

Automatic Exchange of Information and Cross Border Flows of Personal Data

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1 Introduction

International cooperation between national tax authorities through exchange of information is becoming even more important than it was before in combating tax evasion.²³ In October 2014, the heads of tax administrations from 38 countries, who met in Dublin for the 9th meeting of the Forum on Tax Administration (FTA) of the Organization for Economic Cooperation and Development (OECD), announced that they agreed that co-operation will be necessary to implement the base erosion and profit shifting (BEPS) project and automatic exchange of financial information.

In the European Union (EU), the European Commission (EC) published an Action Plan on 6 December, 2012 with concrete proposals to

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² Regarding the historical development of international exchange of information, see, Xavier Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency*, Cheltenham, Edward Elgar Pub, 2015, pp.4-13.

³ Xavier Oberson, *General Report*, in International Fiscal Association, Cahiers de droit fiscal international Vol. 98b, 2013, pp.17-57.

strengthen the fight against tax fraud and tax evasion. Many of these focused specifically on enhancing tax transparency and information exchange. Subsequently, on 18 March 2015, the EC published the Communication on the fight against tax fraud and tax evasion.⁴ This Communication included a Tax Transparency Package setting out a number of measures which can be taken in the short-term to enhance tax transparency, most importantly the automatic exchange of information on cross-border tax rulings within the EU.

Japan does not seem to be a frontrunner in respect to automatic exchange of information, possibly because of privacy considerations.

In this article, the implementation of automatic exchange of information is discussed with a focus on cross border flows of personal data. First, we discuss the legal framework for the exchange of information. Article 26 of the OECD Model Tax Convention, the Intergovernmental Agreements (IGAs) concluded to in relation to the US Foreign Account Tax Compliance Act (FATCA), the Agreement on Exchange of Information on Tax Matters and Tax Information Exchange Agreements (TIEAs), the EU Directive which obliges EU Member states to implement Common Reporting Standards, the OECD Country by Country Reporting (CbCR) Implementation Package (part of BEPS Action plan 13) and the EU Directive and other initiatives on the automatic exchange of information on tax rulings will each be analysed. Special attention will be given to the Japanese implementation of exchange of information. Second, we will discuss

⁴ COM(2015) 136 final.

Taxpayer Identification Numbers (TINs) as these are deemed important in improving the effectiveness of the exchange of information. Third, we discuss protection of personal information in relation to the implementation of automatic exchange of information with a focus on cross border flows of personal data.

2 Legal framework of exchange of information

Exchange of information needs a basis in the legal framework. This is not only the case for exchange of information on request, but maybe even more so for automatic exchange of information.

Automatic exchange of information involves the systematic and periodic transmission of “bulk” taxpayer information by the source country of income to the country of residence of the taxpayer concerning various categories of income or asset information (e.g., dividends, interest, royalties, salaries, pensions, etc.). The information exchanged automatically is normally collected in the source country on a routine basis, generally through reporting of the payments by the payer (financial institution, employer, etc.).⁵ The legal basis for automatic exchange of information is generally (1) the exchange of information provision of a double taxation convention based on Article 26 of the OECD or UN Model Convention, (2) Article 6 of the Convention on Mutual Administrative Assistance in Tax Matters, or (3)

⁵ OECD, Automatic Exchange of Financial Account Information Background Information Brief Updated: 5 November 2015. <http://www.oecd.org/ctp/exchange-of-tax-information/automatic-Exchange-Financial-Account-Information.pdf> (accessed 15 November 2015).

for EU member countries, domestic laws implementing EU directives which provide for automatic exchange.⁶ However, in the past few years, also new instruments have been developed. This is the legal framework which will be discussed below.

2.1 Bilateral tax conventions: article 26 of the OECD Model Tax Convention

Bilateral tax treaties which include a provision based on Article 26 of the OECD Model Tax Convention permit exchange of information. Article 26 provides for broad information exchange and does not limit the forms or manner in which information exchange can take place. The main forms of information exchange are on request, automatic and spontaneous.⁷ Article 26 also provides for confidentiality rules, the purposes for which the information may be used and limits to whom the information may be disclosed.⁸

⁶ OECD, *Automatic Exchange of Information What It Is, How It Works, Benefits, What Remains To Be Done*, p.13 (2012).

<http://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-of-information-report.pdf> (accessed 15 November 2015).

⁷ *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes*: Approved by the OECD Committee on Fiscal Affairs on 23 January 2006, p. 7.

<http://www.oecd.org/tax/exchange-of-tax-information/36647823.pdf> (accessed 15 November 2015).

⁸ OECD, *Keeping it Safe: The OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax Purposes*, 2012, p.12.

<http://www.oecd.org/tax/transparency/final%20Keeping%20it%20Safe%20with%20cover.pdf> (accessed 15 November 2015).

2.2 Convention on Mutual Administrative Assistance in Tax Matters

The Convention on Mutual Administrative Assistance in Tax Matters (the Convention) is the result of work carried out jointly by the Council of Europe and by the OECD. On 25 January 1988 the Convention was opened for signature by the Member States of the Council of Europe and member countries of the OECD (the 1988 Convention). The 1988 Convention was revised in 2010 primarily to align it to the internationally agreed standard on transparency and exchange of information and to open it up to states that are not members of the OECD or of the Council of Europe.⁹ The Convention was amended again and opened for signature on 1 June 2011. This Convention provides for all forms of administrative cooperation and permits automatic exchange of information. Automatic exchange under the Convention requires a separate agreement between the competent authorities of the states, and can be entered into by two or more states under one agreement (with actual automatic exchange always taking place on a bilateral basis). Such a competent authority agreement then activates and “operationalises” automatic exchange between the participating states. Where jurisdictions rely on other information exchange instruments, such as bilateral treaties, a competent authority agreement can serve the same function.¹⁰

⁹ Text of the revised explanatory report to the Convention on Mutual Administrative Assistance in tax matters as amended by protocol. http://www.oecd.org/tax/exchange-of-tax-information/Explanatory_Report_ENG_%2015_04_2010.pdf(accessed 15 November 2015).

