The Current International and European Actions for De-offshoring the World

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Abstract
This article discusses the most recent actions at international and European level for de-offshoring the world. From the automatic exchange of information to the sophisticated rules to fight money laundering and the use of the financial systems for terrorist financing, everything seems to go into the direction of a world tax transparency. However, there is a dark side of these international efforts that brings to re-offshoring again, in a never-ending story of States trying to eat the revenue from each other.

Keywords
automatic exchange of information; tax transparency; offshore; international tax evasion and fraud

1 Introduction

The scope of this paper is to describe the tremendous acceleration on the most sophisticated measures put in place at international level and within the European Union, for de-offshoring the world. The speed is certainly related to the progress of technology that caused various scandals (LGT, UBS and Falciani cases) and media

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leaks [in sequence, Wiki Leaks (2010), Offshore Leaks (2013), Lux Leaks (2014), Swiss Leaks (2015), Panama Papers Leaks (2016)]. There is a multilevel sphere of the automatic exchange of financial information that received a first boost from the 2010 US Foreign Accounts Tax Compliance Act (FATCA), aimed at ensuring that the US Internal Revenue Service could identify and collect the appropriate tax from US persons holding financial assets wherever outside the United States. A second boost arrived on 20 July 2013, when the G20 Finance Ministers and Central Bank Governors endorsed the OECD proposals for a global modern automatic exchange of information (AEOI) in the multilateral context. The level of the European Union is in the middle with a new approach to administrative cooperation in the field of taxation that is now more than a reality.

However, whether it is more likely than not that in the long run the world will be indeed affected by these measures (the sticks), many doubts arise on the rate of success of de-offshoring in the short term, since each single State of the international community prefers to take care of its own interest with unilateral measures (the carrots) bringing back home alone its slice of the undeclared financial cake and, why not, trying to eat the portions of other States, so inducing to offshore again. In reality, it is a never-ending story (Marino, 2017).

The paper is conceptually structured in three parts. The first is describing the international sticks, the second is describing the European sticks, while the third tries to show the resistance of countries and the carrots they offer to attract (transparent and opaque) high net worth individuals.

2 The Latest International Measures Fighting the Offshore World

The Multilateral Convention on Mutual Agreement Assistance in Tax Matters (OECD Multilateral Convention on MAATM), put forward by the OECD in cooperation with the Council of Europe, which opened for signature by member states of both organisations on 25 January 1988, is the most comprehensive multilateral instrument available for all forms of tax cooperation to tackle tax evasion and avoidance, a top priority for all countries.

This sleeping beauty was amended on 31 March 2010, to respond to the call of the G20 at its April 2009 London summit to align it to the international standard on exchange of information upon request and to open it to all countries, in particular to ensure that developing countries could benefit from the new more transparent environment.

Its media turnaround was when Switzerland signed it with no reservation on 15 October 2013, and deposited on 26 September 2016, through its Ambassador at OECD Urlich Lehner, the instrument of ratification with entry into force on 1 January 2017. Currently, 125 countries have signed the Convention, including 17 jurisdictions

covered by territorial extension. With the incredible exception of the United States, this represents a wide range of countries including all G20 countries, all BRIICS, all OECD countries, major financial centres and an increasing number of developing countries (oecd.org).

The Convention has taken an increasing importance with the G20's call for the automatic exchange of information (AEOI) to become the new international tax standard of exchange of information. Strange but true, the Convention, by virtue of its Art. 6, requires the Competent Authorities of the Parties to the Convention to mutually agree on the scope of AEOI and the procedure to be complied with. With that background, the OECD has approved on 15 July 2014, a Common Reporting Standard (CRS) which is based on 1. a model Competent Authority Agreement (CAA) providing the international legal framework for the automatic exchange of CRS information; 2. the CRS; 3. the Commentaries on CAA and CRS; and 4. the CRS XML schema user guide.

The Status of commitments released by the OECD in August 2018 shows that the incredible amount of 103 countries, among early and later adopters, shall undertake exchanges by September 2018, while 1 country by 2019. The United States is out of this level playing field (oecd.org).

