Sharing Tax Information in the 21rst Century:

Cross-border Big Data Flows and Taxpayers as Data Subjects

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Abstract

In the last ten years, governments have initiated several reforms to automatically exchange bulk taxpayer information with other governments (mainly via the Foreign Account Tax Compliance Act, the Common Reporting Standard and Country-by-Country Reporting). This enhanced sharing of tax information has been encouraged by technology change, including digitization, big data, and data analytics, and political trends, including government efforts to reduce offshore tax evasion and aggressive international tax avoidance. In some cases, however, legal protections for taxpayer privacy and other interests are insufficiently robust for this emerging international framework to share big tax data. Conceptually, taxpayers should be seen as 'data subjects' with rights proactively protected by data protection laws and policies, including fair information practices. An optimal regime balancing the interests between taxpayers and tax authorities should include a multilateral taxpayer bill of rights, a cross-border withholding tax in lieu of information exchange, and a global financial registry to allow governments to identify the beneficial owners of business and legal entities.

1 Introduction

In recent years, tax haven data leaks, including the Panama Papers and the Paradise Papers, have suggested that the problem of offshore tax evasion and aggressive international tax avoidance, along with related revenue losses, may be more serious than previously-suspected (Cockfield 2016). At the same time, technology trends—ongoing digitization and the rise of big data, data analytics and artificial intelligence—facilitate government efforts to share and analyze bulk taxpayer information across borders. Beginning with the 2010 passage by Congress of the law known as the Foreign Account Tax Compliance Act (FATCA), governments are increasingly participating in the cross-border transfers of tax and financial information. More recently, global agreements contemplate automatically exchanging financial account information as well as detailed tax and other financial information regarding a multinational company's activities in every country where it operates (through the OECD/G-20 Common Reporting Standard and Country-by-Country Reporting). These processes, sometimes referred to as the Exchange of Information (EOI), that now involve cross-border big data flows challenge traditional legal protections for taxpayer privacy, confidentiality and other rights.

The policy challenge is important because tax and financial information is among the most sensitive and personal information one can collect concerning individuals and business entities like corporations. Yet it remains unclear whether the emerging legal framework to protect these taxpayer rights suffices. This chapter connects several broad topics, explored in depth in other works, to show how taxpayers should be viewed as ‘data subjects’ governed by proactive data protection laws and policies (including fair information practices).

The chapter is organized as follows. Part II provides context by discussing the technological and political trends that are encouraging automatic EOI of ‘big tax data.’ Part III discusses the need to protect taxpayer liberty, privacy, confidentiality, and shows how the current legal regime governing these interests suffers from a number of drawbacks, including ‘legal gaps’ where different bilateral or regional agreements offer different and at-times inferior legal protections. Part IV reviews the elements of an optimal regime to promote efficient and fair EOI, including a multilateral taxpayer bill of rights, a cross-border withholding tax in lieu of information transfer, and a global financial registry.

2 Context: The Push for Automatic Exchange of Information

Taxpayers may be increasing their use of tax havens to evade taxes, launder drug money, or finance terrorist activities. Under some estimates, U.S. residents are evading between $40 and $100 billion each year as a result of international tax evasion (Cockfield 2016, 494). There is also a wide range of estimates of total amounts maintained in the world’s tax havens with studies suggesting there may be between $5 and $38 trillion (Cockfield 2016, 494). The problem is that these governments normally have a great deal of trouble in identifying how much of their resident’s taxable income is generated within foreign countries. The solution? Governments enter into agreements to collect and share tax information with each via EOI. This Part describes how technology and political trends are encouraging automatic EOI to inhibit revenue losses associated with offshore tax evasion and aggressive international tax avoidance.

2.1 Technology Trends

2.1.1 Moving from Analog to Digital Technologies

Technology developments—in particular, big data, data analytics and artificial intelligence—provide tax authorities with new tools to collect and share detailed tax and financial information at a scale and speed previously unheard of. Tax collection efforts have paralleled the technological change that began in the 1960s as collection systems evolved from paper-based analog systems to digital ones (Cockfield et al. 2013, p. 515-518). In addition, there have been ongoing apprehensions surrounding the interaction between technology and taxpayer privacy for some time, from concerns surrounding the usage of electronic records in the 1970s, the movement from analog to digital storage in the 1980s, online return filing and software audits in the 1990s and, more recently, collecting taxpayer information to tax global digital goods and services.

Once rendered into digital format, tax records share the same attributes as any ‘information good’; while the fixed cost of amassing the information in the first place might be high, the marginal cost of replicating and distributing an information good approaches zero (Cockfield 2002). Tax authorities at one point stored tax returns and other paper records in dusty cabinets where they were often difficult to access and mail to another government agency (let alone a foreign tax authority). Now a tax authority can design software to automatically access a taxpayer's detailed personal information, cross-index this information against other government and private sector records then copy and transmit the information across borders—all in a near-costless fashion.

Because of these developments, to help enforce their residence-based tax regimes governments began sharing greater amounts of tax information with other governments. This cross-border sharing began to gather real steam in the 1990s. For instance, in 1997 Canada and the United States began exchanging bulk taxpayer data regarding interest income on bank deposits earned by residents of either country (under the U.S. Qualified Intermediary Program under the Internal Revenue Code). As disclosed under access to information requests, the Canadian government transfers roughly 1 million information slips and records to the United States each year (Cockfield 2017, p. 674). In 2014, Canada agreed to transfer bulk taxpayer data on 'U.S. persons' with Canadian bank accounts to the Internal Revenue Service (IRS) via FATCA (discussed below). The amount of transferred information grew by almost one hundred percent in the two years after the agreement was reached (from roughly 150,000 information slips/records to roughly 300,000 information slips/records).

