European Union Action against Tax Avoidance and Evasion

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Introduction

Large amounts of potential tax revenue are lost annually as a result of tax planning, tax avoidance and tax evasion activities undertaken by the private sector, often actively supported by offshore jurisdictions that maintain artificially low regulatory and tax burdens (harmful competition causing tax base erosion).[1]

Tax jurisdictions with higher average tax burdens have routinely introduced unilateral anti-abuse clauses to counter artificial tax planning constructions. They have also concluded a large number of bilateral (tax or information exchange) agreements, which provide for the exchange of 'foreseeably relevant' information on request, without regard to domestic bank secrecy rules (the 2002 OECD minimum standard).[2] Finally, they have developed multilateral responses in the OECD and G20 framework to facilitate the detection of tax evaders and to increase pressure on tax havens.[3]

Since the 2008 financial crisis in particular, the G20 has stepped up its collective (verbal) action against tax havens by declaring an end to banking secrecy at the London Summit in April 2009 and by threatening to use a toolbox of counter measures against 'uncooperative tax jurisdictions' at its Pittsburgh Summit in September 2009.[4] As a result of this new momentum, tax jurisdictions that were blacklisted by the OECD scrambled to convince the world that they accept the OECD minimum standard and that they thus effectively made it impossible for tax evaders to hide behind banking secrecy.[5]

Within the European Union a more advanced legal framework aimed at tackling tax avoidance and evasion has also recently been developed under the heading *'good governance in the tax area'*.[6] Within the EU the good governance policy covers recent regulatory action on administrative assistance between tax authorities (recovery and assessment assistance and savings tax). On the external side good governance includes the various efforts related to the EU export standards on transparency and fair tax competition, including by means of savings tax- and anti-fraud agreements with third countries.

This paper seeks to briefly assess this recent framework and formulate some recommendations for the future. As a preliminary remark one should note that, when assessing this framework, the EU is – unlike domestic governance structures – handicapped by a unanimity requirement (i.e. none of the 27 Member States must oppose a proposed action). One should also realise upfront that the EU is a multi-layered regional governance structure, in which the numerous

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1 For estimates see Fuest and Riedel (2009) and Commission Communication COM (2006) 254 final, and Tax Justice Network (TJN, 2005), Tax Us If You Can: The True Story of a Global Failure, TJN Briefing Paper, www.taxjustice.net.

2 See OECD (2010), The Global Forum on Transparency and Exchange of Information for Tax Purposes: A Background Information Brief, 14 October 2010, Article 26(1) of the OECD Model Convention on Income and on Capital, as well as the multilateral and bilateral versions of the OECD Model "Agreement on Exchange of Information on Tax Matters", http://www.oecd.org.

3 See OECD (June 2000), Towards Global Tax Cooperation, and the 2010 update of the OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters, http://www.oecd.org.

4 The G20 Summit in September 2009 it was agreed (in point 15 of the second part of the statement) that the leaders "stand ready to use countermeasures against tax havens from March 2010", and there was reference to a toolbox of measures such as: increased disclosure requirements on the part of taxpayers and financial institutions to report transactions involving non-cooperative jurisdictions; withholding taxes in respect of a wide variety of payments; denying deductions in respect of expense payments to payees resident in a non-cooperative jurisdiction; reviewing tax treaty policy; asking international institutions and regional development banks to review their investment policies; and giving extra weight to the principles of tax transparency and information exchange when designing bilateral aid programs (see "Leaders Statement", http://www.pittsburghsummit.gov/mediacenter/129639.htm).

5 By the end of 2010 only 10 countries were still in the category: "jurisdictions that have committed to the internationally agreed tax standard, but have not yet substantially implemented" (Belize, Liberia, Montserrat, Nauru, Niue, Panama, Vanuatu, Costa Rica, Guatemala, Uruguay) – see also OECD (2010) cited in footnote 2.

6 See Promoting Good governance in Tax Matters, COM(2009) 201 final, Council Document 9281/09 of 29 April 2009, http://register.consilium.europa.eu/.

relevant anti-fraud actors include not only the EU regulatory and executive institutions (the lawmaker adopts EU legislation, concludes international agreements, and formulates EU policies on state aid and harmful tax competition; the EU Commission implements state aid policy and acts against fraud through its anti-fraud office: OLAF), but also the 27 EU Member States (which adopt domestic anti-abuse measures, conclude bilateral and regional tax treaties, and co-decide EU legislation and action) and the European judiciary which defines the 'constitutional limits' that all of these European players must respect.