At the same time, information from academic studies and media leaks demonstrate that professional advisers and other intermediaries continue to design, market or assist in the implementation of offshore structures and arrangements that can be used by non-compliant taxpayers to circumvent the correct reporting of relevant information to the tax administration of their jurisdiction of residence, including under the CRS.

Upon the mandate received with the Bari Declaration, issued by the G7 Finance Ministers on 13 May 2017, the OECD released the last on 8 March 2018 the *Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures* and its Commentary with the scope to oblige an Intermediary or user of specifically targets Passive Offshore Vehicles that are held through an Opaque Structure, to disclose certain information to its Tax Administration. Where such information relates to users that are resident in another jurisdiction, it would be exchanged with the Tax Administration(s) of that jurisdiction in accordance with the terms of the applicable international legal instrument.

The Model Rules specifically define: 1. the "CRS Avoidance Arrangements" as any Arrangement for which it is reasonable to conclude that it is designed to circumvent or is marketed as, or has the effect of, circumventing CRS Legislation or exploiting an absence thereof; 2. the Opaque Offshore Structure as a Passive Offshore Vehicle being a Legal Person or Legal Arrangement that does not carry on a substantive economic activity supported by adequate staff, equipment, assets and premises in the jurisdiction where it is established or is tax resident; and, last but not least, 3. the Intermediary, being any person responsible for the design or marketing of a CRS Avoidance Arrangement or Opaque Offshore Structure ("Promoter"), as well as any person that provides Relevant Services in respect of a CRS Avoidance Arrangement.

The non-compliance to the Model Rules shall bring monetary as well as non-monetary penalties on the Professional Intermediaries.

3 The European Developments on the Automatic Exchange of Tax Information (AEOI)

The "big bang" at European level is represented by the adoption of Council Directives 2011/16/EU of 15 February 2011, on "administrative cooperation in the field of taxation and repealing Directive 77/799/EEC" (hereinafter: DAC), the aim of which is to propose a new approach in order to overcome the negative effects of an ever-increasing globalisation on the internal market.

The DAC is under many aspects revolutionary. First of all, it is designed to follow a more intrusive mechanism for the collection of tax information other than VAT, custom and excise duties, allowing rules that make possible to cover all legal and natural persons in the European Union, taking into account the ever-increasing range of legal arrangements, including not only traditional arrangements such as trusts, foundations and investment funds, but any new instruments which may be set up by taxpayers in the Member States (Art. 3). Second, Member States could not refuse to transmit information because they have no domestic interest or because the information is held by a bank, any other financial institution, nominee or person acting in an agency or fiduciary capacity or because it relates to ownership interests in a person (Art. 18). Third, time limits have laid down in order to ensure that the information exchange is timely and thus effective. Last but not least, among the classical alternatives, it is expressly recognised that the mandatory automatic exchange of information without preconditions is the most effective means of enhancing the correct assessment of taxes in cross border situations and of fighting fraud. To this extent, Art. 8 imposes the automatic exchange of available information (AEOI), from the Member State of source to the Member State of residence, regarding taxable periods as from 1 January 2014, on five initial categories of income and capital: a) income from employment; b) director's fees; c) life insurance products not covered by other Union legal instruments on exchange of information and other similar measures; d) pensions; and, e) ownership of and income from immovable property.[2]

Notwithstanding, just as DAC entered into force on the 1st of January 2013, after a few months, the 12th of June 2013, the European Commission released a proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory AEOI in the field of taxation on dividends, capital gains, any other income generated with respect to the assets held in a financial account, any amount with respect to which the financial institution is the creditor or the debtor, including any redemption

[2] The DAC revolution is also confirmed by the *Report from the EU Commission to the European Parliament and the Council on the overview and assessment of the statistics and information on the automatic exchanges in the field of direct taxation,* of 17 December 2018, COM(2018)844 final.

payments, and account balances [COM(2013) 348 final]. Certainly, the agreements that many European governments have concluded with the US as regards the US Foreign Account Tax Compliance Act (FATCA) have given further impetus to AEOI as a way of combating tax fraud and evasion. An expanded AEOI, indeed, would remove the need and incentive for EU Member States to invoke the "most-favoured-nation" provision of Art. 19 of DAC, with a view to concluding bilateral or multilateral agreements that may be considered appropriate on the same subject in the absence of a relevant Union legislation, but which could lead to difficulties for economic operators, if not to distortions and artificial flows of capital within the internal market.

