MANUAL

FRANCIS LEFEBVRE

The Council Directive 2011/16/EU in the Global Context of Tax Transparency and Automatic Exchange of Information

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Summary

List of Abbreviations

AEOI	Automatic Exchange of Information
AML	Anti-Money Laundering
APA	Advanced Pricing Arrangement
BEPS	Base Erosion and Profit Shifting
CbC MCAA	Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports
CbCR	Country-by-Country Report
CCA	Competent Authority Agreement
CMAA	OECD/EC Multilateral Convention on Administrative Assistance in Tax Matters
COREPER	Committee of Permanent Representatives
CRS	Common Reporting Standard
DAC	Directive on Administrative Cooperation in the field of taxation
DOTAS	Disclosure of Tax Avoidance Schems (United Kingdom)
DTC	Double Taxation Convention
EATLP	European Association of Tax Law Professors
ECFR	Europan Charter of Fundamental Rights
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ECJ	Court of Justice of the EU
ECOFIN	Economic and Financial Affairs Council
EDPS	European Data Protection Supervisor
EG ACDT	Expert Group on Administrative Cooperation in the filed of Direct Taxation
EGC	General Court of the EU
EOI	Exchange of Information
EOIR	Exchange of Information upon Request
EU	European Union
EUR	Euro
EUSD	EU Savings Directive
FATCA	Foreign Account Tax Compliance Act
FATF	Financial Action Tax Force
FHTP	Forum on Harmful Tax Practices
FIU	Financial Intelligence Unit
G5	Group of five
G20	Group of twenty
GAAR	General Anti-Avoidance Rule
GRDP	General Regulation on Data Protection
HMRC	Her Magesty Revenue & Customs (United Kingdom)
IBFD	International Bureau of Fiscal Documentation
IFA	International Fiscal Association
IGA	Intergovernmental Agreement
IRS	Internal Revenue Service (United States)
JTSIC	Joint International Tax Shelter Information and Collaboration
KYC	Know Your Costumer
MAD	Mutual Assistance Directive
MCAA	Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information
MFN	Most Favoured Nation

MNE	Multinational Enterprise
MoU	Memorandum of Understanding
OCT	Overseas Countries and Territories
OECD	Organisation for Economic Cooperation and Development
OECD CRS/CAA	OECD Model Standard for Automatic Exchange of Financial Account Information
OECD Model Tax Convention	OECD Model Double Taxation Convention on Income and on Capital
OECD Model MDR/CRS	OECD Model Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Opaque Offshore Structures
OJ	Official Journal of the EU
PE	Permanent Establishment
TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of the EU
TIEA	Tax Information Exchange Agreement
TIEA Model	Model Agreement on Exchange of Information in Tax Matters
TIN	Taxpayer Identification Number.
UN	United Nations
US	United States
USD	United States Dollar
VAT	Value Aggregated Tax

INTRODUCTION[1]

Tax law is one of the areas of law that has experienced **major changes in past years**. Globalization, new technologies and the last economic crisis have increased the political and social pressure on national governments to adopt tax measures to reduce budget deficit and provide greater tax equity.

The traditional principles on which international taxation is based are still considered essentially valid, in spite of the amendments introduced by the OECD BEPS Project. Hence, **administrative cooperation and information exchange are seen as one of the few effective tools to fight against tax avoidance, tax evasion and the so-called aggressive tax planning**. In fact, in a very short period of time, we have gone from almost no cross-border information exchange to the birth and expansion of a new standard of automatic exchange of tax information.

Since 2009, we have witnessed an unprecedented movement towards the improvement of the effectiveness of cross-border exchange of information on request and the enhancement of the automatic exchange of tax information, carried out through changes that broaden the scope of different legal instruments of international mutual assistance. This movement has taken place at international, European and unilateral levels.

However, the characteristics and differentiating elements of EU law allow for relevant progress in administrative cooperation and automatic information exchange in the European context. **Directive 2011/16/EU** on administrative cooperation in the tax field has been amended five times to deepen the tax transparency and the automatic exchange of information. This evolution of the Directive should not be seen as a simple execution, at European level, of international initiatives aimed at combating tax avoidance, tax evasion, aggressive tax planning or harmful tax competition, but rather as the development of an own fiscal strategy by the EU institutions in which, in addition to fight against the aforementioned phenomena, it seeks to guarantee free competition in the internal market.

Thus, the European space is becoming the fastest and most intense application territory of the new international standars of transparency and administrative cooperation. This circumstance can have important legal implications both for national tax administrations and for taxpayers operating transnationally, even beyond European geography.

The purpose of this book is to carry out a critical and practical analysis of Directive 2011/16/EU. It will make possible to compare this multilateral legal instrument of administrative cooperation with those sponsored by other international organizations (G20, OECD) or national authorities (FACTA), showing its strengths and weaknesses. Given the nature of the matter, we will use a legal method to address it, without losing sight of the political and economic implications of the issue. To this end, the work examines different normative groups, with special attention to EU law. However, other sources of international tax law as well as soft law will also be taken into account. Without prejudice to examine the complex interrelation between these sets of rules, this study relies fundamentally on the following esencial sources of knowledge: positive tax harmonization instruments, that is Directive 2011/16/UE, and the Court of Justice of the European Union case law (without prejudice to mention also the case law of the European Court of Human Rights and some national courts).

