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SAPIENZA
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*The exchange of information in tax matters
(The BEPS perspective)*

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SUMMARY

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1. Origins, evolution and global relevance
2. Grounds and general features
3. Tax cooperation and national sovereignty
4. Interests involved in tax cooperation
5. The BEPS Project: increasing transparency and cooperation through multilateralism
6. Brief conclusion

1. ORIGINS, EVOLUTION AND GLOBAL RELEVANCE

1. Origins, evolution and global relevance

Preliminary assumptions:

- Tax evasion, avoidance and tax frauds are an **obstacle to the international markets** (unfair competition).
- **Tax transparency and exchange of information** is the only means by which evasion, avoidance and frauds of taxes can be counteracted in an international environment. Also **cooperation in tax recovery** is needed.
- **Bank secrecy** could help to carry out behaviours aimed at hiding the tax base, because it prevents tax cooperation to be effective. Italian tax authorities are not bind to bank secrecy starting from 1992.



1. Origins, evolution and global relevance

- The **origins of tax cooperation** must be traced back at least to 1963, year of approval of the first version of the OECD Model Tax Convention (MTC)
- Art. 26 of the 1963 MTC ruled the exchange of information only in order to **asses and eliminate cases of double taxation** (Art. 26, par. 1: *“the Contracting States shall exchange such information **as is necessary for carrying out the provisions of this Convention**”*)
- In the 1977 version, art. 26 extended its purposes at **countering domestic tax evasion and avoidance** (the Contracting States shall *“exchange such information **as is necessary for carrying out the domestic laws of the Contracting States concerning taxes covered by the Convention insofar as the taxation thereunder is not contrary to the Convention**”*).



1. Origins, evolution and global relevance

- **MAAT (Multilateral Convention on Administrative Assistance in Tax Matters between OECD & Council of Europe)** Strasbourg, 25-1-1988; only devoted at administrative assistance (special tool)
- **Complete and binding:** *“most powerful instrument”* (OECD)
- **Strongly criticized at the beginning** (from Switzerland, Austria, Germany, esp. Int. Chambers of Commerce) why:
 - a) its rules laid down a **very intensive regime of cooperation** (from that perspective **too intensive**);
 - b) **no adequate protection of the taxpayer’s rights** (especially in privacy matters);
- **A very limited number of States initially signed** (only 8)



1. Origins, evolution and global relevance

- **MAAT Amendments of 2010:** many States (146) have signed MAAT until 22-9-2022 (https://www.oecd.org/ctp/exchange-of-tax-information/Status_of_convention.pdf), Indonesia (1-5-2015) & Italy (1-5-2006; 1-5-2012) included
- **Multilateral (MAAT) against bilateral (MTC) instruments:** A new perspective has been welcomed in Tax Cooperation
- **Broader Scope of MAAT:** a wider range of taxes have been covered (VAT included); exchange on request is no longer the main subject; **also included:** spontaneous exchange, tax examinations abroad, simultaneous tax examinations, assistance in tax recovery and conservancy; **and, especially, automatic exchange of financial accounts (under preliminary agreements)**



1. Origins, evolution and global relevance

New Challenges in Tax Cooperation:

- **G20 2009 (L'Aquila – IT):** *Global standards in Transparency and Exchange of Information* (full exchange of information on request with **no regard to a domestic tax interest or bank secrecy** for tax purposes)
- **USA 2010:** FATCA (*Financial account Tax Compliance Act*) asking transparency **to the taxpayers** and cooperation **to the banks**:
 - national measure having international effects;
 - lack of reciprocity;
 - issues of sovereignty.