¹⁰ OECD, Standard for Automatic Exchange of Financial Account Information

2.3 Model agreement on exchange of information on tax matters and TIEA's

In April 2002, the OECD Global Forum Working Group on Effective Exchange of Information released the Model agreement on exchange of information on tax matters. This agreement promotes international cooperation in tax matters through exchange of information. It represents the standard of effective exchange of information for purposes of the OECD's initiative on harmful tax practices. It only applies to the exchange of information on request. It is not a binding instrument, but contains two models for bilateral agreements. Many so called Tax Information Exchange Agreements (TIEA's) have been signed based on these models.¹¹ Japan has concluded TIEA's with 10 countries such as the Bahamas, Bermuda, and the Cayman Islands. Most countries have signed TIEA's with more countries.¹² For example, the US signed TIEA's with 13 countries, the Netherlands with 25 countries.

2.4 FATCA

In 2010, the United States (US) enacted the foreign account tax

common reporting standard, p.8 (2014).

<http://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-financial-account-information-common-reporting-standard.pdf> (accessed 15 November 2015).

¹¹ For an overview we refer to <http://www.oecd.org/tax/transparency/taxinformationexchangeagreementstieas.htm> (accessed 7 October 2015).

¹² Ministry of Finance, Japan's Tax Convention Network https://www.mof.go.jp/english/tax_policy/tax_conventions/international_182.htm (accessed 7 February 2016).

compliance Act (FATCA) to prevent tax evasion through US citizens' use of foreign financial institutions. It was introduced as part of the Hiring Incentives to Restore Employment Act of 2010.¹³ FATCA requires foreign financial institutions (FFIs) to report to the IRS information on financial accounts held by US taxpayers, or by foreign entities in which US taxpayers hold a substantial ownership interest. FATCA is not enforceable outside the US. However, it obliges US withholding agencies to make a punitive withholding of 30% if the payments to foreign financial institutions do not meet the conditions required by FATCA. As a result, it has become an indirect mechanism to enforce compliance of FFIs who want to avoid FATCA withholding. FATCA targets tax non-compliance by US taxpayers with foreign accounts. It focuses on reporting:

- by US taxpayers of certain foreign financial accounts and offshore assets
- by FFIs of financial accounts held by US taxpayers or foreign entities in which US taxpayers hold a substantial ownership interest

The objective of FATCA is the reporting of foreign financial assets; withholding is the cost of not reporting.

The US Treasury department has issued two model intergovernmental agreements (IGAs). The first IGA, called the Model 1 IGA, requires FFIs to report all FATCA-related information to their own governmental agencies, which then report the FATCA-related information to the IRS. An FFI covered by a Model 1 IGA will not need

¹³ Pub. L. 111-147 (H.R. 2847).

to sign an FFI agreement, but they will need register on the IRS's FATCA Registration Portal. The second version of the IGA, the Model 2 IGA, requires FFIs to report directly to the IRS. Under the Model 2 IGA, FFIs must register with the IRS, and certain FFIs must sign an FFI agreement.

Most developed countries concluded the Model 1 IGA. In September 2015 the IRS announced that 112 jurisdictions have either signed a Model 1 IGA, or are accepted by the US as having done so in principle.¹⁴ Only seven jurisdictions, including Japan, concluded the Model 2 IGA.¹⁵

2.5 Common Reporting Standards

Following the negotiations between the US and several other countries on IGAs to implement FATCA, the OECD was mandated by the G20 to build on these agreements to develop a single global standard for automatic exchange of financial account information. On 21 July 2014, the OECD released the Standard for Automatic Exchange of Financial Account Information in Tax Matters (the Standard). The Standard included a Model Competent Authority Agreement (Model CAA) and the Common Reporting and Due Diligence Standard (CRS). Based on this Standard, countries will annually exchange financial account information. The country in which the account is held will

¹⁴ Notice 2015-66, p.9 <http://www.irs.gov/pub/irs-drop/n-15-66.pdf> (accessed 2 October 2015).

¹⁵ U.S. Department of the Treasury, Foreign Account Tax Compliance Act (FATCA) <https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx> (accessed 7 February 2016).

automatically exchange the information with the tax authorities of the residence country of the account holders. This information includes balances, interest, dividends, and sales proceeds from financial assets, reported to governments by financial institutions. It covers accounts held by individuals and entities, including trusts and foundations. The Standard sets out the financial account information to be exchanged, the financial institutions that need to report, the different types of accounts and taxpayers covered, as well as common due diligence procedures to be followed by financial institutions. On 29 October 2014, 51 jurisdictions signed a multilateral competent authority agreement to automatically exchange this information based on Article 6 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. This agreement specifies the details of what information will be exchanged and when, as set out in the Standard. A total of 61 jurisdictions had signed the agreement by June 2015.¹⁶ The US is not one of these countries as it relies on the bilateral IGA's. Japan has not yet signed the agreement, but has expressed the wish to apply it by 2018.

All EU countries have signed the agreement. Furthermore, in the EU the CRS and exchange of information must be implemented on 1 January 2016 based on Council Directive 2014/107/EU of 9 December

¹⁶ OECD, Automatic Exchange of Financial Account Information. Background information brief 4 June 2015, p.3. For an overview of the countries we refer to <http://www.oecd.org/tax/exchange-of-tax-information/MCAA-Signatories.pdf> (accessed 7 October 2015). <http://www.oecd.org/ctp/exchange-of-tax-information/automatic-Exchange-Financial-Account-Information.pdf> (accessed 2 October 2015).

2014. This Directive amends Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (the “Mutual Assistance Directive”).

This Mutual Assistance Directive establishes all the necessary procedures for better cooperation between tax administrations in the European Union, such as exchange of information on request, spontaneous exchange, automatic exchange, participation in administrative enquiries, simultaneous controls, and notifications to each other of tax decisions. It also provides for the necessary practical tools, such as a secure electronic system for information exchange.

