2-2009 COM(2009) 29** on administrative cooperation in the field of taxation (Directive 2011/16/EU):

- a) Development of the **mobility of taxpayers** (electronic transactions, Directive no. 88/361/EEC on freedom of movement of capitals), of the number of cross border transactions and of the internationalization of financial instruments makes it **more and more difficult for Member States to assess taxes due properly**.
- b) Taxes have **increased** in their number and **modified** in their compliance rules (more complexity in tax systems).
- c) Therefore, **one single Member State cannot manage its internal taxation system without information** coming from other Member States, especially as regards direct taxation.



2. Why Reforming Tax Cooperation

EU Commission, **Proposal 2-2-2009 COM(2009) 29** on administrative cooperation in the field of taxation (Directive 2011/16/EU):

- d) the existing Directive 77/799/EEC was not efficient enough to ensure an appropriate administrative cooperation;
- e) a **reinforced instrument** for administrative cooperation in tax matters:
 - b-1) would ensure and keep effective **full national sovereignty** over the different kinds and levels of taxes applied in the MS;
 - b-2) is the only way of **assessing taxes correctly** and thus preventing and combating tax fraud and tax evasion (due to the lack of harmonization in this field).



2. Why Reforming Tax Cooperation

EU Commission, **Proposal 2-2-2009 COM(2009) 28** concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (Directive 2011/24/EU):

a) Mobility of persons and capital is increasing, and **fraudsters take advantage of the territorial limitation** of the authorities' competences to organize insolvencies in countries where they have tax debts.

b) the existing Directive 76/308/EEC, as lastly amended by Directive 2008/55/EC, was **not efficient enough** to ensure an appropriate administrative cooperation (in 2003, Member States received 3355 assistance requests; by 2007, this was up to 11794; but amount effectively recovered remains low (approx. 5 %)).



2. Why Reforming Tax Cooperation

EU Commission, **Directive proposal 2-2-2009 COM(2009) 28** concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures:

c)The existing legislation **doesn't provide for uniform instruments** for enforcement or precautionary measures.

d)The current **problems linked to the recognition and translation** of instruments emanating from another Member State are a major cause of the inefficiency of the present assistance rules.

e)Under the existing provisions, requests for mutual assistance are **subject to too strict conditions** which have a negative impact on the recovery effect.



3. The new Information Exchange Directive

THE NEW INFORMATION EXCHANGE DIRECTIVE NO. 2011/16/EU



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3. The new Information Exchange Directive

Aims of the Directive:

- a) Setup clearer and **more precise rules** governing administrative cooperation between Member States.
- b) Realize more **direct contacts between services**, with a view to making cooperation more efficient and faster.
- c) A Member State should not refuse to transmit information because it has **no domestic interest** (e.g.: to avoid double taxation, like in the first release of OECD Model). So the **exchange of information is encouraged**, as also set out by Article 26 of the OECD Convention.
- d) Taxes **of any kind** will be covered (exceptions: VAT and excise duties and Social security contributions, see Article 2)



3. The new Information Exchange Directive

The new domestic administrative organization (Art. 4):

For the contacts with other Member States' administrations, each Member State can set up a more decentralized network:

a) Shall (mandatory) design a **single** Central Liaison Office (Italy has three: Dipartimento delle Finanze, Agenzia delle Entrate, Guardia di Finanza);

b) May (optional) design "liaison departments" and "competent officials" with **specific territorial competences**. *"Where a liaison department or a competent official sends or receives a request or a reply to a request for cooperation, it shall inform the central liaison office of its Member State under the procedures laid down by that Member State"* (art. 4, par. 6, **decentralization is favored, but coordination is asked**, as well).



3. The new Information Exchange Directive

Exchange of information on request (what, when, how)

What (Art. 5):

*“The requested authority **shall** communicate to the requesting authority **any [relevant] information** that it has in its possession or that it obtains as a result of administrative enquiries”.*

When (Art. 7):

*“The requested authority shall provide the information **as quickly as possible, and no later than six months** from the date of receipt of the request” (art. 7, par. 1).*

*“However, where the requested authority is **already in possession** of that information, the information shall be transmitted **within two months of that date**” (art. 7, par. 2).*



3. The new Information Exchange Directive

Exchange of information on request

How (Art. 6):

*“the requested authority **shall arrange** for the carrying out of any administrative enquiries necessary to obtain the information referred to in Article 5” (Art. 6, par. 1: compulsory).*

*“The requested authority shall follow **the same procedures as it would when acting on its own initiative** or at the request of another authority in its own Member State” (Art. 6, par. 3: no differences).*

*“When specifically requested by the requesting authority, the requested authority shall communicate **original documents** provided that this is not contrary to the provisions in force in the Member State of the requested authority”.*



3. The new Information Exchange Directive

Automatic exchange of information (Art. 8):

Relevant information which **must** (mandatory) be automatically exchanged:

- a) income from employment
- b) director's fees
- c) life insurance products not covered by other EU instruments on exchange of information
- d) pensions
- e) ownership of and income from immovable property

Efficiency of automatic exchanges is controlled by the Commission by means of ***ad hoc* reports of the MS** (par. 4-5).



3. The new Information Exchange Directive

Spontaneous exchange of information (Art. 9):

MS **must** exchange (“*shall communicate*”) all information relevant for the purposes of art. 1 when (par. 1):

- a) there **may be a loss of tax** in the other Member State;
- b) reductions in a MS **would give rise to increases** in another MS;
- c) a saving in tax may result in one or in the other MS;
- d) a saving of tax may result from **artificial transfers of profits within groups** of enterprises;
- e) information forwarded has enabled information to be obtained which may be relevant in assessing liability to tax.

