

## **Mandatory Automatic Exchange of Information in the Field of Taxation in Relation to Reportable Cross-Border Arrangements. Analysis of the EU Directive 6804/18**

### **Abstract**

The necessity for a mandatory disclosure obligation for intermediaries who project cross-border schemes for their clients, that involve routing assets to or through offshore entities, is very felt at international level, especially in consequence of the recent scandals that highlighted phenomena of tax evasion/elusion - in particular, “Panama Papers” and “Paradise Papers”. These complex cross-border schemes facilitate tax evasion, tax fraud and money laundering, because each tax jurisdiction evaluates a part of the system within its borders.

Considering this scenario, the EU Directive 6804/18 was introduced to provide a set of rules related to the counter of tax avoidance/evasion phenomena and increasing levels of transparency with regard to the exchange of information between the authorities of the Member States within the Union. From the moment of its enforcement, the Directive obliges intermediaries, proposing and commercializing transnational financial schemes to their clients, with the purpose to facilitate tax avoidance, to report the establishment of such mechanisms to the tax authorities of the Member State to which they belong. In turn, the authorities of the aforementioned EU Member States will be compelled, as stated from the Directive, to exchange this information with each other authorities, in order to increase control over the activities of consultants and tax planners, regardless of the imminent possibility of a real risk.

### **1. Introduction**

The fight against tax evasion/elusion represents an issue that cannot affect the individual States in an independent manner. It is a global phenomenon that should be treated through the provision of stringent rules taken at international and regional level.

In particular, it is interesting what has been done by the European Union on this matter. In this context, the path to reach a solution regarding the provision of actions to counter tax evasion/avoidance<sup>2</sup> phenomena has been long and passed through several difficulties.

To solve this issue, a legislative proposal was requested by the European Parliament’s resolution of 6 July 2016 on tax rulings and other measures similar in nature or effects<sup>3</sup>. In particular, the purpose of

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<sup>2</sup> *Saxunova, D., Sulikova, R., Szarkova, R.*, Tax Management Hierarchy – Tax Fraud and a Fraudster, Management International Conference, 2017, 633-644. According to the Organization for Economic Co-operation and Development (OECD) definition, the evasion represents a behavior in violation of the law which consists of all those illegal methods aimed at reducing or eliminating the tax and contribution levy. It occurs in the cases in which the taxpayer subtracts entirely or in part from the tax obligation, by concealing the taxable amount or the assumption of the tax. The evasion, with reference to the tax base, is achieved through a process of non-declaration of part or all of the taxable income (non-declaration) or through a fictitious increase in costs deductible from revenues (simulation of fictitious liabilities). On the contrary, tax avoidance is behavior that conforms to the letter but not to the ratio of the tax provision. It is carried out by means connected to each other, without valid economic reasons, with the purpose to circumvent obligations or prohibitions envisaged by the tax system and obtaining reductions in taxes or reimbursements, otherwise undue.

this resolution was to provide a legislative proposal introducing a mandatory disclosure requirement for intermediaries<sup>4</sup> concerning complex mechanisms and special services related to particular States included on the EU list of tax havens and non-cooperative jurisdictions<sup>5</sup> are designed for and being used by clients to facilitate tax evasion, tax fraud, money laundering or terrorist financing.

The next step was made on the 21 June 2017 when the European Commission adopted a proposal for a directive amending the administrative cooperation.

But, it was the Directive 2011/16/EU<sup>6</sup> that represented the first step in relation to the mandatory automatic exchange of information in the field of taxation regarding the reportable cross-border arrangements.

In particular, the provision of the proposal is referred to ensure early information on cross-border arrangements designed by tax intermediaries or taxpayers by creating an obligation to report such schemes on intermediaries and by inserting the collected information in the automatic exchange of information between tax authorities within the European Union<sup>7</sup>.

The 13 March 2018 Economic and Financial Affairs Council paved the way for its adoption. The Ministers of Economic and Financial Affairs of the EU reached this agreement starting from the proposal of the European Commission, about the possibility of preparing a new regulatory framework in terms of transparency for the exchange of information on possible tax evasion/avoidance mechanisms.

The EU Directive 6804/18<sup>8</sup> regarding the “Mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements” provides the introduction of a common regulatory framework for the automatic and compulsory exchange of tax information. This obligation concerns potentially illicit activities, proposed by the intermediaries, related to tax evasion phenomena - with the peculiarity that they must have at least one or more cross-border elements - to the competent national authorities of the different Member States<sup>9</sup>.

In the field of the Directive 6804/18 EU, the role of tax intermediaries may be to favor the exchange of information related to the tax-planning they prepare for their clients. Specifically, the information taken into account must be transferred immediately by the intermediaries to the national tax authorities, in order to ensure that the latter can effectively carry out an automatic

<sup>3</sup> Official Journal of the European Union, European Parliament resolution of 6 July 2016 on tax rulings and other measures similar in nature or effect, (2016/2038(INI)), 2016. Available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016IP0310>>. Last visited 05/06/2018.

<sup>4</sup> According to the definition given by the OECD, there are two principal groups of tax intermediary: tax advisers and banks and other financial institutions.

(iii) Tax advisers are law, accounting and other professional firms that provide sophisticated tax advice and other services. The activities undertaken by tax advisers regard tax compliance, tax accounting, day-to-day advisory, business and economic tax planning, and dispute resolution.

(iv) Banks and some other financial institutions that promote and facilitate financial instruments and other arrangements that permit tax avoidance, including those that are considered as aggressive tax planning.