The estructure of this work is divided into seven chapters:

Chapter 1 studies the background and political and economic context in which the Directive 2011/16/EU was born, and its interrelation with other international instruments of administrative cooperation and information exchange.

Chapter 2 analyses the purpose of the Directive, its legal basis, its scope, the organisation issues and the temporal aspects.

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Chapters 3 and 4 deal with the analysis of the different forms of administrative cooperation established in the Directive, with special attention to the forms and procedures of information exchange (upon request, spontaneous and automatic).

Chapter 5 studies the conditions and limits on administrative cooperation, with particular emphasis on the limits to the use of the information provided.

Given the relevance of the changes introduced in the Directive to enhance tax transparency and the automatic exchange of information, **Chapter 6** is dedicated to the individualized study of each of these sucessive reforms. Currently it is not possible to speak of a single system of automatic exchange of tax information, but of different instruments of unilateral (FACTA), international (OECD) or supranational (EU) origin tending to enable the collection, supply and automatic transmission of data. Therefore, we will highlight the similarities and differences between those instruments, because they can have important practical effects, affecting the scope of the obligations of taxpayers and tax administrations.

Chapter 7 adresses fundamental rights implications in cross-border exchanges of information. A review of the ECJ case-law (*Sabou, Berlioz, Smaranda Bara, Digital Rights Ireland, Schrems, Tele2, etc.*) appears relevant in this context as it features implications of mutual assistance mechanisms on taxpayers' rights.

CHAPTER 1
THE DIRECTIVE ON ADMINISTRATIVE COOPERATION IN THE FIELD OF TAXATION IN THE GLOBAL CONTEXT

I. Background of administrative cooperation and exchange of information in the EU: Directive 77/799/EEC and its shortcomings

One of the aims of the European Union is to establish an **internal market** that guarantees free movement of goods, people, services and capital. Although fiscal policy is not among the aims and objectives of the EU, Title VII of the Treaty on the Functioning of the European Union (TFEU) provides for tax harmonisation or the approximation of Member States' national legislation to the extent necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.

Since the beginnings of the then so-called European Economic Community, it has been concerned to control tax evasion and tax avoidance across its Member States. These practices not only generate budget losses, but can also give rise to distortions in capital movements and in conditions of competition with adverse effects on the operations of the internal market.

One of the possible measures to combat tax fraud is the cooperation between tax administrations. The exchange of tax information between States allows tax administrations, whose tax control procedures are constrained by national frontiers, to access information that is useful to verify the compliance with tax obligations of taxpayers who make cross-border transactions and so detect possible breaches of the law.

As the internationalisation of economic activities increased, so did cooperation between tax administrations, mainly in the form of bilateral agreements. However, the international dimension of the phenomenon evidenced the inadequacy of these agreements. Thus, the EU institutions considered it necessary **to strengthen this collaboration within the European area, building on a framework of common principles and rules**.[1] This gave rise to Council Directive 77/799/EEC, of 19 December, concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (MAD).[2] **The significance of this Directive lies in having established the ground rules for the administrative cooperation and exchange of information between Member States.**

The MAD originally applied exclusively to direct taxation, but it was soon extended to cover value added tax (VAT),[3] and then other excise duties.[4] However, by creating specific regulatory instruments for the exchange of information on both VAT and excise duties, these taxes once more fell outside the scope of the Directive,[5] although insurance premiums were then included.[6]

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1 SCHILCHER, M./SPIES, K., "The Directives on Mutual Assistance in the Assessment and the Recovery of Tax Claims in the Field of Direct Taxation", in *Introducion to European Tax Law on Direct Taxation*, Linde, 3rd Edition, Wien, 2012, p. 2010.
2 OJ L 336, 27.12.1977, p. 15 y ss.
3 Council Directive 79/1070/EEC of 6 December 1979 (OJ L 331, 27.12.1979).
4 Council Directive 92/12/EEC of 25 February 1992 (OJ L 76, 23.03.1992).
5 Council Regulation 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (OJ L 268, 12.10.2010) modified by Council Regulation 2017/2454/EU of 5 December (OJ L 348, 29.12.2017); and Council Regulation 389/2012 of 2 May on administrative cooperation in the field of excise duty (OJ L 121, 08.05.2012).
6 Council Directive 2003/93/EC of 7 October 2003 (OJ L 264, 15.10.2003); and Council Directive 2004/106/EC of 16 November 2004 (OJ L 359, 04.12.2004).

