Exchange of Information in the Field of Indirect Taxes

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Abstract

In a world where globalised operations are the norm rather than the exception, tax authorities struggle to keep up. With numerous businesses and likewise a lot of tax payers it is difficult to deal effectively with those pretending to be above the (tax) law. In line with the adage 'knowledge is power' and by way of cooperation between tax authorities, a joint battle is fought to combat tax evasion and avoidance. Information exchange is one of the means available to tax authorities to collect, share and act on information to secure tax revenues. This is also the case for indirect taxes. This contribution examines the development of legislation governing information exchange to prevent tax revenue loss in the field of indirect taxes. Within this field, VAT is especially interesting as certain persistent types of fraud prove difficult to combat. Missing Trader Intra-Community fraud is the prime example of this. The key characteristics of this fraud are further examined. A better understanding of fraudulent activities that information exchange aims to prevent provides more nuanced views on far-reaching regulatory provisions governing information exchange. One implication of the information disadvantage tax authorities face is that there is hardly any provision protecting the legal position of tax payers. An appeal system, providing tax payers with the opportunity to object to collection and exchange of their information, is lacking. It remains to be seen whether this is in line with the principle of proportionality when technological developments eliminate the information disadvantage of tax authorities.

Keywords: fraud, tax evasion, legal protection, indirect tax, information exchange.

1 Introduction

Tax evasion and avoidance are much debated subjects. Every business is urged to pay its 'fair share'. Leveraging tax treaties and setting up tax structures are considered an evil. Tax fraud is unsurprisingly perceived as fundamentally wrong. In battling tax evasion and avoidance, tax administrations agree to cooperate by way of exchanging tax payers' information all in line with the adage that knowledge is power and two heads are better than one.

The ever-increasing global commercial activity leads to new challenges for tax administrations worldwide. Especially when it comes to maintaining stable tax revenues, not leaking away due to fraudulent activities. These developments have let to cooperation and mutual administrative assistance in relation to tax matters. Since many years, members of the Convention on Mutual Administrative Assistance in Tax Matters, a convention jointly developed by the OECD and the Council of Europe, work together by exchanging information to 'put an end to bank secrecy and tackle tax evasion'.[1]

This contribution focuses on the exchange of information in the field of indirect taxes, specifically the European field of indirect taxes. These taxes are particularly interesting as some of these taxes (e.g., VAT, excise and customs duties) are extensively harmonised within the European Union. It would go beyond the bounds of this contribution to examine all European indirect taxes. This contribution, therefore, takes VAT as the starting point to examine how information exchange by EU Member States is designed. As there still is a VAT gap of approximately EUR 134 billion,[2] the need for mutual assistance in this field is self-explanatory. The emphasis of this contribution is therefore on the exchange of information in the field of indirect taxation in a European context.

The first purpose of this article is to establish the legislative background of information exchange and the means that have been introduced in the past decades in that regard. Exchanging information is deemed crucial for fighting VAT fraud. Tax authorities face a significant information disadvantage as they greatly depend on tax payers providing relevant information to assess their tax debt. This disadvantage is further amplified by reporting periods of between one and three months. The design of the VAT system is prone to VAT fraud as it is aimed at taxation in the destination country, which requires, for example, specific place of supply rules and VAT zero rates. This contribution explains one specific type of VAT fraud: Missing Trader Intra-Community fraud. A type of fraud so tough to fight that some proposed remedies undermine the very system of VAT taxation.

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1 www.oecd.org/ctp/exchange-of-tax-information/ (last visited 21 June 2022).

2 European Commission, Directorate-General for Taxation and Customs Union, G. Poniatowski, M. Bonch-Osmolovskiy & A. Śmietanka *VAT Gap in the EU: Report 2021* (2021).

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Having established the incentives for extensive cooperation within the European Union, this contribution continues to explain the procedure that tax authorities of EU Member States need to follow to obtain relevant information. It examines the obligations to (automatically) exchange information and the grounds for information exchange refusal. Finally, this contribution covers the legal position of tax payers whose information is requested by competent authorities and how their interests are protected against unlawful information exchange by EU Member States.

2 Background on Information Exchange

Indirect taxes, VAT and excise duties in particular were not the first tax resources that were targeted when the information exchange was presented as a means to tackle tax evasion and avoidance. This section examines the different measures that were taken to develop the information exchange system that is functioning today.