2.1.2 Big Data, Data Analytics and More Recent Technology Trends

Most recently, the combination of three related technology developments have enabled governments to contemplate exchanging and analyzing a taxpayer's personal information at a level previously unheard of. First, governments increasingly amass 'big data' concerning their taxpayers activities. Big data is sometimes denoted by three factors: (a) the data set is large and diverse; (b) the information is generated on a 'flow' or ongoing basis (versus a static data set); and (c) the data is capable of being subjected to data analytics.

Data analytics, the second technology development, is the computer analysis of big data to reveal patterns or other information that is useful to governments (or other parties) (Houser and Sanders 2017). Data analytics provides insights by combining data points to reveal new information or connections among these data points that would otherwise be obscure to the human mind.

The third development involves artificial intelligence, machine learning and blockchain. By AI, we simply mean more powerful computers that are capable of processing and storing (including via the cloud (Mazur 2015)) large amounts of data, not sentient machines that will one day overthrow their human masters. Machine learning allows tax authorities to more effectively deploy these computers to craft their own algorithms to detect risks of taxpayer non-compliance. An ongoing debate is taking place concerning the implications of using such algorithms, as they have may contain biases (racial, gender and so on) built into their coding (Pasquale and Cockfield 2019). Blockchain enables the registration, storing and sharing of even greater amounts of taxpayer information, and offers the possibility that taxpayers can register and verify the accuracy of their own stored personal tax information.

While bulk taxpayer information is increasingly being exchanged across borders, it is less clear whether tax authorities have harnessed technologies revolving around AI, machine learning and blockchain—as of yet. At the domestic level, there are more examples of the usage of big data and data analytics. For instance, a number of U.S. state governments analyze large amounts of data to determine if taxpayers have filed tax returns to generate fraudulent refunds. State tax authorities cross-reference a taxpayer's refund request against billions of records from public and commercial databases to catch the tax cheats. In 2010, the New York Department of Taxation and Finance, for instance, decreased revenue losses by $1.2 billion through this approach (Bourquard and Kirsch 2014).

A barrier to enhanced EOI is the worry that new technologies, which enable the mass storage and transmission of detailed taxpayer information, will violate privacy laws, policies and interests.

2.2 Political Trends

This part briefly examines how revelations from tax haven data leaks combined with OECD and G20 reforms have encouraged governments to adopt enhanced cross-border tax information exchanges.

2.2.1 Tax Haven Data Leaks

Governments and non-governmental groups have long worried about the role of tax havens within the international tax regime. On the one hand, governments seem to embrace these tax havens as some tax laws explicitly encourage their usage.[1] Similarly, the business community in many countries has long advocated for the use of tax havens and other low tax jurisdictions to promote 'tax competitiveness' against companies based in countries that similarly offer tax breaks when their companies 'go global.' On the other hand, governments worry that tax haven usage may be leading to significant revenue losses. Moreover, tax havens at-times can be used by criminals to facilitate global financial crimes like offshore tax evasion, international money laundering and, potentially, terrorist financing.

Public engagement with the issue of offshore tax evasion was sparked by data leaks from tax havens (Cockfield 2016). Earlier leaks out of Lichtenstein and Switzerland involved bank employees who stole account information and provided it to authorities. These leaks were followed

[1] For instance, under Canadian tax law, a double dip cross-border financing structure, with the use of a tax haven-based financing affiliate, has been enabled by a recharacterization provision within section 95(2)(a)(ii) of the Income Tax Act since the 1970s.

by much larger data leaks involving millions of stolen documents. Beginning in 2013, the International Consortium for Investigative Journalists (ICIJ), a Washington-D.C. based journalist organization, revealed a series of data leaks, including: the 2013 leak from Cook Islands, Singapore, BVI, Caymans of over 2.5 million documents; the 2016 Panama Papers of over 11 million documents; the 2016 Bahamas leak of over 1.5 million documents; and the 2017 Paradise Papers (Bermuda) of over 13.4 million documents.

The leaks heightened public anxiety in some countries that global financial opacity—that is, the inability of governments to access needed tax information concerning the behavior of taxpayers—may be contributing to income inequality by allowing criminals and high-income taxpayers to move and hide monies offshore (Cockfield 2018, 236-237).

Tax writings recognize the importance of less tangible cultural and social influences in promoting taxpayer compliance. These influences, which are sometimes referred to collectively as "taxpayer morale," include whether a taxpayer feels patriotic toward his or her country and whether the taxpayer thinks that he or she is getting a more or less fair return on a tax payment. The tax policy concern is that average taxpayers will become less compliant over time if they feel that multinational corporations are not paying their fair share of taxes or that high net worth taxpayers are greatly reducing legal tax payments and getting away with it.

Most salaciously, the leaks provide evidence of global financial crimes such as offshore tax evasion and international money laundering. The leaks also highlight how trillions of dollars flow from developing or middle-income countries to wealthier (mainly) OECD states. In some cases, this capital flight is contributing to human rights violations as assets or profits are shifted offshore, and ordinary citizens are left with far fewer resources.

The leaks also revealed details concerning how multinational firms engage in aggressive tax planning. For instance, LuxLeaks showed how the Luxembourgian government provides private advance tax rulings to reduce global tax liabilities (Marian 2017). Google, Apple and other large multinational firms were identified in the leaks as having deployed corporate subsidiaries in tax haven to (legally) reduce their global tax liabilities. The leaks additionally gave rise to multinational taxpayer concerns that adverse media coverage could harm the company's brand, goodwill or reputation, and possibly reduce long-term share value. These taxpayers increasingly assess the risk that aggressive international tax planning will attract negative media coverage down the road, leading to reputational damage.