Recent EU developments in administrative assistance

Administrative cooperation or assistance between states is necessary because the latter define their tax jurisdiction in an extraterritorial way (e.g. taxing the worldwide income of residents and the domestic source income of non-residents), whereas their powers to investigate and to recover taxes stop at their borders. To close this gap between extraterritorial jurisdiction and territorial enforcement limits, states need each other for a correct assessment and full recovery of taxes, the more so if their citizens are entitled to free movement in a regional economic integration framework such as the EU.

As the needs of public sector revenue increased at the margins of the financial crisis, the European Commission submitted proposals to upgrade existing directives on mutual assistance and the exchange of information (on request, automatic, or spontaneous) when assessing and recovering taxes in general, as well as when collecting tax on savings income in particular.

Recovery assistance

The 1976 Council directive on recovery assistance (upgraded in 2001 and 2008) already required the 'requested' Member States to provide information to assist a 'requesting' Member State to correctly recover taxes. Since 2008 the rules have essentially provided that a requested Member State should: provide information on request, notify documents on behalf of the requesting Member State, recover a claim of the requesting Member State as if it was its own and take precautionary measures on the basis of domestic instruments. However, in spite of their broad scope and the increasing use made of them, these rules proved to be less than sufficient. In fact, only 5 percent of the total amount of claims for which recovery assistance was requested was actually recovered, and the process was slow because of problems linked to the recognition, transposition and translation of requests for assistance, and because of a lack of uniform instruments for enforcement or precautionary measures.[7]

That is why the Commission proposed and the Council adopted a new Directive in January 2010 (applicable from 1 January 2012), which broadens the scope and seeks to improve the efficiency of recovery assistance in a number of ways.[8] Firstly, the new directive allows assistance requests for all tax claims and related charges, involving all natural and legal persons (except *de minimus* claims of less than 1,500 euros and criminal penalties). Secondly, the Directive reduces red tape for requesting recovery assistance. There is no longer any need to exhaust domestic procedures before making a request, direct cross border notification of documents is possible without prior translation, and national enforcement documents are replaced by a uniform European instrument. In addition, the Directive increases the involvement of the requesting state in the recovery procedures of the requested state, because it also creates the possibility for officials of the requesting state to be physically present in tax offices and courts of the requested Member States, and even to examine records and interview individuals. Thirdly, the Directive provides for the 2002 OECD standard on exchange of information on request and thus makes it impossible for taxpayers to hide behind banking secrecy. Fourthly, the new Directive reinforces the possibility of taking precautionary measures and allows for early action on the basis of an original document of the requesting state. Fifthly, the Directive allows for a broad use of the information and the documents obtained through recovery assistance, as they can be used not only for tax, but also for social security and other purposes, and by all judicial and other authorities; while information obtained can even be shared with third-party Member States. Finally, the new Directive facilitates further decision making on implementing rules regarding practical arrangements, means of communication, formats and other standard forms by means of a 'comitology' procedure whereby the

[7] COM(2009) 28 final and Council doc. 6147/09 FISC 19, http://register.consilium.europa.eu/.

[8] Council Directive 2010/24/EU Concerning Mutual Assistance for the Recovery of Claims Relating to Taxes, Duties and Other Measures, Official Journal L 84 of 31 March 2010, p. 1.

Commission, together with the Member States, may take decisions on certain procedural issues (no unanimity requirement).[9]

Assessment assistance

As regards assessment assistance, the 2000 Council *Ad Hoc* Working Party on Fraud[10] had already criticised the European Mutual (Assessment) Assistance Directive of 1997 for its lack of practical impact on the ground, and this was reiterated by two Commission Communications of 2004[11] (mainly triggered by the Enron and Parmalat scandals) and 2006.[12] It nevertheless took the Council until February 2011 to adopt a new assessment assistance directive, which will apply as of 1 January 2013 (except for automatic exchange of information, which will apply as of 1 January 2015).[13]

The most significant achievement of the Directive is that it introduces, as of January 2015, the automatic exchange of 'available information' on non-residents' income from employment, directors' fees, life insurance products (not covered by other Union legal instruments), pensions, and ownership of and income from immovable property.[14] In a second phase, and on the basis of a Commission report and possible proposal to be submitted before 1 July 2017, the Council will, with the aim of strengthening automatic exchange and making it more efficient, consider removing the condition of 'availability' for at least three categories of information and extending the list of categories to include dividends, capital gains and royalties.

