Exchange of Information and Administrative Cooperation between Countries in a Globalised and Digital Economy

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Because of globalisation and digitalisation, borders are blurring. Activities can easily take place cross-border, and this has tax implications. Not only are other rules needed to determine who is entitled to which tax revenue – reflected, for instance, in changes to VAT rules for digital services (2015) and for distance sales (2021)[1] and within corporate income tax via the global tax deal[2] and developments at the EU level regarding pillar 1,[3] which aims at taxation in the sales jurisdiction – but countries are also increasingly facing challenges in terms of collection of tax and enforcement of taxation. To meet these challenges, administrative cooperation between countries, including EU Member States, is vital. Verification, monitoring and administrative cooperation has also been defined as one of the actions in the 2020 action plan for fair and simple taxation supporting the recovery strategy.[4] Under the Fiscalis programme, budget is available to support tax authorities and taxation in order to enhance the functioning of the internal market, to foster the competitiveness and fair competition in the EU, to protect the financial and economic interests of the Union and its Member States, including protecting those interests from tax fraud, tax evasion and tax avoidance, and to improve tax collection.[5]

Various tools are available for administrative cooperation, which can be distinguished in general instruments and instruments for a specific tax or specific taxes. One trend here is that information collected under an instrument for a specific tax is also used for another tax and is shared with different authorities. It should be noted that this is only allowed if these instruments explicitly provide for it. For example, under DAC 7[6] information is collected from platforms about those platforms, platform vendors and their transactions that can also be used for VAT. VAT information is also shared with customs authorities to deal with fraudulent use of customs procedures 42 and 63 (Art. 143 (2) VAT Directive). Customs authorities have access to the VIES system to check the validity of VAT identification numbers and the recapitulative statements.[7] In this editorial an overview is provided of instruments and the current state of play. The instruments themselves are addressed in the articles of this special issue more extensively where relevant.

1 Instruments for Exchange of Information and Administrative Cooperation – Global Level

Both at a global and at the EU level, agreements for exchange of information and administrative cooperation are in place. In the field of international taxation of (corporate) income, countries heavily rely on tax treaties. Organisation for Economic Co-operation and Development (OECD) members typically use the OECD Model Convention on Income and Capital[8] as a basis for concluding tax treaties on income and capital taxation.[9] Article 26 of this model convention provides for exchange of information foreseeably relevant for carrying out the provisions of the convention. The contracting states can also exchange information based on this provision for the enforcement of domestic laws concerning taxes of every kind and description imposed on behalf of

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1 The so-called e-commerce package: Council Directive (EU) 2017/2455, Council Regulation (EU) 2017/2454, Council Implementing Regulation (EU) 2017/2459, Council Directive (EU) 2019/1995, Council Implementing Regulation (EU) 2019/2026, Implementing Regulation (EU) 2020/194.

2 Global Tax Deal, https://taxfoundation.org/oecd-global-tax-deal/, last consulted on 14 January 2023.

3 OECD, *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project* (2020), https://doi.org/10.1787/beba0634-en.

4 Communication from the Commission to the European Parliament and the Council: An Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy, COM (2020), 312 final, pp. 11-13.

5 Regulation (EU) 2021/847 of the European Parliament and of the Council of 20 May 2021 establishing the 'Fiscalis' programme for cooperation in the field of taxation and repealing Regulation (EU) No 1286/2013 PE/35/2021/INIT, OJ L 188, 28 May 2021, pp. 1-17.

6 Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, OJ L 104, 25 March 2021, pp. 1-26.

7 Art. 21 (1a) of Regulation 904/2010 on administrative cooperation and combating fraud in the field of value added tax.

8 The most recent version is the 2017 edition: OECD, *Model Tax Convention on Income and on Capita: Condensed Version 2017* (2017). http://dx.doi.org/10.1787/mtc_cond-2017-en.

9 Another model is the UN Model Taxation Convention.

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the contracting states or their political subdivisions or local authorities insofar as the taxation thereunder is not contrary to the Convention. The Convention on mutual administrative assistance in tax matters[10] also provides a regulatory framework for administrative cooperation such as exchange of information, simultaneous audits and presence of foreign tax officials during audits. The convention pursuant to Article 2 applies to (i) taxes on income or profits, taxes on capital gains (imposed separately from the taxes on income and profit) and taxes on net wealth, (ii) social security contributions, estate, inheritance or gift taxes, taxes on immovable property, general consumption taxes, such as GST or VAT, specific taxes on goods and service, such as excises, taxes on the use or ownership of motor vehicles or other movable property and any other taxes. Customs duties are excluded from the scope of the convention. Article 30 (1) (a) of the convention stipulates that contracting parties can abstain from providing assistance in relation to taxes mentioned in category (ii). On 21 December 2022, 146 countries signed this convention.[11] Countries may also individually engage in tax information exchange agreements, for example based on the Model Agreement of Exchange of Information on Tax Matters.[12] The model agreement contains provisions on the exchange of information on request as well as STEs (simultaneous tax examinations) with active or passive presence. The model protocol also contains provisions on automatic and spontaneous exchange of information.[13] At the outset, this model agreement focuses on direct taxes, but it can be applied to indirect taxes as well, according to the provision of Article 3 (2) of the multilateral version of the agreement. Unlike in the Convention, customs duties are not excluded from the agreement.