Perhaps more importantly, the leaks placed political pressure on governments to take steps to curb areas of alleged abuse. In particular, the leaks encouraged global cooperation surrounding the Common Reporting Standard (see below).

2.2.2 The EOI Reforms and Privacy Protections

This section briefly outlines three recent EOI initiatives: Foreign Account Tax Compliance ACT (FATCA), Common Reporting Standard (CRS) and Country-by-Country Reporting (CbCR).

All U.S. citizens and residents must pay U.S. taxes on their worldwide income.[2] U.S. policymakers worry that many of these individuals fail to report this income, leading to revenue losses of billions of dollars each year (Sullivan 2004). Accordingly, legislation commonly known as FATCA was passed in 2010 to raise revenues from taxing undisclosed offshore income generated by U.S. citizens and others.[3] To comply, many foreign governments agreed to enter into an inter-governmental agreement (IGA) with the U.S. government to implement FATCA: under the general approach, tax authorities amass financial account information collected by banks then transfer this information to the Internal Revenue Service (IRS).

In part as a result of FATCA, the G20 and OECD endorsed the Common Reporting Standard as the global standard.[4] A related multilateral agreement contemplates the automatic sharing of bulk taxpayer information across borders.[5] Under this approach, a participating country such as Singapore is supposed to pass laws that mandate the automatic collection by banks of foreign investor account information then transfer this information to the Singaporean government then onto other participating countries.

In 2013, the OECD also began an ambitious plan to counter 'base erosion and profit shifting' (BEPS) by multinational firms. BEPS refers to the many international tax avoidance plans that firms adopt to legally reduce their global tax liabilities, often by shifting paper profits to tax havens. After two years of reform efforts, the OECD produced its final recommendations, including for all participating countries to adopt Country-by-Country Reporting (CBCR) (Cockfield and MacArthur 2015). Under CBCR, multinational firms for the first time would need to disclose to home and foreign tax authorities their tax and other payments in every country where they operate (Lesage and Kaçar 2013). CBCR only applies to very large multinational firms with annual consolidated group revenues that exceed 750 million Euros (or roughly US$850 million). Unlike FATCA and CRS that try to reveal hidden bank accounts to combat offshore tax evasion, CBCR is directed at helping governments identify risks of aggressive international tax avoidance for possible auditing.

2.3 Summary

New initiatives—most prominently FATCA, CRS and CCBR—contemplate the exchange of bulk (or big data) tax and financial information on an automated basis. The exchanges are

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[2] See I.R.C. § 61(a)("gross income means all income from whatever source derived").

[3] The initial legislation, entitled the *Foreign Account Tax Compliance Act* (FATCA), was not enacted. *See* H.R. 3933, 111th Cong. (1rst Sess. 2009). The legislation was subsequently passed within a large omnibus legislative package that was mainly directed at job creation. *See Hiring Incentives to Restore Employment Act*, Pub. L. No. 111-147, par. 501, 124 Stat. 71 (2010). The provisions to implement FATCA are now contained in sections 1471 to 1474 of the *Internal Revenue Code* (Sup. 2011).

[4] *See* OECD, STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL INFORMATION IN TAX MATTERS (2014), http://dx.doi.org/10.1787/9789264216525-en. A second edition was released in 2017.

[5] OECD, CRS MULTILATERAL COMPETENT AUTHORITY AGREEMENT (2014). The OECD agreement in turn is based on Article 6 of an earlier multilateral agreement. *See* OECD, CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS (1998).

facilitated by technology changes such as data analytics, artificial intelligence, and blockchain, allowing the collection, analysis and disclosure of vast amounts of detailed personal information. Moreover, global political cooperation has been encouraged by a series of tax haven data leaks that heighten public anxiety that undue revenue losses are resulting from (legal but non-compliant) aggressive international tax avoidance and (criminal) offshore tax evasion. A corresponding worry is that these concerns, in an era of growing income inequality where many believe the system is rigged in favor of the wealthy and powerful, may deligitimize democratic practices.

3 Liberty and Privacy Interests

This Part reviews concerns surrounding taxpayer liberty, privacy, confidentiality and other interests, and overviews related legal protections. It also shows how the emerging legal framework to protect these interests does not provide sufficient safeguards.

3.1 Taxation and Liberty

Before proceeding to more specific taxpayers rights such as privacy, we step back to consider the broader liberty interests at stake when a government exercises its monopoly on violence to extract a portion of a taxpayer's income and/or assets. Tax developments historically helped define the relationship between the state and the individual (Cockfield and Mayles 2013). In some countries, these developments provided the roots for later claims surrounding the need to protect taxpayer privacy, lawyer-client confidentiality, commercial and trade secrecy, and other interests.

While the relationship is tax policy and the state is ancient—over two thousand years ago Herodotus traced the influence of Ancient Egyptian tax policies on Ancient Greece—the Anglo-American saga provides fertile ground for the push-back on taxation and emerging norms that supported the political philosophy of liberalism, which begat modern democracies.

In 1066, a clear turning point took place in the Anglo world when the Normans conquered England and slew the last truly English king, King Harold. The new king, William the Conqueror, immediately embarked upon cruel tax policies to govern his Anglo-Saxon subjects. For the first time, he required the lords to record their names, property holdings, property yields and other details as tax records within the Domesday Book—it was referred to as such because domesday in old English signified 'doomsday'; like the Day of Judgment foretold in the Bible, the Domesday Book served as final judgement of tax liabilities for which no appeal was available. From that point on, tax inspectors would scrutinize a lord's property and farm yields to ensure the appropriate amount of taxes were paid. The tax measures threatened to stir rebellion that was only quelled by William's death and his young brother King Henry's precedent setting *Charter of Liberties* of 1100 and *Grant of Tax Liberties to London* of 1133 (Cockfield and Mayles 2013).