In addition, the new directive broadens the scope and seeks to improve the efficiency of assessment assistance in a number of ways that are very much in line with the improvements made to the recovery assistance directive. Firstly, the scope of the Directive is extended to cover all possible taxes not covered by other parts of EU law, and all taxpayers, whether natural or legal persons or and 'any other legal arrangement of whatever nature and form' with or without legal personality, that owns or manages assets and is subject to any of the taxes covered by the directive. Secondly, the Directive reduces red tape for requesting assistance and the minimum conditions for a valid request for information are less cumbersome than those provided for by the OECD Model (the name and address of any person believed to be in possession of the requested information only needs to be provided to the extent known, the requesting Member State does not to provide the nature and the form of the information sought, nor to give grounds for believing that the requested information requested is held by the requested Member State). In addition, the Directive increases the involvement of the requesting state in the procedures of the requested state, because it provides for the participation of officials of the requesting state in the administrative enquiries carried out by the requested Member States. Thirdly, the requested Member State must provide the information within certain time limits (between 1 and 6 months) and, where possible, in electronic form and on the basis of standard forms and computerised formats which are to be developed in the implementation stage of the directive under the comitology (no unanimity requirement). More importantly, the requested Member State can no longer refuse to supply the requested information solely because it is held by a bank, which essentially means that tax avoiders can no longer hide behind banking secrecy laws. Fourthly, the new directive allows a wider use of the received information, i.e. for all taxes and levies referred to in the assessment and recovery assistance directives, including by a third Member State. Fifthly, the new Directive provides for further decision making on a limited number of practical issues by means of the comitology procedure (no unanimity requirement), and specifically *via* the development of standard forms and computerised standards and the evaluation of effectiveness and statistical data to be provided by the Member States to the Commission.[15]

The savings tax

Discussions on a European Savings Tax Directive (STD) started when the intra-EU capital movements

[9] For further details, see Vascega and van Thiel (2010).

[10] The 2000 Report of the *Ad Hoc* Working Party on Tax Fraud to COREPER and ECOFIN Council already identified a large number of weak points that hampered the fight against fraud including various privacy and secrecy provisions, the absence of time limits, restrictions on the use of information, the lack of a trans-national administrative culture, the abuse of tax shelters and obstacles to the involvement of tax officials of the requested state (Council doc. 8668/00 of 22 May 2000, http://register.consilium.europa.eu/).

[11] COM(2004) 611 final of 27 September 2004 on Preventing and Combating Corporate and Financial Malpractice (in particular pages 7, 8, 13 and 18).

[12] COM(2006) 254 final of 31 May 2006, Communication on an EU Anti-fraud Strategy, Concerning the Need to Develop a Coordinated Strategy to Improve the Fight against Fiscal Fraud.

[13] See Council document 5846/11 of 4 February 2011 + ADD 1 COR 1 – I/A item note on adoption, available on the Council's website at www.consilium.europa.eu). See also OJ L 64 of 11 March 2011.

[14] Automatic exchange would only cover tax periods as from 1 January 2014, and only information that is 'available' in the tax files of the Member State concerned and that is retrievable in accordance with national procedures for the gathering and processing of information. To balance performance divergences between Member States resulting from this condition, the Directive has an 'anti-free riding' provision, whereby a Member State, which does not have any category of information 'available', may be considered by other Member States as not wishing to receive any information under the directive.

[15] For more detailed information, see van Thiel and Vascega (2011).

were liberalised in 1990, but it took 13 years, and two failed attempts (1993 and 1998), before the first generation savings tax directive could be adopted in 2003,[16] and another 2 years of tough negotiations on savings tax agreements (STA) with five third countries and ten overseas territories,[17] before the new Directive and the accompanying agreements could be applied as from 1 July 2005.[18]

The 2003 STD essentially obliges any 'paying agent' (debtor, financial institution or certain EU resident intermediary entities, such as trusts, partnerships and investment clubs, that receive interest on behalf of beneficial owners) to report any 'interest payment' (defined along the lines of Article 11 of the OECD Model), which it makes to a non-resident 'beneficial owner' (any individual who receives an interest payment or for whom an interest payment is secured), to its own Member State, which will subsequently automatically provide this information to the Member State of the beneficial owner, so that the interest income can be included in the overall worldwide taxable income of the taxpayer concerned.