As well as changes to its objective scope of application, the MAD was also subject to **several amendments** designed to improve, extend and modernise administrative cooperation and exchange of information between Member States.[7]

Three decades after its coming into effect and despite the amendments made to the MAD, the Member States and EU institutions agreed that it no longer provided a satisfactory response to existing problems in the field of administrative cooperation.[8] The MAD and its subsequent amendments were conceived in a context in which the demands of the internal market were very different to those in the present, since in 1977, free movement had not been achieved and integration was still limited. However, the advent of globalization has originated an enormous increase in the mobility of taxpayers, the number of cross-border transactions and the internationalisation of financial instruments, which has made it essential to strengthen mutual assistance between Member States with regard to taxation, since individual States have serious difficulties to correctly assess taxes and adequately respond to new forms of tax avoidance and tax evasion.[9]

The **MAD had substantial weaknesses** which explained the Member States' poor use of this instrument and impeded a response to the new challenges:[10]

- In contrast to other legal instruments that facilitated the exchange of information (Double Tax Conventions, Information Exchange Agreements, the OECD/Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters), the MAD had not been adapted to the current economic and legal reality, which rendered it an ineffective tool compared to others which enabled greater exchange of information.
- The existence of various national and EU legislative provisions regarding confidentiality (protection of personal data, commercial and industrial secrets, bank secret) prevented or slowed down the exchange of information.
- The ineffectiveness of the MAD in promptly preventing and combatting tax fraud was a result of factors such as the absence of deadlines for responses to information requests, limitations on the use of the information by the requesting State for purposes other than those regarding taxation or on transfer of the information to a third Member State, the lack of clarity regarding the cases in which a Member State could refuse to provide information, the scant automatic and spontaneous exchange of information, the vagueness or inexistence of other forms of administrative cooperation (presence of officials, simultaneous controls).
- The ineffectiveness of the MAD could also be explained by an excessively centralised vision of the relations between the competent authorities of the different Member States, language problems, the lack of human and material resources and, broadly speaking, insufficient understanding and lack of awareness of the procedures of administrative cooperation and exchange of information among the competent officials of some Member States. In short, a lack of "Community administrative culture" as regards the exchange of information and collaboration between tax administrations.

Once the principal drawbacks of the MAD had been defined, a recommendation was made to eliminate the existing legal obstacles at both EU and national level, to enable faster and more effective administrative cooperation between Member States.[11] Specifically, it was proposed to study the introduction of exceptions to the different

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7 Council Directive 2004/56/EC of 21 April 2004 (OJ L 127, 29.04.2004). Also Council Directive 2006/98/EC of 20 November 2006 (OJ L 363, 20.12.2006).

8 See SCHWARZ, J. S., "Intra-Europe Exchange of Direct Tax Information: The Directive on Mutual Assistance 25 Years On", *The EC Tax Journal*, vol. 6, nº 1, 2002, pp. 75-76.

9 ADONNINO, P., "Los scambio di informazioni tra le amministrazioni finanziarie", *Diritto e Pratica Tributaria*, nº 4, 2008, p. 705.

10 On 22 May 2000, the *ad hoc* Working Party on Tax Fraud set up by the Committee of Permanent Representatives (COREPER) presented a report noting the main weaknesses of the Directive 77/799 (Council Document 8668/00 FISC 67 CRIMORG 83). The European Commission also highlighted different weaknesses of this Directive in two communications. First, the Communication on Preventing and Combating Corporate and Financial Malpractice [COM (2004) 611 final]. Second, the Comunication concerning the need to develop a co-ordinated strategy to improve the fight against fiscal fraud [COM (2006) 254 final].

11 Council's Document nº 8668/00 FISC 67 CRIMORG 83, p. 16.

provisions on confidentiality, to establish the shortest possible deadlines within which to respond to information requests, to clarify the ambiguities regarding the requesting State's preservation of the secrecy of the information, and to study the limitations on the third-party use of information. The Commission also highlighted the need to review the limits to information exchange, improve the regulation of the presence of officials of other Member States during on-the-spot-checks, strengthen the automatic exchange of information following the example of the Savings Directive,[12] and to take account of technological improvements to "design standard forms and computer formats for the types of exchanges of information and collaboration envisaged under the Directive" and also to provide Member States with comments, handbooks, guidelines, etc.[13]

In February 2009, the European Commission presented a Proposal for a Council Directive on administrative cooperation in the field of taxation, with the aim of giving Member States powers to cooperate effectively at international level, so as to overcome the negative impacts of globalization on the internal market. The final adoption of this proposal was delayed for two years due to political reservations in the Council concerning the automatic exchange of information.[14] Council Directive 2011/16/EU on administrative cooperation in the field of taxation (DAC) was finally approved on 15 February 2011, repealing Directive 77/799/EEC with effect from 1 January 2013.[15] Thus, the new European model for mutual administrative assistance was established, the first cornerstone of which was Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes.[16]

II. The global economic and political context of the DAC

The reform of the EU framework for administrative cooperation and the exchange of information necessarily took into account the **international context**, and especially, the work undertaken by the OECD in this regard.[17] Many of the new international trends on the exchange of tax information triggered by the work of the OECD had not been included in the MAD or its subsequent amendments. Hence, it is necessary to examine the changes taking place in the field of international exchange of tax information at the time Directive 2011/16/EU was approved.