The Mutual Assistance Directive includes a so-called most favoured nation clause. The EU Member States have to provide any EU partner with the same level of information as they provide to third countries. As the FATCA IGA’s generally provide a scope of automatic exchange of information which is broader than under the Mutual Assistance Directive, these IGA’s would oblige Member States to exchange information on all categories of financial income which they would exchange with the US under the IGA, to all other Member States.¹⁷

Council Directive 2014/107/EU of 9 December 2014 provides for the inclusion in the Mutual Assistance Directive of CRS reporting within the EU for all Member States as of 2016. Based on this Directive,

¹⁷ Samantha Merle, Sumeet Hemkar, Katrina Dautrich-Reynolds, *The global harmonisation of exchange of information*, International Tax Review (2014).
http://www.atoz.lu/IMG/pdf/the_global_harmonisation_of_exchange_of_information__international_tax_review.pdf (accessed 15 November 2015).

Member States will require their financial institutions to implement reporting and due diligence rules which are fully consistent with those set out in the CRS. Furthermore, the scope of Article 8 of Directive 2011/16/EU is extended to include the same information covered by the OECD Model CAA and CRS. Reporting Financial Institutions (RFIs) must report to the competent authority of its Member State the following information with respect to each reportable account: the name, address, Member State(s) of residence, tax identification number (TIN), date and place of birth (in the case of an individual) of each account holder, the account number, and the account balance or value as of the end of the relevant calendar year.

By 30 September 2017, EU Member States must exchange information for the first time, regarding information on 2016. Only Austria is allowed to postpone this date to 30 September 2018 and is only obliged to exchange information from the year 2017 onwards. On 11 September 2015, the Dutch government sent the Implementation Bill on the Common Reporting Standard (CRS) to parliament. This Bill which implements Council Directive 2014/107/EU and the OECD CRS in the Dutch Act on international assistance in the levy of taxes will enter into force on 1 January 2016.

27 May 2015, Switzerland signed an agreement on the automatic exchange of financial account information with the EU to improve international tax compliance. The EU and Switzerland will automatically exchange information on the financial accounts of each

other's residents, starting in 2018.¹⁸

2.6 Country by country reporting

On 8 June 2015, the OECD issued the Country-by-Country (CbC) Reporting Implementation Package as part of the Base Erosion and Profit Shifting (BEPS) Action 13 on transfer pricing documentation.¹⁹ The package includes model legislation that countries can use to implement CbC reporting requirements for multinational enterprises (MNEs) and model competent authority agreements that countries can adopt to facilitate implementation of information exchange between tax authorities with respect to the CbC reports. The OECD aims for the first CbC reports to cover fiscal year 2016. These must be filed in the home country of a group's parent company. The home country then shares the report with other relevant countries under government information exchange mechanisms.

To go more into detail: as of fiscal year 2016, the ultimate resident parent of a group of companies that includes two or more enterprises with tax residence in different jurisdictions, or that includes an enterprise that is tax resident in one jurisdiction and has a permanent

¹⁸ Amending Protocol to the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments.

<http://data.consilium.europa.eu/doc/document/ST-8297-2015-INIT/en/pdf> (accessed 15 November 2015).

¹⁹ <http://www.oecd.org/ctp/transfer-pricing/beps-action-13-country-by-country-reporting-implementation-package.pdf> (accessed 7 October 2015).

establishment taxed in another jurisdiction (MNE Group) has to file a CbC report with the tax administration of its resident country. Furthermore, certain resident separate business units of an MNE Group have an obligation to file a CbC report with the tax administration of their resident country if the ultimate parent entity is not obliged to file a CbC report in its tax residence jurisdiction or if this report cannot be exchanged. A group, which, based on its consolidated financial statements, has a total consolidated group revenue of less than 750 million Euros during the preceding fiscal year, is exempt from the CbC reporting obligation.

The CbC report must contain aggregate information relating to the amount of revenue, profit or loss before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees and tangible assets other than cash or cash equivalents with regard to each jurisdiction in which the MNE group operates. Furthermore, it must identify each entity of the group, the jurisdiction of tax residence, and, where different from such jurisdiction, the jurisdiction under the laws of which it is organised and the nature of the main business activity or activities of such entities. The CbC report must be filed no later than 12 months following the last day of the reporting fiscal year of the MNE Group.

The tax administration can use the CbC report for purposes of assessing high level transfer pricing and other BEPS-related risks, including assessing the risk of non-compliance with transfer pricing rules and, where appropriate, for economic and statistical analysis.

Transfer pricing adjustments by the tax administration are not to be based on the CbC report. The tax administration must preserve the confidentiality of the information in the CbC report at least to the same extent that would apply if such information was provided under the provisions of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. If the entity does not meet its reporting obligations on time, an administrative penalty can be imposed.

The Netherlands has adapted this model legislation to the Dutch legal system. On 16 September the Bill Other Tax Measures 2016 was sent to Parliament in which the CbC legislation is incorporated in new chapter VIIa in the Dutch Corporate Income Tax Act (CITA).²⁰ This new chapter closely follows the OECD model legislation.

Even though Dutch left wing political parties and certain NGOs strive for these CbC reports to be made public, based on the current Bill, this will not be the case. The Dutch government awaits the outcome of the impact assessment the European Commission is undertaking on this topic before coming to a conclusion on whether or not the CbC reports should be made public.

2.7 Automatic exchange of information on tax rulings

Many countries issue tax rulings which give tax payers an assurance on how certain aspects of taxation will be dealt with in specific cases.

²⁰ *Kamerstukken II*, 2015-2016, 34305, no. 2.

Often such rulings have cross border effects. However, other countries than the one issuing the ruling, will usually not be aware of the ruling.