2.1 From Direct Taxation to VAT

Almost 50 years ago, the European Council adopted a Directive which concerned the mutual assistance of EU Member States in the field of direct taxation.[3] The purpose of this Directive was to enable EU Member States to perform a cross assessment of taxes. It entered into force on 1 January 1979. The scope of the Directive was quickly extended to, amongst others, VAT.[4] The concerned amendment entered into force on 6 December 1979. The reason for amending the existing Directive partly lies in the general nature of VAT taxation, aiming to tax consumption within the European Union. VAT also accounts for a percentage of the EU's own resources.[5] The next extension of the Directives' scope entered into force in 1992, making it also applicable to excise duties on a number of goods.[6]

2.2 An Overview of Relevant EU Directives and Regulations

For VAT, a different Regulation was introduced in 1992.[7] This Regulation, amongst others, governs the VAT Information Exchange System (hereinafter: VIES). VIES is often used today to check the validity of customers' VAT numbers. The VIES database in principle includes all VAT numbers of VAT taxable persons established in EU Member States. The VIES database provides suppliers with an indication on the capacity of the customer (business or consumer). This capacity, in principle, determines where taxation should take place. Cross-border taxable supplies (business-to-business) are taxed at the VAT zero rate. A valid VAT number is one of the requirements for applying a VAT zero rate on Intra-Community supplies.[8] The introduction of the present Regulation meant that there were now two parallel instruments for mutual assistance: Council Directive 77/799/EEC (via Council Directive 79/1070/EEC also applicable to amongst others VAT) and Council Regulation 218/92/EEC. Having two parallel instruments was considered complex and inefficient.[9] The Commission therefore proposed in 2001 to eliminate VAT from Council Directive 79/1070/EEC. This proposal was adopted in 2003. To further tighten up the provisions included in Regulation 218/92/EEC and to incorporate the provisions included in Directive 77/799/EEC, a new Council Regulation was introduced: Regulation 1798/2003.[10] Regulation 218/92/EEC was repealed at the same time. The new Council Regulation should provide for more direct contact between internal revenue services of EU Member States.

Council Regulation 1798/2003 was replaced by Council Regulation 904/2010.[11] Excise duties were also eliminated from the scope of Directive 77/799/EEC by adopting Regulation 2073/2004/EC.[12] Both Regulations are still in force today. Regulation 904/2010 is accompanied by two implementing Regulations: Implementing Regulation 79/2012[13] and 815/2012.[14] These Regulations concern further administrative cooperation in combating VAT fraud and special schemes for non-established taxable persons respectively. Finally, to conclude this extensive overview of relevant legislation, there are two relatively recent developments. One is that the Council has adopted Regulation 2017/2454/EU[15] amending Regulation

3 Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation.

4 Council Directive 79/1070/EEC of 6 December 1979 (amending Council Directive 77/799/EEC) concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation.

5 Council Regulation 1553/89/EEC of 29 May 1989 on the definitive uniform arrangements for the collection of own resources accruing from value added tax.

6 Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products.

7 Council Regulation 218/92/EEC of 27 January 1992 on administrative cooperation in the field of indirect taxation (VAT).

8 For more information: Explanatory Notes on Council Directive (EU) 2018/1910, Council Implementing Regulation (EU) 2018/1912 and Council Regulation (EU) 2018/1909 regarding the EU VAT changes in respect of call-off stock arrangements, chain transactions and the exemption for intra-Community supplies of goods ('2020 Quick Fixes').

9 B.J.M. Terra and H.J. Kajus, Mutual assistance, *European VAT Directives Commentary* (2019), para. 1.1.

10 Council Regulation 1798/2003/EC of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation 218/92/EEC.

11 Council Regulation 904/2010/EU of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax.

12 Council Regulation 2073/2004/EC of 16 November 2004 on administrative cooperation in the field of excise duties.

13 Commission Implementing Regulation 79/2012/EU of 31 January 2012 laying down detailed rules for implementing certain provisions of Council Regulation 904/2010/EU concerning administrative cooperation and combating fraud in the field of value added tax.

14 Commission Implementing Regulation 815/2012/EU of 13 September 2012 laying down detailed rules for the application of Council Regulation 904/2010/EU, as regards special schemes for non-established taxable persons supplying telecommunications, broadcasting or electronic services to non-taxable persons.

15 Council Regulation (EU) 2017/2454 of 5 December 2017 amending Regulation (EU) No 904/2010 on administrative cooperation and combating

904/2010/EU extending its scope to special schemes to distance sales of goods and services other than telecommunications, broadcasting and electronically supplied services.[16] The other development is that yet another Regulation was adopted: Regulation 2018/1541/EU.[17]

3 Tax Evasion and Avoidance within the EU

Before examining how mutual assistance by exchanging information prevents tax evasion and avoidance, it should be explained which types of evasion and avoidance occur within the EU. Information exchange instruments seek to tackle certain cross-border fraud schemes which will now be described in more detail.

3.1 VAT Fraud and the VAT Gap

VAT fraud is a rather broad concept. It essentially covers activities resulting in the public purse being deprived of revenue that it should rightfully collect.[18] Unique to VAT is that fraudsters can both manipulate their own liability to remit VAT and abuse the recovery of input VAT mechanism.[19] Some examples of fraud include (not exhaustive):

- Failure to register for VAT purposes;
- Suppression of sales;
- Misclassification of supplies (i.e. zero rates and exemptions);
- Failure to account for VAT on transactions subject to the reverse charge mechanism;
- Smuggling of goods.