The work of the OECD on the exchange of information is closely related to the international organisation's policy on **harmful tax competition**, which grew from "*Harmful Tax Competition. An Emerging Global Issue*", a report published by the Committee on Fiscal Affairs in 1998. This report established the criteria to identify harmful tax regimes, whether they be tax havens or specific tax regimes of OECD member countries. These identifying elements included lack of transparency and effective exchange of information. The report also recommended the creation of a *Forum on Harmful Tax Practices* (FHTP) to ensure the continuity of the project, which would be set out in different progress reports.

The 2000 Progress Report[18] attempted to identify and eliminate harmful tax practices. It initially identified 47 jurisdictions as potential tax havens, albeit concluding that only 41 could be considered as such, following the criteria established in the 1998 report. After various countries agreed to enact the amendments required to eliminate the harmful features of their tax regimes, the list of tax havens was finally reduced to 35 jurisdictions.

In 2001, the OECD significantly shifted the focus of their work on harmful tax competition to target transparency and the exchange of information as decisive factors in

12 Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (OJ L 157, 26.06.2003), repealed by Council Directive 2015/2060/EU of 10 November 2015 (OJ L 301, 18.11.2015).
13 COM (2006) 254 final, pp. 4, 7 y 8.
14 GABERT, I., "Council Directive 2011/16/EU on Administrative Cooperation in the Field of Taxation", *European Taxation*, Vol. 51, nº 8, 2011, p. 342.
15 OJ L 64, 11.03.2011.
16 OJ L 84, 31.03.2010.
17 COM (2006) 254 final, p. 4.
18 OECD, *Towards Global Tax Cooperation. Progress in Identifying and Eliminating Harmful Tax Practices*, OECD Publishing, Paris, 2000.

identifying tax havens. Consequently, the 2001 Progress Report[19] addressed the appropriate scope of the commitments to transparency and effective exchange of information which would permit territories to be considered as "committed jurisdictions". Among other things, it established that the commitment should ensure a sufficient and relevant level of information in response to a request for information, the implementation of measures to ensure that the information thus obtained should only be used for the purposes for which it was acquired, and lifting bank secrecy as an obstacle to the exchange of information.

On 18 April 2002, the OECD also published a ***Model Agreement on Exchange of Information on Tax Matters*** to serve as a model for bilateral or multilateral agreements on exchange of information on tax matters. The model was developed by the *OECD Global Forum Working Group of Transparency and Exchange of Information*, consisting of representatives from various OECD Member countries as well as delegates from non-Member countries and jurisdictions considered to be low tax areas. Although the Model is a soft law instrument consisting of articles and commentaries, its strength lies in presenting the minimum requirements of transparency and exchange of information to be enacted by the committed jurisdictions to avoid being the object of the defensive measures from OECD Member countries provided for in the 2001 Report. The Model thus triggered the signing of a substantial number of ***Tax Information Exchange Agreements*** (TIEAs). Some of the provisions of Directive 2011/16/EU have their origin in this Model Agreement.

Following the 2002 Model Agreement (hereinafter OECD TIEA Model), the OECD focused on promoting worldwide exchange of tax information, particularly by the committed jurisdictions. This materialised in the 2004[20] and 2006[21] Progress Reports. In this sense, the Global Forum defined the **international standards in matters of exchange of information**, that is, the minimum conditions of transparency to be implemented by States to achieve a level playing field in tax matters. This common minimum standard was based on three pillars: (i) generalised provision of tax information when requested by any State, without the possibility of invoking bank secrecy or the requested State's lack of interest in providing the information; (ii) the exchange of all foreseeably relevant information for the correct application of the requesting State's tax system; and (iii) the confidentiality of the information provided, in order to protect the rights and interests of the affected taxpayers. It is also worth noting the OECD *Committee on Fiscal Affairs'* adoption on 23 January 2006 of a Manual for the implementation of regulatory provisions on the exchange of tax information,[22] based on the need to simplify, clarify and strengthen the effectiveness of exchange of information.

The OECD's concern to reinforce the exchange of information between tax administrations is reflected in **Article 26 of the OECD Model Double Taxation Convenion on on Income and on Capital** (hereinafter OECD Model Tax Convention), whose scope of application has been broadened in the subsequent versions published in 2000, 2005 and 2012. In 2000, Art. 26(1) was amended to extend the scope of the exchange of information, permitting the exchange of any necessary information on taxes of any kind levied by Contracting States at all levels of government. In 2005, two new paragraphs, 4 and 5, were included to clarify that the requested State is not permitted to decline to supply information solely because it has no domestic interest in such information or because the information is held by a bank or other financial institution. In 2012, Art 26(2) was amended to expressly state that the information received by a Contracting State can be used for purposes other than those strictly regarding tax, when certain conditions are met. Some of the innovations included in Directive 2011/16/EU reflect the amendments made in 2005 to Article 26 of the OECD Model Tax Convention.