On 6 October 2015 the EU Member states agreed on a proposed Directive²¹ to amend the Mutual Assistance Directive obliging EU member states to exchange information automatically on advance cross-border tax rulings and advance pricing arrangements as from 1 January 2017. Pierre Moscovici, Commissioner for Economic and Financial Affairs, Taxation and Customs, called this a major step in combating aggressive tax planning, creating greater transparency in corporate taxation and in providing fairer competition for both businesses and consumers.²² On 14 July 2015, the Netherlands already agreed with Germany to automatically exchange rulings.²³

In the proposed Directive, rulings are widely defined so as to capture all similar instruments and irrespective of the actual tax advantage involved. General information on these rulings will have to be exchanged every six months. Member States will be able to ask for more detailed information on a particular ruling. In addition, the European Commission will regularly receive the information it needs in order to monitor the implementation of the Directive and ensure that Member States are complying with their responsibilities. Furthermore, information on advance cross-border rulings and advance

²¹ COM(2015) 135 final, 2015/0068 (CNS) of 18 March 2015.

²² Press release of 6 October 2015, http://europa.eu/rapid/press-release_IP-15-5780_en.htm (accessed 7 October 2015).

²³ Staatscourant 2015/21781.

pricing arrangements which were issued, amended or renewed between 1 January 2012 and 31 December 2016 must be exchanged in 2017. Regarding rulings issued, amended or renewed between 1 January 2012 and 31 December 2013 this is only the case if these rulings were still valid on 1 January 2014. On all later rulings information must be exchanged irrespectively of whether they are still valid or not. Member states have the possibility (not an obligation) to exclude advance tax rulings and pricing arrangements issued to companies with an annual net turnover of less than 40 million Euros at a group level, if such advance cross-border rulings and advance pricing arrangements were issued, amended or renewed before 1 April 2016. This exemption will not apply to companies conducting mainly financial or investment activities.

EU Commissioner Moscovici, stated that the EU will continue to work to implement these transparency rules worldwide.²⁴ The final report on action 5 of the BEPS project²⁵ already includes a framework on which agreement has been reached for the exchange of information on rulings that could give rise to BEPS concerns in the absence of compulsory spontaneous exchange. The framework covers six categories of rulings: (i) rulings related to preferential regimes; (ii) cross border unilateral advance pricing arrangements (APAs) or other unilateral transfer

²⁴ Press release of 6 October 2015, http://europa.eu/rapid/press-release_IP-15-5780_en.htm (accessed 7 October 2015).

²⁵ OECD Action 5: Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance (2015). <http://www.oecd.org/tax/beps-2015-final-reports.htm>. (accessed 15 November 2015).

pricing rulings; (iii) rulings giving a downward adjustment to profits; (iv) permanent establishment (PE) rulings; (v) conduit rulings; and (vi) any other type of ruling where the Forum on Harmful Tax Practices (FHTP) agrees in the future that the absence of exchange would give rise to BEPS concerns. For countries which have the necessary legal basis, exchange of information under this framework will take place from 1 April 2016 for future rulings. The exchange of rulings issued on or after 1 January 2010 which were still valid on 1 January 2014 must be completed by 31 December 2016. The Action 5 Report also sets out best practices for cross-border rulings.

2.8 Japan

Japan has concluded many bilateral tax treaties that include an exchange of information provision based on Article 26 of the OECD Model Tax Convention and the Model Agreement on Exchange of Information on Tax Matters. Furthermore, Japan has reached an intergovernmental agreement with the US concerning the exchange of information related to the US FATCA legislation.²⁶ As mentioned before, Japan is one of the few countries which concluded an agreement based on the IGA-2 model. Japan expressed a desire to join the Multilateral Convention on Mutual Administrative Assistance in Tax Matters in 2013. Following the 2014 FTA meeting, the Japanese

²⁶ Statement of Mutual Cooperation and Understanding between the U.S. Department of the Treasury and the Authorities of Japan to Improve International Tax Compliance and to Facilitate Implementation of FATCA. <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Statement-Japan-6-11-2013.pdf> (accessed November 2015).

government announced that it would try to implement the automatic exchange of information on financial accounts held by non-residents and create a system obliging financial institutions to submit financial accounts held by non-residents to exchange information automatically. In 2010, Japan introduced new provisions to implement automatic exchange of information based on tax treaties in the Act on special provisions of the Income Tax Act, the Corporation Tax Act, and the Local Tax Act, in accordance with the Enforcement of Tax Treaties (Act on Special Provisions for the Enforcement of Tax Treaties). Under this act, the number of records sent automatically to overseas tax authorities was approximately 126,000. The number of records received from foreign tax authorities was approximately 133,000 in the 2013 fiscal year.²⁷

The Act on Special Provisions for the Enforcement of Tax Treaties was amended in the 2015 tax reform.²⁸ To execute the exchange of information based on the “Common Reporting Standards”, a reporting system for automatic exchange of financial account information relating to non-residents was introduced.²⁹ Domestic financial institutions must submit the following information to the responsible authorities: the names of non-residents (individuals, corporations, etc.), their address or head office location, information on the annual receipt

²⁷ https://www.nta.go.jp/kohyo/press/press/2014/joho_kokan/index.htm (Accessed on 31 October 2015)

²⁸ http://www.mof.go.jp/english/tax_policy/publication/tax006/index.htm (Accessed on 31 October 2015)

²⁹ Yoshihiro Masui, ‘The automatic exchange of financial account information relating to non-residents-The meaning of CRS’, *Quarterly Jurist* vol.14, 2015, pp.218-223.

of interest and dividends, total account balances, non-resident taxpayer identification number, etc. Financial institutions must commence necessary procedures in 2017 and make the first report in 2018.

Based on the tax treaty, financial account information must be exchanged between the tax authorities in accordance with the common reporting standards; such data will ultimately be aggregated to the Japanese National Tax Agency. It is expected that in 2018, financial account information for 2017 will be provided to overseas tax authorities.

3 Taxpayer Identification Number system

A Taxpayer Identification Number (TIN) identifying each and every tax payer can improve the effectiveness of the exchange of information. Not all countries have such TIN.

