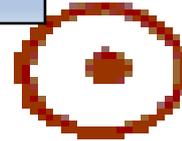


# The exchange of information among tax authorities and the measures to protect the privacy of taxpayers

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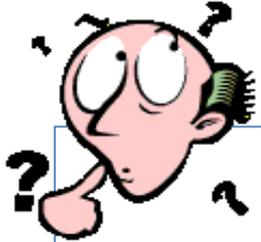
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## My target



Exploring the relationship between international tax cooperation procedures (specifically: procedures involving the **exchange of information between States**) and the **protection of the rights of taxpayers** (in particular as far as the right to privacy)

FIRST OF ALL..... Key discussion points



The following definitions are **key**

- A. what administrative cooperation for tax purposes is ?
- B. which needs are met by this cooperation ?
- C. how it is regulated in international tax law ?

## Administrative cooperation for tax purposes

*“The coordinated, but distinct, activity of bodies of two or more States, which aims at achieving the goals set by one of them that are in line with the ones of the other, equally intended to be achieved”*

Exchange of information

assistance with the collection of the debts of a State outside its territory

With the **increasing importance of economic globalisation** these two activities became **more and more important for:**

- A) fight against losses in tax revenue for individual States
- B) the collection of taxes from national taxpayers (when they transfer funds abroad )
- C) fight against terrorism. States began to monitor more closely economic transactions in order to intercept (and block) money for terrorist acts

See the findings of the recently approved *European Parliament resolution of 26 March 2019 on financial crimes, tax evasion and tax avoidance*

## EXCHANGE OF INFORMATION – GENERAL OUTLINE

### Exchange of information - Target:

- A) remove the **risk of double taxation**,
- B) **tackle tax fraud** by transferring wealth to States other than the State of residence

### Exchange of information - Regulation:

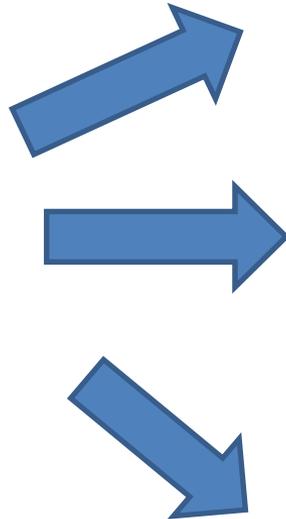
The exchange of information is usually regulated by **international treaties** between individual states – Model: Art. 26 of the OECD Model Tax Convention

#### **Other legislative framework:**

- a) **multilateral treaties** (for example the Convention on mutual administrative assistance in Tax Matters of 25th January 1988 developed by the Council of Europe and the OECD, the Nordic Convention on Mutual Administrative Assistance in Tax Matters of 1989 and the CIAT Model Agreement on Exchange of Tax Information, 1999);
- b) **The Tax Information Exchange Agreements (TIEAs)**
- c) **Foreign Compliance Act (FACTA)** adopted by the US in 2010 which requires foreign financial institutions to tell the US IRS (Internal Revenue Service)
- c) In EU: Regulation 1798/2003/EEC and Directive no. 2003/48/EC

## Exchange of information

METHODS ....



EXCHANGE ON REQUEST

SPONTANEOUS EXCHANGE

AUTOMATIC EXCHANGE

## EXCHANGE ON REQUEST

✓ MOOST COMMON METHOD

✓ A STATE REQUESTS THE INFORMATION AT THE OTHER STATE

✓ **FORBIDDEN** THE *FISHING EXPEDITIONS* OR «EXPLORATORY» REQUESTS

✓ **ADMITTED** REQUESTS ABOUT IDENTIFIED GROUP: FOR EXAMPLE PEOPLE WHO HAVE CLOSED THE CURRENT ACCOUNT FROM A DATE

## SPONTANEOUS EXCHANGE

✓ NOT VERY COMMON

✓ NO REQUEST FROM A STATE TO ANOTHER STATE:  
financial institutions of one Country, while carrying out  
controls, find information that may be important for  
another country and collaboratively send it

