Tax Havens and the Exchange of Financial Information

Anastasia Tsianopoulou

SCHOOL OF ECONOMICS, BUSINESS ADMINISTRATION & LEGAL STUDIES

A dissertation submitted for the degree of
LLM in Transnational and European Commercial Law, Mediation, Arbitration and Energy Law

February 2016
Thessaloniki – Greece

Student Name:	Anastasia Tsianopoulou
SID:	1104140052
Supervisor:	Prof. Georgios Matsos

I hereby declare that the work submitted is mine and that where I have made use of another's work, I have attributed the source(s) according to the Regulations set in the Student's Handbook.

February 2016
Thessaloniki - Greece

Abstract

This dissertation was written as part of the LLM in Transnational and European Commercial Law, Mediation, Arbitration and Energy Law at the International Hellenic University.

The purpose of this research is firstly to provide a presentation of tax havens and their characteristics. Only afterwards, it is possible to present the core documents for the exchange of financial information, lifting the banking secrecy among different countries. Indeed, from the side of the Organization for Economic Co-operation and Development, the Model Competent Authority Agreement and the Common Reporting Standard constitute the model law presented so as to promote tax transparency worldwide. From the other side, the European Union adopted relevant Directives aiming to enhance the capacity of the Member States to assess taxes properly. Until recently, all these efforts are not causing the end of tax evasion, but they constitute a big step forward.

I would like to thank my supervisor, Prof. Georgios Matsos, for the encouragement and advice he has provided during the whole procedure. I would like to express my gratitude to him, as he helped me with his patient guidance, reading my text all the time, responding to my questions and providing substantial suggestions. I feel honored to be supervised by a Professor with this kind of expertise and I am indebted to him for his help.

Keywords: Tax haven, OECD, Common Reporting Standard, European Union, Exchange of financial information

Anastasia Tsianopoulou

10 February 2016

Preface

This dissertation is made as a completion of the LLM program of the Internaional Hellenic University. I would therefore firstly like to thank my academic supervisor Prof. Georgios Matsos for his time, valuable input and support throughout the entire process.

I would also like to thank my family and friends for being helpful and supportive during my time studying the LLM program that provided a positive learning to the students of my class.

Contents

I. Introduction

The modern era enhances global transactions taking advantage of the different legal existing systems. Individuals and entities use the more efficient ways to them so as to make profit in case of undeclared revenues. Even if the reason is not always to conceal illegal transactions, the opportunity to evade or avoid taxes leads individuals to use the benefits offered by different jurisdictions. The existence of tax havens is a cause of that and during the last decades, mostly, the number of tax haven jurisdictions has multiplied. However, the attributes they may have, like the low taxes and the secrecy provided, is a field that government authorities try to undermine. From the relevant case law of the previous century and up until recently, different efforts have been undertaken so that taxation is increased.

The main objective of this dissertation is to provide an analysis of the core characteristics of tax havens and present the ways governments try to increase the public income through the imposition of taxes for which financial information needs to be disclosed. The modern approach to achieve this goal is through the automatic exchange of information, meaning that tax authorities exchange any relevant information directly. At a multilateral level, it was the European Union that first adopted legislation so as to strengthen the cooperation among its Member States. During the last years, on the other side of the Atlantic, USA adopted the Foreign Account Tax Compliance Act of 2009 (henceforth FATCA). Actually, this Act has been criticized for promoting a kind of *American legal imperialism*[1] since it concerns the taxation of US citizens proceeding to cross-border transactions. However, it paved the way for a significant document published by the international Organization for Economic Co-operation and Development (henceforth OECD). This new kind of legislation points out that powerful governments, mainly, attempt to improve their ability to collect taxes given that large capital easily evades taxation. There seems to be a great deal of discussion on what these texts are about; therefore, the importance of analyzing the main provisions is apparent.

This dissertation presents a research based on the multilateral legal documents existing. In the first place, the core characteristics of tax havens are presented, so that the analysis of the legislative documents trying to combat tax avoidance is identified in order to understand the proposed solutions. The significance of this dissertation lays not only on the presentation of the main mechanisms provided by the European

[1] Bean, B. and Wright, A. (2015) The U.S. Foreign Account Tax Compliance Act: American Legal Imperialism? *ILSA Journal of International and Comparative Law*, 21 (2)

Directives and the Common Reporting Standard, but also on the conclusion that almost all financial information could be disclosed once their provisions apply worldwide. The main issue is that these legislative documents are not binding to any other jurisdiction except for the Member States of the EU so that they do not offer a global solution. However, both the EU Directive and the CRS constitute a major step forward as they try to offer an answer to the problem of tax evasion. The dissertation is divided into three chapters which answer eventually the question whether the efforts to combat tax avoidance by disclosing and exchanging financial information have been successful.

The first chapter provides the definition of tax havens, their main characteristics and some significant English and European case law allowing the banking secrecy to be lifted occasionally. In the first part, the definition of tax havens is briefly given; namely, they constitute legal entities offering a competitive taxation system. The second part focuses on the main benefits offered by tax havens, namely the low tax regime, and most importantly the banking secrecy. The final part points out that, since the undisclosed information harms the interests of the state of residence of the reportable persons, English and European case law provides further restrictions for the banking secrecy. Therefore, there is a number of English and European law cases, briefly reviewed in this part, that make the disclosure of financial information mandatory for the protection of the general interest, within the relative jurisdictions.

The second chapter focuses on the model rules published by the OECD for tax collection purposes. The chapter is organized into the following structure. Initially, it introduces the way that the OECD responded to the countries' query for a model law concerning the exchange of financial information that could be adopted worldwide. Therefore, the international organization published two main documents: the Model Competent Authority Agreement and the Common Reporting Standard. The first part makes an introduction to both documents. The second part makes reference to the main provisions of the Model Competent Authority Agreement. Finally, the third part of the chapter focuses on the Common Reporting Standard, which is probably the most significant document existing in tax cooperation. It emphasizes on the procedure that should be followed, not only to guarantee the data protection, but also to be highly recognized if most jurisdictions apply its provisions in a uniform manner. Therefore, important definitions are stated, like the reporting financial institutions, the reportable persons and the reportable accounts. It could be stated that every term is described in detail so that no unjust interpretation happens during its application. Although the chapter primarily focuses on the presentation of its core provisions, a final part with remarks is included, trying to help finding the answer to the question whether this effort means anything to the worldwide exchange of information.

The third chapter provides insights of the European Directives for the exchange of financial information. Taxation falls on the jurisdiction of the Member States and it was not an easy matter to create a cooperation scheme among the different countries. The first part presents the Directive for the information concerning the taxation of savings income. Nowadays there is a proposal from the European side to repeal this Directive, because the next ones that came into force are overlapping. The second part presents the core characteristics of the Directive on Administrative Cooperation. This Directive was amended in 2014[2], so as to implement the main provisions of the Common Reporting Standard, the worldwide standard for the automatic exchange of a full spectrum of financial information. Even if it is not an easy way for most countries to accept this operation, inside the European Union this is an easy step since the cooperation of its Member States has been remarkable during the last years.

II. Tax havens and banking secrecy

This chapter focuses on tax havens and, more notably, their operations and the main attributes, but also includes some English and European case law towards the disclosure of financial information. In recent times, there is the need to end the banking confidentiality offered by tax havens' legislation, since the exchange of information is considered to be important for tax collection purposes.

[2] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L 64, 11.3.2011: The most favored nation clause mentioned in Article 19 was the reason for the amendment; the Member States could not refuse to provide the same protection to other Member States, as they were forced by their bilateral agreement with USA, after the adoption of the FATCA. Therefore, the CRS model law, including almost the same provisions, was needed to be incorporated into EU law. See: 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, OJ L 359, 16.12.2014, Preamble, para. 7: "*The fact that Member States have concluded or are close to concluding agreements with the United States of America relating to FATCA means that those Member States are providing or will provide for wider cooperation within the meaning of Article 19 of Directive 2011/16/EU, and are or will be under an obligation to provide such wider cooperation to other Member States as well*", and para. 9: "*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*"

A. Tax haven; A definition attempt

Tax havens are legal entities: either sovereign states or suzerain jurisdictions[3]. Usually, they are very small jurisdictions, *e.g.* some small islands in the Caribbean, but they still have the power to legislate to their own benefit, even if other governments consider these laws harmful to their interests. Besides, legality means that specific actions are permitted; every jurisdiction has specific rules that govern different situations, no matter if they are ethical and similar to those of the other countries or not. Although there is no exact definition of the term, the OECD gave the main features characterizing tax havens, namely: no or low taxes, lack of effective exchange of information, lack of transparency, and no requirement of substantial activities[4].

International literature shows that tax havens are unlikely to be landlocked, while they are inclined towards economic openness, having small natural resource endowments, and using English as an official language[5]. Also, better governed countries are considered to become famous tax havens. This happens because only better-governed countries can credibly engage into not expropriating foreign investors, including *inter alia* the impossibility of increasing taxes in the future, or not mismanaging their economy so that foreign investors could not have the expected profits. Such a commitment is decisive in order to induce high levels of foreign investment[6].