Further progress was made on the transparency and exchange of tax information after 2008. Several countries were the subject of high profile tax scandals against a background of global economic and financial crisis, leading to a spotlight being

19 OECD, *The OECD's Project on Harmful Tax Practices: The 2001 Progress Report*, OECD Publishing, Paris, 2001.
20 OECD, *The OECD's Project on Harmful Tax Practices: The 2004 Progress Report,* OECD Publishing, Paris, 2004.
21 OECD, *The OECD's Project on Harmful Tax Practices: 2006 update on progress report*, OECD Publishing, Paris, 2006.
22 OECD, *Manual on Information Exchange*, OECD Publishing, Paris, 2006.

placed on the activities of the world's financial centres. At various meetings of the G20 in that year, the OECD was recognized as the appropriate forum to tackle the problem. In this sense, the OECD Progress Report of 2 April 2009[23] differentiated clearly between three types of jurisdictions: first, those that had implemented the internationally agreed standards on the exchange of information and the fight against tax evasion, by not having (or having removed) bank secrecy as an obstacle to the exchange of tax information and having signed at least twelve TIEAs or DTCs with an information exchange clause (*white list*); second, those jurisdictions that had committed to the minimum standards but had not substantially implemented them (*grey list*); third, the jurisdictions that had not committed to the international standards (*black list*). The aim was to step up the international pressure on jurisdictions that had partially or totally failed to implement the standards, so as to oblige them first to sign international treaties or agreements on the exchange of information and then apply them effectively. To this end, in March 2010, the Global Forum launched a **peer review process** to be conducted in two phases. This process aimed to analyse countries' effective implementation of the international standard on transparency and information: phase one would assess whether the domestic legislation of a country or jurisdiction ensured the availability of information, whether the tax authorities were accessible for cooperation with other foreign administrations; phase two would assess the application of tax information exchange standards in practice.

This background of reinforcement and enhancement of the internationally agreed standard on transparency and exchange of information on request gave rise to DAC. However, even before the Directive had been implemented, there was a clear need to adapt it to the different European and international initiatives intended to promote the **automatic exchange of tax information as a future international standard on transparency and exchange of information on tax matters**.[24]

In 2012, the negotiations between the United States and various EU Member States (Germany, France, Italy, Spain and the United Kingdom) to develop a Model Intergovernmental Agreement as a template for the signing of bilateral agreements on the automatic exchange of financial information in the application of the guidelines contained in the **FATCA** (*Foreign Account Tax Compliance Act*),[25] were completed. As a result, the G20 tasked the OECD with developing a single international standard on the automatic exchange of financial account information in tax matters based on these agreements. In February 2014, the OECD published a **Model Competent Authority Agreement (CAA) and a Common Reporting Standard (CRS)**. In July 2014, the OECD published the complete international standard, which included the Commentaries on the Model and the Agreement as well as technical guidelines.[26] The regulatory package was endorsed by the G20 Finance Ministers and Central Bank Governors in September 2014. Article 19 of Directive 2011/16/EU included a kind of **favoured nation clause** requiring any Member State that provides a wider cooperation to a third country to extend this cooperation to any other Member State wishing to enter into such mutual cooperation. Thus, the Commission proposed a reform of DAC in order to align it with these international initiatives and eliminate possible distortions derived from different instruments for automatic exchange of financial account information. This proposal led to the adoption of **Directive 2014/107/EU of 9 December 2014 (DAC 2)**[27] amending DAC.

The adoption of DAC 2 repealed Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (EUSD) with effects from 1 January 2016,[28] as well as the renegotiation of the agreements on measures corresponding to those in the EUSD between the EU and certain European financial centres (Switzer-

23 OECD, *Progress Report on the Jurisdictions Surveyed by the OECD Global Forum in Implementing the Internationally Agreed Tax Standard*, OECD Publishing, Paris, 2009.
24 McINTYRE, M., "How to End the Charade of Information Exchange", *Tax Notes International*, 2009, p. 254; MORENO GONZÁLEZ, S., "Nuevas tendencias en materia de intercambio internacional de Información tribuaria: hacia un mayor y más efectivo intercambio automático de información", *Crónica Tributaria*, nº 146, 2013, p. 193 et seq.
25 https://www.treasury.gov/press-center/press-releases/Pages/tg1653.aspx (last access: 26.06.2018).
26 http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/ (last access: 26.06.2018).
27 OJ L 359, 16.12.2014.
28 Repealed by Directive (EU) 2015/2060 of 10 November 2015 (OJ L 301, 18.11.2015).

land, Liechtenstein, Monaco, San Marino and Andorra), to recast them as agreements on automatic exchange of financial account information in alignment with the new international and European standard.[29]

In parallel, at the beginning of 2013, the OECD/G20 initiated its **BEPS** (*Base Erosion and Profit Shifting*) **Project**, designed to combat base erosion and profit shifting.[30] This project is fruit of the political and social controversy generated by the minimal tax burden borne by multinational enterprise groups (MNEs), thanks to elaborate tax planning structures that take advantage of the network of DTCs and the legal loopholes and disparities between national tax systems, as well as the unfair tax practices of certain countries. This debate highlighted the failure to adapt the international tax framework (based on the principle of taxation of worldwide income in the residence State) to the new globalized and digitalized nature of enterprises' economic activities, which facilitate cases of double taxation or double non-taxation, thus creating opportunities for MNEs to engage in base erosion and shift profits out of the jurisdictions where their income-generating activities are conducted, so substantially reducing their tax burden. Such behaviours impact negatively on the affected States, not only in terms of tax revenue, but also from the perspective of the equity and legitimacy of their own tax systems.