In view of the fact that the STD is based on the principle of automatic exchange of information, a solution had to be found to Luxembourg's main concern of Luxembourg (supported by Austria and Belgium) that competition between intra Community and third country financial market places should not be distorted. These countries therefore insisted on a *transitional period* during which they would be allowed to apply a withholding tax (35 percent as from June 2011, 75 percent of the revenue of which is transferred to the Member State of the beneficial owner), instead of automatically exchanging information, and thus to keep their banking secret until five other European financial centres (Switzerland, Liechtenstein, Monaco, Andorra, San Marino) had accepted the OECD standard on exchange of information. They also insisted on an *external conditionality* clause, whereby the savings tax would apply in the EU only from the moment that equivalent measures were applied by the same five European third countries and the same measures were applied by 10 British and Dutch associated and dependent territories (Anguilla, Aruba, the British Virgin Islands, the Cayman Islands, Guernsey, the Isle of Man, Jersey, Montserrat, the Netherlands Antilles and the Turks & Caicos Islands).

In other words, the 2005 savings tax measures essentially oblige 42 savings tax partners to either automatically exchange information on savings interest payments by their banks to residents of another partner (so as to allow taxation of the savings income in the country of residence), or to apply a withholding tax on outbound interest payments.[19]

Unsurprisingly, the Directive 'did not measure up to the ambitions' in view of its serious shortcomings.[20] One key problem was that neither the STD nor the STA actually oblige all countries to tax savings interest. EU residents will therefore be able to continue to evade taxes, either by moving their residence to (beneficial owner moves out of reach) jurisdictions that do not tax savings income (e.g. Singapore, Hong Kong, Panama), or by shifting their funds to banks situated in these locations (paying agent moves out of reach). A second major problem is that the STD does not cover interest payments made to companies or legal arrangements (trusts), so that taxpayers can evade the savings tax by simply interposing an entity (companies; fiduciary, usufruct or trust agreements) between themselves and the paying agent (beneficial owner moves out of sight). A third important shortcoming is the rather narrow definition of 'interest payment', which allows taxpayers who neither want to shift their residence, nor their income to another jurisdiction, to shift their investment into investment vehicles that yield untaxed income (investment moves out of reach) including life insurance contracts, occupational pensions, complex financial products (derivatives, deferred interest accounts), trusts, or shares (yielding dividends and capital gains).

As early as November 2008 the Commission proposed a new directive[21] that seeks to close the main loop-

[16] Council Directive 2003 48 EC on Taxation of Savings Income in the Form of Interest Payments, Official Journal L 156 of 26 June 2003, p. 38.

[17] These agreements and all other savings tax related documents are available from the Council's web site at http://consilium.europa.eu/cms3_fo/showPage.asp?id=916&lang=en&mode=g;

[18] See the "Green Light" Note from the General Secretariat of the Council contained in Council Document 10038/05 of 21 June 2005, http://www.consilium.europa.eu/showPage.aspx?id=916&lang=en and at http://register.consilium.europa.eu/.

[19] In 2005 three EU Member States (Austria, Belgium and Luxembourg), all five European third countries, and 6 overseas territories (British Virgin Islands, Guernsey, Isle of Man, Jersey, Netherlands Antilles, Turks and Caicos Islands) opted for a withholding tax. Anguilla, Aruba, Cayman Islands and Montserrat provide information to EU Member States. For Anguilla, Cayman Islands and Turks and Caicos Islands the arrangement is unilateral because they tax neither residents nor non-residents on their savings income and thus have no need to receive information (Anguilla, Cayman Islands), or do not receive a share of the withholding tax, if any, levied by EU Member States (Turks and Caicos Islands). In 2010 Belgium switched to automatic exchange of information.

[20] For an excellent early overview, see Jiménez (2006). For a more recent report with references to relevant literature, see Hemmelgarn and Nicodème (2009).