## AUTOMATIC EXCHANGE

✓ THE MOST ENCOURAGED MODEL

✓ OCSE model → FACTA

✓ rules that require data collection and transmission

✓ Dir. 2014/107/CE

✓ In Italy: D.Lgs. 4 marzo 2014 n. 29 e D.Lgs. 15 marzo 2017 n. 32

## EXCHANGE OF INFORMATION, RESTRICTIONS AND PROTECTION

The legislative reference for limitations and guarantees is Art. 26 of the OECD Model agreement on exchange of information (similar provisions in EU information exchange standard)

### *Limitations and guarantees involve:*

- ❖ Only relevant information can be requested
- ❖ Information confidentiality and confidential use
- ❖ Each State may decide not to supply information if: a) in order to supply it, it should adopt administrative measures at variance with its laws or administration practices; b) it may not be obtained in accordance with its laws or administration practices; c) it may disclose a trade, industrial or professional secret or supplying the information is contrary to public policy.
  - ❖ Reciprocal arrangements between States
- ❖ Some limitations to use the information exchanged for purposes other than taxes.

## THE CONFIDENTIALITY OF INFORMATION AND THE RIGHT TO PRIVACY

- ✓ In accordance with the provisions of Art. 26 paragraph 2 **the information exchanged must be kept secret like all information obtained in accordance with national laws.** They can be disclosed only to the authorities in charge of carrying out the procedures - tax assessment and collection as well as judicial examination – in which the information may be relevant. **Information can be made public only during hearings or in judgments about the examination or collection procedures.**
- ✓ In order to make these provisions (and those of other standards) more specific, the OECD published **The Guide on the protection of information exchanged for tax purposes in July 2012**, which contains detailed guidance on the procedures that must be implemented by the administration of each State to protect the confidentiality of information; the Guide also includes specific checklists on the requirements to be met.

## THE CONFIDENTIALITY OF INFORMATION AND THE RIGHT TO PRIVACY

- ✓ **Key principle of the Guide** : Effectively protecting the confidentiality of information and in particular any personal information is a key concern for tax administrations. It is therefore necessary for tax administrations to develop a comprehensive policy including procedures to ensure that the legal framework is effectively implemented. Such policy and procedures need to be reviewed and endorsed at the top level of a tax administration. Further, it needs to be clarified who in the organisation is responsible for implementing the policy. As discussed in more detail below, the comprehensive policy should cover all aspects relevant to protecting confidentiality and include background/security checks of employees, employment contracts, training, access to premises, access to electronic and physical records, departure policies, information disposal policies and managing unauthorized disclosures of confidential
- ✓ Tax administrations **must regularly monitor compliance with the policy in practice**

## THE COMPLIANCE WITH LIMITATIONS AND GUARANTEES IN PRACTICE: THE SO-CALLED “LIST TRADE”



Guarantees and limitations are really implemented ??????

A relevant benchmark: cases so-called «LIST TRADE»

*The term refers to people (the most famous cases are **Heinrich Kieber**, who used to work for the Liechtenstein LGT Bank and **Hervé Falciani** who used to work for the HSBC branch in Geneva) who, in return for money and protection, sold data of the customers of their former banks to the German and the French government. These data demonstrated that customers had hidden wealth abroad. Not only did the two governments started a tax examination procedure about their citizens after this (legally questionable when it comes to how it was carried out) acquisition, but they also provided these lists to other States (among which Italy) so that they could prosecute their citizens mentioned inside them.*

## USE OF «FALCIANI LIST» IN ITALY

### Corte di Cassazione – no. 8605/8606 28th April 2015

*As far as the tax examination procedure is concerned,  
any element of indicative value,  
though obtained unlawfully, can be used.*

