

Exchange of information in a Digitised Society and Taxpayers' Rights

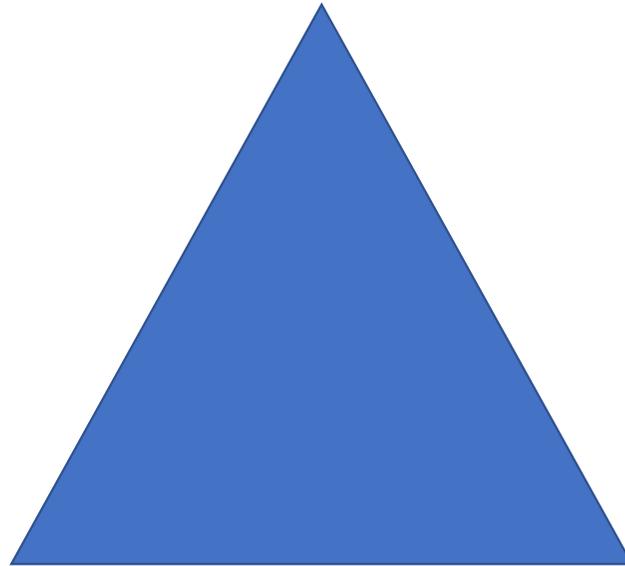


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Efficient taxation

Exchange of information



Taxpayers' Rights

Right to privacy

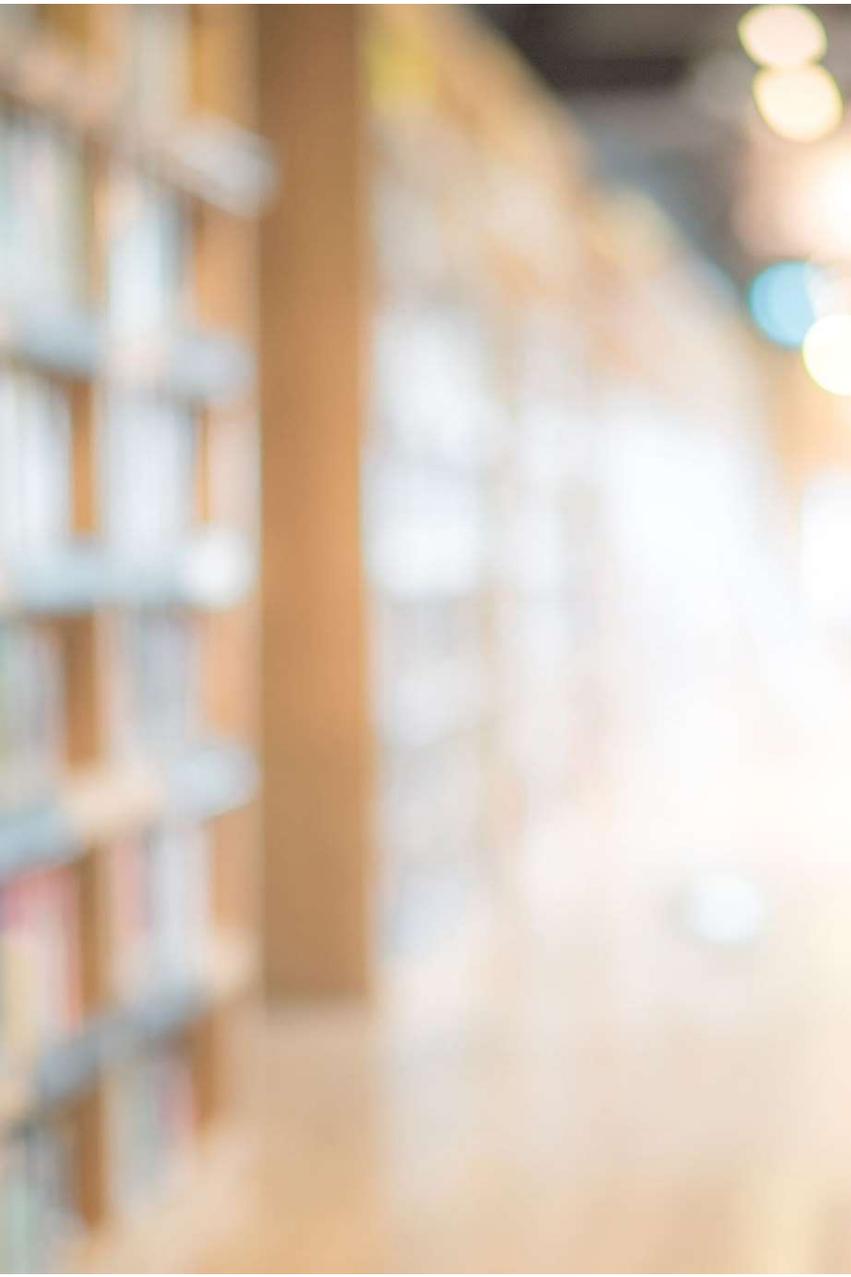
Digitised Society

Big data
Cyber attacks
Quick and easy
spread of
information

Outline

1. Exchange of information
2. Taxpayers' rights in relation to exchange of information
3. Cyber security and big data – special challenges in relation to exchange of information and taxpayers' rights
4. Discussion





1 Exchange of information

- OECD Model Tax Convention and the tax treaties (article 26)
- UN Model Convention and US Model
- Tax information exchange agreements (TIEA)
- EU Law
- Etc.

1 Exchange of information

Art. 26 OECD MTC

“The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.”

1 Exchange of information

Council Directive 2011/16/EU, the Directive on Administrative Cooperation (DAC), The DAC is the fundamental piece of EU legislation on administrative cooperation in direct taxation.