<sup>5</sup> European Commission, Common EU list of third country jurisdictions for tax purposes, Taxation and Customs Union. Available at <[https://ec.europa.eu/taxation\\_customs/tax-common-eu-list\\_en](https://ec.europa.eu/taxation_customs/tax-common-eu-list_en)>. Last visited 05/06/2018.

<sup>6</sup> Council of the EU, Directive 2011/16/EU on Administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, Official Journal of the European Union, 15 February 2011, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0016&from=EN>>. Last visited 01/06/2018.

<sup>7</sup> <<http://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-taxation/file-tax-transparency-for-intermediaries>>. Last visited 05/06/2018>.

<sup>8</sup> EU Directive 6804/18, Mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, Council of the European Union, Attached I (2), Brussels, 2018. Available at <<http://data.consilium.europa.eu/doc/document/ST-6804-2018-INIT/en/pdf>>. Last visited 29/05/2018.

<sup>9</sup> *Oberson, X.*, International Exchange of Information in Tax Matters. Towards Global Transparency, Elgar, 2015, 80-143.

exchange of the information with the tax authorities of the other Member States of the European Union<sup>10</sup>.

The mechanisms proposed by the tax intermediaries are defined as aggressive cross-border tax planning, they have some characteristics that allow several expedients to elude/evade taxes. Among these, is particularly noteworthy the provision of schemes containing cross-border losses with the aim of limiting tax liability<sup>11</sup>, the use of preferential tax regimes deemed better for the peculiarities that distinguish them and for the tax regulations that produce for them, or agreements put in place with other countries that do not respect certain legislative standards internationally agreed<sup>12</sup>.

Given the premises, the purpose of this article is to analyze the innovations introduced by the EU Directive 6804/18 on the automatic and compulsory exchange of information on cross-border tax planning mechanisms taking into consideration also the recent cases Panama Papers and Paradise Papers and the OECD Base Erosion and Profit Shifting.

## 2. Understanding tax evasion/avoidance through the analysis of two concrete cases: Panama Papers and Paradise Papers

The necessity to counteract tax evasion/avoidance phenomena is a very sensitive issue at worldwide level<sup>13</sup>, especially if taken into consideration recent cases from which emerged situation of “escaping” from taxation through particular schemes proposed by tax intermediaries that allow their clients to move part of their capital to countries in which tax jurisdiction is considered to be much more “permissive” - the so called “Tax Havens”<sup>14</sup>.

In particular, focusing the attention on two recent scandals regarding this matter: “*Panama Papers*” and “*Paradise Papers*”. They are two dossier of confidential documents, turned into light by the International Consortium of Investigative Journalists (ICIJ).

Both surveys reveal presumable information on the offshore accounts of companies and personalities from the world of politics, economy, sport, cinema and entertainment who attempted to evade taxes by hiding their wealth in tax havens<sup>15</sup>.

More specifically, the Panama Papers have been published for the first time in April 2016; the name of this investigation derives from the law firm *Mossack Fonseca*, which is based in Panama precisely<sup>16</sup>. This dossier regards a substantial dossier of over 11 million documents containing detailed information on over 200 thousand offshore companies and related organization chart.

<sup>10</sup> Kerzner, D. S., Chodikoff, D. W., International Tax Evasion in the Global Information Age, Palgrave Macmillan, Irwin Law Inc., 2016, 33-39.

<sup>11</sup> Borroni, A., A Comparative Survey on International Corporate Taxation Systems: The American Model, Digital Properties and Digital Consumers: Nuovi Diritti e Nuove Tutele, Piccinelli, G., Mazzei G., Tisci, A. Edizioni Scientifiche Italiane, Seconda Università degli studi di Napoli - Facoltà di Studi Politici e per l'Alta Formazione Europea e Mediterranea Jean Monnet, 2011, 246-251.

<sup>12</sup> Prosser, K.J., Murray, R., Tax Avoidance, Sweet and Maxwell, Thomson Reuters, 2012, 2-6.

<sup>13</sup> Borroni, A., supra note 11, 283.

<sup>14</sup> See at <<http://www.oecd.org/ctp/glossaryoftaxterms.htm>>. “Tax haven in the ‘classical’ sense refers to a country which imposes a low or no tax, and is used by corporations to avoid tax which otherwise would be payable in a high-tax country. According to OECD report, tax havens have the following key characteristics:

- (i) no or only nominal taxes;
- (ii) lack of effective exchange of information;
- (iii) lack of transparency in the operation of the legislative, legal or administrative provisions.

See on the matter, also Prosser, K. J., Murray, R., Tax Avoidance, Sweet and Maxwell, Thomson Reuters, 2012, 2-6.

<sup>15</sup> Müller-Knospe, B., From Panama to Paradise. An insight into secret financial dealings in the world of multinational corporations through the “Panama Papers” and the “Paradise Papers”, GRIN Economy, 2017, 2-5.

<sup>16</sup> Obermayer, B., Obermaier, F., The Panama Papers: Breaking the Story of How the Rich and Powerful Hide Their Money, Oneworld Publications, 2017.

The investigation led to the collection and analysis of 11.5 million secret files in the period between 1970 and 2016. The documents spotlighted a mechanism thanks to which individuals and companies would have recycled money and processed taxes for large sums of money. The chain reaction triggered by this investigation involved banks and law firms which, in providing assistance to clients involved in the scandal, had not complied with anti-money laundering legislation and, therefore, had not carried out an adequate verification of customers' origin<sup>17</sup>.