In the European context, VAT fraud amounts to a major VAT gap. The VAT gap is defined as '[…] the overall difference between the expected VAT revenue and the amount actually collected.'[20] The expected VAT revenue is the taxable base multiplied by the normal VAT rate (which may not be less than 15%[21]). EU Member States may apply one or two reduced rates to certain categories of goods of services.[22] The reduced rate may not be less than 5%.[23] Reduced rates and VAT exemptions result in less VAT collected than expected. This, however, results from the VAT legislation which provides for the possibility to collect VAT at lower rates (or to exempt certain activities). It is therefore to be expected that a 'VAT gap' occurs. By order of the European Commission, the Center for Social and Economic Research has calculated the VAT gap for 2019.[24] The gap to be expected is not included in these calculations, which limits the VAT gap to four categories:[25]

- VAT fraud and VAT evasion (or: the VAT compliance gap);
- VAT avoidance practices and optimisation;
- Bankruptcies and financial insolvencies; and
- Administrative errors.

The EU-wide VAT gap was estimated to be EUR 134 billion in 2019.[26] According to Europol, the cooperation of police forces of the EU, one specific type of VAT fraud (amounting to the VAT compliance gap) results in EUR 60 billion loss in VAT revenue annually.[27] It is the most common form of VAT fraud: Missing Trader Intra-Community (hereinafter: MTIC) fraud. So-called 'carousel fraud' is a very impactful type of MTIC. This contribution examines the means of EU Member States to battle indirect tax, especially VAT, fraud. It is therefore relevant to understand what types of fraud are targeted. MTIC is exemplary of the pressing need for VAT fraud prevention measures.

3.2 Missing Trader Intra-Community Fraud

MTIC is defined as the VAT fraud through the abuse of VAT rules on cross-border transactions between EU Member States by traders that go missing.[28] MTIC profits from the internal market concept, resulting in the abolishment of EU borders in 1993. Since then, all checks on goods and the payment of VAT when goods cross borders within the EU were abolished.[29]

In order to understand MTIC, it should be clear how cross-border supplies of goods are treated for VAT purposes. A general overview of how this works is provided hereinafter. The place of supply of goods is deemed to be the place where the goods are located at the time when despatch of transport of the goods to the customer begins.[30] The supply of goods (which are transported) within the EU is in principle VAT exempt.[31] It is an exemption with the right to deduct input VAT, therefore the transaction is effectively zero rated and subject to VAT in another part of the chain (where the goods are

fraud in the field of value added tax.

16 B.J.M. Terra and H.J. Kajus, Administrative Cooperation and Combating Fraud in the Field of VAT, *European VAT Directives Commentary* (2019), para. 1.3.

17 Council Regulation (EU) 2018/1541 of 2 October 2018 amending Regulations (EU) No 904/2010 and (EU) 2017/2454 as regards measures to strengthen administrative cooperation in the field of value added tax.

18 M. WalPole, *Tackling VAT Fraud*, IBFD Issue 25(5) (2014), para. 1.

19 *Ibid.*

20 https://taxation-customs.ec.europa.eu/business/vat/vat-gap_en (last visited 6 July 2022).

21 Art. 97 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

22 Art. 98 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

23 Art. 99 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

24 European Commission, above n. 2, at 10.

25 *Ibid.*

26 *Ibid.*

27 www.europol.europa.eu/crime-areas-and-statistics/crime-areas/economic-crime/mtic-missing-trader-intra-community-fraud (last visited 6 July 2022).

28 Ashmans Solicitors. (2020). *What Is MTIC-VAT Fraud?*. www.ashmanssolicitors.com/articles/what-is-mtic-vat-fraud/ (last visited 6 July 2022).

29 European Parliament Study on the Possible Solutions for Missing Trader Intra-Community Fraud, Policy Department for Budgetary Affairs Directorate-General for Internal Policies PE 731.902 (June 2022), at 14.