The proposal COM (2013)348 final, has been adopted through Council Directive 2014/107/EU of 9 December 2014 (DAC 2), with the consequence that all financial flows shall automatically be exchanged with regard to taxable periods as from 1 January 2016 (Austria as from 2017).

However, this is not the sole extension of DAC. On 8 December 2015, the European Council adopted another extension with Directive 2015/2376/EU (DAC 3) aimed at improving tax transparency on tax rulings given by States to companies in specific cases about how taxation was structured. On 25 May 2016 the European Council adopted Directive 2016/881/EU (DAC 4) extending mandatory automatic exchange of information to country-by-country reporting (CbCR) in order to fight aggressive tax planning of multinational corporations following BEPS Action 13.

Finally, two more recent amendments. On 6 December 2016, the European Council adopted Directive 2016/2258/EU (DAC 5) by providing tax authorities with access to anti-money laundering information. On 25 May 2018, the European Council adopted Directive 2018/822/EU (DAC 6) as regards as mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. This last Directive, following the parallel work of the OECD on the Model Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Opaque Offshore Structures and its Commentary, aims at ensuring early information on cross-border arrangements designed by the tax intermediaries or taxpayers, by creating an obligation to report such schemes on intermediaries (or taxpayers if intermediaries are not located in the EU) and by inserting the collected information in the automatic exchange of information between Tax Authorities within the European Union (by way of the disclosed arrangements to a central directory where all Members States have access to).

The definitions are quite similar to those of the OECD Model: 1. cross-border arrangement means an arrangement concerning either more than one Member State or a member State and a third country that presents an indication of a potential risk of tax avoidance; and 2. intermediary means any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement.

4 The European Collection and Exchange of Information under Anti-money Laundering Legislation (AML)

Everything started after the 9/11 attacks when President Bush signed into law the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism of 2001,* better known as the USA PATRIOT Act. In particular, Title III has designed the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 containing provisions to financial institutions for the identification of terrorists through an information compliance on anyone using US jurisdictional means (as any Dollar denominated transaction could be).

As a perfect tsunami, this initiative expanded all over the civilised world, for example, in Europe, where Directive (EU) 2015/849 of 20 May 2015, on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (replacing the old Directives 2005/60/EC of 26 October 2005, and 2006/70/EC of 1 August 2006) provides for a stronger customer due diligence obligations on a large variety of intermediaries and professionals with the scope to intercept the *"beneficial owner as the natural person(s) who ultimately owns or controls the customer and/or the natural person on whose behalf a transaction or activity is being conducted"*. On 30 May 2018, such Directive has been further amended by Directive 2018/843/EU, by providing more stringent obligations to make focus on the beneficial owner. Essentially, each single EU Member State must have a financial intelligence unit (FIU) with the power: 1. to control intermediaries and professionals in their customer due diligence obligations; 2. to collect information on the above defined "beneficial owners"; 3. to cooperate and exchange information with FIUs of other EU Member States. Since the area of the "beneficial owner" definition or, alternatively, the Know Your Client (KYC) approach, under the AML is by far larger than any "beneficial owner" perimeter under tax law principles, the level of information obtained is much broader and intrusive and could lead to problems in terms of taxpayers' protection rights. It must be pointed out an everything but homogeneous approach in "beneficial owner" definitions which could have consequences in the correct flow of information.