The BEPS Project, developed between 2013 and 2015, establishes 15 actions[31] to tackle these problems. They revolve around three fundamental pillars: improving the *coherence* of national law regarding cross-border activities, reinforcing *substance* requirements in current international rules, and enhancing *transparency and legal certainty*. **Although the exchange of tax information falls outside the scope of the Project, it takes on a key role as a tool to achieve the objectives proposed in three of the actions**. Action 5, aimed at combatting harmful tax practices, establishes the mandatory, spontaneous exchange of six categories of cross-border *tax rulings*. Action 13, devoted to revising transfer pricing documentation, provides for the automatic exchange of the country-by-country reports that must be presented by multinational groups. Finally, Action 12, on mandatory disclosure rules for aggressive tax planning schemes, makes reference to the exchange of information on such schemes.

The European Union has supported and actively participated in the implementation of the BEPs Project. However, although the aims are shared, the characteristics and elements of the EU law facilitate the use of different measures to those used by the OECD to counter the problems detected, and which, in many cases, are considerably more wide-ranging.

Along these lines, on 18 March 2015, the European Commission presented a **package of tax transparency measures** as part of its agenda to tackle corporate tax fraud, tax avoidance and harmful tax competition.[32] This tax transparency package marks the continuity of other measures adopted by the European Commission in recent years, especially the **Action Plan to strengthen the fight against tax fraud and tax evasion** adopted on 6 December 2012.[33] The Plan included more than thirty measures, some of which were intended to substantially improve the systems for administrative cooperation in tax matters so as to increase compliance with Member States' tax legislation. The transparency package pursues the same objective, and thus proposes measures related to the BEPS Plan, which, in some cases, go beyond the proposals of the OECD/G20 Project. One indication of this is that the tool used to tackle the problems highlighted in actions 5, 12 and 13 of the BEPS plan is, once more, the automatic exchange of tax information, making it necessary to enact new amendments to DAC:

– **Council Directive 2015/2376 of 8 December 2015 (DAC 3)** amended DAC, estab-

29 BRODZKA, A., "Automatic exchange of tax information in the European Union – the standard for the future", *European Taxation*, Vol. 56, nº 1, 2016, p. 30.
30 OECD/G20, *Addressing Base Erosion and Profit Shifting*, OECD Publishing, 12 February 2013.
31 http://www.oecd.org/tax/beps/beps-actions.htm (last access: 26.06.2018).
32 EU COMMISSION, *Communication from the Commission to the EU Parliament and the Council on tax transparency to fight tax evasion and avoidance*, COM (2015) 136 final; EU Commission, *Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation*, COM (2015) 135 final; EU Commission, *Combatting corporate tax avoidance: Commission presents tax transparency*, Brussels, 18.03.2015.
33 COM (2012) 722 final.

lishing the automatic exchange of information on certain advance tax rulings and cross-border Advanced Pricing Arrangements (APAs).[34]

- **Council Directive 2016/881 of 25 May 2016 (DAC 4)** amended DAC to establish the mandatory automatic exchange of information on country-by-country reports between tax authorities.[35]
- **Council Directive 2016/2258 of 6 December 2016 (DAC 5)** amended DAC to permit access to anti-money-laundering information by tax authorities.[36] In contrast to the previous directives, DAC 5 does not extend the scope of the automatic exchange of information, but the fact of guaranteeing the access of tax authorities to information on beneficial ownership in accordance with anti-money-laundering legislation is essential to ensure the effectiveness of automatic exchange of financial account information in tax matters.
- **Council Directive 2018/822 of 22 May 2018 (DAC 6)** amends one more time the DAC to establish mandatory automatic exchange of information on potentially aggressive tax planning arrangements.[37]

The development of the DAC should not be seen as the simple execution, at European level, of international initiatives aimed at combating tax avoidance, tax evasion, aggressive tax planning or harmful tax competition, but rather as the **construction of a fiscal strategy by the EU institutions**, based on hard law instruments, which, in addition to tackling the aforementioned problems, seeks to guarantee free competition in the internal market. Thus, **Europe** is fast becoming the scenario for the **most intensive application of new international standards of transparency and administrative cooperation**.[38] This may have important legal implications for both national tax administrations and taxpayers operating transnationally, even beyond European territory.

From the perspective of a good normative technique, the relevant changes gradually made in the DAC make it advisable to approve an **official codified text** that integrates them in a coherent manner.