30 Art. 32 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

31 Art. 138 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

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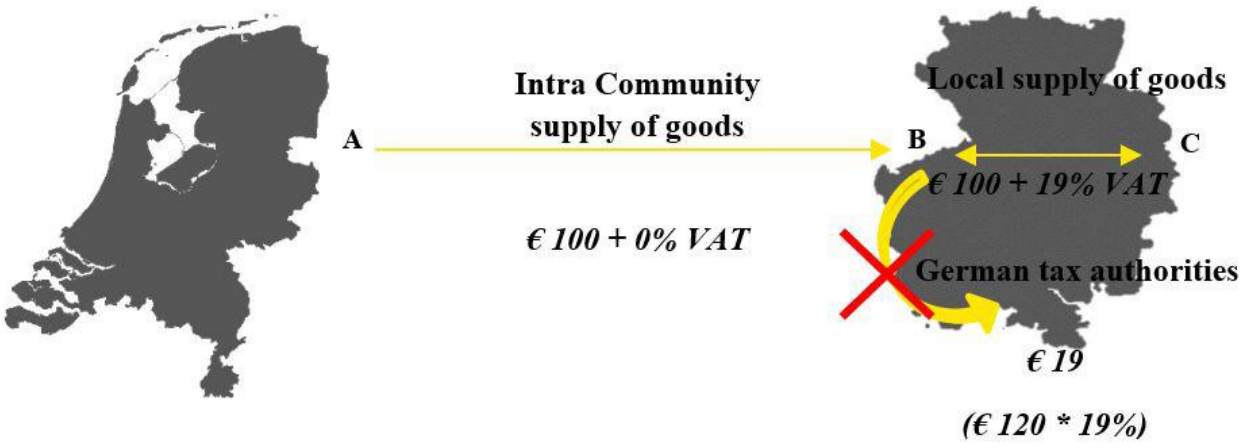
Figure 1 Example of cross-border abuse of VAT rules



acquired).[32] These provisions are abused by fraudsters to commit VAT fraud as illustrated with the following example:[33]

- Company A (established in the Netherlands) sells goods to Company B (established in Germany);
- Company B does not pay VAT to Company A (the transaction is VAT zero rated);
- Company B sells the goods (within Germany) to Company C;
- Company C pays VAT on the goods to Company B.

The above example can be illustrated as follows: see Figure 1.

MTIC fraud occurs when Company B in this example acquires goods with 0% VAT applied. Company B sells the goods within the country it is established in, receiving for example 19% VAT from its customer. Company B disappears, pocketing the VAT owed to the German tax authorities. The VAT exemption on the Intra-Community supply from country A to country B facilitates this type of fraud because there is no irrecoverable VAT burden for the missing trader.

Carousel fraud takes MTIC fraud to the next level. It is a more sophisticated form of VAT fraud. The same goods are sold by a group of companies. The goods return to the initial company selling the goods over and over. An example:[34]

- Company A (established in the Netherlands) sells goods to Company B (established in Germany);
- Company B does not pay VAT to Company A (the transaction is VAT zero rated);
- Company B sells the goods (within Germany) to Company C;
- Company C pays VAT on the goods to Company B;
- Company B disappears, pocketing the VAT;
- Company C deducts the VAT charged by Company B;
- Company C sells the goods back to Company A (the transaction is zero rated).

The German tax authorities now lose on VAT revenues. Company B did not remit the VAT on the sale to Company C while the latter requests a VAT refund for the VAT paid to Company B. The circulation of goods is often repeated within the chain which then leads to multiple losses of revenue. Carousel fraud becomes increasingly more difficult to detect when more companies and more EU Member States are involved in the fraud.

3.3 Challenges in Addressing VAT Fraud

When addressing VAT fraud, there are three important phases:

- Setting up a company;
- Operating a company;
- Termination of a company.

The ability of traders to go missing generally depends on how difficult it is for fraudsters to set up a company. There are some seemingly obvious 'red flags', such as the ability to start a company without a normal structure (e.g. shareholders). Some EU Member States apply strict rules, for example that companies should submit a request for registration in person at the national tax authorities. This, however, is not the case in all Member States.

A registered company is also not necessarily a company with good intentions. Especially, when companies are easy to set up, it is harder for EU Member States to detect fraudulent intentions. The same applies to the phase of operation of a company. Even with MTIC, fraudsters have some time to commit fraud. Assume that a company should prepare and submit monthly VAT returns. Before actually doing so, the company could have been terminated and the VAT could have been pocketed already. While companies are able to register, operate and terminate with relative ease, Member States usually lack real-time data allowing for early detection of irregularities.[35]

32 Art. 169(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

33 Derived from the European Parliament Study, above n. 29, at 14.

34 *Ibid.*, at 15.

35 *Ibid.*, at 22.

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3.4 Measures to Address VAT Fraud

VAT fraud, specifically MTIC fraud, could be tackled in different ways. Some of these are:[36]

- The VAT Information Exchange System;
- Transaction Network Analysis;
- A reverse charge principle.

VIES provides for the possibility to check whether a customer's VAT number is valid. Transaction Network Analysis gathers and compares transactional data by automatic data mining. With more Member States using this tool, it is now possible to cross-check information on an EU level. Finally, the reverse charge mechanism may be applied by Member States in specific situations, mainly high value and high volume sectors particularly vulnerable to MTIC (e.g. mobile phones, PCs and laptops). Under the reverse charge mechanism, the supplier no longer collects VAT. The customer is liable to report and remit VAT.

Other options to address VAT fraud are:[37]

- Delaying VAT refunds;
- Abolishing VAT zero rates;
- 'Gold card' schemes;
- Chain liability;
- Guarantees.