The DAC was amended 2014, 2015, 2016 and 2018, gradually extending its scope

VAT: Regulation 904/2010, VIES, VAT information exchange system

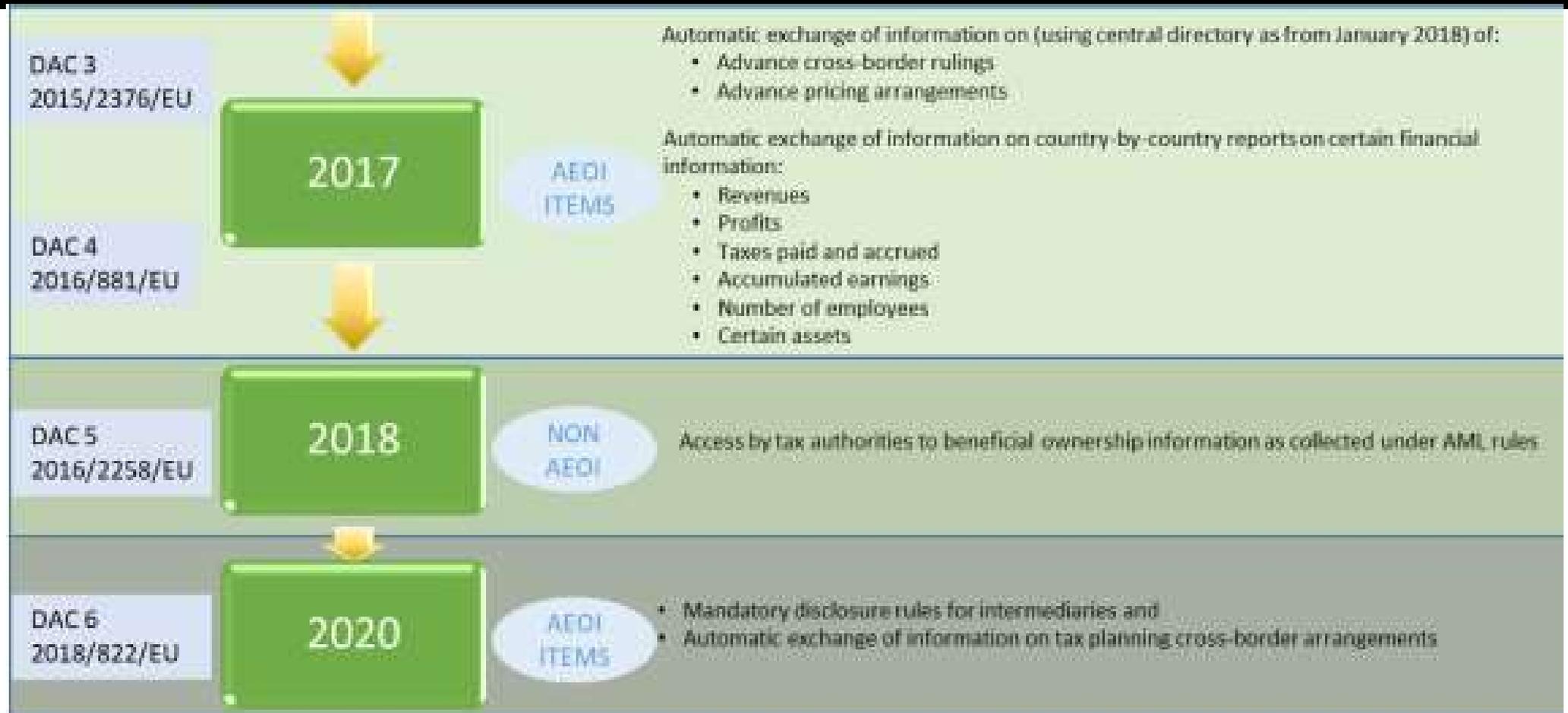
Excise duties: Regulation 389/2012

1 Exchange of information

https://www.eca.europa.eu/lists/ecadocuments/ap19_14/ap_tax_information.pdf



1 Exchange of information



2 Taxpayers' rights and exchange of information

The exchange of information has increased massively the last decade.
Can we see the same development regarding taxpayers' rights?

2 Taxpayers' rights and exchange of information

OECD Model Tax Convention Art. 26

European Convention on Human Rights Art. 8 (Private life – includes data protection according to the case law of ECtHR)

EU Charter, Art. 7 and 8 (Private and family life and protection of personal data)

GDPR: Art. 6 Lawfulness of processing, Art. 9 Sensitive data, Art. 44-50
Transfer of personal data to third countries

2 Taxpayers' rights and exchange of information

Art. 26 (1) OECD MTC – foreseeably relevant information, protects against fishing expeditions. It must be possible to identify the taxpayer

Art. 26 (2) OECD MTC

- Any information shall be treated as secret in the same manner as information obtained under domestic laws
- Information shall only be disclosed to persons and authorities concerned with the assessment, collection etc.

Commentary: Refers to data protection (p. 495)

2 Taxpayers' rights and exchange of information

Model TIEA and its 2015 protocol

Art. 8:
Confidentiality,
but no other
taxpayers' rights

2 Taxpayers' rights and exchange of information

ECtHR: F.S v Germany (Z v Finland, I v Finland)

“The applicant complains that the Federal Ministry of Finance transmitted information concerning his assets and capital income to the Dutch authorities. He considers that there was a breach of his right to respect for his private life under Article 8 of the Convention and of his right to respect for his possessions under Article 1 of Protocol No. 1”

- Justified under Article 8-2: Relevant and sufficient reasons
- Protocol No. 1: The state may enforce such laws as they deem necessary to secure the payment of taxes

