

Edited by Giuseppe Marino

NEW
EXCHANGE OF
INFORMATION
VERSUS
TAX SOLUTIONS
OF EQUIVALENT
EFFECT

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New Exchange of Information versus Tax Solutions of Equivalent Effect

Why this book?

Thanks to technological applications such as the Internet, social networking, tablets, smartphones and credit cards, more information about us is being collected and stored than ever before. This collecting of information, or so-called “datafication”, takes all aspects of life and turns them into data. The result is “big data”: large pools of data are captured, communicated, aggregated, stored and analysed. Big data is both evidence of the increasing intrusion into our daily lives as well as a tool to create transparency, competition and growth. If information is power, then big data is the accumulation of power, especially in taxation.

This book provides a comprehensive survey of the classic methods of exchanging tax information as provided under the OECD Model Tax Convention, tax information exchange agreements, mutual administrative assistance in tax matters and the adoption of Council Directive 2011/16/EU on administrative cooperation and anti-money laundering legislation. Particular attention is given to the rapid international consensus on automatic exchange of information (AEOI) as a direct consequence of the US Foreign Account Tax Compliance Act (FATCA) policy. The book highlights the alternative unilateral tax solutions of equivalent effect, such as the “Rubik agreements” of Switzerland, offshore voluntary disclosure programmes, whistle-blower programmes and offshore tax amnesties.

The challenging aspect of this research is to imagine the consequences of current tax transparency in the future. Two issues are at stake. The first is linked to the relation between unilateralism and cooperation, since cooperation means sharing the revenue related to “datafication” with other members of the international community, while any unilateral initiative brings money straight to the domestic revenue. The second concerns the other face of transparency – privacy.

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Germany

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14.1. Introduction

In recent years, exchange of information (EOI) on tax matters has become extremely relevant to the German government. The constantly increasing number of incoming and outgoing requests for EOI² and the adaptation of many double taxation agreements concerning the regulations of EOI reflect this growing importance.³

14.2. Legal framework for EOI

14.2.1. Domestic law

Section 117 of the *Abgabenordnung* (AO) 2002 (2013)⁴ is the basis for international administrative assistance in tax matters.

Section 117(1) of the AO 2002 authorizes the financial authorities “to take advantage of interstate administrative assistance based on German law”. In this context, “based on German law” does not mean that a specific legal basis is required for a request for information;⁵ instead, it means the request must fulfil the requirements for national administrative assistance that are set

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2. Printed paper of the Federal Assembly (*Bundestagsdrucksache*, BT-Drs.) 17/14054, p. 2 et seq.

3. N. Bozza-Bodden, *Internationale Zusammenarbeit – Informationsaustausch*, in *Internationales Steuerrecht*, Deutsche Steuerjuristische Gesellschaft, Band 36, p. 134 (M. Achatz ed., 2013).

4. DE: *Abgabenordnung* (General Fiscal Code) 2002 sec. 117 (amended 2013) (hereinafter AO), National Legislation IBFD.

5. Bozza-Bodden, *supra* n. 3, p. 148; H.-D. Höppner, *Doppelbesteuerungsabkommen*, art. 26, para. 246 (H. Becker, H.-D. Höppner, H.-K. Kroppen & S. Grotherr eds., Verlag Neue Wirtschafts-Briefe 1997, loose-leaf, as updated in February 2011).

out in section 111 et seq. of the Fiscal Code.⁶ According to section 111(1), first sentence, of the AO 2002, the requested information must be required for the execution of the taxation. The requested information is required if it is legally relevant for the taxation and, for actual or legal reasons, cannot be gathered through intra-state examinations.⁷ However, a suspected tax irregularity is not necessary.

Section 117(2) of the AO 2002 authorizes the financial authorities “to provide interstate administrative assistance based on domestically applicable international agreements, legal instruments of the European Communities or the German Act implementing the Administrative Cooperation and Mutual Assistance Directive”. “Domestically applicable international agreements” are double taxation treaties (DTTs) and tax information exchange agreements (TIEAs). Legal instruments of the European Communities are, for example, EU regulations. The reference to the Act implementing the Administrative Cooperation and Mutual Assistance Directive is declaratory.⁸

Section 117(3) of the AO 2002 authorizes the financial authorities “to provide interstate administrative assistance even without a bi- or multilateral legal basis”. Section 117(3) of the AO 2002 itself contains detailed requirements. Therefore, the other state must assure reciprocity, guarantee tax secrecy and adequate data protection, and ensure that double taxation resulting from administrative assistance will be avoided.

