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FATCA and Data Protection

FATCA is the most effective tool in the fight against tax evasion and tax avoidance. For a long time, civil society (development organisations, Tax Justice Network, Attac...) and the Greens have been fighting for reciprocal automatic exchange of information in tax matters. It is sad to admit: All efforts of the EU have not got us very far. It is thanks to the US initiative that ending the misuse of financial globalisation for tax evasion of massive scale by the most privileged in society has become realistic. The US does what unanimity requirements in the EU Council have hindered us from achieving. FATCA conformity can be achieved in the EU in a way that reflects already practiced tax collection standards. In order to reach our fair and equal tax law enforcement and anti money laundering ambitions, FATCA is the way to go.

Background: What is FATCA and how does it work?

- In order to find out about their taxpayers abroad, the US has the legitimate need to receive information about their income/wealth in other countries. This is where FATCA comes in.
- FATCA requires all financial institutions and intermediaries that have business activities in the US, to tell the US authority about all the US taxpayers' assets and income in all of their world wide branches. If the financial institution is not willing to provide the information to the authority it faces a penalising withholding tax of 30% on all payments from the US. Ultimately this cost will be passed on to the institutions' clients.
- The US Tax Law considers any US citizen or person born in the US as American taxpayer. That has always been the case and is admittedly a very wide definition that most other countries do not apply. But it means that these citizens are potentially liable for tax in the US. Generally and based on bilateral double tax agreements the US has with many other countries, taxes paid in the country the person lives and works in, are deducted from the taxes due in the US. In many cases that leads to zero taxation in the US.
- Realistically the financial institutions have two options. They can either:
    1. Report to the US authorities (in many cases via the domestic authority if it has concluded a bilateral and reciprocal FATCA agreement with the US – see below) to avoid the penalising tax on all payments they receive from the US; or
    2. Try to avoid having US taxpayers in their customer base any longer to bypass reporting obligations.
- Prior to enforcing the legislation the US authorities started concluding bilateral agreements with countries to regulate the automatic data exchange. Thus far the US concluded agreements with Switzerland and Japan, allowing the institutions to directly transmit the data to the US Internal Revenue Service (IRS). This means the end for banking secrecy in Switzerland for US taxpayers which is something the EU didn't manage to achieve during at least a decade. Currently, agreements with France, Spain, Italy and Germany for reciprocal automatic exchange of information between the national tax authorities and the IRS are being negotiated and will be concluded soon. Such agreements have already been concluded with the UK, Ireland and Denmark.(1)

Possible conflicts with Data Protection rights:

Personal Data is protected by EU law and national (constitutional) legislation. Generally private institutions are for good reasons not allowed to pass on personal data they obtain from their clients - while carrying out their business - to others (this includes foreign tax administrations). This could however become possible if community/domestic legislation allows or requires them to do transmit the data. In that case the following conditions have to be fulfilled:

- Legal Basis: Intervention by financial institutions into the protected data of their clients (i.e. the transmission to another party) requires a sound legal basis. For EU financial institutions to become FATCA compliant either EU or domestic legislation has to allow the transmission. Therefore Member States conclude bilateral agreements with the US to agree upon reciprocal exchange of information between public authorities. The EU authorities will obtain the data from the financial institutions/intermediaries before passing them on, based on domestic or community legislation allowing interference into the integrity of the personal data of the customers which are US taxpayers. Within the EU the savings tax directive already requires the banks to supply the data of foreign EU taxpayers to the national authorities. In our view the most efficient implementation of the FATCA exchange of information standard would be via an EU-directive.
- Adequate Data: Another requirement is that only data limited to, and necessary for the specific purpose shall be passed on. For the assessment of tax liabilities information required for the identification of the taxpayers and their taxable assets should be transmitted to the responsible tax collection authority. The intervening legislation will contain a conclusive list of what information will be passed on to the national tax authority and from there to the IRS (for the list see below).
- Storage Periods: Data shall only be stored as long as it is necessary for the purpose it has been transmitted for in the first place. As FATCA requires the transmission of data of persons having assets in EU financial institutions who are identified by the financial institutions as US taxpayers, the data will be treated like any US taxpayers data obtained by the authority. This is thus a matter of treatment of US taxpayers (foreign and abroad) and regulated by national US legislation.

As shown, the intervention into the integrity of personal data by FATCA does not go beyond what is been done within the EU already and can be legally justified. When it comes to enforcement of tax law the Green position has always been that strict banking secrecy is not in line with a fair, consistent and progressive taxation system.(2) National collection mechanisms as well as the savings tax directive make use of automatic exchange of information for non-domestic EU taxpayers within the EU. Thus they are based on the access to data that in some cases is only available in the financial institutions. Financial institutions are used as information providers to the tax authorities everywhere. Where else could the tax collectors look if they don't trust the residents tax return? And history shows: Tax collection based on non transparent tax bases leads to massive tax evasion.

- The Greens are strongly in favour of the savings directive, which unfortunately for a long time could not be improved or extended to third countries because of the unanimity requirement in the Council and a veto by Luxembourg and Austria.
- It would be a contradictory position to now deny the US the right to enforce their own tax law via mechanisms we already make use of. Their initiatives are even more justified

because until now international partners were not ready to conclude efficient bilateral automatic exchange of information agreements.

- Certainly a multilateral cooperation with the US would be the the best way forward. But only because the EU wasn't able to progress in the fight against tax havens and so far didn't find a tool against European and international tax havens, we have no right to now criticise the unilateral initiative the US has taken. We have campaigned for enhanced cooperation in various fields of EU tax policy because all EU 27 initiatives ended up in the same dead-end. We have to thank the US that they managed to lift the siege of the tax haven cartel.

The relevant data that shall be exchanged:

- In the newly concluded bilateral FATCA implementation treaties we can already see which information the US is seeking to exchange. This conclusive list is precisely the information necessary for taxation of resident taxpayers. It can easily be implemented into EU / domestic law and thus allow EU financial institutions to pass on this information to their domestic tax authority. The latter will subsequently forward the information to the foreign tax authorities (according to bilateral treaty rules).
- The list of information to be exchanged are (see for example US-UK treaty under (1)):
    a. the name, address, and U.S. TIN of each Specified U.S. Person that is an Account Holder of such account and, in the case of a Non-U.S. Entity that, after application of the due diligence procedures set forth in Annex I, is identified as having one or more Controlling Persons that is a Specified U.S. Person, the name, address, and U.S. TIN (if any) of such entity and each such Specified U.S. Person;
    b. the account number (or functional equivalent in the absence of an account number);
    c. the name and identifying number of the Reporting United Kingdom Financial Institution;
    d. the account balance or value (including, in the case of a Cash Value Insurance Contract or Annuity Contract, the Cash Value or surrender value) as of the end of the relevant calendar year or other appropriate reporting period or, if the account was closed during such year, immediately before closure
- Furthermore, making use of a standardised due diligence procedure, financial institutions will have to "look through" opaque structures established to dilute taxable assets and wealth. If done right, FATCA as a global standard will be the end for secrecy jurisdictions and tax havens undermining any form of global solidarity, equality and development.
- The information demanded is therefore appropriate.

(1) The Treaties can be found here: http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx
(2) Compare:
http://europeangreens.eu/news/harmonising-europes-taxation-systems-introducing-financial-transaction-tax-and-eliminating-tax