Later tax rebellions similarly led to new tax 'laws' that provided for procedural protections against overly-zealous taxation measures—perhaps most famously the battle between overly-taxed barons and King John that led to the signing of the Magna Carta in 1215. Over centuries these tax debates influenced the development of norms such as the view by John Locke in the 17^{th} Century that every individual is entitled to keep the fruits of their labours and the only acceptable and moral political system was one where the people consented to government regulation and taxation of their properties (Cockfield 2001). These views along with tax disputes between King George and his American colonists played an instrumental role in the founding of the United States as the world's first democracy in 1776 (recognizing that the franchise was only initially extended in a limited fashion to white male property owners).

As a result of these developments, the coercive power of the state to tax has generally been considered a necessary albeit sensitive political aspect of liberal democracies. While many democracies now have a rigorous rule of law along with a variety of taxpayer protections, the connection between liberty and taxation is more acute within illiberal regimes whose residents often transfer monies offshore to protect them against improper seizure by their home governments. These liberty claims hence call for legal protections such as a withholding tax in lieu of information exchange when individuals need anonymous global investments to protect the security of their own persons (along with the security of family members) against arbitrary state action. Moreover, the earlier 'natural rights' views later became human rights claims to protect an individual's privacy, laying the foundation for later taxpayer privacy claims, a topic to which we now turn.

3.2 Taxpayer Privacy

In part due to historical developments and fears of tax agents breaking into homes to seize tax payments, taxpayer information has traditionally been considered to be (along with financial information) one of the most sensitive forms of privacy (Blum 2004). Tax information can provide detailed personal information about an individual's identity and behavior (e.g., tax return information can include information about income, dependents, health and disability status, political donations, and so on). In addition, tax information about income can generate security concerns (as children of the wealthy may be kidnapped) as well as unwanted envy and political reprisals.

Due to the technological developments noted above, governments increasingly amass greater amounts of detailed personal information to protect against the risk of criminal tax evasion and non-compliant tax avoidance (Cockfield 2017b). They also collect non-tax personal data for these same purposes. For example, the Australian government cross-indexes a taxpayer's insurance premiums against her income to analyze risks and the Greek government has flown over personal residences to better assess a taxpayer's true wealth. While these efforts may be effective, they give rise to greater privacy concerns.

This increased collection and sharing across borders of taxpayer big data raises concerns that include: (a) transferred information will not be protected to the extend provided by the law of the transferring country; (b) transferred information may be misused for political purposes such as helping domestic companies against foreign competitors; (c) transferred information may be misused to sanction taxpayers for political reasons, potentially leading to human rights violations (Human Rights Council 2014; American Bar Association 2013); (d) transferred information may be illegally accessed or altered by third parties; and (e) transferred information may be inaccurate leading to foreign investigations that target innocent taxpayers.

There is no doubt that these are serious concerns. Yet a problem with the current global financial regime is that it offers near-anonymity for global financial transactions and investments (Cockfield 2016). The main beneficiaries of this lack of transparency are large multinational corporations, ultra-high net worth individuals (typically defined as individuals with at least $50 million in assets) and those engaged in global financial crimes (i.e., offshore tax evasion, international money laundering and terrorist financing). The main losers in this system are average citizens whose governments sustain tax revenue losses due to aggressive international tax avoidance and offshore tax evasion. In turn, this development encourages the view that the global financial system is rigged in favor of the wealthy and powerful (see the related discussion above).

This view calls for more nuanced analysis in situations where cross-border tax and financial privacy laws are used to frustrate the interests of average citizens. In particular, I have recognized that legal analysis must address these distributive justice concerns surrounding the lack of global financial transparency (Cockfield 2017b).

3.3 Confidentiality and Trade Secrets

In contrast to individual taxpayer rights, the privacy rights of corporate taxpayers have attracted less academic and policy attention. This can be explained in part by the fact that substantive privacy rights are generally associated with individuals. The nature of these privacy rights devolves from the potential for intimate harm (for example, kidnapping) that could be caused from the disclosure of an individual’s personal information. These same concerns are less evident in the case of corporate taxpayers (Blank 2014, p. 40).

Notwithstanding the reduced emphasis placed on corporate privacy rights, it is clear that taxpayer confidentiality and trade secrecy remain important and valid privacy concerns for MNEs (Cockfield and MacArthur 2015). Under Article 26(2) of the OECD model tax treaty, tax authorities must maintain confidentiality surrounding tax information they receive. Under the general approach, disclosure is limited to persons or authorities involved in the assessment, collection, enforcement, prosecution and determination of appeals. Pursuant to the OECD Commentary on Article 26 at paragraph 19.2, a trade or business secret is “generally understood to mean facts and circumstances that are of considerable economic importance and that can be exploited practically and the unauthorised use of which may lead to serious damage (e.g., may lead to severe financial hardship).”

A revelation of a commercial or trade secret could harm the ability of an MNE to compete effectively within the marketplace, potentially reducing national and global welfare. For instance, if a firm feared revealing an important intellectual property right then it may be reluctant to transfer this resource via a licensing agreement with a related foreign affiliate, which could ultimately interfere with the efficient allocation of resources throughout the global economy. Importantly, none of the financial information mandated by CBCR would constitute a trade, business or other secret as defined by the OECD within the Commentary to its model tax treaty.[6]

3.4 Problems with the Existing Legal Framework

A complex patchwork of domestic, Constitutional, tax treaty, and multilateral treaties governs and protects privacy and other taxpayer interests.