Section 117(4) of the AO 2002 presents the rules to which the financial authorities must adhere when implementing legal and administrative assistance. The fiscal authorities have the same rights and powers as in purely domestic administrative assistance, as defined in sections 1(1) and 114 of the Fiscal Code.

Rules on and procedures for EOI are set out in general guidance, published on 25 May 2012.⁹ A further source for reference is the OECD Manual on Automatic Exchange of Information.

6. H.-D. Höppner, *supra* n. 5, art. 26, para. 246.

7. R. Laws, in *Handbuch des Auskunftsverkehrs in Steuersachen*, (R. Laws & M.M.R. Stahlschmidt eds. 2009), p. 38.

8. E. Czarkert, *Exchange of Information and Cross-Border Cooperation between Tax Authorities – Germany*, in *IFA Cahiers*, Vol. 98b, 2013, p. 327.

9. Memorandum of the Federal Ministry of Finance (BMF Memorandum) of 25 May 2012, IV B 1 - S 1320 - 11/06.

14.2.2. International agreements

Germany's DTTs policy is based primarily on the OECD Model Tax Convention on Income and Capital (OECD Model). This also applies for the regulations concerning EOI.

Article 26 of the OECD Model, which sets out the rules for EOI, is implemented in Germany's treaty policy.¹⁰ In older agreements, the wording of the EOI clause often differs from the current version of article 26 of the OECD Model because the wording of article 26 of the OECD Model has undergone its own development.¹¹ The basis for negotiations of DTTs is the current article 26 of the OECD Model.¹² Germany thereby aims to realize the widest possible EOI.¹³

Those agreements signed before 1977 and following the wording of article 26 of the OECD Model 1963 are to be interpreted in such a way that only exchange on request is allowed if the other forms of EOI, such as automatic exchange, are not explicitly dealt with in the treaty.¹⁴ Those agreements signed after 1977 and based on article 26 of the OECD Models post-1977 cover all forms of EOI, including automatic exchange.¹⁵ An automatic exchange of information (AEOI) is given when states agree to regularly exchange certain precisely defined information at a predetermined point in time. The conditions for automatic exchange are laid down by the national authorities involved in administrative arrangements.

In accordance with the 2012 article 26 of the OECD Model Commentary, group requests are allowed in Germany.¹⁶ For group requests, the tax subjects must be identifiable by specific search criteria. Requests without concrete clues are still forbidden.

"Fishing expeditions" are generally excluded by the standard of "foreseeable relevance" of the information, as included in article 26(1) of the OECD Model. Agreements signed by Germany in or after 2005 make a

10. Czarkert, *supra* n. 8, p. 324.

11. *Id.*, p. 321.

12. X. Ditz & J. Schönfeld, *Deutsche Verhandlungsgrundlage für Doppelbesteuerungsabkommen*, DB 2013, p. 1443.

13. E. Czakert, *Die Regelungen zur Amtshilfe in der deutschen Verhandlungsgrundlage für Doppelbesteuerungsabkommen*, ISR 2013, p. 178.

14. M. Engelschalk, *Doppelbesteuerungsabkommen*, art. 26, para. 39, (K. Vogel & M. Lehner eds., Verlag C.H. Beck 2008).

15. *Id.*

16. Bozza-Bodden, *supra* n. 3, p. 140.

clear reference to the “foreseeable relevance” standard, while older treaties generally use the terms “as is necessary” or “as is relevant”. This nonetheless allows the same scope of exchange as the term “foreseeable relevance”.¹⁷ “Foreseeable relevance” does not mean that the relevance of the requested information is certain at the time of the request. However, it must be reasonably possible that the information will be relevant for tax purposes. This is the case when the information’s relevance for tax purposes is probable due to special circumstances,¹⁸ such as in cases of business transactions that are known for their vulnerability to tax evasion.¹⁹ In addition, it is necessary that the requested information cannot be obtained through other (simpler) means based on domestic investigations.²⁰

However, it remains to be seen what this general framework means exactly for group requests. According to the Federal Ministry of Finance (*Bundesfinanzministerium*, BMF), the identification of a specific tax subject can be possible by certain behavioural patterns. For example, this behavioural pattern can be seen in the acquisition of investment vehicles that – as experience has shown – are used for tax evasion, tax avoidance or unjustified tax benefits.²¹ Where the border with “fishing expeditions” can be drawn remains to be seen in practice. The latest OECD Model Commentary suggests that a detailed description of the group must be available for a group request.²² According to the Commentary, the request must also contain the circumstances arousing the suspicion of non-legal tax behaviour of the requested group as well as its legal basis. However, it remains questionable whether this new Commentary is also applicable for older agreements.²³ The Federal Ministry of Finance calls for an application of the new Commentary to old agreements,²⁴ whereas the Federal Fiscal Court has so far decided against such an application.²⁵

17. OECD (2013), *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Germany 2013: Combined: Phase 1 + Phase 2, incorporating Phase 2 ratings*, OECD Publishing, p. 67; see: <http://dx.doi.org/10.1787/9789264205642-en>; OECD Model Tax Convention Commentary (2012), art. 26, para. 4.1; Bozza-Bodden, *supra* n. 3, p. 139.