Usually, in tax havens there is very little activity going on, and for this reason they are often called as *virtual centers* or *legislative spaces*[7]. Globalization enhanced the growth of tax haven systems, while the facilities offered are mainly used for tax evasion or, at least, tax avoidance reasons[8]. They are also used so as to disregard laws like the ones for gambling, and, sometimes, the facilities are supposed to be used for money laundering[9] and terrorist financing. This argument was used as the main justification for the efforts to abolish banking secrecy laws.

---

[3] Palan, R., Murphy, R., and Chavagneux, C. (2010) *Tax Havens: How Globalization really works.* Cornell University Press, Ithaca, NY, USA, p. 3

[4] Organization for Economic Co-operation and Development (*OECD*) (1998) *Harmful Tax Competition: An Emerging Global Issue.* OECD Publishing, Paris, France, p. 23

[5] Dharmapala, D. and Hines, J. (2009) Which countries become tax havens? *Journal of Public Economics*, 93, p. 1060

[6] See fn *5*, p. 1064

[7] See fn *3*, p. 21

[8] Tax evasion is illegal, considered to be a criminal offence in most countries, meaning usually that the taxpayer is not disclosing all or part of his income or some other times may offset expenses that never occurred. On the other hand, tax avoidance is not illegal, since different rules are used so as to pay less taxes. See: Prebble, Z. and Prebble, J. (2010) The morality of tax avoidance. *Creighton Law Review*, 43 (3), Abstract and p. 700

[9] Adamoli, S. (2002) The protection of the EU financial system from the exploitation of financial centers and offshore jurisdictions by organized crime. In *Upperworld and Underworld in Cross-border Crime*, Van

Transactions through tax havens can also have positive, as commonly accepted, consequences. The benefits of going offshore are multiple, such as the strong asset protection, the avoidance of currency restrictions, the greater safety in banking and investments and the possibility of having an important level of privacy in banking offshore[10]. Sometimes, the motivation to make use of them is that it was cheaper to set up branches of banks into locations like the Bahamas while, additionally, they shared New York's time zone[11]. Those jurisdictions, trying to promote the aforementioned advantages, found ways to facilitate the incorporation of companies and other entities in their territory, providing the framework for a low cost and uncomplicated procedure. That way, they managed to attract clients desiring to avoid formalities, and, frequently, the physical presence of the customer is not even a prerequisite. Of course, the global context gives the chance to corporations and individuals that make use of the tax havens' services to proceed to a *treaty shopping*[12], examining the specific benefits before their choice among the hundreds of bilateral treaties existing between their home country and the tax havens.

The difference with the offshore financial centers lays on the following details: an offshore financial center was defined as: "*a regime which has chosen as a main or important path to development, legislative, financial and business infrastructure which is more flexible than orthodox infrastructure and which caters more specifically, and often exclusively, to the needs of non-resident investors […] this legislative framework includes innovations in trust, banking, fiscal, insurance, financial and company law*"[13]. This means that the transactions held through offshore centers are mainly nonresident transactions. Offshore centers are usually found into places far away from the most developed nations, like in the Caribbean region as mentioned above, but two of the most important such centers are located in London and New York. Offshore *centers* consist of a community of experts providing financial services. They are usually considered to be the jurisdictions developed to provide a "*home*"[14] for shell companies and trusts, banking institutions and insurance companies.

Duyne, P. C., Von Lampe, K., and Passas, N. (Eds.), Wolf Legal Publishers (WLP), Nijmegen, The Netherlands, pp. 85-113

[10] Barber, H. (2007) *Tax havens today. The benefits and pitfalls of banking and investing offshore*. John Wiley and Sons Inc., Hoboken, NJ, USA, p.33

[11] See fn *3*, p. 27

[12] Zucman, G. (2014) Taxing across Borders: Tracking Personal Wealth and Corporate Profits. *Journal of Economic Perspectives*, Fall, 28 (4), p. 124

[13] Belle Antoine, R.M. (2013) *Offshore Financial Law, Trusts and related tax issues.* 2[nd] edition, Oxford University Press, Oxford, UK, p.5

[14] See fn *3*, pp. 24-27

Summarizing, a tax haven constitutes a jurisdiction that creates legislation facilitating transactions of nonresidents, mainly with a purpose of escaping domestic taxation, via the insertion of regulations concerning the banking confidentiality[15].

B. The main attributes

To highlight the main features of a tax haven, we need to mention the low or nil taxation and the confidentiality provision. To begin with the zero or near zero taxation, this low rate is imposed to nonresident companies and savers, while the resident population is normally taxed. This practice is usually called *ring-fencing*, since the relevant rules are designed to attract foreign investors[16]. Economically, the *loss* of money from the side of tax havens could be compensated with the *indirect* benefits the governments achieve to collect. The fact is that all the governments want to have the means for achieving the governments' goals *i.e.* the financing of public expenditure and, additionally, the distribution of income. For this reason, the low level of taxation is practically combined with other costs imposed, like the licensing and registration fees, that constitute an important contribution to the economy of the, normally, small country. Additionally, the majority of these places have developed ties with other larger countries that provide to them subsidies in different forms. For instance, the Principality of Monaco is considered that it relies on France while Lichtenstein relies on Switzerland[17].

The second, but not less important, attribute of a tax haven is the confidentiality duty strongly protected, naming it as a *secrecy haven*, an attribute that helps it differentiate from the preferential tax regimes. According to the Report published by the OECD[18], the main difference between a tax haven and a preferential tax regime is that the first one makes no effort to fight harmful tax competition, while a preferential tax regime has the tax base and the interest to prevent such practices[19]. Strict confidentiality provisions concern mostly the banking secrecy law, originated in Switzerland almost a century ago[20], that weakens when countries want to comply with

---

[15] See fn *3*, p. 45
[16] Schjelderup, G. (2015) Secrecy Jurisdictions. *International Tax Public and Finance*, p. 4
[17] See fn *3*, p. 32
[18] See fn *4*, pp. 19-35
[19] Arnold, B. and McIntyre, J. (2002) *International Tax Primer*. 2nd edition, Kluwer Law International, The Hague, The Netherlands, p.141
[20] In Switzerland, during the end of the 19th century, we meet practices adopted, based mostly on tradition, considered to lead to the country's banking secrecy law. In the same period, larger countries started to increase tax rates, leaving Switzerland weaker and unable to compete with other financial centers. Then, the idea to apply low taxation provisions and banking secrecy practices in case foreign capital was attracted could be considered as a solution for the economic development of the country. Later on, the

the disclosure obligation. It also concerns the secret information on the real ownership and the purpose of the existing entities. For instance, trusts are usually not even registered in a public record, and, subsequently, money laundering regulations are difficult to apply[21]. In addition, untraceable or *shell* companies created need no proof of identity, thus avoiding any responsibility for different activities. The Financial Action Task Force Recommendations[22] may provide the rules for finding the beneficial owners, but those rules are many times neglected by corporate service providers located in different countries[23].

Confidentiality constitutes a very important feature of these jurisdictions: it is considered to be an attribute of the relationship between the debtor/bank and the creditor/customer. Customers usually disclose important personal and professional information to the bankers, information that their competitors should not be aware of. Even more, there is the idea that confidentiality has an "*economic value*"[24], enhancing the attraction of clients in case it is well protected. For instance, Panama has severe civil and criminal penalties if financial privacy is not protected[25], but almost all tax havens make exceptions for criminal matters.

From the English case law, very early as in 1862, examining the case *Foster v Bank of London*[26], it was held that between the banker and the customer there is indeed a duty of confidentiality; precisely, the judgement was based on the fact that the judge was not aware of any law against this duty. However, this case did not mean the

---

World War I found Switzerland neutral and political stable, applying advantageous practices in the banking sector, attributes that finally caused the attraction of foreign capital. Like that, before the adoption of the Federal Banking Law, the President of the Federal Council *Pilet – Golaz* in his message to the Federal Assembly referred to the need of reinforcing the security and stability of banks in the time of the global economic crises, and to the need for a strict confidentiality in banking matters, since the clients consider it of great importance. The adoption of the Federal Banking Law of 1934 led to the development of Swiss banking system, where confidentiality is strongly protected. See: Guex, S. (2000) The Origins of the Swiss Banking Secrecy Law and Its Repercussions for Swiss Federal Policy. *The Business History Review*, 74 (2), pp. 240-242, and Feuille fédérale (1934) No. 6 du 9 février, FF 1934/172, Message du Conseil fédéral à l'Assemblée fédérale concernant le projet de loi fédérale sur les banques et les caisses d'épargne, du 2 février 1934, pp. 173-181

[21] See fn *3*, pp. 33-35

[22] "*The Financial Action Task Force (FATF) is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction. The FATF Recommendations are recognised as the global anti-money laundering (AML) and counter-terrorist financing (CFT) standard*." In the same document, there is an identification of the beneficial owners of the legal persons and legal arrangements, as widely recognised in legal affairs. See: Financial Action Task Force (FATF) (2012) *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation*. Updated October 2015, FATF, Paris, France

[23] See fn *16*, p. 3: "*Although the international community has laid out rules that require adequate and timely information on beneficial ownership through the Financial Action Task Force (FATF), there is mounting evidence that corporate service providers, not only in secrecy jurisdictions, but also in countries such as Britain and the USA, do not comply with these rules*"

[24] Chaikin, D. (2011) Adapting the Qualifications to the Banker's Common Law Duty of Confidentiality to Fight Transnational Crime. *Sydney Law Review*, 33 (2), p. 269

[25] See fn *10*, p. 59

[26] Case *Foster v Bank of London*, as reported by Stokes, R. (2011) The Genesis of Banking Confidentiality. The Journal of Legal History, 32 (3), pp. 285-286

protection of the confidentiality duty in the future, due to its unusual facts and due to the restrictive interpretation of its judgement. But, some years later, in 1901, another case affirmed again the confidentiality duty. The case *Great Western Railway v London and County Banking Co*[27] refers to the banker's duty of confidentiality, arising out of implied terms.