The Paradise Papers, instead, have been published in November 2017; it reveals investments in tax havens of politicians all over the world, entrepreneurs, royals and stars of international music. After the Panama Papers, the new giant leaks, unveils a long list of people who have invested in offshore companies<sup>18</sup>. The dossier contains a database of over 13 million confidential documents that come from two international professional firms that supply and manage offshore companies. They are, specifically, Appleby, founded in Bermuda, with nine branches in as many tax havens, and Asiaciti Trust, headquartered in Singapore and others 7 locations like the Cook Islands, Hong Kong, Panama and Samoa.

These investigations are important in the analysis of the Directive because they underline the role of the tax havens with the purpose to guarantee secrecy for anyone who decides to invest. In particular, the secrecy involves the investors, the numbers to invest and the investment methods.

Anyway, there is an important difference between Panama Papers and Paradise Papers. The Paradise Papers are considered more like a tax optimization than a fraud, which is much more undervalued by the companies concerned than the media that denounce this scandal. Differently from the Panama Papers, in fact, Paradise Papers may be considered much less a money laundering, arising from tax fraud and other illicit activities but it takes rather consider some legal systems created by teams of experts in tax optimization. In other words, the major part of these mechanisms cannot currently be qualified as fraudulent<sup>19</sup>.

### 3. Hereinafter the Provisions of the Directive 6804/18

The aim of the Directive to provide new rules on transparency for tax intermediaries represents an important step forward, above all, to allow the competent tax authorities to be always conscious about any activity carried out by companies or individuals residing in their territory<sup>20</sup>.

The automatic exchange of information between the tax authorities of the Member States represents an important instrument to ensure more efficient identification of tax planning mechanisms that enable companies, as well as individuals, to substantially reduce their taxes. The novelties carried by the Directive concern any institution, company or individual whose activity is to guarantee tax advice that may result in tax evasion/avoidance<sup>21</sup>.

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<sup>17</sup> Della Rovere, A., Vincenti, F., Dai Panama Papers ai Paradise Papers: la nuova inchiesta sui paradisi fiscali, Valente Associati GEB Partners, IPSOA, 2017. Available at <<http://www.ipsoa.it/documents/fisco/fiscalita-internazionale/quotidiano/2017/11/07/dai-panama-papers-ai-paradise-papers-la-nuova-inchiesta-sui-paradisi-fiscali>>. Last visited 11/06/2018.

<sup>18</sup> Montalban, P., Paradise Papers: Offshore Investments of the Rich and Powerful, Lulu Press Inc, 1st Ed., 2017.

<sup>19</sup> Eicke, R., Tax Planning with Holding Companies - Repatriation of US Profits from Europe, Eurotax, Wolters Kluwer Law and Business, 2009, 32-34.

<sup>20</sup> OECD, Tax Transparency 2017: Report on Progress, Global Forum on Transparency and Exchange of Information for Tax Purposes, Global Cooperation on Tax Transparency and Exchange of Information, 2017, 43-47.

<sup>21</sup> Petruzzi, R., Spies, K., Tax Policy Challenges in the 21st Century, Series on International Tax Law, Lang, M., Ed., Linde Verlag, 2014, 77-78.

Therefore, any intermediary proposing to its clients cross-border tax planning mechanisms - whose elements will be analyzed in the following paragraphs - has the inescapable obligation to report such schemes to the tax authorities of the Member State in which they reside<sup>22</sup>.

In general, a cross-border tax planning agreement represents a mechanism whose consequences regard more than one jurisdiction within the EU - or even in relation to agreements with third Countries<sup>23</sup>. In accordance with the provisions of the Directive, any intermediary involved in the development and subsequent implementation of tax planning mechanisms in favor of companies or individuals must necessarily give the information regarding the competent tax authorities<sup>24</sup>.

In particular, the main characteristics of the financial mechanisms which trigger the reporting obligation of the national tax authorities are<sup>25</sup>:

- tax-free jurisdictions: use of specific tax jurisdictions that do not provide for any tax with respect to companies or individuals, or that impose very low taxes, or that are included in the EU list of jurisdictions considered “not cooperative”<sup>26</sup>;
- companies outside the jurisdiction of the European Union: when companies or institutions that are not covered by EU regulations are used for the automatic exchange of information on tax matters;
- jurisdictions not bound by the automatic exchange of information: transfer of part of the income or capital through jurisdictions that are not constrained by mechanisms of automatic exchange of information with the State in which the taxpayer is resident<sup>27</sup>;
- specific destination of part of the “avoided” taxes: case in which a fixed percentage is charged as commission - as payment reserved to the intermediary for the services offered<sup>28</sup>;
- inadequate anti-money laundering rules: where it comes to jurisdictions whose anti-money laundering rules turn out to be inadequate or too “soft”;
- losses that reduce tax liability<sup>29</sup>: express provision of agreements that use losses in order to reduce tax liability under certain conditions<sup>30</sup>;
- tax-exempt payment: where a payment is expected, within a specific agreement that guarantees a tax exemption in the jurisdiction in which it should be taxed<sup>31</sup>;
- standard planning mechanisms: in this case, the advice proposed by intermediaries on tax planning is applied equally to more than one taxpayer, without the provision of ad hoc mechanisms<sup>32</sup>;
- agreements concerning the transfer of “difficult to evaluate” intangible assets: transfer of assets whose connotation is difficult to interpret and categorize<sup>33</sup>;

<sup>22</sup> *Platteeuw, C.*, Quick Reference to European VAT Compliance, Deloitte European Compliance Centre, Wolters Kluwer Law and Business, 2011, Ch. 6, 9-10.