The VAT system is designed in such a way that suppliers can recover VAT before even making a taxable supply. It is the result of the concept that VAT should not burden a business. While this part of the VAT system is prone to fraud, it is also key for capital intensive businesses needing fast VAT refunds to perform their activities. Zero rates have proven to be a risk as well (see before). Abolishing them, however, undermines the fundamental principle of VAT that it is destination based (where the actual consumption takes place). Instead of punishing dependable companies with delayed VAT refunds, there is also the option of reward. For companies in low risk sectors or with a clean record there is hardly a reason to impose far-reaching measures. Rewarding the trustworthy companies is also known as the gold card scheme. The Netherlands, for example, is famous for a reward which is considered extreme in other countries: the Dutch tax authorities enter into covenants with businesses. Companies promise to proactively disclose tax risks, be compliant and discuss tax issues upfront and the tax authorities promise to respond quickly to any inquiries.[38] Chain liability entails that parties within a supply chain are jointly and severally liable for VAT remittance.[39] Should customers know or have reasonable grounds to suspect that payable VAT would remain unpaid, they are liable for that VAT debt. Finally, there are guarantees where trusted or certified service providers handle customers' VAT returns. These are only some of the measures that have the potential to prevent VAT fraud.

36 *Ibid.*, at 24.
37 WalPole, above n. 18, para. 3.
38 *Ibid.*, para. 3.5.
39 *Ibid.*, para. 3.6.

4 The EU Information Exchange Mechanism

Up until now, this contribution examined the need for measures to tackle tax evasion and avoidance as well as the possibilities to address VAT fraud. Several ways to prevent VAT fraud have been presented. These measures mainly focus on the responsibilities of taxable persons (e.g. to validate VAT numbers of customers) or on the VAT system (e.g. the reverse charge mechanism). In this section we examine how information exchange between Member States further contributes to better fraud prevention and a more efficient approach to occurring fraudulent activities.

4.1 The Purpose of Mutual Assistance Regulations and Directives

The extensive legislative history regarding information exchange can be explained by the fact that tackling cross-border tax evasion and avoidance was and still is of great importance to the EU. This already follows from the First Report on the application of the common system of VAT (dated 17 May 1977):[40]

> [T]he prevention of tax evasion and avoidance remains primarily the responsibility of the national authorities. However, this does not mean that the Community institutions are indifferent to a question which, in view of budgetary and economic difficulties, is of major importance today. Moreover, Article 35 of the Sixth Directive allows the Community to expand its role in this area, since it provides for the adoption of further Directives to develop the common system of value added tax.[41]

EU Member States should take the necessary measures to prevent tax evasion and avoidance. That the EU is involved in the prevention of tax evasion and avoidance can be understood considering that a percentage of the EU's own resources comes from VAT collections by Member States.[42] It should therefore not be surprising that mutual assistance is heavily supported by the EU as the solution to tax evasion and avoidance resulting in a loss of tax revenues. This loss of revenue is mentioned in every legislative instrument discussed in section 2.2. As time progressed, the importance of tackling the problems that tax evasion and avoidance pose is more and more emphasised. It is now a joint battle, fought side by side by the EU and its Member States. It should therefore be clear that the very purpose of extensive cooperation by way of information exchange is to prevent tax evasion and tax avoidance and combat any occurring fraudulent activities which undermine the operation of

40 First Report from the Commission to the Council on the Application of the common system of VAT submitted in accordance with Art. 34 of the Sixth Council Directive (77/388/EEC) of 17 May 1977.
41 For more information: Terra and Kajus, above n. 9, para. 1.2.
42 Council Regulation 1553/89/EEC of 29 May 1989 on the definitive uniform arrangements for the collection of own resources accruing from value added tax.

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the internal market. The latter is exactly what happened. The preamble of Council Regulation 2018/1541/EU contains some particularly interesting considerations which can be summarised as follows:

- The current VAT system is based on transitional arrangements, which have become outdated and prone to fraud.
- Carrying out an administrative enquiry is often necessary to combat VAT fraud. The Member State where the taxable person is established should, in principle, undertake the enquiry unless it is able to provide the information requested.
- Forwarding information without a prior request to the competent authorities of other Member States should be as simple and effective as possible. Competent authorities should be able to forward information by secure means they deem more appropriate.
- The VAT exemption for the import of goods is often abused. Customs officials, when checking whether the requirements for applying the exemption are met, should have access to the registry of VAT identification numbers and the recapitulative statements.

These are only five of the considerations included in the most recent Regulation. It could therefore be considered the most detailed step-by-step masterplan of the European Council to tackle tax evasion and avoidance. The European Parliament published a report on the proposal for Council Regulation 2018/1541/EU. The explanatory statement, amongst others, mentions that this Regulation *should strike the right balance between requests for and analysing of information on the one hand and data protection and privacy on the other*.[43] The Regulation should also *strike a better balance between interests and responsibilities of the requesting and requested authorities*.[44]

4.2 The Information Exchange Concept

One of the first requirements for EU Member States according to Article 4(1) of Regulation 904/2010/EU is to designate a central liaison office which is responsible for maintaining contact with other Member States. Requests related to matters outside a Member State should be forwarded to the competent Member State according to Article 6. The information that Member States communicate may help the correct assessment of VAT.[45] Information should be communicated by electronic means following Article 51.