C. Case law against banking secrecy

Although banking confidentiality provided by tax havens' legislation gave a flourish to these jurisdictions, in recent years a lot of efforts are apparent so as to discourage offshore transactions. From the case law to important legal instruments, mainly the most developed nations try to receive information concerning financial assets and property items belonging to their citizens. Offshore transactions make tax collection a difficult task for the competent authorities. Subsequently, some decades ago, the first signs of revealing important financial information are apparent from the case law.

As such, in 1924 a famous dispute was brought in front of the English Court of Appeal, very frequently cited afterwards in banking law. It is about the case of *Tournier v National Provincial and Union Bank of England*. The decision was in favor of the financial privacy, stating that there was an "*implied"* contractual term[28] imposing the obligation to the bank of not disclosing information of its clients to third persons. It was held that "*I come to the conclusion that one of the implied terms of the contract is that the bank enter into a qualified obligation with their customer to abstain from disclosing information as to his affairs without his consent. I am confirmed in this conclusion by the admission of counsel for the bank that they do, in fact, consider themselves under a legal obligation to maintain secrecy*"[29]. This duty is many times protected by statutory law with stringent provisions of criminal nature, and, in some jurisdictions, a statutory change would be needed for lifting the secrecy provided[30]. However, the protection of

[27] Case *Great Western Railway v London and County Banking Co*, as reported by Young, M.A. (2013) Banking Secrecy and Offshore Financial Centres: Money laundering and offshore banking. Routledge, Abingdon, UK, p. 112
[28] See fn *24*, p. 265
[29] Case *Tournier v National Provincial and Union Bank of England*, UK Court of Appeal (1924) 1 K.B. 461, p. 484
[30] For instance, see the case of Switzerland, Loi fédérale sur les banques et les caisses d'épargne (Loi sur les banques, LB) 1 du 8 novembre 1934 (Etat le 1er juillet 2015), art. 47: "*1. Est puni d'une peine privative de liberté de trois ans au plus ou d'une peine pécuniaire celui qui, intentionnellement: a. en sa qualité d'organe, d'employé, de mandataire ou de liquidateur d'une banque, ou encore d'organe ou d'employé d'une société d'audit, révèle un secret à lui confié ou dont il a eu connaissance en raison de sa charge ou de son emploi; b. incite autrui à violer le secret professionnel; c. révèle un secret qui lui a été confié au sens de la let. a ou exploite ce secret à son profit ou au profit d'un tiers. 1bis Est puni d'une peine privative*

banking secrecy is not unconditional. From the aforementioned case, four fundamental qualifications were provided to its limitation. The disclosure of confidential information can be accepted a) under the compulsion of law, or b) when there is a duty to the public, or c) for the interest of the bank or d) after the customer's consent[31].

The four aforementioned categories were developed by English case law. The compulsion of law qualification frequently involves regulatory or investigatory authorities that access confidential information held by a bank[32]. Looking into the case *Norwich Pharmacal Co v Customs and Excise Commissioners*[33], the House of Lords held that the bank may be ordered to disclose to a third party information so that he is able to commence proceedings against the bank's client. The second qualification was stated in *Pharaon v Bank of Credit and Commerce International SA*[34]. Precisely, it was held that the duty of confidentiality to a client of a bank can be overridden where fraud is alleged and, subsequently, information disclosure is required to support private litigation. Concerning the interest of the bank, in the case *Sunderland v Barclays Bank*[35], it was stated that it was an interest of the bank to disclose information about a client that has drawn several cheques in respect of debts coming from gambling, when it wanted to dishonor a cheque. The last qualification concerns the breach of confidentiality in case of an express or implied consent of the customer. In *Turner v Royal Bank of Scotland plc*[36] was concluded that the banking practice did not justify the use of information about the client's creditworthiness, although the bank supposed that it had an implied consent on that. But, another case affirmed the implied consent of the bank's client. The case *Lee Gleeson Pty v Sterling Estates Pty Ltd*[37] found that the bank was impliedly authorized to advise the third party, the builder, of the changed instructions.

---

de liberté de cinq ans au plus ou d'une peine pécuniaire celui qui obtient pour lui-même ou pour un tiers un avantage pécuniaire en agissant selon l'al. 1, let. a ou c"

[31] See fn 29, p. 473

[32] Ellinger, E.P., Lomnicka, E. and Hare, C.V.M. (2011) *Ellinger's Modern Banking Law*. 5th edition, Oxford University Press, NY, USA, p.180

[33] Case *Norwich Pharmacal Co v Customs and Excise Commissioners,* House of Lords (1974) AC 133: this case involves the owner and exclusive licensee of a patent, when his patent was infringed by unknown importers into the United Kingdom. Norwich Pharmacal Co started litigation against the Excise Commissioners that forced the disclosure of information so that the importer of the chemical could be identified in order to reach the one who infringed the patent. The House of Lords held that when an innocent third party has information relating to another party's unlawful conduct, a court could order the assisting of the person suffering damage by disclosing the needed information.

[34] Case *Pharaon v Bank of Credit and Commerce International SA,* as reported by Ellinger, E.P., Lomnicka, E. and Hare, C.V.M. (2011) Ellinger's Modern Banking Law, p. 181

[35] Case *Sunderland v Barclays Bank*, as reported by Ellinger, E.P., Lomnicka, E. and Hare, C.V.M. (2011) Ellinger's Modern Banking Law, pp.191-192

[36] Case *Turner v Royal Bank of Scotland plc*, as reported by Ellinger, E.P., Lomnicka, E. and Hare, C.V.M. (2011) Ellinger's Modern Banking Law, pp.195-197

[37] Case *Lee Gleeson Pty v Sterling Estates Pty Ltd*, as reported by O'Donovan, J. (2005) *Lender liability*. Sweet & Maxwell, London, UK, p. 162

In recent times, along the same line, an important non judicial case revealing the future efforts by governments to end tax evasion is the one involving the Union Bank of Switzerland AG (UBS), a bank helping clients coming from USA to conceal their offshore accounts from their state of residence. The conclusion of a bilateral treaty between the two countries was the key for the dispute settlement, considered to be a "major step" to the weakening of banking secrecy's history[38].

From the EU perspective, a case brought in front of the Court of Justice during the last decade referred to Luxembourg law on this matter. Under Luxembourg law, professional secrecy is governed by the Luxembourg Criminal Code. In the case *Criminal proceedings against Paul der Weduwe*[39] it is provided that according to the country's statutory law a) *Directors, members of the governing and supervisory boards, managers, employees and other persons employed by the credit institutions and other professions of the financial sector mentioned […] shall be required to maintain secrecy in regard to information entrusted to them in the course of their professional business. Disclosure of such information is an offence punishable under […] the Criminal Code*, and b) *The duty to maintain secrecy shall cease when disclosure of information is authorized or required by or pursuant to a legislative provision even if it predates the enactment hereof.* The Court stated that the questions submitted were inadmissible.

The change of direction became apparent some years later, in *Coty Germany GmbH v Stadtsparkasse Magdeburg*[40]. Coty Germany GmbH is a producer and distributor of perfumes, holding also an exclusive license for a specific perfumery. The dispute arose when the company purchased through the internet a bottle of the perfume for which it had the license, finding out that it was a counterfeit product. Then, it requested for the name of the holder of the account that he had paid for the perfume. When the company started a court litigation, the Bundesgerichtshof, namely the Federal Court of Justice, decided to stay the proceedings and to ask for a preliminary ruling before the Court of Justice. Then, it was held that the provision concerning the protection of *intellectual property rights "must be interpreted as precluding a national provision […] which allows, in an unlimited and unconditional manner, a banking institution to invoke banking secrecy in order to refuse to provide […] information concerning the name and address of an account holder*".