1. Origins, evolution and global relevance

New Challenges in Tax Cooperation:

- **OECD 2013 BEPS Action Plan:** (iii) *Ensuring transparency while promoting increased certainty (need for transparency and ethics in taxation as well):*
 - *Apple CEO Tim Cook's hearing before the U.S. Congress (0,7% approx global tax rate)*
 - *UN Millennium Declaration (Global taxation based on transparency & cooperation)*
 - *Mark Zuckerberg's (Yale, 2017): taxation of earnings from facebook «communities» located in a single state (**tax solidarity from multinationals of the web**); never applied*



1. Origins, evolution and global relevance

New Challenges in Tax Cooperation:

- **OECD 2014:** CRS (*Common Reporting Standards*) has setup a new standard in automatic exchange of bank data, based on FATCA standards.
- **BEPS Final Reports 2015:** MAAT becomes part of BEPS Agreements
- **Objective of cooperation has been gradually expanded** to subjects other than double taxation and tax evasion and/or avoidance, like:
 - *Aggressive Tax Planning* (“taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability”)
 - *Double non-taxation* (“subject-to-tax clause in DTT)



1. Origins, evolution and global relevance

Effects on tax planning of new regulations in Tax Transparency and Cooperation:

- **Less opportunities for business to catch:**
 - Reduction of **tax havens**
 - Increasing in **information circulation**
 - Tendency to **leveling tax conditions**
- **New challenges for business to face:**
 - **Tax rulings** to prevent assessments and sanctions (also criminal)
 - **New relationship** with tax administration (the Cooperative Compliance)
- **New aspects for business to care:**
 - Increased needs for **legal comparison** (state-by-state analysis)
 - Careful attention to the **economic reasons of each operation**



2. GROUNDS AND GENERAL FEATURES

2. Grounds and General Features

Forms of tax cooperation:

a) legislative:

international treaties
mutual agreement procedures

b) judicial:

rogatory commissions between judges of contracting States

c) administrative:

c-1) *in tax assessment* (information exchange, simultaneous inspections, tax inspection abroad)

c-2) *in tax recovery* (information on claims, direct recovery, precautionary measures)

c.3) *in notifications*



2. Grounds and General Features

Tax Administrations can choose different instruments:

- **Proliferation of different tools**, many of which can be activated in the same situation, has been never so high as in recent times (this is particularly true Inside EU, but it is also true outside).
- Therefore, **Tax Administration, must evaluate what tool appears most convenient**, in terms of wideness of the scope, speed of the procedure and mandatory response (possibility of enforcement for the tools introduced with regulations and directives).
- The use of one rather than another of the available tools **is not a breach in the procedure** that can be challenged by the taxpayer ("**technical discretion**").



2. Grounds and General Features

Different forms of exchange of information:

a) on request:

Standard model of cooperation instruments

b) automatic:

Expressly ruled and in specific agreements for single sectors (highly increasing: see hearing before the Italian Parliament of E. Ruffini (director of Italian Tax Agency «Digitalizzazione e interoperabilità delle banche dati fiscali», 5-5-2021)

c) «spontaneous»:

Underestimate in the EU, but spontaneous only as regards the initiative of the subject but compulsory regarding the duty to proceed with them; not more effective or less useful for that



2. Grounds and General Features

Recent transformations and future developments:

a) From the «traditional» exchange system: (on request, spontaneous, automatic, simultaneous and/or abroad inspections, etc.)

Standard model of cooperation instruments: information normally flow from one State to another

b) ... to the implementation of common database: States must contribute and can have access whenever they need (FATCA – CRS, VIES in EU)

c) ... and the cooperation from taxpayers and other subjects:

- *Voluntary disclosure programs* (USA, Australia, South Africa, Italy)
- *Tax ruling reports* (EU Directive 2015/2376/UE - DAC 3)
- *Country-by-Country-Reports* (Directive 2016/881/UE - DAC 4)
- *Potentially aggressive tax planning arrangements* (EU Directive 2018/822/UE - DAC 6)



2. Grounds and General Features

Tax evasion, money laundering, exchange of information:

- In the same way of each criminal activity, **tax evasion produces illegal wealth**, which is hidden through **money laundering**.
- The need for «washing» dirty money is the reason why **tax evaders choose non-transparent jurisdictions («tax havens»)** for allocating their wealth.
- More than low tax rates, tax havens grant:
 - **Anonymity in property of company shares,**
 - **Bank secrecy,**
 - **Lack of tax cooperation.**