2 Exchange of Information and Administrative Cooperation – EU Level

On an EU level, Directive 2011/16/EU[14] provides for a legal framework for administrative cooperation. Pursuant to Article 2 (2) of this Directive, VAT, customs duties and excise duties are beyond the scope of this directive. For these taxes different legal instruments at the EU level provide a basis for administrative cooperation (see further on). Directive 2011/16/EU has been amended several times, where the latest trend is transparency and the provision of information to the tax authorities. Under DAC 6,[15] mandatory disclosure of cross-border tax arrangements has been implemented. Under DAC 7,[16] platforms are required to obtain, review and provide information about themselves and platform sellers operating on the platform to the tax authorities. The information can also be used for VAT. Another amendment is expected with the DAC 8 proposal, where information is to be collected and shared about exchange transactions and transfers of reportable cryptocurrencies.[17]

In the field of indirect taxes several Regulations deal with the exchange of information and administrative cooperation between EU Member States: for VAT Regulation 904/2010,[18] for customs duties Regulation 515/97[19] and for excise duties Regulation 389/2012.[20] Indirect taxes such as customs duties, VAT and excise are characterised within the EU by a high degree of harmonisation, where direct taxes are not. Where in the field of direct taxes traditionally tax treaties are concluded – including provisions on exchange of information – the number of agreements with non-EU countries on administrative cooperation and exchange of information is limited. Administrative cooperation in the field of VAT is only arranged by an agreement with Norway[21] and by the EU-UK trade and cooperation agreement.[22] EU Member States therefore rely on the global arrangements referred to previously. The agreement with Norway and the UK are largely similar to Regulation 904/2010. Norway also participates in Eurosfisc. In the field of indirect taxation a similar trend can be discovered where more

10 OECD and Council of Europe, *The Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol* (2011), http://dx.doi.org/10.1787/9789264115606-en.

11 Overview of jurisdictions participating in the convention: www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf. Last consulted on 14 January 2023.

12 OECD, 'Agreement on Exchange of Information on Tax Matters', www.oecd.org/ctp/exchange-of-tax-information/2082215.pdf.

13 OECD, 'Model Protocol for the Purpose of Allowing the Automatic and Spontaneous Exchange of Information under a TIEA', www.oecd.org/ctp/exchange-of-tax-information/Model-Protocol-TIEA.pdf.

14 Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L 64, 11 March 2011, pp. 1-12.

15 Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements ST/7160/2018/INIT, OJ L 139, 5 June 2018, pp. 1-13.

16 Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation ST/12908/2020/INIT, OJ L 104, 25 March 2021, pp. 1-26.

17 Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, Brussels 8 December 2022, COM (2022) 707 final.

18 Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, OJ L 268, 12 October 2010, pp. 1-18.

19 Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, OJ L 82, 22 March 1997, pp. 1-16.

20 Council Regulation (EU) No 389/2012 of 2 May 2012 on administrative cooperation in the field of excise duties and repealing Regulation (EC) No 2073/2004, OJ L 121, 8 May 2012, pp. 1-15.

21 Agreement between the European Union and the Kingdom of Norway on administrative cooperation, combating fraud and recovery of claims in the field of value added tax, Brussels 28 November 2017, 14390/17, FISC 265, N 56, ECOFIN 949, Interinstitutional File 2017/0272 and 2017/0273.

22 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 149, 30 April 2021, pp. 10-2539, Protocol on Administrative Cooperation and Combating Fraud in the Field of Value Added Tax and on Mutual Assistance for the Recovery of Claims Relating to Taxes and Duties.