III. Interrelation between the DAC and other international instruments for exchange of information

As seen above, Directive 2011/16/EU coexists with other international instruments that articulate the exchange of information between administrations at international level.[39] Besides the bilateral treaties and agreements facilitating the exchange of information between countries (DTCs, TIEAs, IGAs), it is worth noting **the Convention on Mutual Administrative Assistance in Tax Matters** (CMAA), developed jointly by the OECD and the Council of Europe in 1988 and amended by Protocol in 2010 to align it to the international standard on exchange of information on request and to open it to all countries. The Convention is the most comprehensive multilateral instrument available for all forms of mutual assistance and tax co-operation (exchange of information, assistance in the collection of taxes, simultaneous inspections, etc.) to tackle tax evasion and avoidance.[40] Article 6 of the Convention regulates the automatic exchange of

34 OJ L 332, 18.12.2015.
35 OJ L 146, 03.06.2016.
36 OJ L 342, 16.12.2016.
37 OJ L 139, 05.06.2018.
38 CALDERÓN CARRERO, J. M., "La dimensión europea del proyecto BEPS", *Quincena Fiscal*, nº 6, 2016, pp. 120-121.
39 *Vid*. SCHENK-GEERS, T., *International Exchange of Information and the Protection of Taxpayers*, Wolters Kluwer, The Netherlands, 2009; SEER, R./GABERT, I., "European and International Tax Cooperation: Legal Basis, Practice, Burden of Proof, Legal Protection and Requirements", *Bulletin for International Taxation*, vol. 65, nº 2, 2011, pp. 88-98; CALDERÓN CARRERO, J. M., *Intercambio de información y fraude fiscal internacional*, Centro de Estudios Financieros, Madrid, 2000; MARTÍNEZ GINER, L. A., *La protección jurídica del contribuyente en el intercambio de información entre Estados,* Iustel, Madrid, 2009, pp. 43-54.
40 124 jurisdictions currently participate in the Convention, including 15 jurisdictions covered by territorial extension. http://www.oecd.org/ctp/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm (last access: 06.07.2018).

tax information and has emerged as the **key legal base** on which to build new instruments for automatic exchange of financial account information in tax matters and country-by-country reports endorsed by the OECD.

The existence of **different regulatory levels of cross-border exchange of information** requires that the relations of coincidence and complementarity between them be addressed. Article 1(3) DAC recognises that when there exist various international or supranational rules that permit the exchange of information on the same taxes, the rule that facilitates the widest-ranging exchange of information should be applied (principle of maximum effectiveness – *wider-ranging provisions of assistance*). When both rules permit the transmission of the information to be exchanged, some authors defend the use of the clause that best guarantees tax secrecy in the requesting State.[41] Other authors advocate the application, in cases of conflict, of the normative instrument which, as well as facilitating the most effective exchange of information and offering the greatest guarantees of tax confidentiality, most respects the legal position of the persons subject to the exchange of information.[42]

41 CALDERÓN CARRERO, J. M., "La asistencia mutua e intercambio de información en materia tributaria", in Carmona Fernández, N. (Coord.), *Convenios Fiscales Internacionales y Fiscalidad de la Unión Europea*, CISS-Wolters Kluwer, Madrid, 2018, p. 1395.

42 SÁNCHEZ LÓPEZ, M. E., *El intercambio de información tributaria entre Estados*, Bosch, Barcelona, 2011, p. 15.

CHAPTER 2
GENERAL ISSUES OF THE DIRECTIVE 2011/16/EU

I. Purpose

DAC was conceived with the objective of developing "a new administrative cooperation between the Member States' tax administrations", providing the instruments "likely to create confidence between Member States, by setting up the same rules, obligations and rights for all Member States."[43] The deficiencies and limitations of the MAD, as well as its inadequacy for the demands of economic globalization, make it an ineffective instrument, meaning "a completely new approach must be taken by creating an entirely new text to give Member States the powers to efficiently cooperate at international level to overcome the negative effects of an ever increasing globalisation on the internal market."[44]

Thus, the intention of DAC is **to establish a new model of mutual assistance in the field of taxation in the EU**, adapted to new international trends, making it possible to fight more intensively and effectively against issues such as double taxation, tax fraud and evasion, which jeopardise the functioning of the internal market.[45]

Administrative cooperation and, in particular, the exchange of tax information between States as expressed in DAC constitute an essential instrument to encourage the correct implementation of national tax systems in the age of globalisation and digitalisation. This tool is vital for administrations that wish to avoid the loss of revenue resulting from the lack of knowledge of taxpayers' income in other States. It is also essential for taxpayers seeking the correct application of their tax debts, avoiding the application of State tax rules which, in the absence of such information, might result in their being subjected to higher taxation.

The primary purpose attributed to the exchange of information at both international and European level is usually as an instrument to ensure tax systems are correctly applied in order to combat tax fraud. However, in recent years worldwide initiatives aimed at countering harmful tax competition and aggressive tax planning strategies by multinational enterprises rely on the adoption of measures (e.g. anti-abuse clauses, requirements on corporate and financial transparency, disclosure duties), whose effectiveness is conditional to the existence of the exchange of information between national tax authorities. This highlights that administrative cooperation and the exchange of information are **key factors to ensure the survival of the current tax systems** of Member States of the EU and the OECD, based on the primacy of the principle of residence and its corollary of the taxation of a taxpayer's worldwide income in their State of residence.[46]

Furthermore, **in the context of EU law**, it should not be overlooked that the **exchange of information can be used at the service of taxpayers** operating transnationally so they can be taxed according to their circumstances, ensuring the absence of discriminatory treatment between citizens of different EU countries. In other words, national tax administrations **may not obstruct the European freedoms invoking ignorance of**