The application was inadmissible.



2 Taxpayers' rights and exchange of information

DAC

Art. 16

Information communicated between Member States in any form pursuant to this Directive **shall be covered by the obligation of official secrecy and enjoy the protection extended to similar information under the national law of the Member State which received it.** Such information may be used for the administration and enforcement of the domestic laws of the Member States concerning the taxes referred to in Article 2.

Art. 25 – Data protection

2 Taxpayers' rights and exchange of information

C-276/12 Sabou (on Directive 77/799/EEC)

1. European Union law [...] must be interpreted as **not** conferring on a taxpayer of a Member State either the **right to be informed** of a request for assistance from that Member State addressed to another Member State, in particular in order to verify the information provided by that taxpayer in his income tax return, or **the right to take part in formulating the request** addressed to the requested Member State, or the right to take part in examinations of witnesses organised by the requested Member State.

2. Directive 77/799 [...] does **not** govern the question of the circumstances in which **the taxpayer may challenge the accuracy of the information** conveyed by the requested Member State, and it does not **impose any particular obligation with regard to the content of the information conveyed**.





2 Taxpayers' rights and exchange of information

VAT: Regulation 904/2010

Confidentiality, art. 34 and 55

2 Taxpayers' rights and exchange of information

Excise duties: Regulation 389/2012, preamble

This Regulation respects the fundamental rights and observes the principles which are recognised by the Charter of Fundamental Rights of the European Union, in particular the right to the protection of personal data (Article 8). In view of the limits set by the present Regulation, the processing of such data carried out within the framework of this Regulation does not go beyond what is necessary and proportionate for the purposes of protecting the legitimate fiscal interests of the Member States.