<sup>23</sup> *Schreiber, U.*, International Company Taxation: An Introduction to the Legal and Economic Principles, Springer Texts in Business and Economics, University of Mannheim, 2013, 46-48.

<sup>24</sup> EU Directive 6804/18, Mandatory automatic exchange, 2.

<sup>25</sup> See, on this point, Annex IV, preamble and section C, point 1, of the compromise text of the Presidency of the draft directive.

<sup>26</sup> *Weimar, M. R.*, Identifying and Quantifying Rates of State Motor Fuel Tax Evasion, National Cooperative Highway Research Program, Transportation Research Board of the National Academies, 2008, 37-38.

<sup>27</sup> See on this matter, OECD, OECD/G20 Base Erosion and Profit Shifting Project Country-by-Country Reporting - Compilation of Peer Review Reports, Inclusive Framework on BEPS Action 13, OECD Publishing, Paris, 2018.

<sup>28</sup> See also *Hugh, J. A., Brian, J. A.*, Comparative Income Taxation: A Structural Analysis, Aspen Publishers, 2004, 357.

<sup>29</sup> *Borroni, A.*, supra note 11, 246-251.

<sup>30</sup> *Crundwell, F.*, Finance for Engineers: Evaluation and Funding of Capital Projects, Springer, Library of Congress Cataloging in Publication Data, 2008, 253-254.

<sup>31</sup> *Blazek, J.*, Tax Planning and Compliance for Tax-Exempt Organizations: Rules, Checklists, Procedures, Wiley NonProfit Authority, fifth Ed., 1993.

<sup>32</sup> *Panayi, C. H. J. I.*, Advanced Issues in International and European Tax Law, Bloomsbury, Hart, 2015.

<sup>33</sup> *Contractor, F. J.*, Valuation of Intangible Assets in Global Operations, Library of Congress Cataloging in Publication Data, 2001, 347-348.

- conversion of part of the assets: part of the income or capital of the customer is converted into products or payments that are not subject to automatic exchange of information.

These are, in general, the main characteristics that allow to classify a particular tax planning mechanism as potentially suitable for tax evasion/avoidance<sup>34</sup>.

However, as already stated in the previous paragraphs, the mere presence of these elements does not immediately involve risks. In fact, these are essentially indicators provided to alert the competent national authorities about potential aggressive tax planning mechanisms.

#### 4. Analysis of the Contents of the Directive

The main purpose of the Directive is to strengthen tax transparency and counter aggressive tax planning by including new provisions in the current Council Directive 2011/16/EU on administrative cooperation in the field of taxation.

The issues addressed by this legislative proposal are relevant for the EU and a broader international agenda. In its 2016 conclusions on an external tax strategy and measures against abuses of the tax treaty, the EU Council invited the European Commission to consider legislative initiatives on mandatory disclosure rules inspired by action 12 of the Base Erosion Profit Shifting (BEPS) project of the OECD<sup>35</sup>, in order to introduce more effective disincentives for intermediaries who produce for their customers tax evasion/elusion plans.

According to what is stated by the Directive, financial advisers who design for their clients, mechanisms that require the presence of one or more of the above mentioned distinctive elements will have the obligation to report these mechanisms to the competent tax authorities of the Country they belong to. In particular, this duty is referred even to cases before they are used and regardless of the possibility that the risks of evasion are concrete and imminent<sup>36</sup>.

With regard to the obligation of the States, the Directive provides that they automatically let circulate the information received from financial intermediaries on tax planning regimes through a centralized database. In this way, all the authorities of the Member States of the European Union will be able to guarantee a timely warning about potential new risks of circumvention and, above all, States will be able to respond quickly, in cases in which necessary, implementing appropriate measures to block any “risky” situations, in order to carry out the related checks more effectively<sup>37</sup>.

From a practical point of view, therefore, considering what has been stated, the duty of a particular State to indicate a specific regime does not immediately imply that it may be risky<sup>38</sup>. The main element is essentially to highlight a potential risk, underlining the mere necessity for a mechanism proposed by intermediaries to be examined by the competent tax authorities.

Furthermore, Member States considered appropriate to apply sanctions that are effective and dissuasive against companies that do not comply with transparency measures. In this way, the

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<sup>34</sup> European Commission, Tax Transparency for Intermediaries, Fair Taxation, 2017, <[https://ec.europa.eu/taxation\\_customs/sites/taxation/files/factsheet\\_intermediaries\\_proposal\\_06-2017.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/factsheet_intermediaries_proposal_06-2017.pdf)>. Last visited 24/04/2018.

<sup>35</sup> Mandatory Disclosure Rules, Action 12 contains recommendations regarding the design of mandatory disclosure rules for aggressive tax planning schemes, taking into consideration the administrative costs for tax administrations and business and drawing on experiences of the increasing number of countries that have such rules. Available at <<http://www.oecd.org/ctp/beps-actions.htm>>. Last visited 01/06/2018.

<sup>36</sup> Kerzner, D. S., Chodikoff, D. W., supra note 10, 35-36.

<sup>37</sup> Weimar, M. R., supra note 26, 35-36.

<sup>38</sup> Lai Lan Mo, P., Tax Avoidance and Anti-Avoidance Measures in Major Developing Economies, Praeger, Westport Connecticut, London, 2003, 2-3.

objective is to set up a sort of deterrent for intermediaries that encourage or facilitate the possibilities of avoidance or tax evasion<sup>39</sup>.