[38] Szarmach, L. (2010) Piercing the Veil of Bank Secrecy? Assessing the United States' Settlement in the UBS Case. *Cornell International Law Journal*, 43 (2)

[39] Case C-153/00, Criminal proceedings against Paul der Weduwe (2002), Jugdement, ECLI:EU:C:2002:735

[40] Case C-580/13, Coty Germany GmbH v Stadtsparkasse Magdeburg (2015) Judgement, ECLI:EU:C:2015:485

Nowadays, it is apparent that the global efforts towards the lifting of banking secrecy may mean the weakening of the role that tax havens play today. Following the case law towards this direction, the OECD has published a model law, while USA adopted the FATCA; in the same time, the EU is making its own efforts for the exchange of information. At the bilateral level, different existing treaties include provisions so as to protect the interests of the country of residence that tries to minimize the flow of capitals to low taxation territories.

III. The OECD model rules for the exchange of financial information

The leaders of the economically most developed countries of the world requested for a model law to provide solutions for a worldwide cooperation regarding tax matters. Thus, the OECD provided the model rules that made a significant progress towards the lifting of banking secrecy in order to ensure tax compliance when cross-border transactions take place.

A. Introduction

The OECD supports the fight against tax evasion on the global level longtime ago. However, according to international literature, it was founded that all previous efforts have led only to a relocation of bank deposits between tax havens[41]. Havens unwilling to comply with new global standards manage to attract new clients, while the most compliant ones have lost some of them. The conclusion was that the total amount of wealth managed offshore was left unchanged.

Now, the Organization proceeded to a different effort; it prepared a model law, consisting of the Model Competent Authority Agreement and the Common Reporting Standard. The Model Competent Authority Agreement[42] has provisions so as to ensure the appropriate flows of information, containing clauses relevant to the compliance and enforcement in the contracting states. It also contains provisions concerning the type of information that should be exchanged and the timing and method for the automatic

[41] Johannesen, N. and Zucman, G. (2014) The End of Bank Secrecy? An Evaluation of the G20 Tax Haven Crackdown. *American Economic Journal: Economic Policy*, 6 (1), p. 89
[42] Organization for Economic Co-operation and Development (*OECD*) (2014) *Standard for Automatic Exchange of Financial Account Information in Tax Matters. OECD Publishing, Paris, France*, pp.21-27

exchange. The Model Competent Authority Agreement was provided because a separate agreement between the competent authorities is needed, if a bilateral or a multilateral treaty[43] among the interested jurisdictions already exists[44]. The Multilateral Competent Authority Agreement is signed today by 79 jurisdictions[45], while most of the signatory states are pledged to exchange this kind of information in 2017.

The Common Reporting Standard has the rules concerning the reporting of financial institutions to their home jurisdiction. This model law provides the so called due diligence procedures that should be followed in order to protect the quality of the required information[46]. It is not a treaty and, thus, it should be transposed into domestic law or into the European legislation[47] (indeed, in the case of the European Union, this has already happened through the adoption of the Directive 2014/107/EU). The Common Reporting Standard is very similar to the FATCA having only small differences mainly because of its multilateral character, while FATCA is applied through bilateral conventions between USA and other countries[48].

Concluding, it is worth mentioning that a basic feature of both texts is that data secrecy is protected in detailed rules. Towards this way, the receiving jurisdiction adopts the legal framework in order to ensure a high level of protection of the data disclosed, while the OECD's Guide on confidentiality could also be found as an important document serving the same purpose[49].

B. The Model Competent Authority Agreement

The Model Competent Authority Agreement constitutes the text furnishing the detailed rules for the automatic exchange of information between jurisdictions. Such an agreement may be either bilateral, based[50] or not on reciprocity[51], or even it can have a

---

[43] A multilateral convention is usually more efficient, and subsequently the OECD Model Tax Convention could be seen as a very useful instrument.
[44] Organization for Economic Co-operation and Development (*OECD*) (2015) *The CRS Implementation Handbook*. OECD Publishing, Paris, France, p. 24
[45] Organization for Economic Co-operation and Development (*OECD*) (2015) Signatories of the Multilateral Competent Authority Agreement and intended first Information exchange date Status, as of 27 January 2016, available at: *http://www.oecd.org/ctp/exchange-of-tax-information/MCAA-Signatories.pdf*
[46] See fn *42*, p.11
[47] See fn *44*, p. 5 and p. 9
[48] See fn *44*, p. 87
[49] Organization for Economic Co-operation and Development (*OECD*) (2012) *Keeping It Safe: The OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax Purposes*. OECD Publishing, Paris, France
[50] See fn *42*, Model Competent Authority Agreement, p. 21
[51] See fn *42*, Annex II, Nonreciprocal Model Competent Authority Agreement: "*1.There may be situations where the automatic exchange of financial account information does not need to be reciprocal (e.g. because one of the jurisdictions does not have an income tax). In such cases, the information would be sent only by [Jurisdiction A] to [Jurisdiction B], but not by [Jurisdiction B] to [Jurisdiction A]. 2. While a*

multilateral character[52]. For this reason, the OECD published three different models, similar in the general lines, but having differences at the relevant clauses. It depends on the will and the needs of the different governments that lead them to conclude one or more of these Model Agreements.

The Model Agreement consists of a preamble and seven sections. The preamble is serving two purposes: it is fulfilling the purpose to mention the general objectives and the main ambition, namely the collaboration of the signatory jurisdictions in tax matters, and it adduces that the signatory jurisdictions seek to improve international tax compliance assisting each other through the automatic exchange of information. Still, this procedure has to follow the rules of confidentiality, provided that the information exchanged is used only for the purposes agreed upon.

The different sections of the Model Agreement refer to the practical matters. Precisely, it is delineated that a reportable account constitutes the financial account maintained by a reporting institution, held by a reportable person or by a passive enterprise, for which the controlling persons are reportable persons[53], as defined in the Common Reporting Standard. In this case, the information exchanged includes mainly the name and the tax identification number of the country of residence of the reportable persons together with the account balances[54]. This information should be automatically exchanged between the competent authorities[55]. In regard to the definition of the reporting financial institutions, it is mentioned, negatively, that these institutions are not the non-reporting financial institutions[56], again as defined in the Common Reporting Standard.

C. *The Common Reporting Standard (CRS)*

i. An overview of the core provisions

The Common Reporting Standard provides the detailed procedure in case a government asks for information from its financial institutions, always complying with the due diligence requirements[57]. Those requirements are further elaborated, while analytical provisions are stated concerning the reportable information and the targeted

---

nonreciprocal agreement could largely be based on the Model Competent Authority Agreement, some changes would be needed in order to reflect its nonreciprocal nature", p. 223

[52] See fn *42,* Annex I, Multilateral Model Competent Authority Agreement, p. 215

[53] See fn *42*, p. 217

[54] See fn *42*, p. 218

[55] See fn *42*, p. 220

[56] See fn *42*, p. 217

[57] See fn *42*, pp.29-63

institutions. Finally, the rules and the administrative procedures are available, so as to ensure the effective implementation of its provisions.

Regarding the basic provisions of the Common Reporting Standard, it is worthy to analyze the due diligence procedures provided: the financial institutions have to report *solely* the information concerning the residents of the participating jurisdictions[58]. The due diligence procedures concern mainly an estimation of the time the account was created; also, there is an estimation whether the account holder is an individual or an entity. Still, they may differentiate, depending on the value of the accounts examined, taking always care of the exceptions for which this information should not be reportable, as it happens when there are cash value insurance contracts.

Not all jurisdictions have the possibility to benefit from the automatic exchange of information regime[59]. The Common Reporting Standard applies only to those jurisdictions that have already created the legal basis to this. To introduce the most popular way, this means that a jurisdiction should initially become a party of a multilateral convention in tax matters, and then sign a bilateral or multilateral competent authority Agreement containing the clauses of the Common Reporting Standard. Afterwards, the exchange of information happens only bilaterally. In recent times, many jurisdictions, even Switzerland and Monaco that are famous tax haven jurisdictions, have created the appropriate legal framework. Thenceforth, the financial institutions that are resident in participating jurisdictions have the responsibility to collect the appropriate information, as far as the individuals and entities resident of another participating jurisdiction are concerned. As a consequence, only the jurisdictions that comply with these requirements would send and receive financial information bilaterally.