*The exception are those elements that cannot be used  
due to specific legal provisions as well as the compliance  
with fundamental constitutional rights.*

*Therefore, as for tax assessment and examination and  
within the adversarial procedure with the taxpayer,  
bank data transmitted by French authorities  
to Italian ones may duly be used*

*as per Directive 77/799/ECC of 19th December 1977.*

*The receiving authority shall not be required  
to carry out preliminary verifications  
even if the elements were obtained illegally  
or in breach of the right to bank secrecy.*

## USE OF «FALCIANI LIST» IN ITALY

The reasoning is the following: since the Constitution does not acknowledge bank secrecy, the need to protect tax interests – expressed in Art. 53 of the Constitution – overrides bank secrecy. As a consequence, even if data are originally obtained unlawfully, they can be used because they are transmitted by another State in compliance with the rules in force, without prejudice to the taxpayer's right to be heard (and so to demonstrate the lawfulness of his/her conduct). Moreover, it shall be noted that the Italian tax system, unlike the Code of Criminal Procedure, lacks a specific provision on the interdiction to use unlawfully gathered evidence.



## USE OF «FALCIANI LIST» IN ITALY

It means that since states exchange information in accordance with the provisions on tax cooperation, any abuse necessary to gather evidence and data in the first place would become lawful and there would be no contradiction with the provisions on confidentiality. As a matter of fact, bank secrecy would not be taken into account and the obligation to confidentiality for banks would only concern the security and success of trade operations instead of phenomena such as tax fraud.

*The superior raison d'état to combat tax fraud would justify the use of evidence that was knowingly gathered unlawfully*





I AM NOT AGREE !!!!!!!!!!!

1) Evidently, they contradict the above-mentioned provisions of the OECD Model and with the operational guidelines of the Guide on the protection of information exchanged for tax purposes: what is the point in implementing a detailed series of rules, procedures and recommendations that are supposed to ensure a specific and limited use of information and imposing strict protocols to keep and transmit data, if then it is possible to use data collected in breach of these protective measures ?



I AM NOT AGREE !!!!!!!!!!!

2) The right to privacy is guaranteed by the European Convention on Human Rights. The Convention specifies that the right can be limited only in the following cases: 1) when expressly provided for by laws; b) in order to achieve goals of public interest, only if the limitation is necessary and consistent with the democratic set-up of the society (proportionality principle)



I AM NOT AGREE !!!!!!!!!!!

3) If data or news were obtained unlawfully they shall not be used, since the fact that they are properly transmitted does not solve the original unlawfulness (principle of subsequent impossibility of use). The tax proceeding is, indeed, an administrative proceeding based on the principle of legality. Any legal breach makes the proceeding unlawful and, in this case, it is clear that the law was violated



I AM NOT AGREE !!!!!!!!!!!

4) The rules associated with fair proceedings and due process were violated, since they cannot be guaranteed only by the right to be heard: the issue here is not to give a chance to the taxpayer to be heard and provide justification. The issue here is to prevent examination procedures from being carried out “unfairly” (also since all European Constitutions acknowledge the principle of impartiality, transparency and fairness of the activities of the public administration).

Moreover, the principle of “loyalty” is mentioned in the French case-law about the impossibility to use the Falciani list, Court d’Appel de Paris 8th February 2011 no. 10/14507. The principle of loyalty comes with another question: if data were obtained in violation of the national laws of a Country that transmitted the information, how can the receiving Country use the information if we think about the rules set out by treaties on information exchange?



I AM NOT AGREE !!!!!!!!!!!

- 5) By using data and information so, the whole guarantee scheme would collapse. Impossible not to think that, in this way, tax matters are managed unlawfully and not democratically and the tax system and taxpayers cannot be “equally armed”
- 6) Clearly illegal practices, such as stealing files to banks to sell them to tax authorities with the complicity of States (which, in all the cases mentioned, ensured full protection to whom gave them the stolen data) are encouraged.