First, governments pass domestic tax laws that prohibit unauthorized access or transfer of taxpayer information (Li 1998).[7] Domestic non-tax laws such as corporate laws often allow the identity of the true (or beneficial) owners of business entities to remain hidden. Second, certain countries (such as Canada and the United States) have additional Constitutional protections (such as prohibitions against unreasonable government searches, including investigations reviewing taxpayer information). In this context, the Supreme Court of Canada has emphasized the protection of individuals' personal information, repeatedly recognizing the right to privacy as a fundamental human right aimed at protecting the dignity, autonomy, integrity and security of individuals.[8]

The European Union's Convention on Human Rights at-times offers similar human rights protections against the abusive government access, use or disclosure of tax information.[9] Moreover, these human rights protections are also found within United Nations human rights protections, including more recent documents that try to inhibit the privacy harms caused by government mass surveillance of granular personal data (that do not specifically reference tax matters).[10] The increased linkages between human rights and the protection of taxpayer data

[6] The OECD has explicitly stated that any information transferred under CBCR should ensure that there is no public disclosure of "confidential information (trade secrets, scientific secrets, etc.) and other commercially sensitive information." See OECD Implementation Guidance, supra note 4 at paragraph 44.

[7] Li notes that, while privacy and confidentiality rights were built into tax systems such as the Canadian one at the inception, in the 1980s there began to be increasing recognition—and legal protection—for these rights. Id. at 89-90.

[8] *R v Dyment*, [1988] 2 SCR 417; *R v O'Connor*, [1995] 4 SCR 41; *R v Mills*, [1999] 3 SCR 668.

[9] Philip Baker and Pasquale Pistone, BEPS Action 16: The Taxpayers' Right to an Effective Legal Remedy under European Law in Cross-border Situations, 5-6 EC Tax Review 335 (2016)(describing the impact of 'European law', including the European Convention on Human Rights); Clement Endresen, Taxation and the European Convention for the Protection of Human Rights: Substantive Issues, 45 Intertax 508 (2017)(discussing how the Convention does not normally apply to substantive tax issues, which is appropriate given the national sovereignty concerns). But see Sommer v. Germany (April 27, 2017, no. 73607/13)(ECHR)(holding that German government search of a lawyer's financial information records violated Article 8 of the Convention).

[10] United Nations General Assembly, *Universal Declaration of Human Rights* (Gen. Ass. Resolution 217A, Dec. 10, 1948). In December 2013, the United Nations General Assembly adopted resolution 68/167, which

demonstrates the need for data protection laws and policies to protect the taxpayer as a data subject (see below).

Third, bilateral tax treaties typically provide for a series of protections for privacy and commercial confidentiality (generally based on Article 26 of the OECD model tax treaty). Commercial and trade secrets are hence protected by both domestic and tax treaty rules. Domestic tax laws provide for the maintenance of confidentiality with respect to any non-public tax information, including commercial and trade secrets. Tax treaties generally contain a provision that lets the tax authorities of one country request tax information from another, mainly to assist with audits. Under the general rule found within Article 26(3)(c) of the OECD model tax treaty, a government can deny an information request on the basis that the request violates the taxpayer's right to maintain commercial and trade secrecy. In the FATCA context, the bilateral IGAs between the United States and foreign governments offers additional protections.

Fourth, multilateral agreements increasingly bind participating countries to privacy protections. For example, under the Country-by-Country Reporting (CbCR) reforms noted above governments must agree to provide and enforce legal protections to maintain the confidentiality of reported information equivalent to the protection under an income tax treaty or other EOI agreement.[11] Further, the automatic transmission of CbCR information is limited to those countries that satisfy these requirements. There are also regional agreements such as the European Union's Directive on Administrative Cooperation that was extended in 2014 to include automatic EOI among member states.

While the current global tax framework surrounding EOI is in flux, a number of observers have suggested that this regime provides insufficient legal protections for taxpayer privacy and other rights.[12] First, elements of the current regime such as FATCA do not operate on a reciprocal basis hence the privacy protections only go one way. Second, there are so many different domestic and now international agreements they give rise to 'legal gaps' where particular countries have not

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expressed concern at the negative impact that surveillance and interception of communications may have on human rights. While the resolution focused on mass surveillance techniques, it would also apply to the possible misuse of bulk tax information exchanged across borders.

[11] *See* OECD, ACTION 13: GUIDANCE ON THE IMPLEMENTATION OF TRANSFER PRICING DOCUMENTATION AND COUNTRY-BY-COUNTRY REPORTING ¶¶ 7, 9, 15 (2015), http://www.oecd.org/ctp/beps-action-13-guidance-implementation-tp-documentation-cbc-reporting.pdf.

[12] For a comprehensive review, see Filip Debelva and Irma Mosquera, Privacy and Confidentiality in Exchange of Information Procedures: Some Uncertainties, Many Issues, but Few Solutions, 45 Intertax 362, 377-(2017)(advocating a multilateral agreement for privacy and confidentiality) and Irma Mosquera et al., The Rule of Law and the Effective Protection of Taxpayers' Rights in Developing Countries (WU International Taxation Research Paper Series No. 2017 – 10, 2017). See also Philip Baker and Pasquale Pistone, BEPS Action 16: The Taxpayers' Right to an Effective legal Remedy under European Law in Cross-border Situations, 5-6 EC Tax Review 335 (2016)(discussing how the rules of certain surveyed countries do not sufficiently protect the right to confidentiality and privacy); Menita Giusy De Flora, Protection of the Taxpayer in the Information Exchange Procedure, 45 INTERTAX 447, 448-450, 458 (2017)(advocating for "a clear and common set of rules"); Niels Diepvens and Filip Debelva, The Evolution of the Exchange of Information in Direct Tax Matters: The Taxpayer's Rights Under Pressure, 4 EC Tax Review 210 (2015).

signed onto adequate measures to protect taxpayer interests in ways required by transferring countries. Third, there is significant uneven enforcement of EOI measures, leading to concerns that transferred tax information will be used for improper, illegal or abusive reasons. Fourth, many countries have financial secrecy laws that mask the true identities of owners of cross-border investments for wealthy or criminal taxpayers, leaving less well resourced taxpayers at the mercy of the uneven legal regime.