18. DE: BFH, 16 Jan. 2009, VII R 25/08.

19. DE: BFH, 9 Dec. 2009, VII R 47/07.

20. See *supra* n. 9, para. 4.1.2; Engelschalk, *supra* n. 14, art. 26, para. 35.

21. Printed paper of the Federal Assembly (*Bundestagsdrucksache*, BT-Drs.) 17/10404, p. 12.

22. Update to the OECD Model Tax Convention and its Commentary (2012), para. 5.2.

23. See S. Lampert, *Die dynamische Auslegung von Doppelbesteuerungsabkommen unter besonderer Beachtung des Kommentars zum OECD-Musterabkommen*, IStR 2012, p. 513.

24. Printed paper of the Federal Assembly (*Bundestagsdrucksache*, BT-Drs.) 17/10305, p. 21.

25. DE: BFH, 9 Feb. 2011, I R 54.

Article 26(5) of the OECD Model has not yet been implemented in the majority of German agreements.²⁶ For revisions or adaptations of DTTs, Germany intends to implement article 26(5) of the OECD Model.²⁷

Article 27 of the OECD Model has so far been partially implemented in few agreements.²⁸ For revisions or adaptations of DTTs, Germany intends to implement article 27 of the OECD Model.²⁹

Concerning TIEAs, Germany orientates to the OECD Agreement on Exchange of Information on Tax Matters.³⁰ This also applies for information exchange agreements that Germany signed with grey list countries – specifically with Andorra (2010), Anguilla (2010), Antigua and Barbuda (2010), the Bahamas (2010), Bermuda (2009), the British Virgin Islands (2010), the Cayman Islands (2010), the Cook Islands (2012), Cyprus (2011), Dominica (2010), Gibraltar (2009), Grenada (2011), Guernsey (2009), the Isle of Man (2009), Jersey (2008), Liechtenstein (2009), Monaco (2010), Montserrat (2011), San Marino (2010), St Lucia (2010), St Vincent and the Grenadines (2010) and the Turks & Caicos Islands (2010).³¹

With some grey list countries, Germany signed double tax agreements including rules concerning EOI – specifically with Liberia (1979), Malta (2001) and Mauritius (2011).³²

26. OECD (2013), *supra* n. 17, p. 68.

27. See art. 25(5) of the German basis for negotiation for agreements for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital.

28. Engelschalk, *supra* n. 14, Art. 27, para. 11; M. Hendricks, *Durchsetzung deutscher Steueransprüche im Ausland*, IStR 2009, p. 847; Czarkert, *supra* n. 8, p. 324.

29. See art. 26 of the German basis for negotiation for agreements for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital.

30. Czarkert, *supra* n. 8, p. 321.

31. See: http://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Internationales_Steuerrecht/Allgemeine_Informationen/2013-01-22-Stand-DBA-1-Januar-2013.pdf?__blob=publicationFile&v=1 (accessed 14 Oct. 2013).

32. See: http://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Internationales_Steuerrecht/Allgemeine_Informationen/2013-01-22-Stand-DBA-1-Januar-2013.pdf?__blob=publicationFile&v=1 (accessed 14 Oct. 2013).

In 2008, Germany signed the OECD Mutual Assistance Convention of 1988³³ and, in 2011, the 2010 protocol.³⁴ However, neither the manual itself nor the 2010 protocol has yet been ratified.³⁵

In 1992, Germany abstained concerning the reference of the OECD Model Agreement for the Undertaking of Simultaneous Tax Examinations³⁶ and has not yet made use of it.