It is certain that only entities can be reporting financial institutions. Such entities are considered to have the broad definition of the term, meaning that they may be legal persons or legal arrangements, like partnerships and trusts, the last ones mainly in case of investment entities[60]. Thence, they are, usually, custodial institutions, like custodial banks and brokers, depository institutions, like savings and commercial banks, investment entities and specified insurance companies, resident in a participating jurisdiction. In case their branches are located in non-participating jurisdictions, financial institutions do not collect this information for the branches. Under the Common Reporting Standard, the residence of an entity means the place where it

[58] See fn *42*, p.31
[59] See fn *42*, p.23
[60] Se fn *44*, p 35

is resident for tax purposes; if this is not the case because it is treated as fiscally transparent, then it is considered to be resident in the place it is incorporated or has its management or is subject to financial supervision. If the entity is a trust, it is considered to be resident of the jurisdiction in which one or more trustees are resident, but only in case the trust is not already considered being resident of another participating jurisdiction[61]. Finally, there is the provision that institutions of a public nature or the ones considered having low risk of being used for tax evasion, like governmental entities, international organizations, central banks and pension funds, constitute entities excluded from the obligation to report, according to the Standard[62].

On the subject of the reportable persons, information should be disclosed about the account holders, individuals or entities, even from the trusts, residents of the participating jurisdictions, and the estates of a decedent that was previously resident in a participating jurisdiction[63]. It is important to note that the reportable entities concerned are not financial institutions[64]. Additionally, various entities are not treated as reportable persons, *e.g.* corporations the stock of which is traded on securities markets, governmental entities, international organizations and central banks[65]. Ultimately, in case the reportable entities are passive non-financial entities[66], then the financial institutions should identify the controlling persons, and if they are reportable persons, then the relevant information should be reported accordingly[67].

In the case of reportable passive non-financial entities, the controlling persons are defined as the *beneficial owners* described in the Financial Action Task Force Recommendations[68]. If the reportable entity is a legal person, the controlling persons are the natural persons that exercise control over the entity; in general terms, they are the persons with a controlling ownership interest. The control maybe exercised through direct or indirect ownership or shareholding of one or more intermediate entities. On the occasion that the reportable entity is a partnership, then the controlling persons are

---

[61] See fn *44*, p. 37
[62] See fn *42*, pp.45-50
[63] See fn *42*, pp,191-193
[64] See fn *44*, p. 46
[65] See fn *42*, p. 57
[66] See fn *44*, p. 46
[67] See fn *44*, p. 47
[68] See fn *22*, pp. 60-61: "*For legal persons:* a) The identity of the natural persons […] who ultimately have a controlling ownership interest in a legal person; and to the extent that there is doubt under (a) as to whether the person(s) with the controlling ownership interest are the beneficial owner(s) or where no natural person exerts control through ownership interests, the identity of the natural persons (if any) exercising control of the legal person or arrangement through other means, c) Where no natural person is identified under (a) or (b) above, financial institutions should identify and take reasonable measures to verify the identity of the relevant natural person who holds the position of senior managing official. *For legal arrangements: (*a) trusts – the identity of the settlor, the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust (including through a chain of control/ownership); (b) Other types of legal arrangements – the identity of persons in equivalent or similar positions".

considered to be the natural persons that exercise control through direct or indirect ownership of the capital or having profits of the partnership, voting rights or exercise control over the management. Finally, if the reportable entity is a trust, then the controlling person is every person involved in it, like the settlor, the trustee, the protector, the beneficiary[69] and every natural person exercising effective control over the trust. When the settlor, the trustee, the protector and the beneficiary are entities, then the reporting institutions should identify the controlling persons of the entities[70].

The Common Reporting Standard provides, finally, the details for the kind of information that should be reported[71]. As such, the information disclosed concerns all types of investment income, mainly interest and dividends but also the account balances and sales proceeds from financial assets. This information definitely includes *inter alia* the details of the account holder like the name and the tax identification number, the account number, the account balance and the gross amount of income from dividends and interests. There are some exceptions, like the retirement and pension accounts and the term life insurance accounts.

ii. The application of CRS; a new world regime?

Even from the first sight, it can be noted that the documents published by the OECD do not create a new legal tax order worldwide. This happens not only because a certain number of countries have agreed to adopt those documents, but also because the current versions exclude many kinds of reportable information.

Developed countries seem to have the main concern to impose and apply the model law in order to obtain financial information for their own residents. However, if the real need is a new existing order all around the world, it is very important that the developing countries become participating jurisdictions, as well. If not, reportable persons could evade the automatic exchange of information if they choose to have

[69] Langbein, J. (1995) The Contractarian Basis of the Law of Trusts. *The Yale Law Journal*, 105 (625), p. 627: "*The trust is a deal, a bargain about how the trust assets are to be managed and distributed. To be sure, the trust originates exactly where convention says it does, with property. […] The owner, called the settlor, transfers the trust property to an intermediary, the trustee, to hold it for the beneficiaries. We treat the trustee as the new owner for the purpose of managing the property, while the trust deal strips the trustee of the benefits of ownership. The distinguishing feature of the trust is not the background event, not the transfer of property to the trustee, but the trust deal that defines the powers and responsibilities of the trustee in managing the property. […] Trusts are contracts*.", and p. 632: "*Trusts are gifts. [...] The donor just delivers the asset, conveys realty, registers securities in the donee's name, or executes a deed of gift. […] The simple gift is a two-party transfer, from transferor (donor) to transferee (donee). The ordinary trust, by contrast, entails a three-party relationship, in which the donor (settlor) arranges with the trustee to divide the donee's interest between trustee and beneficiary. In the time-honored formulation, the trustee takes legal title to the property for the benefit of the beneficiary*." and Ausness, R. (2010) The Role of Trust Protectors in American Trust Law. *Real Property, Trust and Estate Law Journal*, 45 (2), p. 321: "*A trust protector is a person who the settlor appoints to ensure that the trustee carries out the settlor's wishes*"

[70] See fn *44*, pp. 47-48,

[71] See fn *44*, p.94

financial transactions in a non-participating jurisdiction, or if they become residents of a non-participating jurisdiction. For this reason, it is proposed that incentives should be given to governments, usually non-members of the OECD, in order to participate in this exchange of information scheme[72]. Besides, in reality, they need this kind of information at the most[73].

Therefore, attention should be given primarily to the capacity building and to the non-reciprocity condition, if necessary, so that weaker countries become only recipients of information[74]. Moreover, some other issues need to be fixed accordingly, allowing the creation of proportional confidentiality requirements and the introduction of guarantees for the collection of information coming from bigger countries. This means that the OECD countries should take care of the developing countries' needs[75]. Strategies like the ones previously mentioned would probably motivate the developing countries in becoming participating jurisdictions, when the benefits for them would be substantial from the very beginning.

The Common Reporting Standard has numerous loopholes that would be important to address in the future[76]. Mainly, the financial exchange of information comprises a lot of exceptions that keep out multiple ways for the preservation of banking secrecy. For instance, a number of reporting institutions are exempted from the obligation to disclose financial information, or, concerning the *ratione materiae* of the model rules, some wealth-related information is omitted from its clauses, as it happens with the information on interest in real estate[77].

Ultimately, incentives should be given to the developing countries so that they become participating jurisdictions of the new tax order, and, secondly, many loopholes of the existing documents need to be fixed so that the elites do not find ways to perpetuate harmful tax practices. The OECD may have published the Model Competent Authority Agreement and the Common Reporting Standard, but all this

---

[72] Knobel, A. and Meinzer, M. (2014) "The end of bank secrecy"? Bridging the gap to effective automatic information exchange, An Evaluation of OECD's Common Reporting Standard (CRS) and its alternatives. Preliminary Report, *Tax Justice Network*, p. 51, para. 68

[73] Global Forum on transparency and exchange of Information for tax purposes (2014); *Automatic Exchange of Information: A Roadmap for Developing Country Participation*; Final Report to the G20 Development Working Group, 5 August 2014, p.9: "*Detection of tax evasion is critical for developing countries in particular: US$8.5 trillion of household assets are held abroad. In 2012, more than 25% of all Latin American and almost 33% of all Middle Eastern and African household wealth was held abroad compared to the worldwide average of 6%. Estimates of tax revenue and illicit financial flows lost by developing countries generally range in the hundreds of billions of US dollars per year, exceeding the amount of official development assistance*."

[74] See fn *72*, p. 13 and p. 30

[75] See fn *73*, p. 5: "*The roadmap focusses on the needs of developing countries, and low income countries in particular*."

[76] See fn *73*, pp. 28-47

[77] See fn *42*, p. 165: "*However, the term "Financial Asset" does not include a non-debt, direct interest in real property; or a commodity that is a physical good, such as wheat*"

effort does not lead to the end of the tax havens era, and, even if relevant legal documents are adopted nowadays, there is a long way to go until the automatic exchange of information among all the countries around the world.

IV. The EU Directives for the exchange of financial information

Inside the European Union, the Member States shall disclose information between each other about savings and other assets held by European citizens. Tax transparency is the cornerstone, although taxation falls within the competence of the Member States, as part of their sovereignty.