In the above cases exchange is **spontaneous** in its initiative but **compulsory**. Info which simply “*may be useful*” to another MS **may be** communicated (par. 2).



3. The new Information Exchange Directive

Spontaneous Exchange vs. “information laundering” (the “lists”):

“**Vaduz list**” was “bought” by German tax administration from an officer of the national Lichtenstein bank who stole it. Similarly, “**Falciani list**” was stolen by an employee of HSBC Swiss bank, and then obtained by French government in the same way.

In both cases information has been the **consequence of a criminal offence** in the State where it has been obtained.

Both the “lists” have been circulated in the EU by mean of the **spontaneous exchange** ruled by art. 4 of the Directive 77/799/EEC.



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Italian criminal judges recently stated that lists are illegal sources of proof and **must be destroyed**. Tax Agency will claim this decision

3. The new Information Exchange Directive

Spontaneous Exchange vs. “information laundering” (the “lists”):

Critical issue: can an information to be considered “dirty” in the State of origin become “clean” in the State of destination? How must we face this “**information laundering**” phenomenon? Differences could raise between evidence in a criminal trial and those in tax assessment.

Italian art. 37 D.P.R. 600/73 states that tax authorities “*procedono (...) al controllo delle dichiarazioni sulla scorta ... (omissis) ... delle informazioni **di cui siano comunque in possesso**” (English: “**no matter how they have got them**”)*

Italian art 33 D.P.R. 600/73 states that Guardia di Finanza (Tax Police) can be authorized by the judge to give tax authorities evidences gathered during investigations carried out for criminal purposes.



3. The new Information Exchange Directive

Most Favored Nation Clause (Art. 19):

*“Where a Member State provides a **wider cooperation to a third country** than that provided for under this Directive, that Member State may not refuse to provide such wider cooperation to any other Member State...”*

The sense of this rule is that a Member State has to provide cooperation to other Member State **under the same better conditions** stipulated with a third country, thus stressing the specific EU dimension.



3. The new Information Exchange Directive

Exchange of information with third countries (Art. 24):

MS **may** communicate **to another MS** any relevant information obtained by a third country only if this is allowed pursuant to an **agreement with that third country**.

MS **may** communicate **to a third country** any relevant information obtained by another MS, at the following conditions:

- a) the competent authority of **that MS consented** to that communication;
- b) the **third country provides the cooperation** required to gather evidence of the transactions which appear to constitute an abuse of tax legislation.



3. The new Information Exchange Directive

Overcoming bank secrecy (Art. 18, par. 2):

*“In no case shall Article 17(2) and (4) be construed as permitting a requested authority of a Member State to decline to supply information **solely because this information is held by a bank**, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person”.*

This article **does not abolish bank secrecy** in the Member States where it concerns their relationship with their own taxpayers, but only tackles bank secrecy and abolishes it **between Member States**, thus creating a strong platform for a complete, real, efficient and effective administrative cooperation in the EU.



3. The new Information Exchange Directive

Overcoming bank secrecy (Art. 18, par. 2):

Justifications given by the Commission:

- a) bank secrecy has never been intended to serve as a means to **encourage tax fraud and evasion;**
- b) it must be rather understood just to be a **protection against excessive rights for the tax administration of the home country;**
- c) this should not prevent information being provided where the **taxing rights of other Member States are concerned;**
- d) EU Member States **cannot ask more to non EU tax havens** if they do not improve administrative cooperation between them.



4. Which Future in Tax Cooperation?

WHICH FUTURE IN TAX COOPERATION?



4. Which Future in Tax Cooperation?

- **U. S. Foreign Account Tax Compliance Act (FATCA)** is compliant with the new global standards for transparency and exchange of information, and with EU system of co-operation.
- U.S. taxpayers must report financial assets outside US must report those assets to the IRS. **Foreign Financial Institutions (FFI) are required to report directly to the IRS** information about financial accounts held by U.S. taxpayers. have to enter into a special agreement with the IRS by June 30, 2013-
- FATCA promotes **State-to-bank agreements**, and for FFI operating in U.S. this is compulsory. A State-to-State approach has been accepted by US as requested by the EU Commission.
- FATCA gives one-way information, but could generate information which the IRS may exchange spontaneously.



4. Which Future in Tax Cooperation?

- RUBIK agreements are not compliant with the EU policy: They could “**normalize**” **several positions** which otherwise would be irregular.
- They also are against EU principle of free movement of capitals, because they create special regimes for resident of MS who will sign them.
- The **additional protocols** don't solve this problem because the object of Rubik is wider than that of Directive 2003/48.
- EC must speed up negotiations with Switzerland and other third States (see EP Resolution of 19th April 2012).



4. Which Future in Tax Cooperation?

- By 1st January 2013, the new rules will create inside the EU area an **environment where bank secrecy will be not anymore admitted**, in cross-border situations at least.
- Paradoxically, according to the new Directive, if a MS maintains bank secrecy in its jurisdiction, it cannot use bank data for national purposes, but it can be obliged to give them to another MS who makes this request.
- This situation will probably **shift capital outside the EU**, finding places where anonymity is granted.
- **Italian new rules against use of cash** could increase this phenomenon.