14.3. European approaches to EOI

The regulations of Directive 2011/16/EU are taken into the new EU Administrative Cooperation Code by the Implementation Act of the Administrative Cooperation and Mutual Assistance Directive.³⁷ Article 8 of the Administrative Cooperation and Mutual Assistance Directive was fully adopted in section 7 of the EU Administrative Cooperation Code.³⁸ Concerning EOI under the legislation of the EU Administrative Cooperation Code, the information must stem from a lawful source. As the Constitutional Court decided that the use of data derived from the acquisition of stolen bank data is constitutionally permissible, this data can also be the subject of an EOI.³⁹

The European Union obliges Member States to set up or designate national Asset Recovery Offices (AROs) as national contact points for cooperation between Member States on the tracing of assets derived from crime.⁴⁰ The AROs shall be allowed to exchange information and best practices on request as well as spontaneously. Germany designated two AROs, a Federal Criminal Police Department (*Bundeskriminalamt, Referat SO 35 "Vermögensabschöpfung"*) and a Federal Bureau of Justice Department (*Bundesamt für Justiz, Referat III 1*). While the Federal Bureau of Justice's Department is designated as the national judicial ARO, which has an

33. Printed paper of the Federal Assembly (*Bundestagsdrucksache, BT-Drs.*) 17/3987, p. 21.

34. See: http://www.strassburg-europarat.diplo.de/Vertretung/strassburg__europarat/de/06/CAHTAX__Seite.html (accessed 14 Oct. 2013).

35. See: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=127&CM=1&DF=&CL=GER> (accessed 14 Oct. 2013).

36. H. Reiffs, *Simultanprüfung als besondere Form der internationalen Zusammenarbeit der Steuerbehörden*, StBp 2004, p. 346.

37. *Amtshilferichtlinie-Umsetzungsgesetz (AmtshilfeRLUmG)*.

38. EU-Amtshilfegesetz (EUAHiG).

39. See sec. 14.8.1.

40. Council Decision 2007/845/JHA of 6 December 2007; COM(2011) 176.

advisory and training role and serves as a focal point for national and international requests, the Federal Criminal Police's Department is the operational part of the AROs with responsibility for practical cooperation between law enforcement agencies. The judicial and the operative part of the ARO are in regular contact and the interdisciplinary approach is efficient and functional.⁴¹ The roles and responsibilities are clearly divided.⁴²

In the European Union's fight against organized crime, the European Commission campaigns for an enhancement of the databank of the EU Agency for Law Enforcement Cooperation and Training (Europol), including economic and financial information (financial data, i.e. bank accounts and codes, credit cards, etc.; cash assets; shareholdings/other assets; property data; links with companies; bank and credit contacts; tax position and other information revealing a person's management of his financial affairs).⁴³ The extensive Member States' obligation to provide such data for the database is regarded as critical in Germany.⁴⁴

14.4. Collection and EOI under money laundering legislation

According to section 111(1) of the AO 2002, "all German Authorities have to provide assistance to the tax authorities". This applies for information that is necessary for the taxation and thereby also for relevant information that was collected by the FIU, which is based at the Federal Criminal Police Office (*Zentralstelle für Verdachtsmeldungen im Bundeskriminalamt*). Furthermore, section 15(2), first sentence, of the Money Laundering Act⁴⁵ includes the obligation to provide transaction information to the tax administration when a criminal proceeding is initiated and the information may be possibly relevant for the initiation or the proceeding of a taxation procedure.⁴⁶ Section 15(2), third sentence, of the Money Laundering Act stipulates that the collected information can be used for both administrative tax proceedings and criminal tax proceedings.

41. Evaluation Report on the fifth round of mutual evaluations "Financial Crime and Financial Investigations", Report on Germany, EU Document 16269/3/11 REV 3 (de).

42. Id.

43. COM(2013) 173 final, p. 65.

44. E.g. printed paper of the Federal Assembly (*Bundesratsdrucksache*, BR-Drs.) 346/13, p. 1.

45. DE: *Geldwäschegesetz* (Money Laundering Act) 2008 sec. 15.

46. P. Korts & S. Korts, *Ermittlungsmöglichkeiten deutscher Finanzbehörden bei Auslandsachverhalten*, IStR 2006, p. 870.

However, it is discussed whether these rules are in accordance with the right to informational self-determination (deduced from articles 1(1) and 2(1) of the German Constitution)⁴⁷ and the principle of proportionality (deduced from article 20(3) of the German Constitution)⁴⁸ if the information is collected for anti-money laundering reasons but used for purely tax reasons.⁴⁹ These concerns are mainly based on two arguments. First, the information collected for money laundering reasons may not only affect the person who is suspected to be involved in money laundering transactions.⁵⁰ Second, the information may also be used if it turns out that there is no connection to organized crime, money laundering or terrorist financing.⁵¹ With regard to this, it is not guaranteed that the intensive instruments for the fight against money laundering, organized crime and terrorist financing mutate to a weapon of tax investigation.⁵²