A. The Savings Directive and the Directive on Administrative Cooperation, as recently amended

i. The Savings Directive

A very important step for the EU to lift banking secrecy had been the adoption of the Directive on taxation of savings income. Its main aim was to enable savings income made in one Member State to be made subject to taxation if the owner is an individual of another Member State[78]. This piece of legislation was considered to be a milestone for the tax cooperation of the Member States and was long discussed and analyzed[79]. This Directive was not proposed and adopted at once. The abolishment of capital exchange controls was fundamental for the establishment of the internal market but it led to the creation of a large tax haven inside the EU territory, since corporations and individuals tried to benefit from the differentiation of existing tax regimes. Although a common tax rate on savings income could be considered to be a valuable solution, this provision was not easily accepted[80].

The present Directive concerns only the interest payments, as defined in Article 6. The main provision is that a paying agency of one Member State reports a minimum amount of information to the competent authority of its Member State concerning the interest payments benefited by individuals taxed in a different Member State[81]. Unfortunately, legal persons are excluded from the scope of the Directive. The "*beneficial owner* is any individual who receives an interest payment, or any individual for whom the interest payment is secured for his own benefit"[82]. The information disposed concerns the personal details of the beneficial owner, including *inter alia* his

[78] Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments, OJ L 157, 26.6.2003, art. 1(1)
[79] See fn *72*, p. 9
[80] Communication from the Commission to the Council (1989) *Tax measures to be adopted by the Community in connection with the liberalization of capital movements*. COM 89/60, Article 4(1):"*The rate of the withholding tax may not be less than 15%"*
[81] See fn *78*, art. 8
[82] See fn *78*, art. 2(1)

identity, his residence and his account number[83]. The Directive provides the automatic way for the exchange of information. Precisely, the competent authority of the Member State of the paying agency has the *obligation* to exchange any relevant information to the competent authority of the Member State of the beneficial owner[84]. This happens automatically, at least once a year, for all interest payments made during this period[85].

The Savings Directive has been criticized for containing a number of loopholes needed to be fixed. Apart from the legal persons that are not included in its personal scope, it has been proposed that the taxation of interest at source is vital for fulfilling its main objective. In a different scenario, jurisdictions, like Gibraltar, could attract investments since their legislation exempts most types of interest[86]. In addition, Austria, Belgium and Luxembourg are permitted to maintain a withholding tax system instead of providing information[87].

Later on, it was amended, primarily because some financial instruments were not formerly covered, including the ones equivalent to interest-bearing securities and certain indirect means of holding interest-bearing securities[88]. Significant definitions are posed, having a clarification of the definition of interest payment, in order to ensure that indirect investments are taken into consideration when calculating the percentage of the assets invested in these instruments[89]. Moreover, the present document includes various personal details reported, including *inter alia* the tax identification number[90]. Nowadays, there is a proposal to repeal the Savings Directive since it is mentioned that the prospective Directive 2014/107/EU "*will take precedence"* over the revised Savings Directive, and, like that, a significant overlap will exist, *albeit*, in some cases, the Directive of 2003 could also apply. However, "*the benefit to be gained from keeping the two legal instruments operating in parallel would be minimal"*. For this reason, to make sure that there is only one standard for the automatic exchange of information and in order to prevent situations where both Directives are applied in parallel, it is proposed that the Savings Directive should be repealed[91].

[83] See fn *78*, art. 8(1) and 8(2)
[84] See fn *78*, art. 9(1)
[85] See fn *78*, art. 9(2)
[86] Jimenez, A.M. (2006) Loopholes in the EU Savings Tax Directive. *Bulletin for International Taxation, IBFDP*, 20 (12), p. 481
[87] Somare, M. and Wöhrer, V. (2015) Automatic Exchange of Financial Information under the Directive on Administrative Cooperation in the Light of the Global Movement towards Transparency. *Kluwer Law International, Intertax*, 43 (12), p. 805
[88] Council Directive 2014/48/EU of 24 March 2014 amending Directive 2003/48/EC on taxation of savings income in the form of interest payments, OJ L 111, 15.4.2014, Preamble para. 1 and art. 6
[89] See fn *88*, Preamble, para.10 and art. 6
[90] See fn *88*, Preamble, para.2 and art. 3(2)
[91] Proposal for a Council Directive repealing Council Directive 2003/48/EC (2015) COM 129 final, explanatory memorandum

ii. The Directive on Administrative Cooperation

The European Union makes efforts to confront tax avoidance and tax evasion in different ways. A Directive was adopted in 1977[92] aiming to strengthen the collaboration between the 9 Member States. Particularly, under the Directive on Mutual Assistance, the competent authorities, usually the Ministries of Finance or their authorized representatives[93], should exchange any information needed to realize the correct assessment of taxes on income and on capital[94], "*irrespective of the manner in which they are levied*"[95]. The Directive provides three different ways for the exchange of information, namely the exchange on request, the spontaneous exchange and the automatic exchange[96].

An important case law came after the application of this Directive. Precisely, a case brought before the Court of Justice concerned the request for a preliminary ruling to clarify whether the exchange of information procedure protects specific rights of taxpayers or not. In this case, *Jiří Sabou*, a Czech professional footballer, challenged the notice of the Czech tax authority, which has carried out an inspection involving requests from different Member States. The judgement of the Court mentions that European Union law, and mainly the Directive on Mutual Assistance, must be interpreted as not conferring on a taxpayer the right to be informed of a request for assistance or the right to take part in formulating the request addressed to other Member States, or the right to take part in examinations of witnesses organized by other Member States[97].

The Directive on Administrative Cooperation of 2011[98] repeals the Directive on Mutual Assistance. Particularly, it expands the scope of cooperation in this field, since the new Directive concerns all taxes[99], direct and indirect, not covered yet by other European legal texts. The cooperation of Member States, even by electronic means, will enable them to collect taxes properly[100]. Information concerning *all taxes of any kind levied by, or on behalf of, a Member State* or its subdivisions, including local

---

[92] Council Directive 77/799/EEC of 19 December 1977 on mutual assistance by Member States in the field of direct taxation and taxation of insurance premiums, OJ L 336, 27.12.1977
[93] See fn *92*, art. 1(5)
[94] See fn *92*, art. 1(1)
[95] See fn *92*, art. 1(2)
[96] See fn *92*, art. 2-4: article 3 for the automatic exchange of information: "*For categories of cases which they shall determine under the consultation procedure laid down in Article 9, the competent authorities of the Member States shall regularly exchange the information referred to in Article 1 (1) without prior request*"
[97] Case C-276/12 Jiří Sabou v Finanční ředitelství pro hlavní město Prahu (2013) Judgment, ECLI:EU:C:2013:678
[98] Council Directive 2011/16/EU
[99] See fn *98*, art. 2(1)
[100] See fn *98*, art. 1(1) and 1(2)

authorities, shall be subject to exchange[101]. However, the value added tax, customs duties and excise duties are covered by different European legislation and thus exempt from the scope of this Directive, as it happens with the mandatory social security contributions[102].

Definitely, it gives the minimum rules and enables Member States to proceed to a wider cooperation, if possible[103]. Given that it is not an easy matter for national authorities to assess taxes properly due to the internationalization of financial instruments, the internal market functioning is showing its negative consequences. The solution proposed has to do with the exchange of information between the Member States, developing schemes and providing common rules broadly accepted. An important section of relates to the gathering of information from a Member State when requested, even if it is not needed for its own tax purposes[104]. For different scenarios, there are three different ways to disseminate this information. Like previously, there is an exchange of information upon request, the spontaneous and the automatic exchange.

The exchange of information on request happens when a requesting authority receives the information mentioned in Article 1(1), if the competent authority of another Member State has it in its possession or if it has obtained it after administrative enquiries[105]. The requesting authority can also ask for a specific administrative enquiry mentioning the justification for that[106]. In both cases, the requested authority should proceed to the necessary actions as if it was to the benefit of its own Member State[107], inside the time limits mentioned carefully for each single case[108].

The spontaneous exchange happens if: a) the competent authority of one Member State has grounds for supposing a possible loss of tax for another Member State, or b) when a person has a reduction or an exemption from taxes in one Member State that would increase his liability in another Member State, or c) when a saving in tax could happen in case two persons from different Member States conduct business dealings, or d) when the competent authority on one Member state has grounds for supposing that groups of enterprises obtain a saving of tax because of artificial

---

[101] See fn *98*, art. 2(1)
[102] See fn *98*, art. 2(2)
[103] See fn *98*, Preamble, para. 21: "*This Directive contains minimum rules and should therefore not affect Member States' right to enter into wider cooperation with other Member States*"
[104] See fn *98*, art. 18(1)
[105] See fn *98*, art. 5
[106] See fn *98*, art. 6(2)
[107] See fn *98*, art. 6(3): "*In order to obtain the requested information or to conduct the administrative enquiry requested, 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*"
[108] See fn *98*, art. 7

transfers of profits, or e) when information forwarded to one Member State from a second one permitted information to be obtained that may be helpful in assessing liability to tax in the second Member State. Possibly, the competent authorities can disseminate information between each other when they are aware of and in case it could be useful to the others[109].

Finally, it is provided that the competent authority of one Member State shall automatically inform the competent authority of another Member State for the incomes coming from employment, for the director's fees, the life insurance products not covered by other European legal texts, the pensions and the ownership of an income coming from immovable property[110].