[21] COM (2008) 727 final of 13 November 2008 – Council Document 15733/08 of 13 November 2008, http://register.consilium.europa.eu/. For the latest compromise proposal presented to the December 2009 and January 2010 ECOFIN Councils see Council document 16473/1/09 of 25 November 2009. See also the progress report by the Czech Presidency in Council Doc 10277/1/09 of 29 May 2009, the ECOFIN Council Press release of January 2010 (Council Document 5400/10), http://register.consilium.europa.eu/.

holes by covering EU taxpayers who hide behind intermediary entities inside the EU or in third countries,[22] and by extending the scope of the Directive to equivalent forms of income from investment funds and to income from innovative financial and life insurance products. As yet, however, no agreement has been reached on the new text, mainly because Austria and Luxembourg reiterated the two main substantive concerns that they had also raised in 2003, i.e. the need for *external conditionality* (all savings tax partners must apply equivalent or the same measures) and the need to extend the duration of the *transitional period* to the moment that the other savings tax partners switch to automatic exchange of information.[23]

Recent external EU action to promote good governance in the tax area

In April 2009 and 2010 the European Commission submitted two communications to the Council (respectively on good tax governance and on tax and development), which responded by adopting conclusions in both cases.

In its June 2009 conclusions on good governance the ECOFIN Council recalled the importance of implementing the good governance tax principles of transparency, exchange of information and fair tax competition and committed to further discuss and promote these at an international level and towards third countries (recalling the March 2009 European Council joint position that refers in this respect to the fight against tax evasion and the application of appropriate and gradual countermeasures towards uncooperative third country jurisdictions). It also welcomed the emerging international consensus on the OECD standard on exchange of information and called for negotiations on improved savings tax agreements and anti-fraud agreements in particular with the five European third countries.[24]

In its June 2010 conclusions on tax and development, the Foreign Affairs Council essentially recognises that capital flight, including tax evasion and avoidance, is a major obstacle to domestic resource mobilisation in developing countries and agrees that the EU and its Member States will support developing countries in tax policy, tax administration and tax reforms, including the fight against tax evasion and other harmful practices. The Council also agreed to further promote a transparent and cooperative international tax environment with a greater participation of developing countries in the process of adopting and implementing international standards discussed in international fora (UN, OECD, International Tax Dialogue, International Tax Compact).[25]

To date, however, these conclusions have yielded few results. As noted above, a new savings tax directive has not been agreed upon and negotiations with the other savings tax partners to upgrade existing savings tax agreements have not started. Moreover, exploratory talks on the possibility of concluding savings tax agreements with international financial centres such as Singapore, Hong Kong and Macao have been unsuccessful (though Norway and Iceland have been more responsive). Efforts to conclude anti-fraud and tax information exchange agreements with European third countries have also proven fruitless to date. Even although an anti-fraud agreement was negotiated with Liechtenstein,[26] it was never concluded by the Council and did thus not enter into force. Nor did the Council adopt the June and November 2009 proposals of the Commission to upgrade the existing anti-fraud agreement with Switzerland, and to negotiate new anti-fraud agreements with Andorra, Monaco and San Marino, along the lines of the Liechtenstein

[22] EU paying agents must identify, on the basis of anti-money laundering information already available to them, EU resident beneficial owners who are behind non taxed third country investment vehicles and must report accordingly ('look through' mechanism). In addition, European tax exempt entities or legal arrangements (charities, partnerships, investment funds, pension funds, trusts, fiduciaries, etc.) must apply the savings tax measures as they are considered paying agents upon receipt of an interest payment.

[23] See Background Economic and Financial Affairs Council of 19 January 2010, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ecofin/112324.pdf.

[24] Subsequent to the Commission Communication of 2 April 2009 on Promoting Good Governance in Tax Matters (Council document 9281/09 FISC 57 containing COM(2009) 201 final (http://register.consilium.europa.eu/)), the ECOFIN Council adopted Conclusions on 9 June 2009 (Document 10252/4/09 REV 4 FISC 72, http://register.consilium.europa.eu/).