Considering what stated, the Directive aims at strengthening the EU's position regarding tax transparency. Intermediaries will in future have the obligation to share with the tax administrations of the State of residence the schemes that they develop for their customers<sup>40</sup>.

Tax administrations, in turn, will have access to all the information they need in order to fight any aggressive tax planning mechanisms, through which the erosion of tax bases is possible<sup>41</sup>.

This agreement is a further step in the EU towards greater openness and more efficient cooperation, facilitating taxation that can be more equitable and more effective for all EU Countries.

Following this line, the next paragraphs analyze the main innovations introduced by the Directive.

#### 4.1. Positive Aspects that not Require Further Adjustments

Taking into account some of the innovations introduced by the Directive, they could have positive effects in relation to a concrete and effective contrast to the phenomena of tax evasion.

In fact, thanks to the prediction of the circulation of information on potential risks, independently of actual consequent tax evasion, it is possible to keep under control fiscal planning mechanisms. The task of intermediaries is to point out any transnational agreement within which one or more of the elements mentioned in the preceding paragraphs are provided, which could indicate the possibility that a specific agreement has been set up in order to avoid paying the taxes<sup>42</sup>.

In this sense, the effective exchange of information is a fundamental mean of mutual assistance of sovereign States in tax matters and establishes a shared international tax risk management<sup>43</sup>.

The Directive introduces a common standard to all Member States regarding the exchange of information on financial accounts within the European Union. The provision of a standardization aimed at establishing the actual regulatory and technical requirements. Indeed, the standard established within the OECD<sup>44</sup> guarantees the automatic exchange of information and gives a framework for these exchanges in relation to the extra-European level<sup>45</sup>. This link between as stated from the EU directive and the provisions of the OECD is an important step in order to provide a broader framework both internally and externally to the EU.

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<sup>39</sup> Hokamp, S., Gulyás, L., Koehler M., Wijesinghe, S., *Agent-based Modeling of Tax Evasion: Theoretical Aspects and Computational Simulations*, Wiley Series in Computational and Quantitative Social Science, Wiley, 2018, 6-8.

<sup>40</sup> Gravelle, J. G., *supra* note 14, 5-6.

<sup>41</sup> Brown, K. B., *A Comparative Look at Regulation of Corporate Tax Avoidance*, Springer, George Washington University Law School, 2012, 3-24.

<sup>42</sup> Blazek, J., *supra* note 3.

<sup>43</sup> Seer, R., *Overview of Legislation Practices Regarding Exchange of Information Between National Tax Administration in Tax Matters*, European Parliament, Directorate-General for Internal Policy, Economic and Monetary Affairs, 2015.

<sup>44</sup> OECD, *Automatic Exchange of Information, Implementation Report, 2017* Available at <<https://www.oecd.org/tax/transparency/reporting-on-the-implementation-of-the-AEOI-standard.pdf>>. Last visited 24/05/2018.

<sup>45</sup> OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters*, OECD Publishing, 2014.

The exchange of information takes place on a systematic basis by the Member States, at regular pre-established intervals and without any prior request<sup>46</sup>.

Effective “circulation” of information related to potentially aggressive cross-border tax planning mechanisms may have important consequences in order to promote the creation of equal tax standards in the internal market of the various Countries. Furthermore, a further positive aspect concerns the possibility that the tax authorities of the Member States can share information in a transparent and automatic way with their counterparts from other Member States, without having to go through special mechanisms or preliminary authorizations<sup>47</sup>.

In addition, considering that the major number of tax planning schemes proposed by intermediaries are able to “move” between several jurisdictions, the effective and timely communication of information concerning these mechanisms would allow the Member State authorities to have availability of all the information they need to guarantee an immediate response to a potentially verifiable problem - that is to act quickly where aggressive tax practices are revealed<sup>48</sup>.

In order to facilitate the automatic exchange of information and optimize the use of resources, exchanges should take place through a common network (CCN) prepared by the Union - a sort of centralized database in which all the information is included in time exchanged<sup>49</sup>. This is undoubtedly an element of great importance in consideration of the fact that through this common network the information would be immediately available<sup>50</sup>.

The purpose of this provision is to guarantee a secure central register relating to administrative cooperation in the tax area; in particular, with the aim to facilitate its provision, the Member States should establish a series of practical arrangements - on all measures for standardizing the communication of all the required information.

Moreover, the Directive gives also clarifications regarding the language to use for the exchange of information. In fact, in order to avoid misunderstandings or potential inconsistencies deriving from the translation of information, the prediction of uniformity from the semantic point of view is undoubtedly a fundamental element. This aspect may favor higher levels of clarity and transparency - although, it must be said that the Directive considers some cases in which it is possible to use a different language<sup>51</sup>.

It would be desirable, as suggested by the Directive, to provide that the establishment of these common standards come from the Commission, in order to have a *super partes* body able to establish minimum common elements.

#### 4.2. Elements that Need More Improvements

The innovations introduced by the Directive are important in terms of combating tax avoidance phenomena and, above all, improving the level of transparency and strengthening cooperation on the part of the tax authorities of the various EU Member States.

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<sup>46</sup> According to the provisions of Article 8 (1) of the Directive, available information means the information contained in the tax records of the Member State which communicates the information, which can be consulted in accordance with the procedures for the collection and processing of information in that Member State.