The above tsunami wave is clear at international and European level: all countries involved do have an anti-money laundering legislation (AML) and related organisation. It is worth noting that for all countries concerned, AML is in essence a criminal law providing limitations to the individual freedom both on the side of intermediaries and professionals as well as on the side of beneficial owners (in this latter case either for money laundering tax related crimes, i.e. aggressive tax avoidance, tax evasion and fraud, or, in some cases, for the so called "self-money laundering"). One outstanding point of further investigation is the possible confusion between administrative cooperation in tax matters (less intrusive information balanced with less taxpayer protection) and the judiciary cooperation in tax matters (more intrusive information balanced with

more taxpayer protection). The additional role of FIUs with reference to AML/KYC definitions which are not at all homogeneous all over European Member States may indeed contribute to this overlapping with the consequence to have an explosive cocktail of more intrusive information and less taxpayer protection. On top of this, on 6 December 2016, the European Council adopted Directive 2016/2258/EU (DAC 5) by providing tax authorities with access to anti-money laundering information.

5 The European List of Non-cooperative Jurisdictions for Tax Purposes

On 5 December 2017, the EU Council adopted long awaited conclusions on the establishment of a EU list of non-cooperative jurisdictions for tax purposes. Notwithstanding the common approach achieved by EU Institutions has to do with the prevention of third-countries to use harmful corporate tax practices beyond the European territory, it is worth noting that the main criterion driving the list is the application of or the commitment to the OECD AEOI/CRS that has a major impact on the monitoring of individual taxpayers' behaviours. The third country should not only have committed to and started the legislative process to effectively implement the CRS, but must also be able to provide initial exchanges in 2018 at the latest, and have arrangements in place to be able to exchange information with all EU Member States by the end of 2017, either by signing the Multilateral Competent Authority Agreement (MCAA) or through bilateral agreements.

6 The Paradox of the "Realpolitik", Alias Global Re-offshoring Measures

After the above described tax policy trends, it is now the time to answer a simple question: Are AEOI/CRS/AML strong and effective solutions accepted by the international community to fight the offshore world?

Apparently yes, but the answer is no. Few examples arrive from the United States. According to the majority and minority staff report *Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts* released on 26 February 2014, by the Permanent Subcommittee on Investigations at the United States Senate led by Carl Levin, FATCA's disclosure requirements have been limited and weakened by its implementing regulations, and may allow many US taxpayers to continue concealing their accounts in Switzerland and elsewhere [part V, B (3)(b)(iii)].

At the same time, according to the Financial Time Report *US Tax Havens: The New Switzerland?* by K. Scannell and V. Houlder, published on 8 May 2016, in South Dakota financial assets held by local trusts increased from USD 32.8 trillion of 2006 to USD 226 trillion of 2014, and the number of trust companies increased from

20 to 86 in the same period. This is possible because the United States is strong enough to pretend worldwide financial information through FATCA on its citizens, but it is zero generous in outbound transparency.

Las but not least, H.J. Res. 41 through Public Law 115–4 of 14 February 2017 has been approved (first signature of President Trump) which nullifies the *Disclosure of Payments by Resource Extraction Issuers* rule finalised by the Securities and Exchange Commission on 17 July 2016 (the rule, mandated under the Dodd-Frank Wall Street Reform and Consumer Protection Act, requires source extraction issuers to disclose payments made to governments for the commercial development of oil, natural gas, or minerals).

6.1 The situation is not different in the European Union

The Report on the inquiry into money laundering, tax avoidance and tax evasion released on 16 November 2017 by the European Parliament Committee of Inquiry to investigate alleged contraventions and maladministration in the application of Union law in relation to money laundering, tax avoidance and tax evasion (so called PANA Committee), lists the following critical aspects:

At point 190, concludes that the lack of cooperation and coordination between and among the EU Institutions and agencies, Member States and competent authorities on different pieces of legislation with regard to tax evasion, tax avoidance and money laundering is a systemic problem;

At point 191, concludes that some Member States tend not to provide relevant information in the desired quantity and quality and in general do not seem to exert genuine efforts to crack down on tax avoidance and tax evasion, which constitutes a breach of the principle of sincere cooperation enshrined in the TEU; concludes from this that the Member States are seeking to conceal their own misconduct;

At point 202, regrets that tax policy issues at Council level are often blocked by individual Member States, in order to protect tax havens; calls, therefore, for the abolition of the principles of unanimity of the Member States in tax matters in order to make progress in the fight for tax justice and reduce the burden on EU citizens;

At point 206, identified several cases of maladministration with reference to the application of the DAC and AML directive.