[25] Subsequent to the 21 April 2010 Commission Communication entitled: "Tax and Development – Cooperating with Developing Countries on Promoting Good Governance in Tax Matters" (Doc. 8891/10), the EU Foreign Affairs Council adopted on 4 June 2010: "Council Conclusions on Tax and Development – Cooperating with Developing Countries in Promoting Good Governance in Tax Matters". Doc 10349/10 DEVGEN 182 ACP 159 FISC 55 FIN 219 ECOFIN 324 ONU 102, http://register.consilium.europa.eu/. See also the website of the international tax compact (http://www.tax-compact.net/), and the 2011 report to the G20 Development Working Group by the IMF, OECD, UN and World Bank entitled: "Supporting the Development of More Effective Tax Systems", http://www.oecd.org/dataoecd/54/29/48993634.pdf.

[26] For a first draft, see Council doc. 17247/08, http://register.consilium.europa.eu/. The draft was, however, not acceptable to the Council (see ECOFIN conclusions of 10 February 2009 (Council Document 6069/09, p.20, http://register.consilium.europa.eu) and of 4 November 2008 (Council Document 15067-08, p. 12, http://www.consilium.europa.eu) and after re-negotiation the Commission submitted an upgraded draft in December 2009 (COM (2009) 644 final of 23 November 2009 and COM (2009) 648 final/2 of 3 December 2010 – Council Documents 1689/09 and 16690/1/09 of 3 December 2009, http://register.consilium.europa.eu/). See also Background Economic and Financial Affairs Council, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ecofin/112324.pdf.

agreement.[27] The reason for this lack of action is the fact that Austria and Luxembourg link further progress on the anti-fraud agreements to progress on the Savings Tax Directive (and in particular to a satisfactory solution to the transitional period and external conditionality).

As for good governance clauses in agreements with third countries, the Council did adopt conclusions on 14 May 2008,[28] which underline the importance of implementing on as broad a geographical basis as possible, the 'principles of good governance in the tax area, i.e. the principles of transparency, exchange of information and fair tax competition'. More specifically, the conclusions recognise the need to include general good governance clauses in relevant agreements to be concluded by the Community and its Member States. They contain the following appropriate text for such a clause: "with a view to strengthening and developing economic activities while taking into account the need to develop an appropriate regulatory framework, the Parties recognise and commit themselves to implementing the principles of good governance in the tax area, as subscribed to by Member States at Community level. To that effect, without prejudice to Community and Member States competences, the Parties will improve international cooperation in the tax area, facilitate the collection of legitimate tax revenues, and develop measures for the effective implementation of the above mentioned principles" (point 4 of the Conclusions).

In the wake of these Council conclusions, the Commission has introduced draft good governance clauses in the on-going negotiations with numerous third countries and groups of countries. The latter's reactions, however, have been rather mixed. Whereas many countries are open to the idea of including some kind of reference to good governance concepts such as transparency, exchange of information, combating tax avoidance and evasion in their agreement with the EU, others seem to have problems accepting particular elements or the wording of the model clause set out above, while others basically seem to be hostile to the idea of such a reference in their agreement with the EU.

Assessment and conclusions

Our assessment of the recent action of the European Union to counter tax avoidance and evasion is mixed. As regards cooperation and assistance between tax administrations, it is positive that the new recovery assistance directive provides for an improved legal framework that should, at least potentially, increase the effectiveness and efficiency of the intra Community cross border recovery of taxes by Member States. However, since recovery assistance remains 'on request' (and not automatic), it remains to be seen whether the new Directive will perform better than its predecessor, under which only 5 percent of the total amount of claims for which recovery assistance was requested was actually recovered. The proof of the pudding will be in the eating. It is now up to the tax administrations of the Member States to make the fullest possible use of these new opportunities and start building a more collective responsibility for recovering tax claims in Europe.

All of the above equally applies to the new assessment assistance directive, which introduces a number of important changes (broader scope, no bank secrecy exception, time limits, standard forms, broad use of the information obtained) that are likely to increase assessment assistance between Member States, while simultaneously reducing administrative burdens and red tape. In addition, the new assessment directive has the rather important positive achievement of introducing the automatic exchange of information on a broad spectrum of income and capital items, which, in political and financial terms, could well prove to be the single most important recent development in the area of exchange of information.