43 Preamble, Recital nº 2.
44 Preamble, Recital nº 3.
45 Preamble, Recital nº 1.
46 SOLER ROCH, M. T., Prologue to Martinez Giner, L. A., *La protección jurídica del contribuyente en el intercambio de información entre Estados*, *cit*., 2009, p. 9.

the fiscal situation of a taxpayer if they can make use of various normative instruments designed to facilitate mutual assistance and the exchange of information.[47]

In this sense, the Court of Justice of the European Union (ECJ) has reminded in various decisions that lack of knowledge of information concerning a non-resident taxpayer is no justification for precluding the application of a certain tax benefit when Directive 77/799 provides for ways of obtaining such information.[48]

In other judgements, the ECJ has addressed the role of Directive 77/799 (or, when applicable, Directive 2011/16) **as a criterion of proportionality of national measures of tax control.** It is well known that the effectiveness of tax control is an overriding reason relating to the public interest capable of justifying a restriction on the exercise of the fundamental freedoms enshrined in the Treaty. The ECJ has stressed that this criterion may authorise a Member State to implement measures which allow the requirements for applying a deduction or tax advantage to be ascertained clearly and precisely, provided that such probative requirements are not disproportionate. In this sense, the MAD/DAC provides an instrument for the tax authorities of the Member States to implement these control actions. This does not prevent national tax authorities from requiring taxpayers to provide such proof as they may consider necessary to determine whether it is appropriate to grant a tax deduction. Nonetheless, requiring a taxpayer to provide excessively strict or burdensome proof may be disproportionate and contrary to EU law, especially when such information may be obtained by means of the MAD/DAC.[49]

As regards the relations between EU Member States, the ECJ has also indicated that national legislation which absolutely prevents the taxpayer from submitting evidence cannot be justified in the name of tax supervision. Thus, *a priori*, it cannot be ruled out that the taxpayer may be able to provide relevant documentary evidence enabling the tax authorities of the Member State to ascertain, clearly and precisely, that he meets equivalent requirements to those laid down by national law at issue in his State of residence.[50]

Nevertheless, **the case law concerning the need to guarantee the effectiveness of tax control cannot be transposed in its entirety to movements of capital between Member States and third countries**, since such movements take place in a different legal context from that currently in place within the EU.[51] The ECJ considers that the framework for cooperation between the competent authorities of the Member States established by the MAD/DAC may not exist between these authorities and those of a third country where that State has not entered into any undertaking of mutual assistance.[52] Thus, **when the legislation of a Member State makes the grant of a tax advantage dependent on satisfying requirements, compliance with which can be verified only by obtaining information from the competent authorities of a third country, it is, in principle, legitimate for that Member State to refuse to grant that advantage, if, in particular, because that third country is not under any international obligation to provide information, it proves impossible to obtain such information from that country.**[53]

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47 CALDERÓN CARRERO, J. M., "Asistencia mutua e intercambio de información en materia tributaria", *cit.,* 2018, p. 1389.

48 ECJ, judgments of 12 April 1994, C-1/93, *Halliburton Services*, para. 22; 14 February 1995, C-279/93, *Schumacker*, para. 45; 11 August 1995, C-80/94, *Wielocx*, para. 26.

49 ECJ, judgments of ECJ of 15 May 1997, *Futura Participations*, C-250/95, para. 41, 8 July 1999, *Baxter,* C-254/97, paras. 17-19; 28 October 1999, *Vestergaard*, C-55/98, para. 26; 14 September 2006, *Stauffer*, C-386/04, para. 50; 9 November 2006, C-520/04, *Turpeinen*, paras. 36-37.

50 ECJ, judgements of 8 July 1999, C-254/97, *Baxter*, para. 19 y 20; 10 March 2005, C-39/04, *Laboratoires Fournier*, para. 25; 27 September 2007, C-184/05, *Twoh International*, para. 35; 11 October 2007, C-451/05, *ELISA*, para. 96; 25 October 2007, C-464/05, *Geurts-Vogten*, para. 28; 18 December 2007, C-101/05, *Skatteverket*, para. 59.

51 ECJ, judgements of 18 December 2007, C-101/05, *Skatteverket*, para. 60; 19 November 2009, *Comisión/Italia*, C-540/07, para. 69; 28 October 2010, *Établissements Rimbaud*, C-72/09, para. 40; 10 February 2011, *Haribo Lakritzen Hans Riegel y Österreichische Salinen*, C-436/08 and C-437/08, para. 65.

52 ECJ, judgments of 10 February 2011, *Haribo Lakritzen Hans Riegel y Österreichische Salinen*, cit., paras. 65 y 66; 24 November 2016, C-464/14, *SECIL*, para. 64.

53 ECJ, judgments of 17 October 2013, C-181/12, *Welte*, para. 63; 10 April 2014, C-190/12, *Emerging Markets Series of DFA Investment Trust Company*, para. 84; 24 November 2016, C-464/14, *SECIL*, para. 64.