3.1 OECD

In 2012, the OECD Committee on Fiscal Affairs recommended that countries encourage non-resident recipients of income to disclose their residence country Tax Identification Number (TIN), and that countries should consider making this disclosure mandatory. When it is mandatory for the recipient of income to disclose his or her residence country TIN to the payer of income, there should be a mandatory requirement for the payer to pass the TIN to the tax administration of the source country. Where the recipient of income voluntarily discloses his residence country TIN to the payer of income, countries should

either consider making it a mandatory requirement for the payer to pass the TIN to the tax administration of the source country or adopt an alternative means of tax compliance (e.g., withholding tax at a full rate subject to reduction if the recipient of income provides the payer with relevant means of identification). When a TIN is not provided, the OECD recommends that alternative means of identification should be required and strongly enforced.

3.2 Taxpayer Identification Number and the EU

In the EU, there is currently not a European TIN: each country uses its own TIN specifications and some EU countries do not have TINs at all. The European Commission has made a webpage with information about TINs that Member States choose to publish. This information includes general information about TINs by country (when the Member State's tax administration has chosen to publish this information):³⁰ descriptions of the structure and specificities of the national TIN (how is it allocated, whether it changes over time, etc.), examples of official documents showing the TINs, a list of national reference websites and details of the national contact points. Furthermore, the European Commission has provided for a TIN online check module:³¹ an online check module which allows checking the TIN syntax (i.e. algorithm) or, if not available, the TIN structure.

³⁰ https://ec.europa.eu/taxation_customs/tin/tinByCountry.html (accessed 7 October 2015).

³¹ https://ec.europa.eu/taxation_customs/tin/?locale=en (accessed 7 October 2015).

In action 22 of the Action Plan of the European Commission to strengthen the fight against tax fraud and tax evasion of 27 June, 2012 a European Taxpayer Identification Number (EU TIN) is considered as providing the best means of identifying taxpayers under automatic exchange of information.³² The national TINs are built according to national rules, which differ considerably and make it difficult for third parties such as financial institutions and employers to correctly identify and register foreign TINs and for the tax authorities to report this information back to the other tax jurisdictions. According to the European Commission, the creation of an EU TIN might constitute the best solution to overcome the current difficulties faced by Member States in properly identifying all their taxpayers engaged in cross border operations. Whether this could be a unique EU number or the addition of an EU identifier to existing national TINs is an issue which, in the view of the European Commission should be further explored, as should link with the other existing EU registration and identification systems.

3.3 Japan

According to the Japanese government the number system is needed to guarantee fairness and transparency.³³ In 2016, the Japanese

³² COM (2012) 722 final. Communication from the Commission to the European Parliament and the Council. An Action Plan to strengthen the fight against tax fraud and tax evasion, action 22.

http://ec.europa.eu/taxation_customs/resources/documents/taxation/tax_fraud_evasion/com_2012_722_en.pdf (accessed 15 November 2015).

³³ Headquarters of the Government and Ruling Parties for Social Security

government introduced a Social Security and Tax Number (nicknamed “My Number”), for companies, including financial institutions, and individuals.

In 1999, the Residential Basic Book Act was revised to provide personal identification information for administrative institutions. The Basic Resident Registration Network System (also called the Juki Net) is used for both Japanese residents and non-residents. The information used to confirm personal identification in the Juki Net is restricted to the name, date of birth, sex, address, and residence record code. However, many have claimed that the national residency registry network is unconstitutional and poses a danger to public privacy. The Kanazawa District Court³⁴ and the Osaka High Court³⁵ held that the Juki Net was unconstitutional. The Supreme Court reversed the Osaka High Court decision and concluded that there were no grounds for the appellees’ allegation that the management, use, etc. of their identification information by way of the Juki Network illegally infringe their right or interest in making their own decision on the handling of the information on their privacy.³⁶ Some local municipalities refused to

Reform June 30, 2011

Provisional, Outline of the Social Security and Tax Number System (2011). <http://www.cas.go.jp/jp/seisaku/bangoseido/english.html> (accessed 31 October 2015).

³⁴ Kanazawa District Court, May 30, 2005, Hanrei Jiho (1934)3 (2005).

³⁵ Osaka High Court, Nov. 30, 2006. This case was not listed in the court report.

³⁶ Supreme Court, Mar. 6, 2008, Minshu 62(3) 665 (2008).

http://www.courts.go.jp/app/hanrei_en/detail?id=1276 (accessed 11 November 2015).

connect to the Juki network.³⁷ In 2013, the penetration rate of Juki cards had remained at 5 percent.

In 2012, a comprehensive reform of the Japanese social security and tax system was introduced, and introduction of the common number system related to the social security tax was proposed. The Act on the Use of Numbers to Identify a Specific Individual in the Administrative Procedure (the My Number Act)³⁸ was introduced in 2013 to implement the so-called “My Number” system. In this Act, the term “Individual Number” is the number obtained by converting a resident’s record code, which is based on the Basic Resident Registration Act. After January 2016, the Individual Number must be provided in an income tax-withholding statement of the payments made for an employee’s salary, interest, and dividends. According to the revised My Number Act, it should be possible to link the Individual Number on a voluntary basis to bank accounts from 2018.

³⁷ Masato Hirose, ‘Towards Introducing an Identification Number System for Social Security and Taxation’, *NRI Papers* No. 161, 2011, p.2.
<https://www.nri.com/global/opinion/papers/2011/pdf/np2011161.pdf> (accessed 11 November 2015).

³⁸ Act on the Use of Numbers to Identify a Specific Individual in the Administrative Procedure
<http://www.cas.go.jp/jp/seisaku/bangoseido/pdf/en3.pdf> (accessed 4 November 2015).

4 Protection of Personal Information and Transfer of Personal Data to Other Countries

Confidentiality of taxpayer information is a fundamental cornerstone of tax systems. Citizens and their governments only have confidence in international exchange if the information exchanged is used and disclosed only in accordance with the agreement on the basis of which it is exchanged. Before entering into an agreement to exchange information with another country, it is essential that the receiving country has the legal framework and administrative capacity and processes in place to ensure the confidentiality of the information received and that such information is only used for the purposes specified in the instrument.³⁹ Exchange of information instruments usually contain provisions that require confidentiality and put limitations on the persons to whom the information can be disclosed, and the purposes for which the information may be used.