3.5 Summary

In the modern world, countries' tax systems are inextricably interwoven with normative questions of justice and the appropriate relationship between citizen and state. In many countries, the government's power to take away a portion of the fruit of one's labours (along with unearned wealth accumulated via gifts, bequests, etc.) is attenuated by legal and Constitutional protections for privacy rights, commercial confidentiality and trade secrets. Individuals living or dealing with illiberal governments—where taxpayer's personal information is more at risk of being improperly accessed, used and disclosed—rely on the current environment of global fiscal opacity to protect their taxpayer rights when they transfer monies offshore. The problem with this lack of global fiscal transparency is that governments normally know little to nothing about their residents' foreign-based assets or income.

To inhibit revenue losses associated with offshore tax evasion and aggressive international tax avoidance, governments have initiated new EOI measures such as FATCA, CRS, and CbCR. Critics note that the current and emerging legal framework to protect taxpayer privacy and other rights suffers from a number of deficiencies that could be addressed through better laws and policies, a matter taken up next.

4 Optimal Reforms

As I explored elsewhere, there are two discrete but related elements surrounding effective exchanges of cross-border tax and financial information (Cockfield 2010, at p. 454). First, the cross-border tax information exchange legal regime needs to be efficient in the sense that it should promote low taxpayer compliance costs and low tax authority administrative costs. Second, the exchange should be fair in the sense that any transferred information is afforded a requisite level of privacy and other rights protection (normally equivalent to legal protections set out within domestic law). The two elements are related in the sense that governments will be reluctant to engage in big tax data exchanges with other countries (or meaningfully implement existing agreements) unless they have legal assurances that their taxpayers' rights will not be violated. This Part discusses how to achieve an appropriate balance between taxpayer privacy concerns and tax authorities' need to access foreign-based taxpayer information.

4.1 Multilateral Taxpayer Bill of Rights

As discussed elsewhere in greater depth, governments should consider adopting a broad multilateral taxpayer bill of rights that would provide assurances to participating countries that any transferred tax or financial information attracts a minimum level of legal protection (Cockfield 2010; Baker and Groenhagen 2001; Sawyer 1999)). Such a global agreement would address the concerns noted previously surrounding issues such as 'legal gaps' that occur from the application of different bilateral and regional legal protections.

Moreover, this global agreement could implement data protection laws and policies to recognize the fact that, given the technology and political trends discussed previously and recognizing the critical human rights role of taxpayer liberty and privacy, a taxpayer is increasingly viewed as a 'data subject'. Accordingly, the agreement could emphasize widely-accepted fair information practices that seek to proactive protect the interests of data subjects, including notice, consent, access, collection purpose specification, and data accuracy/security. These practices were initially developed by the OECD in 1980 and are reflected in the European Union's General Data Protection Regulation as well as the privacy laws in countries such as Canada (via the *Personal Information Protections and Electronic Documents Act*) and administrative guidelines in nations such as the United States (via the Federal Trade Commission's data privacy guidelines).

These fair information practices are used to smooth over conflicts caused by the interaction of different national privacy laws when personal information is transferred borders. A recent example of their usage is the 2016 European Union-United States Privacy Shield that is designed to protect individuals' privacy rights when personal data is transferred from European companies to U.S. ones.[13] Given technology change and the enhanced EOI efforts, building in fair information practices into an international agreement would treat taxpayers in the same way as 'data subjects', namely those individuals who are subjected to personal information collection techniques from businesses and others.

4.2 Withholding Tax for Non-Cooperative States

As briefly explored, a cross-border withholding tax on global investments could assist tax authorities enforce their tax laws, and protect the liberty and privacy interests of taxpayers who reside in illiberal regimes.

As the new EOI initiatives gain steam, a challenge is that certain countries are either refusing to participate or they are signing onto to the initiatives but will not meaningful implement them. As Avi-Yonah has discussed, as long as there is one non-participating country then undisclosed investment monies can flow to this outlier (Avi-Yonah 2000, p. 1667-1669). His proposed solution resembles the now-defunct EU Savings Directive as it (a) called for the

[13] Under this agreement, the United States provided the EU with binding assurances that the access by U.S. government authorities of transferred personal information for national security purposes will be subject to clear limitations, safeguards and oversight mechanisms. In addition, EU citizens are offered a mechanism to seek redress if their rights appear to be violated and an annual joint review will monitor the implementation of the commitments. *See* EUROPEAN COMMISSION, GUIDE TO THE E.U.-U.S. PRIVACY SHIELD 9-19 (2016)

automatic exchange information about portfolio non-resident interest payments; or (b) if an exchange of information does not occur then the country where the investment takes place will tax the interest and send the bulk of the resulting tax revenues to the residence country (EU Council Directive 2003)[14]. Accordingly, this EOI measure ensures tax payment via withholding or provides the government with another source of information to contrast against the taxpayer's tax filings. Building on these views, I previously outlined how tax authorities could embrace online technologies—an extranet among participating countries—to impose such a withholding tax (Cockfield 2001, p. 1235-1263).