The Directive of 2011 was amended in 2014[111] since the EU wanted to respond to the new challenges coming along, in the period when bilateral treaties between the Member States and USA are concluded after the adoption of the FATCA, and when the OECD presented the Common Reporting Standard. Thus, it is necessary for the EU to have its own legislation, not only to fight against tax evasion in case cross-border transactions take place, but also to confer legal certainty to its Member States and its individuals[112]. The legal roots of this amendment lays on the most favored nation clause mentioned in the Directive of 2011, forcing a Member State not to refuse to provide a wider cooperation to other Member States, if it has already developed a wider cooperation with a third country[113].

Now, the exchange of information shall happen at least once a year[114]. The competent authority of each Member State, from the beginning of 2016, should additionally inform the other competent authority of the identification of the reportable persons, including the tax identification number and the account number that they have, and, if the account holder is an entity and one or more controlling persons are reportable persons, then the same information should be disclosed, this time for the controlling reportable persons[115]. The term *reportable person* means Member States persons, individuals or the estates of a decedent that were resident in any Member State, and entities, resident in any Member State, excluding mainly corporations the

---

[109] See fn *98*, art. 9(1) and 9(2)
[110] See fn *98*, art. 8
[111] Council Directive 2014/107/EU, Preamble, para. 7 and para. 9
[112] Cerioni, L., (2015) *The European Union and Direct Taxation: A Solution for a Difficult Relationship.* Routledge, New York, NY, USA, p.95
[113] See fn *98*, art. 19
[114] See fn *111*, art. 1(2)
[115] See fn *111*, Annex I, Section I and Section VIII: "*The term "Reportable Account" means a Financial Account […] held by one or more Reportable Persons or by a Passive NFE with one or more Controlling Persons that is a Reportable Person*"

stock of which is traded on established securities markets, governmental entities, central banks and international organizations[116].

Concerning entities, partnerships, limited liability partnerships and similar legal arrangements that have no residence for tax purposes, they are considered to be resident in the country where the effective management takes place. Finally, in case of passive non-financial institutions, it is recognized that the controlling persons should be found so as to conclude if they are reportable persons or not[117]. The *controlling persons* are the natural persons that exercise control over the entity. In case of a trust, it means the settlor, the trustee, the protector, the beneficiary and any other natural person that exercises ultimate effective control. If there is a legal arrangement other than a trust, the controlling persons are the ones having similar positions. It is important that the European Directive keeps the interpretation of the term from the Financial Action Task Force Recommendations[118].

The Directive, also, mentions the important details in order to define the reporting financial institutions. For this reason, the Member States should provide a list with the non-reporting financial institutions and the excluded accounts to the Commission, which will be published as necessary[119]. Both the reporting and the non-reporting financial institutions are defined in the first annex of the Directive of 2014. If the financial institutions are mainly custodial institutions, depository institutions, investment entities and specified insurance companies, the reporting ones are defined negatively, as the financial institutions that are not non-reporting financial institutions. Moreover, they should be resident in a Member State or the branches of non-reporting institutions should be resident in a Member State. Precisely, the non-reporting financial Institutions are *inter alia* governmental entities, international organizations and central banks, custodial institutions, depository institutions, retirement and pension funds, and other entities that present a low risk of being used for tax evasion[120].

The Directive gives the essential definitions for the correct application of its provisions. In detail, lifting the banking secrecy, the reportable account is defined as the one maintained by a Member's State reporting financial institution, held by

---

[116] See fn *111*, Annex I, Section VIII: "*The term "Reportable Person" means a Member State Person other than: (i) a corporation the stock of which is regularly traded on one or more established securities markets; (ii) any corporation that is a Related Entity of a corporation described in clause (i); (iii) a Governmental Entity; (iv) an International Organization; (v) a Central Bank; or (vi) a Financial Institution*"

[117] See fn *111*, Annex I, Section V, para. 2: "*Determine Whether the Entity is a Passive NFE with One or More Controlling Persons who are Reportable Persons […] (a) Determining whether the Account Holder is a Passive NFE […], (b) Determining the Controlling Persons of an Account Holder […], (c) Determining whether a Controlling Person of a Passive NFE is a Reportable Person*"

[118] See fn *111*, Annex I, Section VIII: "*The term "Controlling Persons" must be interpreted in a manner consistent with the Financial Action Task Force Recommendations*"

[119] See fn *111*, art. 1(2)

[120] See fn *111*, Annex I, Section VIII

reportable persons or by passive non-financial institutions when their controlling persons are reportable persons.

It is also provided that the competent authorities of the Member States can inform the others in case they are not willing to receive any kind of relevant information. Moreover, there is the provision to disseminate this information from third countries and to third countries, as well. Precisely, a competent authority of one Member State receiving information from a third country may, if it is permitted by their bilateral or multilateral agreement, provide this information to the competent authorities of other Member States, but only if they have an interest to that. Also, the competent authorities may communicate information obtained to a third country, but only if the competent authority of the Member State from which the information originates has consented to this, and, cumulatively, the third country agrees to gather evidence for the "*irregular or illegal nature of transactions which appear to contravene or constitute an abuse of tax legislation*"[121].

Concluding the research, the added value of the amendment of the Directive, except for the important definitions mentioned in its first Annex, is that the Member States are required to adopt and publish the laws and regulations needed so as to comply with the provisions of the Directive by the end of 2015. The Member States are urged to apply the measures from the beginning of the following year, with the exception of Austria, that should comply with it a year later[122].

B. The CRS in the light of the Directive on Administrative Cooperation

For the EU, it is not needed to adopt a Model Competent Authority Agreement, since the clauses of its Directives are incorporated into national law. The European Directives are binding to all Member States, while the documents published by the OECD need to be signed and applied by the interested jurisdictions worldwide.

Generally, it can be noted that the Directive on Administrative Cooperation was amended so as to be in parallel with the Common Reporting Standard. Both the Directive on Administrative Cooperation and the Common Reporting Standard refer to the data protection safeguards and to the due diligence procedures that should be followed.

In the European side, there is the provision that the exchange of information can happen in three different ways: upon request, automatically and spontaneously, for

[121] See fn *98*, art. 24
[122] See fn *111*, art. 2

different kinds of financial information. However, the Common Reporting Standard provides only the automatic way for the exchange of financial information. This happens because in the European Union there is a strong cooperation in many fields and, therefore, the spontaneous or upon request exchange of information happens in supplementary cases, enhancing the general cooperation among the Member States. Moreover, the amendment that the Directive 2014/107/EU provided, added significant information that should be disposed automatically. For instance, it provides that the personal details, including the tax identification number, the account number and the account balance of the reportable persons should be provided to the other countries.

Thereupon, it can be considered that the European Union provided the exchange of financial information before the publication of the relevant documents by the OECD. However, the Common Reporting Standard was providing the automatic exchange for a full spectrum of financial information that was not mentioned previously in the European legislation. For this reason, the Directive 2014/107/EU was adopted so as to incorporate the Common Reporting Standard into European law, including the same details for the information that should be disclosed, and giving the definitions and the due diligence procedures for the effective implementation of the automatic exchange of information.

Inside the EU, it is possible that banking secrecy is finally lifted, and this operation brings the desired benefits. There is an integrated mechanism that forces Member States to engage in all the operations agreed upon. European law is binding to Member States, given that they have to transfer the provisions of the Directives into national legislation. Therefore, it can be considered that the relevant financial information will be indeed disclosed in the future. This is an operation that can work only through the total commitment of governments, and it is challenging to see the results that will appear after the application of these legal instruments. Possible tensions between the Member States are softly avoided, when there is no differentiation with countries that have been characterized in the past as famous tax havens.

V. Conclusions

This paper, although just skimming the surface of the important matters relating to tax havens, attempted to present the core issues of the existing legal texts concerning the exchange of financial information among different countries worldwide. In order to better understand the mechanisms elaborated by different international organizations, the first chapter briefly analyses the main characteristics of tax havens. The secrecy provision, an attribute that enhances global transactions, has a negative consequence to the governments because they seem to be unable of collecting taxes properly. For this reason, from the case law to the national and international law, governments endeavor to receive the financial information needed. It cannot be denied that this operation could be successful only through the multilateral cooperation.

Regrettably, there is no existing mechanism to deal with banking secrecy accurately. The second and third chapter of this essay point out that a major effort to this end was the model law presented by the OECD. The OECD presented the Common Reporting Standard, similar to the legal Act adopted by USA, and afterwards implemented by the European Union. Certainly, there are detailed provisions for the efficient exchange of the most important financial information, concerning the income and assets held by individuals and companies, even by offshore companies. For this reason, some of the most crucial definitions are posed by the legislators, also presented in this dissertation. Throughout the introduction of the main mechanisms provided so that countries exchange financial information concerning their residents, it is deduced that this operation is not reaching the end of the tax havens epoch.