Furthermore, section 15(2), first sentence, of the GwG 2008 is criticized for not clearly stating what “possibly relevant information” is.⁵³ In this respect the regulations may break the principle of legal certainty (deduced from article 20(3) of the German Constitution).⁵⁴

Moreover, there is a rather practical problem arising if information collected for money laundering reasons is also used for tax reasons. The fight against money laundering transactions and crime often requires long-term observations by undercover agents; otherwise, the necessary evidence will not be perpetuated. However, the fiscal authorities will follow a quite different approach; usually, they will be interested in immediate measures to safeguard funds. Furthermore, fiscal authorities may be forced to make contact with the taxpayer by procedural provisions at a time when undercover agents are still in the line of duty. So they and the effect of their actions can be jeopardized easily by the fiscal authorities.

47. DE: *Grundgesetz* (German Constitution) 1949.

48. Id.

49. A. Fülhbier, *Kommentar zum Geldwäschegesetz*, sec. 10, mn. 5 et seq. (A. Fülhbier, R.R. Apffelbach & P. Langweg eds., RWS 2006); F. Herzog, *Kommentar zum Geldwäschegesetz*, sec. 10, mn. 3 et seq. (F. Herzog & O.C. Achtelik eds., C.H. Beck 2010).

50. Id.

51. Id.

52. Id.

53. Id.

54. Id.

14.5. The EOI in numbers

Statistics on EOI are available grouped by EOI on request, spontaneous EOI and AEOI, but not catalogued by EOI under article 26 of the OECD Model, TIEAs and EU law.⁵⁵

Requests for information						
	2007	2008	2009	2010	2011	2012
Requests to other states	584	605	478	584	606	884
Requests from other states	1,683	1,190	2,125	1,224	1,003	1,099

Spontaneous exchanges*						
	2007	2008	2009	2010	2011	2012
Information to other states	9,206	25,247	26,389	22,530	2,273	1,781
Information from other states	958,446	359,716	1,403,001	1,781	359	307

* Until 2010 some information was counted as spontaneous that has been classified as automatic exchange since 2011; printed paper of the Federal Assembly (*Bundestagsdrucksache*, BT-Drs.) 17/14054, p. 3.

Automatic exchanges*						
	2007	2008	2009	2010	2011	2012
Information to other states	111,666	34,578	208,730	1,833	87,517	565,999
Information from other states	232,018	337,905	295,706	1,897,826	290,292	1,174,053

* The increasing amount of provided information in 2012 is based on pension notifications; printed paper of the Federal Assembly (*Bundestagsdrucksache*, BT-Drs.) 17/14054, p. 4.

According to the federal government, the average reply time to a request is not recorded.⁵⁶ However, according to Germany's treaty partners that have provided information for the peer review, in most cases Germany is neither able to provide information within 90 days or do they offer a status update.⁵⁷ Between 2007 and 2009, German revenue authorities provided

55. The following tables are based on information provided by the federal government; printed papers of the Federal Assembly (*Bundestagsdrucksache*, BT-Drs.) 17/2743, p. 9 and 17/14054, p. 3.

56. Printed paper of the Federal Assembly (*Bundestagsdrucksache*, BT-Drs.) 17/2743, p. 10.

57. OECD (2013), *supra* n. 17, p. 77.

final responses to information requests within 90 days approximately 12% of the time. Approximately 35% of requests were responded to between 90 and 180 days and 25% between 6 months and 1 year.⁵⁸

Between 2005 and 2008, Germany received 7,793,661 (2005, 1,436,470; 2006, 2,809,400; 2007, 2,362,151 and 2008, 1,185,640) interest reports based on the EU Savings Directive.⁵⁹ In the same period, Germany provided 7,488,327 (2005, 1,442,736; 2006, 2,749,228; 2007, 2,296,020 and 2008, 1,000,343) interest reports to other countries.⁶⁰ Until mid-2010, 19,117 reports were analysed. Only 678 reports led to increased tax revenue. Hence, the federal government is of the opinion that the Savings Directive fulfils its target as a preventive measure.⁶¹

14.6. Automatic exchange of information

Germany argues for an extension of AEOI. An important impetus for this is the US Agreement to Improve International Tax Compliance with respect to the US information and reporting provisions commonly known as the Foreign Account Tax Compliance Act (FATCA). This requires foreign financial institutions, such as banks, to enter into a private contract with the US Internal Revenue Service (IRS) to identify their US account holders and disclose the account holders' names, taxpayers' identification numbers, addresses and the accounts' balances, receipts and withdrawals. US payers making payments to non-compliant foreign financial institutions (FFIs) are required to withhold 30% of the gross payments. However, this method raises multiple doubts, e.g. concerning the costs for the financial intermediaries⁶² and the national or European data protection.⁶³ For this reason, several large EU banks such as UBS, ING and Deutsche Bank closed selected trade departments in the United States after the introduction of FATCA.