<sup>47</sup> OECD, Study into the Role of Tax Intermediaries, OECD Publishing, 2008, 30-31.

<sup>48</sup> EU Directive 6804/18, Annex I (3).

<sup>49</sup> Ivi, Annex I (13).

<sup>50</sup> Kerzner, D. S., Chodikoff, D. W., supra note 10, 296-297.

<sup>51</sup> De Broe, L., International Tax Planning and Prevention of Abuse, A Study under Domestic Tax Law, Tax Treaties and EC Law in relation to Conduit and Base Companies, Doctoral Series, Academic Council, 2008, 339.



However, some passages in the Directive are not clear or, at least, they presage incompleteness and need for integration. On this matter, the next paragraphs analyze the incomplete Articles and the potential integrations of the same.

One of the elements that need more improvements concerns the so-called “main benefit test”<sup>52</sup>. This principle is satisfied in cases where one of the main advantages consists in obtaining a tax advantage, and the mechanism becomes subject to the notification obligation<sup>53</sup>.

The delegations of the several States have split up on this regard. Some of them consider that automatic exchange of information should take place only in cases where the actual presence of mechanisms presenting the characteristics of the main advantage is verified, in order not to make the work of the Member States and the related tax authorities too cumbersome, that would be in this way overloaded with information. On the other hand, Countries expressed the necessity to extend the main advantage criterion as much as possible, with the purpose of inserting the biggest number possible of information, independently of the actual presence of the criterion. The intent, of course, in this case would be to guarantee a complete and effective exchange of information, leaving to the authorities the task of verifying the presence or absence of cross-border tax planning mechanisms<sup>54</sup>.

It would be desirable - and perhaps much more effective - to understand this criterion as widely as possible. This would entail, on the one hand, a greater amount of work for the competent tax authorities; but, on the other hand, it would not leave uncertain situations, since all the tax mechanisms proposed by the intermediaries to their clients would be analyzed<sup>55</sup>.

The weight of effectiveness in this sense would be much higher than that of the workload for the authorities. In fact, it is stated that would be crucial to grant the Commission access to a sufficient amount of information so that it can monitor the proper functioning of this Directive<sup>56</sup>.

A further article of the Directive that would require further improvements, in order to provide a better interpretation, generally, is the Article 8. In particular in relation to the point concerning “the scope and conditions of the mandatory automatic exchange of information on cross-border mechanisms subject to the notification requirement”<sup>57</sup>. Specifically, this article states that it is responsibility of the Member States to take the necessary measures in order to oblige intermediaries to transfer information on the cross-border mechanisms subject to the notification obligation to the competent tax authorities.<sup>58</sup>

In this regard, the main uncertain aspect concerns the lack of a coherent and shared normative basis within the EU. In particular, the provision of the Article 8 of the Directive can be considered a problem in view of the fact that it allows the States to regulate themselves, with the consequent risk of inconsistencies between them.

Furthermore, the Article 8 refers to the possibility of the right to exemption from mandatory communication, in some specific cases. For example, the right to exemption from disclosure of

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<sup>52</sup> EU Directive 6804/18, Annex I (13).

<sup>53</sup> *Prosser, K. J., Murray, R.*, supra note 12, 147.

<sup>54</sup> *Hugh, J. A., Brian, J. A.*, supra note, 17-19.

<sup>55</sup> *Prosser, K. J., Murray, R.*, supra note 12, 147-149.

<sup>56</sup> EU Directive 6804/18, Annex I (6).

<sup>57</sup> See on this point see *Seiler, M.*, GAARs and Judicial Anti-Avoidance in Germany, the UK and the EU, Series on International Tax Law, Lang, M. Ed., Linde Verlag, 2014.

<sup>58</sup> EU Directive 6804/18, Annex I, art. 8aaa, 22.

information on a cross-border mechanism subject to the notification requirement in cases where the obligation would infringe the professional secret of the lawyer (intermediary) on the basis of the internal rules of the Member State<sup>59</sup>. It is undeniable that this may be a questionable element, or rather a limitation to the *ratio* of the Directive, in the sense that it leaves several possibilities to avoid the transfer of information in some cases<sup>60</sup>.

This is just an example, but it is clear that this kind of situation could have negative consequences for the effective application of the Directive - in consideration of the fact that it permits great levels of discretion both to the States and to intermediaries.

For this reason, it would be preferable to provide an *ad hoc* regulatory framework that is the same for all Member States, in such a way as to leave no room for the possibility of different interpretations.

The same problem is recognized also with regard to the penalties applicable to intermediaries. On this specific point, in fact, the Directive states that “in order to improve the prospects of effectiveness, Member States should establish sanctions against the violation of national provisions implementing this Directive and ensure that these sanctions are effectively applied in practice, that they are proportionate and that have a deterrent effect”<sup>61</sup>.

Also in this case there could be discrepancy between the sanctions. In some States they are deemed too “soft”, without any deterrent power, while, on the contrary, in other cases they might even be too severe<sup>62</sup>.

Also with reference to penalties, the Directive should guarantee a common structure by the different Member States. The aim would be to ensure an effective follow-up to regulatory certainty in order to implement the Directive as effectively as possible, these elements should come “from above” of the European Union and not left to the discretion of individual Member States<sup>63</sup>.