2. Grounds and General Features

Treaties against money laundering:

- ***UN Convention against illicit traffic in narcotic drugs and psychotropic substances, (Vienna, 19/20-12-1988, signed by 145 States):***
 - No bank secrecy
 - Possible seizure
- ***Convention against money laundering (Strasbourg, 8-11-1990):***
 - As in the case above, more binding instruments as compared to tax cooperation



2. Grounds and General Features

Treaties against money laundering:

- These two agreements allowed to carry out **joint actions in order to counter simultaneously** money laundering and tax evasion with cooperation
- **Still exist coordination needs** between:
 - Duty of secrecy of criminal prosecution (in money laundering proceedings)
 - Duty of information and participation of taxpayer in tax assessment procedures

3. TAX COOPERATION AND NATIONAL SOVEREIGNTY

3. Tax Cooperation and National Sovereignty

Taxing powers and sovereignty:

- **States derive their sovereignty from different sources** (divine right for the ancient monarchies, popular vote for democracies, etc.)
- Thanks to sovereignty, **each State can fully exercise inside its boundaries**: powers of investigation, power to gather information, power to collect taxes, etc.
- Tax cooperation duties of States represent a **limit to free expression of national sovereignty**



3. Tax Cooperation and National Sovereignty

National sovereignty vs. tax cooperation:

- Treaties that admit tax cooperation **derogates to national sovereignties** of the contracting States.
- This can be only admitted in case of **reciprocity**:
 - **Internal reciprocity**: both/all contracting States have by the treaty the same interest and right to cooperate
 - **External reciprocity**: interest to cooperate can be only indirect for some contracting State (e.g.: OECD Model for tax cooperation of 2002)
- National **Constitutions often rule reciprocity** (e.g. art. 11 of the Italian Constitution).



3. Tax Cooperation and National Sovereignty

National sovereignty vs. lack of tax cooperation treaties:

- In this case, requests of information can be satisfied time by time, only depending on the **international courtesy**.
- Accordingly, **positive answer is not compulsory**.
- For a long time, U.S.A. and Switzerland have adopted agreements for the exchange of financial information. Only Switzerland was sending data to U.S.A.
- In the view of the Swiss authorities, these agreements **have not been a breach of the swiss bank secrecy rules**.
- Clearly, this option doesn't give **certainty** or **equality**



3. Tax Cooperation and National Sovereignty

A study case: FATCA and reciprocity in tax cooperation:

- **First step:** unilateral rules (U.S. Congress 2010, Financial Account Tax Compliance Act)
- **Second step:** bilateral rules (UK, FR, ES, IT negotiated in order to obtain reciprocity from U.S.)
- **Third step:** effects of bilateral conventions have been reciprocally extended to each contracting State



4. INTERESTS INVOLVED IN TAX COOPERATION

4. Interests Involved In Tax Cooperation

- In each treaty **more interests are involved**:
 - a) Joined interest of both/all contracting States
 - b) Specific interest of only one of the contracting States
 - c) Specific interests of the taxpayers
- The single treaties can put **wider or narrower limits** in exchanging or in using information
- Single instruments can give **more or less protection** of each interest



4. Interests Involved In Tax Cooperation

I) Joined interest of all contracting States:

- **Gradual evolution:**
 - a) From countering double taxation (OECD MTC 1963)
 - b) To defending national taxing power (MTC 1977)
- **Consequences on the scope of the treaty:**
 - a) Information on cases of double taxation
 - b) Information on all national taxes included in the treaty scope



4. Interests Involved In Tax Cooperation

II) Specific interest of only one of the contracting States:

A. Interest of the Requesting State in obtaining the information:

Requests satisfy the (substantial) interest in cognitive needs of tax assessment and the **use of cooperation is one of the investigation tools** available to the tax offices, who can make their choice according to a “technical discretion” criterium, that **the taxpayer is not allowed to criticize.**

4. Interests Involved In Tax Cooperation

II) Specific interest of only one of the contracting States:

B-1). Interest of the Requested State in giving not the information:

Protect the (substantial) interest in **defending national economy** safeguarding secrets (industrial, commercial and professional) or public order.

