

Rethinking the International Tax Transparency Framework

Introduction

Transparency and exchange of information for tax purposes have been under discussion within the international tax arena for the past 10-15 years. Since then, regulations in this regard have proliferated at a domestic, regional, and international level but in an unmethodical, uncoordinated and complex manner, thus resulting in an intricate framework which requires careful consideration and expertise from taxpayers and specific know-how from tax advisors, financial institutions and tax authorities.

Prima facie, it would seem that transparency in general and Tax Transparency¹ in particular, are a realization of democracy and therefore should be encouraged at all levels.² However, when analyzing how this framework has evolved in the past years, it seems that the cost being paid by taxpayers for ensuring Tax Transparency has exceeded the associated benefits.

Brief overview of existing Tax Transparency regulations

In the European Union (EU)³, member countries have adopted Directive 2011/16/EU on Administrative Cooperation (DAC). The DAC provides for spontaneous (SEOI), automatic (AEOI) and ‘on request’ exchange of information (EOIR).⁴

The DAC has evolved along with the OECD’s Base Erosion and Profit Shifting (BEPS) project. So, to continue to be in line with the BEPS project and its main objectives, the DAC has been amended several times, broadening of the scope of information to be reported. The Directive 2014/107/EU on automatic exchange of financial accounts information (DAC 2)⁵ was the extension of the AEOI within the EU to also cover the Common Reporting Standard (CRS) and was, at least partly, a reaction to the adoption of the Foreign Account Tax Compliance Act (FATCA) in the US. Under the DAC 2 obligations, EU Member States automatically exchange financial account information, as well as dividends, interests, gross proceeds and other investment income paid to that account during a year. Afterwards, Directive 2015/2376/EU on automatic exchange of advance cross-border tax rulings (ATR) and advance pricing

¹ For the purposes of this article, Tax Transparency should be understood as all currently existing exchange of information systems (automatic, spontaneous or upon request) and regarding all tax-related information (financial information, tax rulings, etc.).

² M. Fenster, "The Opacity of Transparency", 91 Iowa L. Rev. 885 (2006), available at: <http://scholarship.law.ufl.edu/facultypub/46>.

³ For further information regarding the evolution of Tax Transparency regulations within the EU, please see: Cahiers de droit fiscal international, 2020, International Fiscal Association (IFA), Volume 105 (B), General Report, 39 and the Addendum to the General Report on Subject 2, 3.

⁴ Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32011L0016>.

⁵ Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0107>.

agreements (APA) (DAC 3)⁶ was issued. Then, Directive 2016/881/EU on automatic exchange of country-by-country reporting (CbCR) (DAC 4)⁷ was published, adopting the OECD standard set forth under BEPS Action 13 regarding country-by-country reporting for MNE groups. Later, Directive 2016/2258/EU (DAC 5)⁸ was launched, addressing access to Anti-Money Laundering information by tax authorities. Following, Directive 2018/822/EU on AEOI in relation to reportable cross-border arrangements (DAC 6)⁹ was adopted, basically reproducing the OECD guidelines set forth under BEPS Action 12 (Mandatory Disclosure Rules). Finally, Directive 2021/514/EU on tax transparency and fight against tax evasion (DAC 7)¹⁰ was published, introducing reporting obligations for platform operators.

As for the United States' (US), the US has enacted the FATCA¹¹, which served to force foreign financial institutions to directly report to the US Internal Revenue Service (IRS) information about financial accounts held by US taxpayers or held by foreign entities in which US taxpayers hold a substantial ownership interest.¹² FATCA generally imposes a 30% withholding tax on certain US-source payments to foreign financial institutions (FFIs) unless they agree to identify and report to the US tax authorities their US account holders. Non-financial foreign entities are subject to the 30% withholding tax unless they report their direct and indirect US owners who hold at least 10% of the capital.

Finally, Switzerland's¹³ main legal instrument for exchanging tax related data is Double Tax Conventions (DTCs), specifically article 26 of the OECD Model, standard which Switzerland fully adopted on 13 March 2009.¹⁴ Switzerland also enforces Tax Transparency through the execution of Tax Information Exchange Agreements (TIEAs), mainly with jurisdictions deemed as tax havens. The scope of TIEAs is rather limited since they only govern EOIR, unlike article 26 of the OECD Model which governs all three exchanges (SEOI, EOIR and AEOI). Furthermore, Switzerland also concluded

⁶ Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, available at: <https://eur-lex.europa.eu/eli/dir/2015/2376/oj>.

⁷ Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0881>.

⁸ Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities, available at: <https://eur-lex.europa.eu/eli/dir/2016/2258/oj>.

⁹ Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32018L0822>.

¹⁰ Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021L0514>.

¹¹ FATCA is the common name used to refer to s. 501 of the Hiring Incentives to Restore Employment (HIRE) Act of 2010, available at: <https://www.congress.gov/bills/111/11th-congress/house-bill/2847>.

¹² O. A. Wanyana, "Curtailling BEPS through Enforcing Corporate Transparency: The Challenges of Implementing Country-by-Country Reporting in Developing Countries and the Case for Making Public Country-by-Country Reporting Mandatory", in: 12(1) World Tax Journal, (2020).

¹³ For further information regarding the Swiss Tax Transparency framework, please see: Cahiers de droit fiscal international, 2020, International Fiscal Association (IFA), Volume 105 (B), Switzerland Branch Report.