58. Id.

59. See *supra* n. 56, p. 11, newer statistics are yet to be published.

60. Id.

61. Id.

62. See Statement of the German Banking Association (*Bankenverband*), <https://bankenverband.de/publikationen/ods/aktuelles-stichwort-facta-abkommen-ueber-zwischenstaatlichen-informationsaustausch/aktuelles-stichwort-facta-abkommen-ueber-zwischenstaatlichen-informationsaustausch/download> (accessed 14 Oct. 2013).

63. See Statement of the article 29 Working Party, http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2012/20120621_letter_to_taxud_fatca_en.pdf (accessed 14 Oct. 2013); http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2012/20121001_letter_to_taxud_fatca_en.pdf (accessed 14 Oct. 2013).

Thus, on 31 May 2013, Germany and the United States signed an agreement on an automatic exchange of bank information based on the joint statement that France, Germany, Italy, Spain and the United Kingdom made with the United States. According to the statement, the direct transfer of information from the FFI is replaced with a chain of information transmission. While the FFIs submit the relevant data to the German authorities, the German authorities transfer this obtained data to the US authorities on the basis of article 26 of the US-German DTA. Thereby, the obligation to sign a private contract with the IRS is discharged for the German financial intermediaries. By implementing the joint statement of the FATCA, a negative impact on the free movement of capital and the individual's right to privacy can be prevented.⁶⁴

Based on the joint statement with the United States, these G5 countries have also agreed to pilot an extension of AEOI to each other in the area of capital income and therefore establish a new standard in Europe. In their joint letter to EU Commissioner Algirdas Šemeta, the G5 states campaigned for such a multilateral system of AEOI and invited other EU Member States to join the pilot. In addition, they advocated the implementation of article 8 of the Administrative Cooperation and Mutual Assistance Directive of 2011, which provides for mandatory EOI, and the effective application of the "most-favoured-nation" provision in its article 19. Accordingly, they called upon all EU Member States to agree without delay to the amending proposal of 2008 to the EU Savings Directive of 2003, which aims to close existing loopholes and better prevent tax evasion. The Commission proposal seeks to improve the Directive so as to better ensure the taxation of interest payments that are channelled through intermediate tax-exempted structures. An extension is also proposed to the scope of the Directive to income equivalent to interest obtained through investments in some innovative financial products as well as in certain life insurance products.

14.7. Joint audits

In contrast to ordinary forms of international audits, which are characterized by two or more independent but simultaneously held and coordinated audits in two or more different countries, joint audits are held by one single audit team composed of members from the participating countries. This leads to legal problems concerning the sovereign authority of foreign auditors. Only

64. S. Hanloser, *FATCA und Datenschutz*, ZD-Aktuell 2012, 02973.

domestic authorities are allowed to use sovereign authority.⁶⁵ In section 10 of the EU Administrative Cooperation Code, it is therefore laid down that officials from other countries are allowed to interview taxpayers or examine documents in the presence of domestic officials if the taxpayer has consented in advance. Consequently, joint audits with other EU states on the territory of the Federal Republic of Germany are possible.⁶⁶

At the moment, the German tax authority is performing a pilot project concerning joint audits with the Dutch tax administration. Using appropriate cases, the implementation of joint audits is being tested. The project is being carried out based on the 2010 OECD Joint Audit Report. A first meeting was held at the end of 2012 between participating financial authorities of Bavaria, North Rhine Westphalia and the Netherlands. In this meeting, the modalities and progress of the project were defined. In 2013, the first audits began, which will be evaluated later.⁶⁷

Agreements concerning joint audits were signed by the Bavarian authorities with the Netherlands and Italy. Agreements with Croatia, the Czech Republic and Hungary are to follow.⁶⁸

14.8. Alternative tax solutions and their legitimacy

In addition to the improvement of EOI, Germany also uses alternative techniques to obtain information.

14.8.1 National trends

Official statistics on the acquisition of stolen bank data do not exist. In the well-known *LGT* case, German authorities purchased CDs with stolen bank data from a former *LGT* employee in January 2006.⁶⁹ In the following

65. R.M. Seer, *Kommentar zur Abgabenordnung und Finanzgerichtsordnung*, sec. 193, mn. 43 (K. Tipke, H.W. Kruse & R.M. Seer eds., Verlag Otto Schmidt, loose-leaf; as updated in September 2013).