4.1 OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data

In 1980, the OECD adopted the Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data (“1980 Guidelines”) to address concerns arising from the increased use of personal data and

³⁹ OECD, A step change in tax transparency Delivering a standardised, secure and cost effective model of bilateral automatic exchange for the multilateral context, pp.8-9. http://www.oecd.org/ctp/exchange-of-tax-information/taxtransparency_G8report.pdf (accessed 15 November 2015).

the risk to global economies resulting from restrictions to the flow of information across borders. In the 1980 Guidelines, two major problems are mentioned: (a) the need to ensure that information can be obtained about rules, regulations, decisions, etc., which implement the Guidelines, and (b) the need to avoid transborder flows of personal data being hampered by an unnecessarily complex and disparate framework of procedures and compliance requirements. The first problem arises because of the complexity of privacy protection regulations and data policies in general. There are often several levels of regulation (in a broad sense) and many important rules cannot be laid down permanently in detailed statutory provisions; they have to be kept fairly open and left to the discretion of lower-level decision-making bodies. The second problem is proportional to the number of domestic laws which affect transborder flows of personal data. In the opinion of the OECD there are obvious needs for coordinating special provisions on transborder data flows in domestic laws, including special arrangements relating to compliance control and, where required, licenses to operate data processing systems.⁴⁰

In 2012 the OECD and the Global Forum on Transparency and Exchange of Information for Tax Purposes, the multilateral framework within which work in the area of tax transparency and exchange of information is carried out by over 110 jurisdictions, developed a guide

⁴⁰ OECD, Guidelines on the Protection of Privacy and Transborder Flows of Personal Data.
<http://www.oecd.org/sti/ieconomy/oecdguidelinesontheProtectionofPrivacyandTransborderFlowsOfPersonalData.htm#guidelines> (accessed 15 November 2015).

on the protection of confidentiality of information exchanged for tax purposes as a tool to help ensure that the requirements to maintain confidentiality under all exchange of information instruments are properly observed.⁴¹ This guide on confidentiality, which is called “Keeping it Safe”, sets out best practices related to confidentiality and provides practical guidance on how to ensure an adequate level of protection.

In the same year, the OECD Model Tax Convention Article 26 was updated. Article 26 provides the confidentiality rules under the Model Convention, the purposes for which the information may be used and limits to whom the information may be disclosed. Contracting States may include provisions in their bilateral conventions concerning the protection of personal data exchanged according to their law. Data protection concerns the rights and fundamental freedoms of an individual, and in particular, the right to privacy, with regard to automatic processing of personal data⁴².

Article 26(2) of the OECD Model Tax Convention provides that any information received must be treated as secret in the same manner as information obtained under the domestic laws and may only be disclosed to persons or authorities concerned with the assessment or collection of, the enforcement or prosecution in respect of, the

⁴¹ OECD, *supra* note 8, p.12.

⁴² OECD, Update to article 26 of the OECD Model tax convention and its commentary, approved by the OECD Council on 17 July 2012 paragraph 1, 10. [http://www.oecd.org/ctp/exchange-of-tax-information/120718_Article%2026-ENG_no%20cover%20\(2\).pdf](http://www.oecd.org/ctp/exchange-of-tax-information/120718_Article%2026-ENG_no%20cover%20(2).pdf) (accessed 15 November 2015).

determination of appeals in relation to the taxes to which the treaty applies, or the oversight of the these. The information may be used only for such purposes.

Article 26 of the OECD Model Tax Convention provides for broad information exchange and does not limit the forms or manner in which information exchange can take place. The main forms of information exchange are: on request, automatic, and spontaneous.⁴³

In 2012, Article 26(2) of the OECD Model Tax Convention was revised to allow the competent authorities of Contracting States to use information received for tax purposes for non-tax purposes. Since this revision the last sentence of paragraph 2 states: “Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use”. This was previously included as an optional provision in paragraph 12.3 of the commentary. This makes the exchange of information between the contracting states easier, but it is not uncontroversial. It is supposed to make an important contribution to fighting tax crimes and other crimes, more effectively by allowing different tax and law enforcement agencies to cooperate more closely. It is directly linked to the OECD’s work in connection with the “Oslo Dialogue” on inter-agency collaboration to

⁴³ Manual on the implementation of exchange of information provisions for tax purposes: Approved by the OECD Committee on Fiscal Affairs on 23 January 2006, p.7. <http://www.oecd.org/tax/exchange-of-tax-information/36647823.pdf> (accessed 15 November 2015).

better fight financial crimes including illicit financial flows.⁴⁴

On 11 July, 2013 the OECD Council adopted a revised Recommendation of the Council concerning Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data (“Privacy Guidelines”).⁴⁵ It states that countries should refrain from restricting transborder flows of personal data between themselves and other countries where (a) the other country substantially observes the Guidelines or (b) sufficient safeguards exist, including effective enforcement mechanisms and appropriate measures put in place by the data controller, to ensure a continuing level of protection consistent with the guidelines (para. 17) and that any restrictions to transborder flows of personal data should be proportionate to the risks presented, taking into account the sensitivity of the data and the purpose and context of the processing (para. 18).

4.2 EU Data Protection

Privacy and data protection rules are fundamental rights under EU law. These can be found in the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights, the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108),⁴⁶ Article 16(1) of the

⁴⁴ <http://www.oecd.org/ctp/crime/Oslo-Dialogue-flyer.pdf> (accessed 7 October 2015).

⁴⁵ <http://www.oecd.org/sti/ieconomy/2013-oecd-privacy-guidelines.pdf> (accessed 15 November 2015).

⁴⁶ <http://conventions.coe.int/treaty/en/Treaties/Html/108.htm> (accessed 15

Treaty on the Functioning of the European Union, and the Data Protection Directive 95/46/EC.

4.2.1 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108)

Convention 108 was enacted by the Council of Europe in 1981. In 2001, an Additional Protocol was added to Convention 108. In Article 2, it allows cross border flows of personal data to a recipient who is not subject to the jurisdiction of a party to the Convention, only if that State or organisation ensures an adequate level of protection for the intended data transfer.