¹⁴ For further details: X. Oberson, "International Exchange of Information in Tax Matters, Towards Global Transparency", UK/USA (2016); R. A. Pfister, "El intercambio de información tributaria con países emergentes y en vías de desarrollo", in: Periódico Económico Tributario (2016).

additional Tax Transparency related agreements such as the Multinational Convention on Mutual Administrative Assistance in Tax Matters (MCMAAT), which derived in the introduction of the SEOI and the AEOI on 1 January 2017.¹⁵

Specifically in terms of financial information, on 14 February 2013 Switzerland has entered into an Intergovernmental Agreement with the US for Cooperation to Facilitate the Implementation of FATCA according to Model 2 (IGA Model 2)¹⁶ and adopted the CRS as of 1 January 2017. Financial account information was successfully exchanged with 36 partner states for the first time at the end of September 2018¹⁷.

As for the current level of compliance of Switzerland with CRS provisions, according to the “Peer Review of the Automatic Exchange of Financial Account Information 2020”¹⁸, the OECD stated that Switzerland’s legal framework implementing the AEOI standard is in place, but needs further improvement in regards to certain associations and foundations that are currently excluded from reporting¹⁹ and three jurisdiction-specific excluded accounts²⁰ which are not in line with the requirements of the AEOI standard.²¹

Conclusion

The OECD has reported that voluntary disclosure programs and offshore tax investigations have already helped to identify about EUR 102 billion in additional revenue (tax, interest, penalties) and that 1 million of taxpayers have come forward to voluntarily disclose their assets.²² Notwithstanding the above, many remain skeptical. For instance, the EUR 102 billion consist of one-time payments which do not represent a sustained growth of tax revenue in the long term. Also, taking the US as an example, FATCA

¹⁵ Transposed into the Federal Act on International Automatic Exchange of Information in Tax Matters of 18 December 2015 (AEOIA) (SR 653.1) and its corresponding Ordinance, available at: <https://www.fedlex.admin.ch/eli/cc/2016/259/en>.

¹⁶ Swiss Federal law on the implementation of the FATCA Agreement between Switzerland and the United States, available at: <https://www.fedlex.admin.ch/eli/cc/2014/314/de>.

¹⁷ Federal Act on the international automatic exchange of country-by-country reports of multinational corporation (ACREA) (SR. 654.1) and its complementary Ordinance, available at: <https://www.sif.admin.ch/sif/en/home/multilateral-relations/exchange-information-tax-matters/automatic-exchange-information/country-by-country-reports.html>.

¹⁸ OECD, Peer Review of the Automatic Exchange of Financial Account Information 2020, OECD Publishing, 2020, Paris, <https://doi.org/10.1787/175eeff4-en>.

¹⁹ Specifically, associations that pursue a non-commercial purpose and foundations that pursue a public, charitable or non-material purpose that are currently considered as non-reporting financial institutions as per domestic legislation.

²⁰ Accounts of associations that pursue a non-commercial purpose, accounts of foundations that pursue a public, charitable or non-material purpose and capital contribution accounts.

²¹ R. Wüthrich for International Tax Review (ITR), "Switzerland steps up CRS implementation", 11 February 2021, available at: <https://www.internationaltaxreview.com/article/b1qhp9yx08s1mp/switzerland-steps-up-crs-implementation>.

²² OECD, Transparency and Exchange of Information for Tax Purposes Multilateral Co-operation Changing the World. 10th Anniversary Report, 3, available at: <https://www.oecd.org/tax/transparency/global-forum-10-years-report.pdf>. It should be noted that OECD statistics do not clarify whether the revenue collected as a result of voluntary disclosure comprise past tax periods (i.e.: a lump-sum tax payment for past taxes, interest and penalties due) or whether such disclosures are prospective and the enhanced tax collection will remain in future tax years.

was projected to generate \$8.7 billion in revenue between fiscal years 2010-2020 but the limited information that is publicly available suggests that FATCA may not have lived up to its objective.²³

The brief overview presented above demonstrate that even when material milestones have been achieved and revenue collection has increased, fundamental issues remain. The Tax Transparency framework, as conceived today, is costly, complex and time consuming for wealth owners, financial institutions, and tax authorities, it does not adequately guarantee the effective collection of taxes and does not appropriately protect individuals' rights of secrecy and privacy regarding their tax related information.²⁴

To improve the current Tax Transparency scenario, the OECD could consolidate the different reporting regimes currently in place in one single unified standard. Also, the US could adopt the OECD's Tax Transparency framework rather than having its own isolated framework. Finally, other alternative mechanisms such as withholding agreements, which have been implemented in the past (such as "Rubik agreements" or "anonymous withholding tax model") can also be explored as a solution for developing countries.

That said, it seems that the key word in moving forward is simplification. Tax Transparency regulations, at all levels (i.e.: international, regional, domestic) should be simplified to avoid jurisdictions from doubling their compliance efforts regarding substantially identical regimes (i.e.: DAC and OECD) and allowing less developed countries to fully comply with Tax Transparency.

²³ S. Beer, M Coelho, S. Leduc, "Hidden Treasures: The Impact of Automatic Exchange of Information on Cross-Border Tax Evasion" (IMF Working Paper 19/286, 2019).

²⁴ R. A. Pfister, "Rethinking the Concept of Automatic Exchange of Information with Emerging and Developing Countries based on the Practice of the Swiss Withholding Tax Agreements", in: *Revue européenne et internationale de droit fiscal*, N°2016/1.