Following the PANA Committee Inquiry Report, the European Parliament adopted Recommendation P8_TA (2017) 0491 of 13 December 2017 to the Council and the Commission, where many examples of re-offshoring ambitions are listed:

At point 16, stresses that there is a need to be vigilant to ensure that Brexit would neither favour tax competition between the 27 remaining Member States to attract certain industries and services currently located in the United Kingdom, nor lead to a relaxation of efforts in fighting tax evasion on the UK's side, including its overseas and related territories;

At point 29, emphasises that at least four Member States would be included on the list of non-cooperative jurisdictions if screened according to the same criteria;

Notes that, according to the most recent OECD data on foreign direct investment, Luxembourg and the Netherlands combined have more inward investment that the US, the vast majority of which is in special purpose vehicles with no substantial economic activity, and Ireland has more inward investment than either Germany or France;

At point 73, considers it regrettable that the provisions of DAC, which were in force during the time covered by the Panama Papers revelations, were not implemented effectively and that the amount of information and rulings exchanged was low.

6.2 International level

At international level, the Commentary to the Rule 1.1(e)(ii) of the 2018 OECD Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, expressly states that: *"A number of jurisdictions offer tax incentives to individuals to encourage them to take up tax residence in that jurisdiction. These incentives may involve temporary or permanent exemptions from tax on foreign source income and obtaining such tax residency may only require the resident to have a minimal presence in that jurisdiction. A person who is tax resident in more than one jurisdiction may use such a certificate to not declare the fact the he or she is a tax resident in another jurisdiction. Presenting such a certificate to a Financial Institution as proof of residence in order to undermine the Financial Institution's due diligence procedures would fall within the specific hallmark in Rule 1.1(e)(ii) as an Arrangement for which it is reasonable to conclude that it has the effect of undermining or exploiting weaknesses in, the due diligence procedures used by Financial Institutions to correctly identify all the jurisdictions of tax residence of an Account Holder and/or Controlling Person."*

7 Conclusion

The dilemma is where the international tax policy stands between the edge of the automatic exchange of information for de-offshoring and the edge of any unilateral tax solution of equivalent effect, which may be inducing to re-offshoring. This brings to two concluding remarks. The first is related to the relation between Machiavellian unilateralism and Habermas cooperation, since the latter means to share the revenue related to "datafication" with other members of the international community, while any unilateral initiative brings money straight to the domestic revenue. As "The Leopard" of Giuseppe Tomasi di Lampedusa warns, everything must change because everything remains as it is (Tomasi Di Lampedusa, 1958), and the feeling is that this ocean of information, cooperation and recommendation, risks to be useless in the long run or, better, could only be useful for large but not all taxpayers. The second has to do with

the other face of transparency being the privacy (as the recent Facebook/Cambridge Analytica scandal demonstrates). In principle, the United States and Europe have different views on what privacy means. While in the United States privacy is meant as the right of a consumer to know how and where his personal data are being held, and must be balanced with the interests of the business sector and the society as a whole, in Europe privacy is prominently a matter of dignity of the human being, hence a fundamental right of citizens within the society. So far, AEOI is an example of the growing State control on "datafication", like a fuel for impenetrable State authoritarianism, the need of future investigation is more perceived on the individual as taxpayer rather than on the individual as consumer. The mission in this future scenario is probably to analyse how far supranational rules governing big data are being democratically developed, with the scope to go beyond the proportionality principle and tail some sustainable protection rules for the taxpayer.

References

Marino, G. International and European Measures for De-Offshoring: Global Ambitions and Local Hypocrisies. *Intertax,* 45(8–9) 2017. ISSN 0165-2826.

Tomasi Di Lampedusa, G. *The Leopard*. New York: Pantheon, 2007.