In 2012, the modernisation of Convention 108 introduced a so called adequate appropriate level of protection rule into Article 12 4. An adequate appropriate level of protection can be ensured by:

- a) the law of that state or international organization, in particular by applicable international treaties or agreements, or
- b) approved standardised legal measures or ad hoc legal measures, such as contract clauses, internal rules or similar measures that are implemented by the person who discloses or makes data accessible and by the recipient; internal rules or similar measures having to be binding, effective, and capable of effective remedies.⁴⁷

November 2015).

⁴⁷ T-PD (2012)04 rev en. Consultative Committee Of The Convention For The Protection Of Individuals With Regard To Automatic Processing Of Personal Data (T-Pd) Final document on the modernisation of Convention 108 http://www.coe.int/t/dghl/standardsetting/dataprotection/TPD_documents/

This “adequate level of protection” standard is similar to the “adequate level of protection” standard in the EU data protection Directive of 1995. Both are important and basic standards in the EU.⁴⁸

The Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (T-PD) is of the opinion that automatic exchange of information is legitimately regarded as an essential tool in combating fraud and tax evasion. However, it emphasises that any such exchanges must fully respect the rule of law and human rights, in particular the rights to privacy and personal data protection. Automatic data exchanges must not under any circumstances weaken the rules governing the protection of personal data, as enshrined in the European Convention on Human Rights and Convention 108. Therefore, T-PD believes that it is vital that specific safeguards are adopted so as to ensure full respect for individuals’ fundamental rights when the relevant state policies are implemented.⁴⁹ Regarding transborder data flows, T-PD recommended that countries ensure, prior to implementing the relevant automated

T-PD_2012_04_rev_en.pdf(accessed 15 November 2015).

⁴⁸ Kaori Ishii, *Philosophy and Contemporary Issues of Personal Information Protection Law Historical and International Perspective of Right to Privacy*, Japan Keiso Shobo, 2014, p.177.

⁴⁹ Directorate General of Human Rights and Rule of Law, Consultative Committee Of The Convention For The Protection Of Individuals With Regard To Automatic Processing Of Personal Data [ETS No. 108] T-PD(2014)05, Opinion on the implications for data protection of mechanisms for automatic inter-state exchanges of data for administrative and tax purposes,p.2.
[http://www.coe.int/t/dghl/standardsetting/dataprotection/TPD_documents/T-PD\(2014\)05_En_Opinion%20tax%20\(final\).pdf](http://www.coe.int/t/dghl/standardsetting/dataprotection/TPD_documents/T-PD(2014)05_En_Opinion%20tax%20(final).pdf) (accessed 2 November 2015).

processing, that automatic interstate exchanges of personal data may validly take place in compliance with their domestic legislation, taking due account of the legislation of the destination country or countries, particularly as regards the possibility of subsequent re-use of the data for purposes other than those originally intended.⁵⁰

Moreover, T-PD is of the opinion that provisions specifically relating to international transfers should be incorporated in the legal instrument governing the automatic exchange in question, which should also take into account the principle of proportionality, especially to avoid the mass transfer of personal and sensitive information to countries without an appropriate level of protection. The T-PD recommends that specific attention is given in the legal instrument to the fact that there can be no onward transfers by the requesting authority to another authority set in a third country unless the transmitting authority has authorised it. T-PD is of the opinion that the legal instrument should also cover the guarantees and rights of the data subject, as well as the remedies available and information relating to the independent supervision entrusted to the data protection authority.⁵¹

4.2.2 The EU Mutual Assistance Directive and the Data Protection Directive

The EU Mutual Assistance Directive⁵² provides for the exchange of

⁵⁰ *Id.*, p.4.

⁵¹ *Id.*, p.4.

⁵² Council Directive 2011/16/EU of 15 February 2011 on administrative

information on request, the automatic exchange of information and the spontaneous exchange of information. Article 25 of the Mutual Assistance Directive provides data protection by providing that all exchange of information pursuant to the Mutual Assistance Directive is subject to the Data Protection Directive.⁵³ However, Member States must restrict the scope of the obligations and rights provided for in various articles of the Data Protection Directive to the extent required in order to safeguard an important economic or financial interest of a Member State or of the EU, including monetary, budgetary, and taxation matters. Article 25(1) of the Data Protection Directive stipulates that transfers of information to third countries may only take place if such country ensures an adequate level of protection. Article 25(6) empowers the Commission to issue decisions in this respect. The effect of such a decision is that personal data can flow from the EU and European Economic Area Member States to that third country without any further safeguard being necessary. The European Commission decided that the following countries have an adequate level of protection for personal data: Andorra, Argentina, Canada, Faeroe Islands, Guernsey, Isle of Man, Israel, Jersey, New Zealand,

cooperation in the field of taxation L 64 11 March 2011 PP. 1 -12.

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2011.064.01.0001.01.ENG (accessed 2 November 2015).

⁵³ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data L 281 , 23/11/1995 PP. 31 -50.

<http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:31995L0046> (accessed 2 November 2015).

Switzerland, Uruguay, and the US.⁵⁴ Japan is not included in this white list. However, being included in the white list does not mean that it cannot be challenged that there is an adequate level of protection. In 2013, Mr. Schrems an Austrian national, made a complaint about the transfer of his personal data by Facebook to the US. In his view the US did not ensure adequate protection of the personal data against the surveillance activities by the US public authorities. In July 2014 the Irish High Court asked the Court of Justice of the European Union (ECJ) whether, EU Member States are bound by the European Commission's finding – as quoted above – that certain countries, such as the US in this case, ensure an adequate level of protection. On 6 October 2015 the ECJ gave its judgment in this case.⁵⁵ The ECJ observed that if the European Commission has made a decision finding that a third country ensures an adequate level of protection, this decision is binding on Member States and has the effect of authorizing transfers of personal data until the Commission decision is declared invalid by the ECJ. However, such Commission decision does not limit the rights of persons whose personal data has been or could be transferred to a third country to lodge a claim and it does not limit the national authority to examine such a claim either. However, only the ECJ can declare such Commission decision invalid. Furthermore, the

⁵⁴ Commission decisions on the adequacy of the protection of personal data in third countries.

http://ec.europa.eu/justice/data-protection/international-transfers/adequacy/index_en.htm (accessed 12 November 2015).