### **4.3. Analysis of the OECD Base Erosion and Profit Shifting (BEPS) Project in the Light of the Directive**

The analysis of the OECD/G20 project “Base Erosion and Profit Shifting”, in relation to Directive 6804/18, is important referring to the content of this project. In fact, the starting point regards the consideration that globalization has opened opportunities for both multinational companies and individuals to reduce the tax burden to a minimum, damaging governments, society and businesses<sup>64</sup>. The action plan states that taxation is at the heart of the sovereignty of countries, but also recognizes that in some cases the interaction between different national tax laws leads to gaps and frictions, in line with the provisions of the directive. Therefore, the BEPS action plan concludes that new standards at the international and regional level - in line with the Directive

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<sup>59</sup> *Monsenego, J.*, Taxation of Foreign Business Income Within the European Internal Market: An Analysis of the Conflict between the Objective of Achievement of the European Internal Market and the Principles of Territoriality and Worldwide Taxation, IBFD Doctoral Series, Vol. 22, 2012, 204-205.

<sup>60</sup> *Campbell, D.*, International Taxation of Low-Tax Transactions, Low Tax Jurisdiction II, Yorkhill Law Publishing, 2009, Double Taxation Treaties (DTT), 17-18.

<sup>61</sup> EU Directive 6804/18, Annex I, art. 25 bis.

<sup>62</sup> *Lai Lan Mo, P.*, supra note 38, 77-79.

<sup>63</sup> *Lang, M. Pistone, P., Schuch, J., Staringer, C., Storck, A., Zagler, M.*, Tax Treaties: Building Bridges Between Law and Economics, IBFD, 2010, 485-486.

<sup>64</sup> *Christians, A.*, BEPS and the New International Tax Order, Brigham Young University Law Review, 2016.

purposes - should be designed to ensure the consistency of corporate income taxation at international level<sup>65</sup>.

In particular, this project refers to the set of tax strategies that some companies put in place with the provision to erode the tax base and thus subtract taxes from the tax authorities. The shifting of profits from high-tax Countries to Countries with zero or reduced taxation is, in fact, a strategy that leads to the erosion of the tax base<sup>66</sup>.

More specifically, the project includes new minimum standards for the exchange of information between Countries to counteract and hopefully eliminate the exploitation of vehicle companies with an elusive consequence; limitation to harmful tax practices; automatic exchange of information when agreements of a fiscal nature between countries and multinationals are stipulated; agreements between the various tax administrations to avoid the possibility that the contrast to the double non-taxation flows, on the contrary, into a double taxation<sup>67</sup>.

The BEPS project contains recommendations in order to introduce major changes in the national tax laws of over 100 Countries and jurisdictions that are part of the Integrated Framework, which is part of the collaboration for the implementation of the BEPS project.

In particular, the project involves 15 actions through which to equip governments with national and international instruments in order to combat tax evasion/avoidance phenomena, ensuring that profits are taxed in the jurisdiction in which the economic activities from which the profits derive, are carried out. By analyzing the project specifically, the Action Plan outlines 15 actions considered essential to concretely achieve the aims of the BEPS Project<sup>68</sup>. In particular, actions 2 to 14 are divided into three pillars:

- (iv) to give coherence to national tax regimes regarding trans-national activities (actions 2-5);
- (v) reinforcing the substantial requisites underlying the current international standards, pursuing a realignment of taxation (and tax regimes) with the substantial localization of production activities and the creation of value (actions 6-10);
- (vi) increase transparency, exchange of information and improve the conditions of legal certainty for both businesses and governments (actions 11-14).

Two further transversal actions complete the strategy and, ideally, represent the basis on which the three pillars stand: (i) the first action, in terms of the digital economy and (ii) the last action on the use of a conventional tool multilateral type<sup>69</sup>.

Some of the measures contained in the BEPS package will be immediately applicable, such as the aforementioned new transfer pricing guidelines. Others will require a review of national laws and bilateral tax treaties, with regard to action 15, as said, it suggests the use of a multilateral instrument that avoids having to underwrite hundreds of bilateral treaties and at the same time guarantees conditions of greater uniformity of application<sup>70</sup>.

<sup>65</sup> *Azam, R.*, Minimum Global Effective Corporate Tax Rate as General Anti-Avoidance Rule, Columbia Journal of Tax Law, Columbia University, 2017.

<sup>66</sup> Available at <<http://www.oecd.org/tax/beps/>>. Last visited 11/06/2018.

<sup>67</sup> OECD, OECD Secretary-General Report to G20 Finance Ministers and Central Bank Governors, OECD Publishing, 2018, 21-35. Available at <<http://www.oecd.org/tax/OECD-Secretary-General-tax-report-G20-Finance-Ministers-Argentina-March-2018.pdf>>. Last visited 11/06/2018.

<sup>68</sup> Available at <<http://www.oecd.org/ctp/beps-actions.htm>>. Last visited 11/06/2018.

<sup>69</sup> *Ezenagu, A.*, Faltering Blocks in the Arguments against Unitary Taxation and the Formulary Apportionment Approach to Income Allocation, Asper Review of International Business and Trade Law, 2017.

<sup>70</sup> Servizio del Bilancio, Il Progetto Base Erosion and Profit Shifting (BEPS), Nota Breve No. 13, ottobre 2015, Senato della Repubblica, XVII legislatura. Available at <<https://www.senato.it/service/PDF/PDFServer/BGT/00941275.pdf>>. Last visited 11/06/2018.

The report clarifies that taxation remains a matter of national sovereignty; however, the obligation not to conflict with the commitments undertaken at the international level puts a specific limitation on the differentiated implementation.