While this measure would promote enforcement, it could also serve to protect taxpayer liberty and privacy interests. Taxpayers residing in, or dealing with, illiberal governments with weak rules of law may not trust these governments to protect their privacy and other rights. These taxpayers could choose to deal with a non-cooperative government as the base for their global investments (and hence their cross-border investments would be subject to the withholding tax).

4.3 Global Financial Registry

A major challenge to the EOI initiatives is that governments often cannot identify the ultimate (or beneficial) human owners of cross-border investments because corporate laws provide ownership anonymity (by permitting business entities to own investments without disclosing the true human owners of these entities). To address this problem, academics and governments have discussed the need for financial registries that mandate the disclosure of beneficial owners of business entities such as corporations and legal entities such as trusts and foundations (Zucman 2014).

A fully-searchable public financial registry, as espoused by some governments and commentators, would be highly problematic as it would overly intrude on taxpayer privacy rights and potentially inhibit global capital flows, reducing overall economic growth (Cockfield 2017b).

Nevertheless, a global financial registry accessible only by government tax authorities might be politically feasible. Such a registry would help government investigators by addressing one of the main information disadvantages facing governments, namely their inability to identify the human beneficial owners of cross-border investments. In addition, the registry would help governments determine if their resident firms had paid tax on worldwide income.

Governments might consider the government-to-government exchange of entity and ownership information if they were provided with sufficient privacy safeguards, including a multilateral taxpayer bill of rights. Still, non-cooperative states would presumably develop new business or legal entities that would not be covered by the new disclosure obligations. In addition, the entity and ownership information is often recorded by offshore service providers and tax haven governments do not currently have access to this information (Cockfield 2016). Problematically,

[14] The European Union abandoned this approach to join the Common Reporting Standard initiative.

governments such as Canada and the United States maintain 'onshore' financial secrecy laws that mask beneficial owner identities. Nor do many low income countries have the needed human and technological resources for effective collection, use and disclosure of tax information within an EOI regime.

Finally, the global registry will not cover the non-cooperative states touched on in the discussion of the withholding tax (as they presumably will not sign on). In lieu of disclosure under a global registry, a payment to someone from a non-cooperative state to someone living in a participating state will be subject to the withholding tax. There would need to be a way to identify the jurisdiction of the beneficial owner of the payment so that this country could enjoy the revenues associated with the withholding tax.

5 Conclusion

In recent years, academics have begun a more careful study of automatic cross-border exchange of information (EOI). EOI is being driven by technology developments (e.g., the transition from analog to digital, big data, data analytics, and artificial intelligence) and political developments (e.g., tax haven data leaks and the OECD/G20 Base Erosion and Profit Shifting (BEPS) reforms). In particular, the Foreign Account Tax Compliance Act (FATCA), the Common Reporting Standard (CRS) and Country-by-Country Reporting (CBCR) all contemplate automatic exchanges of bulk tax and financial information across borders. Under this regime, the rights and interests are protected by a complex patchwork of domestic, Constitutional, bilateral tax treaty and, increasingly, multilateral agreements.

Despite these measures, there are ongoing concerns surrounding the EOI initiatives involving cross-border big data flows such as a lack of reciprocity, legal gaps, uneven enforcement, lack of tax administration resources to meaningfully implement, and the ongoing impact of offshore and onshore financial secrecy laws. Effective cross-border tax sharing will be inhibited to the extent the exchanges are not perceived to be fair because of insufficient taxpayer privacy protections.

A multilateral taxpayer bill of rights could set out widely-accepted fair information practices and promote legal certainty as well as the effective implementation and enforcement of EOI measures. This development could be accompanied by a global financial registry, accessible only by governments, to allow tax authorities to discern the real identities of taxpayers. As further protections for taxpayer liberty and privacy (and accounting for the reality of non-cooperative states), the proposed regime could provide for a withholding tax in lieu of information exchange, which also protects concerns of taxpayers who reside within, or deal with, illiberal governments.

Reference List

Avi-Yonah, Reuven S. (2000). Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State. *Harvard Law Review*, 113(7), 1573-1676.

Baker, P, and A. Groenhagen. (2001). *The Protection of Taxpayers Rights—An International Codification*. London: European Policy Forum.

Baker, Philip, and Pasquale Pistone. (2016). BEPS Action 16: The Taxpayers' Right to an Effective Legal Remedy under European Law in Cross-border Situations. *EC Tax Review*, 25(5/6), 335-345.

Blank, Joshua D. (2014). Reconsidering Corporate Tax Privacy. *New York University Journal of Law and Business,* 11, 31-121.

Blum, Cynthia. (2004). Sharing Bank Deposit Information with Other Countries: Should Tax Compliance or Privacy Claims Prevail. *Florida Tax Review*, 6(6), 579-648.

Bourquard, JoAnne and Cassandra Kirsch. (2014). Big Data = Big Benefits. *State Legislatures*, 40(8), 32-34.

Cockfield, Arthur J. (2001a). Income Taxes and Individual Liberty: A Lockean Perspective on Radical Consumption Tax Reform. *South Dakota Law Review*, 46, 8-71.

Cockfield, Arthur J. (2001b). Transforming the Internet into a Taxable Forum: A Case Study in E-Commerce Taxation. *Minnesota Law Review*, 85, 1235-1263.

Cockfield, Arthur J. (2002). The Law and Economics of Digital Taxation: Challenging Traditional Tax Laws and Principles. *Bulletin for International Fiscal Documentation,* 56, 606-620.