Developments in the more specific area of savings tax, on the other hand, are much less encouraging. We seem to be stuck with a savings tax framework that looks like a Swiss cheese because it has so many loopholes in its geographic, personal and substantive scope. It is surprising that such a framework even yields the few pennies that seem to flow into the coffers of some EU Member States.[29] The main reason is

[27] Draft Council decision authorising the Commission to open up negotiations for agreements between the European Union and its Member States, on the one hand, and the Principality of Andorra, the Principality of Monaco and the Republic of San Marino, on the other, to combat fraud and other illegal activity to the detriment of their financial interests and to ensure administrative cooperation through the exchange of information on tax matters and by authorising the Commission to start negotiations for an agreement between the European Union and its Member States, on the one hand, and the Swiss Confederation, on the other, to combat direct tax fraud and direct tax evasion and to ensure administrative cooperation through the exchange of information on tax matters (the declassified part of the document is in Council Document 16308/09 EXT 1 of 8 January 2010, http://register.consilium.europa.eu/).

[28] Conclusions of the ECOFIN Council of 14 May 2008, http://www.consilium.europa.eu.

[29] In reality, the savings tax measures seem to have mostly affected small scale tax evaders, while raising very little revenue (see also Jiménez 2006).

that the EU and its Member States are effectively held hostage by Austria and Luxembourg, which both seem to have a very one-sided interpretation of EU solidarity. In fact, they expect all other Member States to be convinced by their 'level playing field' argument that they cannot move forward unless other financial centres do so, but they do not seem to understand that all other Member States expect Austria and Luxembourg not to obstruct them in the collection of taxes from their residents in accordance with their national laws.

However, the fact is that maintaining a level playing with outside financial centres does not require Austria and Luxembourg to block either the adoption of a new savings tax directive or the conclusion (and provisional entry into force) by the EU and all Member States (except themselves) of anti-fraud agreements with third countries.[30] Therefore, it is understandable that individual Member States, like Britain and Germany have now themselves concluded upgraded savings tax agreements with countries like Switzerland (even though there are doubts about their compatibility with the EU law). Another interesting development in this respect is the fact that Swiss banks are now increasingly pondering the option of accepting deposits only if customers themselves declare and provide the evidence that tax was paid in respect of these deposits.

More generally, it is important to bear in mind that institutions at a European level have the specific task of formulating a legal framework, which in a way has the character of a common minimum standard. From this perspective the incorporation of an automatic exchange of information into that common minimum standard is an important step forward, which must now be taken extensively by Member States, which ultimately have the task of assessing and collecting taxes. They might consider some relatively simple additional measures that could help them in this task. EU Member States could, for instance, coordinate the way that they identify taxpayers and introduce one single European wide tax identification number for each individual and company (and real estate and car, etc.). Another practical measure could be to introduce easy ways for using standard formats for automatic exchange. It could also be useful to promote more actual contacts between the different European tax administrations (EU Fiscalis programme; OECD offshore compliance network) and to consider broadening the scope for joint action towards single large taxpayers.

Internationally, Member States could start a European discussion on the many complex and opaque international structures that are used for tax fraud and avoidance (which could be done in the Council's Code of Conduct Group). This would automatically trigger a discussion on how to achieve greater transparency and enhance the exchange of information with third countries. It could also result in discussions on more consistent EU policies towards tax havens in a shared determination to end offshore abuse and to realise the automatic exchange of information worldwide.

Finally, even although the OECD has announced that the era of banking secrecy is over,[31] the fight against tax avoidance and evasion will be an on-going exercise. The recent developments within the EU in last two years can be seen as just a tiny step towards the ideal world in which every citizen and company pays taxes according to his/her ability to pay. However, it remains important to realise that every step is worthwhile, because it increases equal treatment and may help countries to reduce the unsustainable budget deficits and public sector debt levels from which they have been suffering since the end of 2008.

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[30] In fact, the EU and other Member States except Luxembourg and Austria, could sign and conclude, as well as accept the provisional application, of the Liechtenstein anti-fraud agreement, and agree to give the Commission the mandate to negotiate similar agreements with the other four European countries. This would at least allow the process to go forward without the risk of immediately triggering the end of the savings tax transitional period, because under the provisions of the Savings Tax Directive that would only ensue if those agreements actually were to come into effect (which would require ratification by all Member States, including Luxembourg and Austria).

[31] OECD (2011) estimates that the G20/OECD efforts have resulted in an extra 14 billion euros of tax revenue over 2 years in the 20 countries where data is available.