A very interesting and (at least in wording) drastic provision is included in Article 16. Member States that have provided information may request for feedback on the information. Should this situation arise, the requesting Member State should in principle *without prejudice to the rules on tax secrecy and data protection applicable in its Member State* send this feedback.

Member States should electronically store information, such as data on the identity, activity, legal form and address of persons to whom it has issued a VAT number according to Article 17. Based on Article 21, the following details should be made available:

- VAT identification numbers issued by the Member State receiving the information;
- Total value of Intra-Community supplies and services.

Member States should have information available to link sales to taxable persons via their VAT numbers. The data should be complete and accurate according to Article 22. This also means that VAT numbers should return invalid in VIES when taxable persons cease their economic activities (or when tax authorities may assume this is the case). When no VAT returns are submitted, tax authorities may assume that economic activities have been ceased. The taxable person has the right to prove the existence of its economic activity.

Articles 25 to 27 govern the request for administrative notification. Upon request, the requested authorities shall inform the addressee of all instruments and decisions which concern the application of VAT legislation in the jurisdiction of the requesting authority. These seemingly ordinary provisions, in my opinion, entail that the addressee of decision is only informed if this is requested by the requesting Member State. This instrument is least appreciated by the Member States as it has a limited impact on VAT assessment.[46]

Administrative enquiries aid the prevention and discovery of fraud. To further strengthen the possibilities of investigating cross-border supplies, the instrument of joint audits is introduced. Officials from at least two tax administrations form an audit team. This approach avoids duplication of work and reduces the administrative burdens for tax authorities. The same applies to businesses, which face only one (joint) audit instead of several audits by different officials. The present instrument is included in Article 28.

The information collected by Member States is, according to Article 55, covered by the obligation of official secrecy. The collected information may be used for the assessment of other levies, duties and taxes which are covered by Council Directive 2008/55/EC.[47]

43 European Parliament Report on the amended proposal for a Council regulation amending Regulation 904/2010/EU as regards measures to strengthen administrative cooperation in the field of value-added tax, (COM(2017)0706 – C8-0441/2017 – 2017/0248(CNS)), at 28.

44 *Ibid.*

45 B.J.M. Terra, H.J. Kajus, *Administrative Cooperation and Combating Fraud in the Field of VAT: 1 Council Regulation (EU) No. 904/2010 on administrative co-operation and combating fraud in the field of VAT (Recast)*, European VAT Directives Commentary (2019), para. 1.5.2.

46 Commission Staff Working Document Impact Assessment Accompanying the document Amended proposal for a Council Regulation Amending Regulation (EU) No 904/2010 as regards measures to strengthen administrative cooperation in the field of value added tax.

47 Art. 2 of Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures.

4.3 Upon Request or without Prior Request

Based on Article 7, information should be provided to a requesting authority upon its request. Article 9 imperatively states that the requested authority *shall* communicate pertinent information it obtains or possesses (e.g. the results of administrative enquiries). Communication should take place between one and three months, depending on whether the information is already in the possession of the requested authority according to Article 10.

Member States shall also exchange information without prior request. This is to increase the possibility of detecting and preventing fraud. Automatic exchange should at least take place according to Article 13:

- When the Member State of origin possesses information on which the Member State of origin depends for appropriate taxation (e.g. the Intra-Community supply of cars);
- When there is a suspicion of fraud in another Member State (e.g. discrepancies between Intra-Community supplies reported by the suppliers and acquisitions by the customers);
- When there is a risk of tax loss in another Member State (e.g. VAT refunds to taxable persons not established in the other Member State).

Within the category of information exchange without prior request, a further distinction can be made: automatic (Article 14) or spontaneous (Article 15) exchange of information. Automatic information exchange especially happens in order to help Member States dealing with non-established taxable persons. Information should be spontaneously exchanged in situations not covered by Article 14.

4.4 Information Exemptions

Requested authorities shall provide the requested information, under the conditions set out in Article 54(1):

- The number and nature of requests do not impose a disproportionate administrative burden on the requested authority;
- The requesting authority has exhausted the usual sources of information, unless this is not possible considering the result to be achieved.

There are also several grounds for refusal of providing requested information to requesting Member States:

- Article 51(2) states that there is no obligation for requested Member States to share information which it is prohibited to collect for its own purposes. Member States that are able to collect such information are not bound to share this information with Member States not authorised to do so.
- Article 51(3) includes a provision of similar meaning, stating that requested Member States may refuse information provision if the requesting Member State is, for legal reasons, unable to provide similar information. If this is the case, the Commission should be informed of the ground for refusal.
- Article 51(4) governs the refusal of information that would lead to disclosure of commercial, industrial or professional secret information. Disclosure contrary to public policy may also be refused.