Secrecy, art. 28 “ Information communicated or collected by Member States pursuant to this Regulation or any information to which an official or other employee, or a contractor has had access in the course of his duties shall be covered by the obligation of official secrecy and shall enjoy the protection granted to similar information under the law of the Member State receiving that information.”

2 Taxpayers' rights and exchange of information

The right to see information held by the tax authority (Sweden: yes)

The right to correct errors in the information (yes)

That the information held by the tax authority is encrypted (yes)

That the information held by the tax authority about a specific taxpayer is accessible only to the tax officials dealing with that taxpayer's affairs (yes)

The right to be informed before information relating to him is exchanged in response to a specific request (no)

(Observatory on the protection of taxpayers' rights)

2 Taxpayers' rights and exchange of information

- The right to be heard by the tax authority before the exchange of information relating to him with another country (no)
- The right to challenge before the judiciary the exchange of information relating to him with another country (no)
- The right to see any information received from another country that relates to him (yes, when it has become part of a tax matter)
- The right to confidentiality of tax information (yes, but tax decisions are public documents)

Conclusion: Domestic law is an important source of taxpayers' rights.

3 Cyber security and big data

3 Cyber security and tax data

The risk for cyber attacks

- Malware – malicious software programs (including viruses) designed to attack IT systems.
- Ransomware, which encrypts files and blocks access to computer systems unless a payment is made.
- Remote attacks on websites or IT systems, for example (Distributed) Denial of Service (DDoS) attacks which prevent websites operating.
- Phishing – the use of bogus emails and websites to trick individuals into supplying confidential information. Example: E-Mail purporting to be from tax authority which promise a tax refund but which are really an attempt to get people to hand over confidential information.
- The theft of IT hardware or data.

3 Cyber security and tax data

Some specific risks for the tax administration

- Vacuum cleaner attack and exposure of personal data
- Manipulation of on-line refunding
- If the information was deleted and the record of payments and tax return data were destroyed...

3 Cyber security and tax data

2015: US IRS cyber attack: personal data from 724 000 taxpayer accounts were exposed

2019: Bulgarian Personal Tax Revenue Office suffered a data breach exposing all personal income information of all adult citizens

2020 June-September: Her Majesty's Revenue and Customs (HMRC) in the U.K. was hit with 521 582 malicious email attacks (spam 377 820, phishing 128 255, malware 15 507)

3 Cyber security and tax data

Why is tax data interesting to steal?

Tax information may reveal information about income, spending and savings, employment status, personal belongings, disability status, associations and club memberships, donations to charities, mortgage costs, child support and alimony, and the amount and size of gifts to family members and others.

(Clockfield, Arthur, Protecting taxpayer privacy rights under enhanced cross-border tax information exchange: toward a multilateral taxpayer bill of rights, U.B.C Law Review Vol 42:2 p. 437)

3 Cyber security and tax data

The less a tax system does, the less sensitive data does it have to include:

Personal income tax does not have to:

- Take family relations and marital status in account
- Allow deductions for allowances
- Allow deductions for charity etc.

But still, a lot of data will be in the system



3 Cyber security and tax data

Challenges in protecting tax data

1. Big data sets with many users:

”The IRS computing system involves hundreds of millions of users, billions in payments to hundreds of millions of taxpayers, trillions in collections from hundreds of millions of taxpayers, and notoriously complex laws, regulations, and processes.”

2. The human factor:

- Driven by financial gain, personal grudges or political ideas
- If they have access to the data, they do not need any specific technical skills

3. Shortage in cyber security experts

Michael Hatfield, *Cybersecurity and Tax Reform*, 93 IND. L.J. 1161 (2018).

4 Discussion

How does the digitized society affect the need of protection of taxpayers' rights regarding exchange of information?

- The more and faster exchange of information, the higher protection is needed
- The GDPR provides a legal protection of personal data in data processing – tax authorities are allowed to process data
- The OECD MTC, the TIEA Model and EU law contain confidentiality rules
- National laws and TPR Charters contain further protection of taxpayers' rights
- The human factor – to restrict access to data is important
- Design of substantive tax laws – the simpler, the less sensitive data

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Thank you!