66. E. Czakert, *Der internationale Informationsaustausch und die grenzüberschreitende Kooperation der Steuerverwaltungen*, IStR 2013, p. 602.

67. *Id.*, p. 603.

68. Bavarian States Ministry of Finance (*Bayerisches Staatsministerium der Finanzen*), Press Release 244, 23 July 2013.

69. First discussion about such CDs took place in the late 1990s; see R. Wendt, *Die rechtliche Problematik der Beschaffung steuerlich relevanter Informationen gegen Bezahlung*, DStZ 1998, p. 145.

years, further acquisitions of stolen data from Switzerland and Luxembourg followed.

In 2010, the Constitutional Court (*Bundesverfassungsgericht*, BVerfG) decided that the criminal proceedings' utilization of data derived from such an acquisition is constitutionally permissible.⁷⁰ Use of the data for criminal tax assessments should also be possible if the data is unlawful under domestic law or is in violation of international agreements. This applies for both administrative and criminal tax assessments.⁷¹ The taxpayer therefore does not have the possibility to reject the use of the data.

Despite the Court's decision, the legality and legitimacy of the acquisition remain a controversial topic of discussion in politics and jurisprudence.⁷²

Neither a whistle-blower reward programme nor an offshore amnesty programme exists in Germany at present.⁷³

Voluntary disclosure of tax evasion is an actual and important issue. German taxpayers with capital income from foreign assets are particularly affected, especially as data of tax evaders has been bought by the German tax authorities. The voluntary disclosure is set in section 371 of the Fiscal Code. A voluntary disclosure in terms of section 371 leads to exemption from punishment for tax evasion in the sense of section 370 of the Fiscal Code.

The conditions for the criminal exemption effect as a result of voluntary disclosure are an appropriate declaration to the tax authorities, payment of the evaded tax and the absence of a reason for exclusion (section 371 of the Fiscal Code). The declaration to the tax authorities must include all relevant facts for an accurate tax assessment by correcting or supplementing the incorrect or incomplete particulars. The reasons for an exclusion of the exemption effect of the voluntary disclosure are listed exhaustively in section 371(2) of the Fiscal Code. For example, an exemption from punishment shall not apply where the act had already been fully or partially detected at the time of the correction, supplementation or subsequent furnishing of omitted particulars and the perpetrator was aware of this or should have

70. DE: BverfG, 9 Nov. 2010, 2 BvR 2101/09.

71. I. Kaiser, *Zulässigkeit des Ankaufs deliktisch erlangter Steuerdaten*, NStZ 2011, p. 390.

72. Instead of many: M.H. Gehm & J. Habetha, *Ankauf von Steuerdaten?*, ZRP 2012, p. 223.

73. However, such a programme already existed in the past and a new programme is discussed in the context of the announced reforms of the EU Savings Directive; cf. J. Dams & K. Seibel, *Letzte Chance für Steuersünder*, Welt am Sonntag, 26 May 2013, p. 1.

expected this upon due consideration of the facts of the case. In the event that stolen bank data is bought by the authorities, an exemption from punishment does not apply if a comparison of the data obtained and the data originally provided by the taxpayer leads to the taxpayer needing to pay more tax.⁷⁴ The authority's ownership of the CD alone is not as yet sufficient for an exemption from voluntary disclosure. The exemption from punishment only takes effect on the criminal liability according to section 370 of the AO 2002. Other (non-tax) criminal offences remain unaffected.⁷⁵

Regardless of the results on the criminal tax level, voluntary disclosure leads to a new tax procedure or to resumption of an unfinished tax procedure. The taxpayer must then pay the evaded taxes (and surcharges) due to changes in the tax assessments.

The information obtained through voluntary disclosure can be used by the tax authorities for EOI in accordance with the usual rules.

The voluntary disclosure rules, i.e. section 371 of the AO 2002, are in line with the German Constitution; it is legitimized mainly by fiscal reasons.⁷⁶

14.8.2. International trends

On an EU level, Germany argues for the swift adoption of the proposal for a revision of the EU Savings Directive as a necessary intermediate step towards an extended AEOI.⁷⁷ In particular, the proposal contains an expansion of the material and personal scope of the Directive, which aims to close existing loopholes. The Commission was mandated for negotiations concerning the revision of the EU Savings Agreement with Andorra, Liechtenstein, Monaco, San Marino and Switzerland. This mandate includes agreements for an AEOI on capital income, which Germany prefers.⁷⁸

Switzerland does not support an automatic or spontaneous EOI. In order to both satisfy the requests of other states regarding tax compliance with respect to their taxpayers with assets deposited in Switzerland and to some

74. E. Iannone, *Steuerliche Selbstanzeige trotz Berichterstattung über den Ankauf von Steuer-CDs*, NJW 2012, p. 3482.

75. H. Pump & E. Krüger, *Selbstanzeige ist kein Strafaufhebungsgrund für sämtliche Straftaten – Die Rechtsrisiken bei der Selbstanzeige*, DStR 2013, p. 1972.