Refusal of information is not allowed on the sole ground that the information is held by a bank or financial institution according to Article 51(5). Moreover, the requesting Member State should always be informed of the grounds of refusal.

5 Legal Protection of Taxable Persons

The taxpayers' interests are, putting it mildly, not considered very important in the European rules regarding information exchange. There are some provisions governing secrecy, as discussed in section 4 of this contribution. Member States can refuse information exchange if secrecy provisions in the requesting Member States offer less protection than in the requested Member State.[48]

5.1 Tax Payers' Interests and the Refusal Grounds

As Schenk-Geers remarks, during the preparation of Council Directive 77/799 the European Parliament adopted a Resolution.[49] This Resolution proposed legal protection consisting of the right of appeal for taxpayers against a judgement of Member States on the confidential nature of tax data.[50] This right of appeal should enable taxpayers to defend themselves against suspected unlawful use of information. No action was taken on the advice. I agree with Schenk-Geers that this appears illogical considering that states must be transparent in their actions and weigh the interests of its citizens in a reasonable way.[51] There is certainly no 'level playing field' in this regard. The refusal grounds laid down in Article 51 of Regulation 904/2010/EU do not mention weighing the interests of tax payers at all.

5.2 Notification Procedure

The notification procedure laid down in Article 25 of Regulation 904/2010/EU appears to be to only instruct requested authorities to inform the addressees of instruments if the requesting Member State asks to do so. Reciprocity between a state and its citizens is crucial for efficiency of legislation. Willingness of tax payers to cooperate in the exchange of information does not increase when reciprocity is absent.[52] Given that there are rather limited notification procedures in place, Regulation 904/2010/EU does not provide for the right of appeal for tax payers. It becomes clear that the obligation

48 T. Schenk-Geers, *International Exchange of Information and the Protection of Taxpayers*, EUCOTAX Series on European Taxation volume 24, at 206.
49 *Ibid.*
50 Advice of the European Parliament, OJEC of 13 Dec. 1976, nr. C-293/35.
51 Schenk-Geers, above n. 48, at 207.
52 J.L.M. Gribnau, 'General Introduction', in G.T.K. Meussen (eds.), *The Principle of Equality in European Taxation* (1999), p. 23-26.

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to exchange information is mainly aimed at the interests of the Member States. This can, in a way, be explained by the nature and purpose of taxation which is to guarantee the existence and functioning of a state.[53] It should, however, be noted that Member States should always observe fundamental tax payers' rights and balance them with the States' fiscal interests. These fundamental rights should prevent a one-dimensional pursuit of revenue interests by Member States.

5.3 Exhaustion of Own Possibilities

As noted in section 4.3 and governed by Article 54(1), Member States should exhaust their own resources before consulting other Member States. This obligation of effort is, however, limited. If the Member State is *running the risk of jeopardising the achievement of the desired end*, the information can still be requested from another Member State. This provision somewhat follows the principle of proportionality. But Member States are in no way required to account for the reasons why their own resources are insufficient in achieving the desired goal. There, however, is a clear reason for this approach. If prior notification was required, tax payers could warn each other and information may be manipulated or deleted. I again agree with Schenk-Geers that this is a great risk to be considered.[54]

5.4 A Nuanced Approach to Protecting Interests of Tax Payers

It has been established in this section that protection of interests of tax payers is limited in European legal instruments. There are secrecy and (limited) notification provisions in place. There are, however, no means a tax payer may use to defend himself against potential unlawful use of information relating to his legal position.
I do see the shortcomings of the European legislative measures governing cross-border information exchange relating to the position of tax payers. There are very good reasons to develop a system of legal protection for tax payers in this regard. But I do recognise the importance of enabling Member States to collect and share as much information as possible. It should not be forgotten that Member States have a significant disadvantage in battling tax evasion and avoidance. They greatly depend on data that is to be provided by tax payers via tax reporting (or gathered in a tax audit). It is inherent to this process that it does not take place in real time. This is a strong argument in favour of the proportionality of the design of the system of information exchange as it has been developed until now. Steps towards new legislation in the field of real-time reporting have been taken by the European Commission.[55] The report that was published recently investigates amongst others the impact of Digital Reporting Requirements, which covers for example mandatory e-invoicing. These measures should make tax authorities less dependent on tax payers providing information.