## 5. Effective Application and Entry into Force of the Directive

On the euro-unitary level the fight against aggressive tax planning started with the adoption of the Anti Tax Avoidance Directive 2016/1164/EU<sup>71</sup>, which envisaged the adoption of binding anti-abuse measures in order to guarantee a common standard of struggle against tax evasion by companies. The deadline for implementation in the Member States is scheduled by the end of 2018, with the entry into force of the rules with effect from 1 January 2019.

The Directive 6804/18 represents a natural continuation of the path taken at an international level, first, and then by the European Union, in pursuit of fiscal transparency: this, in fact, will amend the Directive on administrative cooperation in the tax area (DAC) - 2011/16/EU.

The *ratio* of the Directive, indeed, concerns the improvement of the transmission of data relating to agreements envisaged in the already launched information exchange mechanism governed, in this case, by Directive 2011/16/EU, in its last updated version, coming to graft a close connection with the data transmission<sup>72</sup>.

The Directive shall enter into force on the twentieth day following its publication in the Official Journal of the European Union. Member States will have until 31 December 2019 to transpose the Directive into national laws and regulations, and the new reporting requirements will be applied starting from 1 July 2020.

In order to control the effective operation of the Directive, each Member State will be responsible for taking all measures considered necessary for the purpose of asking intermediaries to submit information on declarable cross-border provisions, whose first step was implemented between the date of enforcement and the date of application of this Directive.

As regards the transmission of information, intermediaries and interested taxpayers, as appropriate, will have the obligation to transmit information on the cross-border agreements by 31 August 2020.

The effectiveness of the Directive may permit to strengthen tax transparency and fight against aggressive tax planning by including into the existing Council Directive 2011/16/EU new provisions, which would require Member States to: (i) lay down rules for mandatory disclosure to national competent authorities of potentially aggressive tax planning schemes with a cross-border element by the (ii) “intermediaries” (e.g. tax advisers or other actors that are usually involved in designing, marketing, organizing or managing the implementation of such “arrangements”); and (iii) ensure that national tax authorities automatically exchange this information with the tax authorities of other Member States<sup>73</sup>.

The full implementation of the Directive 6804/18 presents several obstacles, first of all, in relation to the effective collaboration of intermediaries (which should certainly be accompanied by

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<sup>71</sup> Council Directive (EU) 2016/1164, Laying Down Rules Against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market, 12 July 2016.

<sup>72</sup> The Directive 2011/16/EU was amended by Directive 2014/107/EU, (DAC 2), with a focus on the role of financial intermediaries in the exchange of information, from Directive 2015/2376/EU (DAC 3), which introduces the automatic exchange of information in relation to tax rulings, from Directive 2016/881/EU (DAC 4), concerning the transmission of data deriving from country-by-country reporting (CbCR) and finally, Directive 2016/2258/EU (DAC 5), concerning the access of the tax authorities to anti-money laundering information.

<sup>73</sup> See at <<https://www.eumonitor.nl/9353000/1/j9vvik7m1c3gyxp/vkmj8stby0zq>>. Last visited 04/06/2018.

convincing sanctions) and, secondly, related to the compatibility of the same with the human rights protected by the ECtHR and the European Charter (think, as we said, to protect privacy, professional secrecy, the right not to incriminate oneself)<sup>74</sup>.

Further enhancements could also look into administrative cooperation, the promotion of the use of simultaneous controls and the presence of foreign officials for audits. These elements can further increase levels of transparency and improve the system of information exchange in the tax area, allowing, under extreme circumstances, to modify and transfer tax administrations of EU Member States from mere cooperation to real fiscal coordination<sup>75</sup>.

## 6. Concluding Remarks

Transparency and the exchange of information for tax purposes are some of the most important issues on the current international agenda. In fact, the combination of these two elements might be one of the most effective tool to combat money laundering and prevent tax evasion/avoidance.

The initiatives of the last years, both at international and European level, have allowed tax authorities to have a very broad access to information relevant for tax purposes.

In the European Union, especially through the instrument of the Directives, the double taxation treaties, the tax information exchange agreements and the multilateral agreement on mutual administrative assistance in tax matters.

Based on what emerged from the analyzed Directive, the automatic exchange of information is the best expedient in order to obtain greater transparency in tax matters.

On the basis of pre-existing regulatory systems, the European Commission has paved the way for the elaboration of a proposal allowing EU Member States to apply the new forecasts in an equally rapid manner. Moreover, being in possession of all the information they need, the States might have the possibility to react optimally to the potential phenomena of tax evasion/avoidance, succeeding in effectively preventing the erosion of their tax base.

The positive consequences are twofold: EU Member States would be informed of the ongoing tax treatment to which the companies or individuals would be subjected in another State, thus being fully aware of the correctness or otherwise of their behavior; and, at the same time, the Countries would see part of the responsibility and burden on them discharged, thanks to the provision of inter-state cooperation.

In conclusion, more transparency on the proposed mechanisms will result in further incentives for both Member States and companies to act more clearly and correctly, thus discouraging potential attempts at tax collection.

In fact, the mandate for the States to compulsorily and periodically share information with the competent tax authorities of other Countries should actually and effectively prevent “risky” phenomena from their very beginning.

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<sup>74</sup> *Aggarwal, E.*, Common Reporting Standard: Survivor's Guide to OECD Automatic Exchange of Information of Offshore Financial Accounts, CreateSpace Independent Publishing Platform, 2015.

<sup>75</sup> *Amadeo, F.*, Novità fiscali. L'attualità del diritto tributario svizzero e internazionale, SUPSI, 2018, 220-230.

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