Reference to individual values does not give individual rights to prevent the communication but is inspired by the principles of international law: **States can refuse cooperation when it could bring a national prejudice.**



4. Interests Involved In Tax Cooperation

II) Specific interest of only one of the contracting States:

B-2). Interest of the Requested State in giving not the information:

Protect the (procedural) interest in being **compliant with its own legal system.**

According to the principles of **efficiency, effectiveness and economy**, the Requested State can refuse to use employees and structures if **the Requesting State can otherwise acquire the information needed. ("No fishing expeditions").**



4. Interests Involved In Tax Cooperation

II) Specific interest of only one of the contracting States:

B-3). Interest of the Requested State in giving not the information:

Protect the (procedural) interest in not to give **information that the Requesting State cannot obtain inside its own country** (e.g.: bank secrecy). Different breaches can occur:

International principle of reciprocity: Requesting States cannot increase their domestic powers of investigation by applying a treaty (“**reverse discrimination**”)

Domestic principle of good governance: “**impartiality**”



4. Interests Involved In Tax Cooperation

III) Specific interest of the taxpayer:

A. Avoiding double or multiple taxation:

This is the ordinary reason of OECD MTC.

Nevertheless, interest of **taxpayer has not a direct protection by the treaties**. Only domestic remedies can actually ensure legal protection.

4. Interests Involved In Tax Cooperation

III) Specific interest of the taxpayer:

B. Be subjected to audits with impartiality, transparency and fairness criteria:

In MTC there is no explicit provision. The need for an advance communication to the taxpayer is doubtful.

When national laws (e.g. The Netherlands) provide for it, taxpayer can appeal to the Tax Court in order to inhibit cooperation (see ECJ and ECHR on the right to be heard in advance).



4. Interests Involved In Tax Cooperation

III) Specific interest of the taxpayer:

C. Ensure right of defense to intermediaries (see ECJ 16-5-2017, C-682/5 *Berlioz*):

A person, who has been sanctioned with an administrative decision that orders him to provide information in the context of an exchange between national tax administrations regarding other taxpayers pursuant to Directive 2011/16, is entitled to **challenge the legitimacy of requests without “foreseeable relevance”**.



**5. THE BEPS PROJECT:
INCREASING TRANSPARENCY
AND COOPERATION
THROUGH MULTILATERALISM**



5. The BEPS Project

What BEPS Project is for?

- **Meaning of the abbreviation:** Base Erosion and Profit Shifting
- **BEPS is based on a disconnection** between jurisdiction where business income is declared and that where economic activity and creation of value take place.
- Such disconnection is caused by **gaps / asymmetries in national tax systems and international standards.**
- **Result: double non-taxation**



5. The BEPS Project

Why double non-taxation is a problem and why we need to counter it?

- **Reduces revenues** (between \$ 100 and \$ 240 billion annually according to conservative OECD estimate)
- **Distorts market competition** (between SMEs and MNE)
- **Garbles investment decisions**
- **Compromises trust of citizens and the fairness of the system** (political and media attention for ethic issues)



5. The BEPS Project

Main steps of the path followed by the BEPS Project:

- **OECD, *Addressing Base Erosion and Profit Shifting* (February 2013):** Present the issues related to BEPS in an objective and comprehensive manner.
- **OECD, *Action Plan on Base Erosion and Profit Shifting* (September 2013):** Provide countries with domestic and international instruments that better align rights to tax with economic activity in a comprehensive way, through: (i) identifying actions needed to address BEPS, (ii) setting deadlines and (iii) identifying the resources needed and the methodology.