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information is collected and provided to the tax authorities even in (almost) real time. Since 1 July 2021, platforms need to collect information about platform sellers and their transactions and provide it to tax authorities on request, Article 242a VAT Directive. Under the customs action plan there will be new customs reporting requirements for platforms.[23] As of 1 January 2024, payment service providers will need to collect and provide payment information to provide information to combat e-commerce VAT fraud.[24] Several EU Member States apply SAF-T, real time reporting or e-invoicing next to (or together with)[25] regular VAT returns.[26] Under these digital reporting requirements, more information is collected compared with regular VAT returns and within a shorter period of time or even before a transaction takes place.[27],[28] On 8 December 2022 the European Commission tabled a proposal including a mandatory e-invoicing with a digital reporting requirement system for intra-Community trade. This means that businesses will have to issue an invoice within two working days after the taxable event takes place and subsequently report the transaction within another two working days after the invoice was issued.[29] EU Member States will share this information within one day after having received it with a central system called VIES (VAT Information and Exchange System).[30]

3 Concerns – Taxpayers' Rights, Privacy and Proportionality

The trend of transparency and collecting more and more information from both taxpayers and intermediaries like platforms and financial institutions causes an increase in costs for the private sector. Even though the private sector obtains benefits from the fight against fraud and tax evasion, the proportionality is a concern, last but not least, because of the accumulation of rules. Platforms, in particular, will have to deal with obligations to collect and provide information to tax authorities under the VAT Directive, DAC 7 and, if they arrange payments, under the rules for payment service providers too.[31] In the future they will need to comply with customs obligations as well as obligations under DAC 8 if they deal with cryptocurrencies. At the same time it is unclear what tax authorities will do with the information and how it will be of use.[32] These measures certainly have a deterrent effect,[33] but it is not yet completely clear what part they will play in the compliance risk management strategy of tax authorities. Taxpayer's rights and privacy are other concerns of this trend of transparency. Both Boei and Van Dam and Huiskers-Stoop, Nieuweboer and Breuer address this topic in their respective contributions to this special issue. Van Verseveld also refers to a lack of legal protection of taxpayers and the proportionality thereof. The way legal protection of taxpayers is currently arranged may no longer be proportional if tax authorities have real-time data to analyse. Janssen addresses the improvement of cooperation between EU Member States' authorities. Fragmentation of the framework of international tax cooperation is addressed by Cannas. He pleads for a higher level of international consistency in taxpayer protection standards.

23 Customs Action Plan – Frequently Asked Questions, https://ec.europa.eu/commission/presscorner/detail/pl/qanda_20_1710 (last consulted on 29 November 2022).

24 Council Directive (EU) 2020/284 of 18 February 2020 amending Directive 2006/112/EC as regards introducing certain requirements for payment service providers, OJ L 62, 2 March 2020, pp. 7-12; Council Regulation (EU) 2020/283 of 18 February 2020 amending Regulation (EU) No 904/2010 as regards measures to strengthen administrative cooperation in order to combat VAT fraud, OJ L 62, 2 March 2020, pp. 1-6.

25 In Poland since October 2020 SAF-T VAT ledgers are being combined with the VAT return. The VAT return is included and submitted in one xml file together with the SAF-T VAT ledgers. IBFD, Poland – Value Added Tax Country Tax Guides, section 11.7 (consulted on 15 December 2022).

26 *See*, for example, the situation of Poland: J. Sarnowski and P. Selera, 'Reducing the VAT Gap – Polish Experience and Legislative Measures Introduced in Years 2016-2018', 30(3) *International VAT Monitor* (2018).

27 The latter is being applied by Italy.

28 An overview of EU Member States applying digital reporting requirements can be found in the study commissioned by the European Commission: Economisti Associati et al., 'VAT in the Digital Age. Final Report. Volume 1. Digital Reporting Requirements', March 2022, Annex A, https://op.europa.eu/en/publication-detail/-/publication/818e4799-0967-11ed-b11c-01aa75ed71a1/language-en/format-PDF/source-search.

29 Proposal for a Council Directive amending Directive 2006/112/EC as regards VAT rules for the digital age, Brussels 8 December 2022, COM (2022), 701 final.

30 Proposal for a Council Regulation amending Regulation (EU) No 904/2010 as regards the VAT administrative cooperation arrangements needed for the digital age, Brussels 8 December 2022, COM (2022), 703 final.

31 *See* on the cascading of obligations under Art. 242a VAT Directive and DAC 7: M. Merkx, A. Janssen and M. Leenders, 'Platforms, a Convenient Source of Information Under DAC7 and the VAT Directive: A Proposal for More Alignment and Efficiency', 31(4) *EC Tax Review* 202-218.

32 For example, the Dutch government has stated in the so-called 'uitvoeringstoets' (implementation test) that it is not yet clear whether it will be possible to cross-check the information collected by the payment service providers with the VIES and OSS-information and if so in which way this will be implemented: Implementatie EU Richtlijn PSP (betalingsdienstaanbieders), Dutch Parliament 2022-2023, 36231, nr. 4 (Uitvoeringstoets).

33 There is strong evidence that if people believe they are observed or if information is known they are more likely to comply: OECD, *The Changing Tax Compliance Environment and the Role of Audit* (2017), at 245.