Observing the current situation, the majority of governments disregard the adoption of relevant legislation, considering it to be harmful for their interests. Consequently, any effort to exchange financial information depends on the real counties' will. The model rules published by the OECD are not widely recognized and adopted. It is expected that the European Union solely could adopt relevant legislation, mainly because the cooperation of its Member States is outstanding. Concerning the rest of the countries, this operation could be successful only sporadically, when legal provisions to this end were posed in the different bilateral agreements. Further research would be needed in the future, primarily because the relevant provisions are not applied yet, while it is essential to evaluate the results and the relevant case law that may arise; at present, only a theoretical analysis can be made, since there is no practical application of the aforementioned documents. Secondly, it is necessary to record the prospective signatory jurisdictions in order to observe the dynamic of the operation.

VI. Bibliography

European legislation

1. Council Directive 77/799/EEC of 19 December 1977 on mutual assistance by Member States in the field of direct taxation and taxation of insurance premiums, OJ L 336, 27.12.1977
2. Directive 95/46/EC of the European 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, OJ L 281, 23.11.1995
3. Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments, OJ L 157, 26.6.2003
4. Council Directive 2003/123/EC of 22 December 2003 amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 007, 13.1.2004
5. Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L 64, 11.3.2011
6. Council Directive 2014/48/EU of 24 March 2014 amending Directive 2003/48/EC on taxation of savings income in the form of interest payments, OJ L 111, 15.4.2014
7. 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, OJ L 359, 16.12.2014
8. Directive EU 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 141, 5.6.2015

Conventions, legislation and documents

9. Communication from the Commission to the Council (1989) *Tax measures to be adopted by the Community in connection with the liberalization of capital movements.* COM 89/60

10. Communication from the Commission to the European Parliament and the Council (2012) *An Action Plan to strengthen the fight against tax fraud and tax evasion.* COM 722 final

11. Conclusions of the ECOFIN Council meeting concerning taxation policy (1997), OJ 98/C 2/01

12. Council of the European Union (2015) Legislative Acts and other Instruments, 8297/15

13. European Commission (2015) COM 136 final, Communication from the Commission to the European Parliament and the Council on tax transparency to fight tax evasion and avoidance

14. European Commission (2015) COM 394 final, Proposal for a Council Decision on the signing, on behalf of the European Union, of the Amending Protocol to the Agreement between the European Community and the Principality of Liechtenstein providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments

15. Financial Action Task Force (*FATF*) (2012) *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation.* Updated October 2015, FATF, Paris, France

16. Feuille fédérale (1934) No. 6 du 9 février, FF 1934/172, Message du Conseil fédéral à l'Assemblée fédérale concernant le projet de loi fédérale sur les banques et les caisses d'épargne, du 2 février 1934

17. Global Forum on transparency and exchange of Information for tax purposes (2014); *Automatic Exchange of Information: A Roadmap for Developing Country Participation*; Final Report to the G20 Development Working Group, 5 August 2014

18. Loi fédérale sur les banques et les caisses d’épargne (Loi sur les banques, LB) 1 du 8 novembre 1934 (Etat le 1er juillet 2015),

19. Organization for Economic Co-operation and Development (*OECD*) (1998) *Harmful Tax Competition: An Emerging Global Issue*. OECD Publishing, Paris, France

20. Organization for Economic Co-operation and Development (*OECD*) (2012*)* *Keeping It Safe: The OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax Purposes*. OECD Publishing, Paris, France

21. Organization for Economic Co-operation and Development (*OECD*) (2014) *Standard for Automatic Exchange of Financial Account Information in Tax Matters*. OECD Publishing, Paris, France

22. Organization for Economic Co-operation and Development (*OECD*) (2015) *The CRS Implementation Handbook*. OECD Publishing, Paris, France

23. Organization for Economic Co-operation and Development (*OECD*) (2015) Signatories of the Multilateral Competent Authority Agreement and intended first Information exchange date Status, as of 27 January 2016, available at: *http://www.oecd.org/ctp/exchange-of-tax-information/MCAA-Signatories.pdf*

24. Proposal for a Council Directive repealing Council Directive 2003/48/EC (2015) COM 129 final

Case law

25. Case C-420/98, W.N. v Staatssecretaris van Financiën (2000) Judgement, ECLI:EU:C:2000:209

26. Case C-153/00, Criminal proceedings against Paul der Weduwe (2002) Judgement, ECLI:EU:C:2002:735

27. Case C-276/12, Jiří Sabou v Finanční ředitelství pro hlavní město Prahu (2013) Judgment, ECLI:EU:C:2013:678

28. Case C-580/13, Coty Germany GmbH v Stadtsparkasse Magdeburg (2015) Judgement, ECLI:EU:C:2015:485

29. Norwich Pharmacal Co v Customs and Excise Commissioners, House of Lords (1974) AC 133

30. Tournier v National Provincial and Union Bank of England, UK Court of Appeal (1924) 1 K.B. 461

Books

31. Adamoli, S. (2002) The protection of the EU financial system from the exploitation of financial centers and offshore jurisdictions by organized crime. In *Upperworld and Underworld in Cross-border Crime*, Van Duyne, P. C., Von Lampe, K., and Passas, N. (Eds.), Wolf Legal Publishers (WLP), Nijmegen, The Netherlands
32. Arnold, B. and McIntyre, J. (2002) *International Tax Primer*. 2nd edition, Kluwer Law International, The Hague, The Netherlands
33. Barber, H. (2007) *Tax havens today. The benefits and pitfalls of banking and investing offshore*. John Wiley and Sons Inc., Hoboken, NJ, USA
34. Belle Antoine, R.M. (2013) *Offshore Financial Law, Trusts and related tax issues.* 2nd edition, Oxford University Press, Oxford, UK
35. Cerioni, L., (2015) *The European Union and Direct Taxation: A Solution for a Difficult Relationship.* Routledge, New York, NY, USA
36. Ellinger, E.P., Lomnicka, E. and Hare, C.V.M. (2011) *Ellinger's Modern Banking Law*. 5th edition, Oxford University Press, NY, USA
37. O'Donovan, J. (2005) *Lender liability*. Sweet & Maxwell, London, UK
38. Palan, R., Murphy, R., and Chavagneux, C. (2010) *Tax Havens: How Globalization really works*. Cornell University Press, Ithaca, NY, USA
39. Young, M.A. (2013) *Banking Secrecy and Offshore Financial Centers: Money laundering and offshore banking*. Routledge, Abingdon, UK

Articles

40. Ausness, R. (2010) The Role of Trust Protectors in American Trust Law. *Real Property, Trust and Estate Law Journal*, 45 (2)
41. Bean, B. and Wright, A. (2015) The U.S. Foreign Account Tax Compliance Act: American Legal Imperialism? *ILSA Journal of International and Comparative Law*, 21 (2)
42. Chaikin, D. (2011) Adapting the Qualifications to the Banker's Common Law Duty of Confidentiality to Fight Transnational Crime. *Sydney Law Review*, 33 (2)
43. Dharmapala, D. and Hines, J. (2009) Which countries become tax havens? *Journal of Public Economics*, 93

44. Guex, S. (2000) The Origins of the Swiss Banking Secrecy Law and Its Repercussions for Swiss Federal Policy. *The Business History Review*, 74 (2)

45. Jimenez, A.M. (2006) Loopholes in the EU Savings Tax Directive. *Bulletin for International Taxation, IBFDP*, 20 (12)

46. Johannesen, N. and Zucman, G. (2014) The End of Bank Secrecy? An Evaluation of the G20 Tax Haven Crackdown. *American Economic Journal: Economic Policy*, 6 (1)

47. Knobel, A. and Meinzer, M. (2014) "The end of bank secrecy"? Bridging the gap to effective automatic information exchange, An Evaluation of OECD's Common Reporting Standard (CRS) and its alternatives. Preliminary Report, *Tax Justice Network*

48. Langbein, J. (1995) The Contractarian Basis of the Law of Trusts. *The Yale Law Journal*, 105 (625)

49. Prebble, Z. and Prebble, J. (2010) The morality of tax avoidance. *Creighton Law Review*, 43 (3)

50. Schjelderup, G. (2015) Secrecy Jurisdictions. *International Tax Public and Finance*

51. Somare, M. and Wöhrer, V. (2015) Automatic Exchange of Financial Information under the Directive on Administrative Cooperation in the Light of the Global Movement towards Transparency. *Kluwer Law International, Intertax*, 43 (12)

52. Stokes, R. (2011) The Genesis of Banking Confidentiality. *The Journal of Legal History*, 32 (3)

53. Szarmach, L. (2010) Piercing the Veil of Bank Secrecy? Assessing the United States' Settlement in the UBS Case. *Cornell International Law Journal*, 43 (2)

54. Zucman, G. (2014) Taxing across Borders: Tracking Personal Wealth and Corporate Profits. *Journal of Economic Perspectives*, Fall, 28 (4)