5. The BEPS Project

Main steps of the path followed by the BEPS Project:

- **Final Report approved by G20 – Lima, 8 October 2015**
 - *Package of 15 analytic reports*
 - *«**Countries are sovereign.** It is up to them to implement these changes, in different manners, as long as they do not conflict with their international legal commitments. **However, BEPS requires coordinated responses, particularly in the area of domestic law measures**»*



5. The BEPS Project

Main steps of the path followed by the BEPS Project:

- **Final Report approved by G20 – Lima, 8 October 2015**

Measures for strengthening international standards:

MTC: (i) Anti avoidance provisions; (ii) PE; (iii)

MAP;

Transfer Pricing: intangibles; Risk allocation;

Profit split use; Documentation duties; other;

Harmful tax practices: “nexus” criterim &

information exchange on rulings

5. The BEPS Project

Main steps of the path followed by the BEPS Project:

- **Multilateral agreement (MLI):**
Approved and opened at signature by OECD on November 2015
Modifies all DTT approved by the contracting parties avoiding the need to approve 2000 DTT approx.
Not compulsory but **100 States signed at 10-11-2022**
(<https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf>). **Not yet U.S.A.**
Minimum standard asked



5. The BEPS Project

Features of the BEPS Project:

- **Fast:**
 - Completed within 2 years
- **Global:**
 - OECD and G20
 - 14 Developing Countries, ATAF/ CIAT
 - Subsequent contribution of more than other 60 DC
- **Transparent:**
 - 23 Discussion drafts published
 - 12.000 Pages of comments received
 - 11 Public consultations, frequent Webcast updates



5. The BEPS Project

BEPS Project rules regarding exchange of information:

- Action 12 - *Disclosure of Aggressive Tax Planning Arrangements*
- Action 13 - *Country-By-Country Reporting*
- Action 14 - *Make Dispute Resolution Mechanisms More Effective*
- *Peer Review process of harmful tax practices (patent boxes, rulings)*

5. The BEPS Project

Action 12 – Taxpayers’ disclosure of Aggressive Tax Planning Arrangements):

- Duty for business (and intermediaries) to inform annually Tax Administration about their aggressive tax planning schemes (**not compulsory for States**).
- This Action includes measures aimed at developing and applying a more effective system of information exchange **between tax administrations as well on this subject.**

5. The BEPS Project

Action 13 – Country by Country Reporting (CbCR):

- Standardized procedures for the exchange of information on transfer pricing, based on a uniform system of documentary duties.
- The larger the number of adhering states (and changing their national rules) the more effective the instrument will be.
- Application recommended starting from the 2016.
- Some applications anticipated on an experimental basis.

5. The BEPS Project

Action 14 – Dispute Resolution Mechanisms:

- Revision of MAPs in order to provide a **faster and more effective** tool for resolving disputes related to DTT.
- Fast adoption of a binding arbitration system (that was present before only in some States)
- Introduction of a **monitoring system for double taxation and double non-taxation cases** based on exchange of info.

5. The BEPS Project

Peer Review Process against Harmful Tax Practices:

- BEPS Final Report: “An *enhanced peer review process on harmful tax competition cases could solve many BEPS cases*”.
- The process includes the provision of a “*spontaneous mandatory*” (wording to be evaluated carefully) information exchange on the following aspects:
 - a) *Patent box preferential regimes* (align to “nexus”).
 - b) *Tax rulings for specific taxpayers*

6. BRIEF CONCLUSION

6. Brief conclusion

- The evolution of international tax cooperation rules has followed a path of gradual but **uninterrupted growth in transparency of tax administration and collaboration of taxpayers and intermediaries** in the assessment of tax evasion and avoidance behaviors.
- Actually it can be said that **Tax Havens (if they still exist), have greatly reduced their offensive potential thanks to cooperation between States.**
- This process is **particularly strong in the EU**, thanks to *ATAD - Anti Tax Avoidance Directives* approved from 2011 onwards, but **G20/OECD network is extending this regime to the whole world.**



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Thank you very much
for your kind attention!