Cockfield, Arthur J. (2010). Protecting Taxpayer Privacy under Enhanced Cross-border Tax Information Exchange: Toward a Multilateral Taxpayer Bill of Rights. *University of British Columbia Law Review,* 42, 419-471.

Cockfield, Arthur J. (2016). Big Data and Tax Haven Secrecy. *Florida Tax Review,* 18, 483-539.

Cockfield, Arthur J. (2017a). Examining Canadian Offshore Taxation. *Canadian Tax Journal*, 63, 651.

Cockfield, Arthur J. (2017b). How Countries Should Share Tax Information. *Vanderbilt Journal of Transnational Law*, 50, 1091-1132.

Cockfield, Arthur. (2018). Shaping International Tax Policy in Challenging Times. *Stanford Journal of International Law*, 54, 223-240.

Cockfield, Arthur J., and Carl MacArthur. (2015). Country-by-Country Reporting and Commercial Confidentiality. *Canadian Tax Journal,* 63, 627-660.

Cockfield, Arthur J., and Jonah Mayles. (2013). The Influence of Historical Tax Law Developments on Anglo-American Law and Politics. *Columbia Journal of Tax Law,* 3, 40-69.

Cockfield, Arthur, Walter Hellerstein, Rebecca Millar, and Christophe Waerzeggers. (2013). *Taxing Global Digital Commerce*. The Netherlands: Wolters Kluwer Law & Business.

Debelva, Filip and Mosquera, Irma. (2017). Privacy and Confidentiality in Exchange of Information Procedures: Some Uncertainties, Many Issues, but Few Solutions. *Intertax,* 45, 362.

Endresen, Clement. (2017). Taxation and the European Convention for the Protection of Human Rights: Substantive Issues. *Intertax,* 45, 508-526.

Li, Jinyan. (1998). Taxpayers' Right in Canada, in Duncan Bentley, ed., *Taxpayers' Rights: An International Perspective* (Gold Coast, Revenue Law Journal), at 89.

Sullivan, Martin A. (2004). U.S. Citizens Hide Hundreds of Billions in Cayman Accounts. *Tax Notes,* 103, 956-964.

Marian, Omri (2017). *The State Administration of International Tax Avoidance.* Harvard Business Law Review 7, 1.

Mazur, Orly. (2015). Taxing the Cloud. *California Law Review,* 103, 1-65.

Zucman, Garbriel. (2014). Taxing Across Borders: Tracking Personal Wealth and Corporate Profits. *Journal of Economic Perspectives,* 28, 121-148.

See for further reading / examples

Carmona, Ms. Maria Magdalena Sepúlveda. (22 May 2014). Human Rights Council, Report of the Special Rapporteur on Extreme Poverty and Human Rights. UN Doc. A/HRC/26/28.

De Flora, Menita Giusy. (2017). Protection of the Taxpayer in the Information Exchange Procedure. *Intertax*, 45, 448-450, 458.

Diepvens, Niels and Debelva, Filip. (2015). The Evolution of the Exchange of Information in Direct Tax Matters: The Taxpayer's Rights Under Pressure. *EC Tax Review*, 4, 210.

European Union. (2003). Council Directive 2003/48/EC of 3 June 2003 on Taxation of Savings Income in the Form of Interest Payments.

Houser, Kimberly A. and Sanders, Debra. (2017). The Use of Big Data Analytics by the IRS: Efficient Solutions or the End of Privacy as We Know It. *Vanderbilt Journal of Entertainment and Technology Law*, 19(4), 817.

International Bar Association. (2013). Tax Abuses, Poverty and Human Rights: A Report of the International Bar Association's Human Rights Institute Task Force on Illicit Financial Flows, Poverty and Human Rights. .

Lesage, Dries and Kaçar, Yusuf. (2013). Tax Justice Through Country-by-Country Reporting: An Analysis of the Idea's Political Journey. In Jeremy Leaman and Attiya Waris (Eds.), *Tax Justice and the Political Economy of Global Capitalism, 1945 to the Present* (pp. 262-263). New York: Berghahn.

Michel, Scott D. and Rosenbloom, H. David. (May 30, 2011). FATCA and Foreign Bank Accounts: Has the U.S. Overreached? *Tax Notes International,* 62, 712.

Mosquera, Irma et al. (2017). The Rule of Law and the Effective Protection of Taxpayers' Rights in Developing Countries. *WU International Taxation Research Paper Series No. 2017 – 10*.

Pasquale, Frank and Cockfield, Arthur J. (forthcoming 2019). Beyond Instrumentalism: A Substantive Perspective on Law, Technology and Digital Persona. *Michigan State Law Review*.

OECD (2014). Standard for Automatic Exchange of Financial Information in Tax Matters. http://dx.doi.org/10.1787/9789264216525-en.

OECD (1998). Convention on Mutual Administrative Assistance in Tax Matters.

OECD (2015). Action 13: Guidance on the Implementation of Transfer Pricing Documentation and Country-by-Country Reporting. http://www.oecd.org/ctp/beps-action-13-guidance-implementation-tp-documentation-cbc-reporting.pdf.

OECD. (2014). CRS Multilateral Competent Authority Agreement.

Sawyer, A.J. (1999). A Comparison of New Zealand Taxpayers' Rights with Selected Civil Law and Common Law Countries—Have New Zealand Taxpayers Been "Short-Changed"? *Vanderbilt Journal of Transnational Law,* 32, 1345.

European Commission. (2016). Guide to the E.U.-U.S. Privacy Shield, 9-19.

United Nations General Assembly. *Universal Declaration of Human Rights* (Gen. Ass. Resolution 217A, Dec. 10, 1948).