76. Instead of many: W. Dumke, *Kommentar zur Abgabenordnung*, sec. 371, para. 3 with further references (B. Schwarz ed., Haufe-Lexware, loose-leaf update as of 2000).

77. Monthly report of the BMF, August 2013, p. 30.

78. Id.

extent maintain bank secrecy, Switzerland had been looking for a solution with an equivalent effect to AEOI. This situation gave rise to the new Swiss standard: the so-called “Rubik standard”.

The German federal government and Switzerland signed such a tax treaty based on the Swiss standard in September 2011. The treaty should impose a retroactive levy of up to 41% on capital in Swiss bank accounts held by German citizens (solution for the past) and impose a tax on future interest income while allowing the account holders to remain anonymous (solution for the future).⁷⁹ In the agreement, the authorities of both states expressly recognized that the agreement has an equivalent effect to AEOI.⁸⁰

The German federal government estimated revenue from tax arrears under the deal at EUR 10 billion and an additional EUR 700 million annually from withholding tax. The lower house of the German parliament of Germany,⁸¹ where the German federal government parties have a majority, approved the deal in October 2012. However, the upper house,⁸² dominated by opposition parties, rejected its ratification in November 2012, arguing that the agreement has too many loopholes and that it goes against tax equity. A proposal for mediation failed in early 2013.⁸³

Liechtenstein and the United Kingdom signed a TIEA and a Memorandum of Understanding on 11 August 2009. Whereas the Agreement basically corresponds to the OECD Model (covering EOI upon request under specific conditions), the Memorandum of Understanding represents a new approach to tax cooperation. A specific disclosure programme (Liechtenstein Disclosure Facility, LDF) has been made available to UK taxpayers with assets in Liechtenstein. The LDF gives taxpayers from the United Kingdom the opportunity to disclose all non-declared assets and settle outstanding tax liabilities under advantageous conditions. Germany also signed a Tax Information Agreement with Liechtenstein based on the OECD Model in 2009 – but a programme corresponding to the LDF is not part of the Germany-Liechtenstein agreement.

79. In summary: R.M. Seer, *Recent Development in Exchange of Information with the EU for Tax Matters*, EC Tax Review 2013, p. 74 et seq.

80. See the introductory section of the agreement and the joint declaration in the annex of the agreement; analysing whether the agreement may have an equivalent effect to AEOI: A. Rivolta, *New Switzerland-Germany and Switzerland-United Kingdom Agreements: Does Anyone Offer More than Switzerland?*, 66 Bull. Intl. Taxn. 3, 2012, p. 139 et seq.

81. Federal Assembly (*Bundestag*).

82. Federal Council (*Bundesrat*).

83. Plenary Protocol (*Bundesratsprotokoll*) 906, p. 21 (B); printed document of the Federal Assembly (*Bundestagsdrucksache*, BT-Drs.) 17/12282, p. 1.

In the debate over a revision of the EU Savings Agreement, the Liechtenstein head of government, Adrian Hasler, campaigned for legalization of the assets of non-residents based on the model of the disclosure programme with the United Kingdom.⁸⁴

14.9. Conclusion

In a globalizing world, national tax authorities face ever-increasing difficulty gathering all the relevant facts in international tax cases. As a comprehensive collection of the facts is absolutely necessary for fair taxation, national tax administrations need to cooperate and collaborate closely in order to acquire the relevant information. This cooperation and collaboration has assumed various shapes, from the classic EOI to joint audits. However, some states do not yet provide such an EOI.

Until the international EOI works smoothly on all levels and with all countries, other solutions, such as the purchase of stolen data or voluntary disclosure programmes, may be necessary. With respect to the increasing number of bi- and multilateral agreements enlarging the international network for EOI on tax matters, these other solutions may lose their importance in future. However, fostering and accelerating this progress will remain one of the biggest challenges for the countries involved.

84. *Handelsblatt*, 12 May 2013; see: <http://www.handelsblatt.com/politik/international/informationsaustausch-mit-eu-liechtenstein-laesst-locker/8194108.html> (accessed 14 Oct. 2013).

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