53 Schenk-Geers, above n. 48, at 208.
54 *Ibid.*, at 209.
55 European Commission, above n. 2.

It should be noted that the present legal protection only concerns the exchange of information. Mutual assistance in information exchange is not an aim in itself. It is ultimately aimed at verifying that tax revenues are not lost due to fraudulent activities. Once irregularities are discovered, information exchange in itself will not lead to correcting (potential) tax revenue loss. Competent Member States should act on the information to secure these revenues. This means, in the field of VAT, that Member States should issue additional assessments, tax penalties and where necessary file criminal charges. In each and every one of these instances, tax payers have full rights to defend themselves.
I do recognise that this does not take away the concerns that data is unlawfully disclosed or used by tax authorities. In that case, there is nothing a tax payer can do about that, which is at least at odds with the principle of reciprocity and that tax administrations should operate in a transparent manner. But it could also be viewed as the 'least bad' solution to battling tax evasion and avoidance. That is, until tax authorities are fully able to collect real-time data to analyse. Should that happen, I expect that lack of protection of tax payers' interests is no longer proportional. With recent developments in the field of automation and e-solutions, tax authorities should be able to collect and share information in a more efficient manner in the foreseeable future. With their informational disadvantages likely subsiding (or at least lessening), the legal position of tax payers should, in my view, be reconsidered. This is in accordance with the principle of proportionality. Maybe it is not possible to fully implement an appeal system, without losing momentum to tackle tax evasion and tax avoidance. That does not necessarily entail that the information exchange system should remain unchanged. The system and its means should evolve with the technological developments, like it has done since its introduction.

6 Conclusion

In this contribution, I have examined the concept of information exchange in the field of indirect taxes. There is a long legislative history discussed in this regard. The need for cooperating tax authorities was already pressing in the 1970s. The means necessary to effectively monitor and exchange information apparently needed to be amended to keep up with the ever-increasing scale of EU trade. The clear purpose of all this legislation is to approach a financially significant problem: tax evasion and tax avoidance. This contribution focuses on types of fraud occurring in the field of indirect taxes, specifically VAT. The existence of MTIC was examined in depth. MTIC shows that fraudsters rely on the typical lack of information suffered by tax authorities to perform their fraudulent activities. When Member States can cross-check information provided by the tax payers concerned in these transactions, it is already too late. VAT is at that

stage already pocketed, leaving the European Union with a VAT gap of billions of Euros.

To combat these types of fraud, several approaches have been discussed in this contribution. From rewarding reliable tax payers in sectors less prone to fraud to eliminating loss of VAT revenue by introduction of the reverse charge mechanism. In a different way but like VAT fraud, the most far-reaching forms of these approaches (also) undermine the very design of the VAT system. Exchange of information is, however, basically compatible with the current design of the VAT system. Information exchange enables the competent tax authorities to gather information, which can be cross-checked with the information available from other Member States.

One of the critical disadvantages tax authorities face is that they lack the right information at the right time. When exchanging information, it is critical that all EU Member States are actively engaged. Therefore, Member States are required to exchange information when:

- Other Member States depend on this information to issue correct assessments;
- When there is a suspicion of fraud in another Member State;
- When there is a risk of tax loss in another Member State.

Member States should, however, not only exchange information upon request by other Member States. They should also spontaneously exchange information to maximise chances of picking up indications of VAT fraud. A greater effort is required from Member States in this regard as they should not only monitor their own tax revenues. They should also gather information, detect fraudulent activities and communicate crucial information to the relevant tax authorities. Unless this process is very efficient, information exchange likely cannot keep up with the rapid practices of fraudsters.

With time being of the essence, it is understandable that the process of information exchange is quite straightforward. There are only a few limitations to consider for a Member State when providing another Member State with information:

- Member States are not required to share information that is prohibited to be collected in the requesting Member State;
- Member States may refuse to provide information if the requesting Member State is, for legal reasons, unable to provide similar information;
- Member States may refuse disclosure of commercial, industrial or professional secret information. The same applies to disclosure contrary to public policy.

Also, the number and nature of requests should not impose a disproportionate burden on the requested Member State. All resources the requesting Member State *could have used*, should be used. Broadly formulated obligations and limited grounds for refusal should lead to efficient information exchange.

The legal position of subjects of information exchange, the tax payers, are hardly mentioned in the legislation governing information exchange. This is understandable from the position of tax authorities, given their information disadvantage. But with limited notification procedures and no objection grounds (or a system of appeal) for tax payers, the question rises whether their interests are sufficiently protected. The risk of wrongful use of gathered information by tax authorities without tax payers being able to object is realistic. Apparently, there have not been better methods for the EU to fight tax evasion and tax fraud without undermining the very system these methods aim to protect. It could be argued that the principle of proportionality is met when tax authorities face significant disadvantages gathering relevant information. Moreover, the national systems should provide for adequate appeal procedures when assessing the tax debt. Nevertheless, it is important to note that information exchange has evolved over the years. The developments have enabled Member States to collect and share information in a more efficient and effective way. The same should apply to the position of tax payers, meaning that if tax authorities are better able to collect relevant information, the position of tax payers should be strengthened. Power should be in balance with countervailing power. How future information exchange developments take shape remains to be seen. That the future of information exchange will be interesting is for certain.

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