⁵⁵ ECJ 6 October 2015, Case C-362/14, Maximilian Schrems v. Data Protection Commissioner.

<http://curia.europa.eu/juris/liste.jsf?num=C-362/14> (accessed 12 November 2015).

ECJ observes that in the light of the fact that the level of protection ensured by a third country is liable to change, the Commission must check periodically whether the finding is still factually and legally justified. The ECJ held that the decision regarding the US adequate level of protection is invalid. Subsequently, on 6 November 2015 the European Commission adopted a Communication on the Transfer of Personal Data from the EU to the United States of America under Directive 95/46/EC providing an overview of the alternative tools for transatlantic data transfers in the absence of an adequacy decision.⁵⁶

Article 26(1) of the Data Protection Directive states that transfers of personal data to a third country which does not ensure an adequate level of protection may take place if the transfer is necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of legal claims. Article 29 Working Party indicates this provision must be interpreted restrictively.⁵⁷

Recital 58 of the Data Protection Directive refers to cases in which international exchange of data might be necessary “between tax or customs administrations in different countries” or “between services

⁵⁶ COM(2015) 566 final. http://ec.europa.eu/justice/data-protection/international-transfers/adequacy/files/eu-us_data_flows_communication_final.pdf (accessed 12 November 2015).

⁵⁷ Article 29 Working Party, Working document on a common interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995 (Adopted on 25 November 2005) 2093/05/EN WP 114 p.5. http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2005/wp114_en.pdf (accessed 15 November 2015).

competent for social security matters”.⁵⁸ Article 29 Working Party mentions this exception can only be used if the transfer is of interest to the authorities of an EU Member State themselves, and not only to one or more public authorities in the third country.⁵⁹

Preamble 17 of Council Directive 2014/107/EU⁶⁰ explicitly states that the directive respects the fundamental rights and observes the principles which are recognised in particular by the Charter of Fundamental Rights of the European Union, including the right to the protection of personal data.

The CRS amendment of the Mutual Assistance Directive by Directive 2014/107/EU also makes an addition to the data protection provided for by Article 25(3) of the Mutual Assistance Directive:

“Notwithstanding paragraph 1, each Member State shall ensure that each Reporting Financial Institution under its jurisdiction informs each individual Reportable Person concerned that the information relating to him referred to in Article 8(3a) will be collected and transferred in accordance with this Directive and shall ensure that the Reporting Financial Institution provides to that individual all information that he is entitled to under its domestic legislation implementing Directive 95/46/EC in sufficient time for the individual to exercise his data protection rights and,

⁵⁸ EU Directive 95/46/EC - The Data Protection Directive, Recital (58). Official Journal L 281 , 23/11/1995 P. 0031 – 0050.

⁵⁹ Article 29 Working Party, *supra* note 57, p.15.

⁶⁰ Council Directive 2014/107/EU of 9 December 2014. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0107> (accessed 15 August 2015).

in any case, before the Reporting Financial Institution concerned reports the information referred to in Article 8(3a) to the competent authority of its Member State of residence.”

Notwithstanding this safeguard, the European Commission’s Expert Group on Automatic Exchange of Financial Account Information for Direct Taxation Purposes (AEFI Group) observed in its March 2015 report that there is a risk that the data of account holders transferred to countries outside the EU without data protection provisions comparable to those in the EU are not be properly protected in and that the data could be used for purposes other than combating tax evasion and that there is not an effective mechanism to protect the data of account holders transferred outside the EU.⁶¹

Regarding the agreement between the EU and Switzerland on the automatic exchange of financial account information, the European Data Protection Supervisor (“EDPS”) considered that there is a specific need to ensure that data subjects are duly and timely informed on the circulation and use of their personal data, as required by Article 10 of the Data Protection Directive.⁶² According to the EDPS the agreement

⁶¹ European Commission, First Report of the Commission AEFI expert group on the implementation of Directive 2014/107/EU for automatic exchange of financial account information (2015), p.8. http://ec.europa.eu/taxation_customs/resources/documents/taxation/tax_cooperation/mutual_assistance/financial_account/first_report_expert_group_automatic_exchange_financial_information.pdf (accessed 15 November 2015).

⁶² Opinion of the EDPS on the EU-Switzerland agreement on the automatic exchange of tax information (8 July 2015) para20, para21. <https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/>

should have specified that information on data transfers should be provided to the data subject with a reasonable delay before the actual exchange of the data takes place so that the individual concerned gets time to defend himself if relevant. The information provided should, at the minimum, inform the data subjects of the fact that their personal data will be sent to a competent authority for the purpose of fighting tax evasion, include a list of the categories of data sent, and the contact information of the controller in their country of residence, and inform them of their right to object and their right of redress.

On 1 October 2015 the European Court of Justice (ECJ) decided that that the requirement of fair processing of personal data laid down in Article 6 of the Data Protection Directive requires a public administrative body to inform the data subjects of the transfer of those data to another public administrative body.⁶³ The ECJ observed that Member States may restrict this right when such a restriction constitutes a necessary measure to safeguard an important economic or financial interest, including monetary, budgetary and taxation matters. However, such restrictions must be imposed by legislative measures. This is a very important judgement. Many EU Member States do not give notice to data subjects. The Netherlands used to inform the data

Opinions/2015/15-07-08_EU_Switzerland_EN.pdf (accessed 15 November 2015).

⁶³ ECJ 1 October 2015, Case C 201/14, Smaranda Bara and others v Președintele Casei Naționale de Asigurări de Sănătate and others. <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d51721d92244c748c28891b5055ee3b3b7.e34KaxiLc3eQc40LaxqMbN4Oc38Le0?text=&docid=168943&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=66693>(accessed 7 November 2015).

subject of the exchange of tax information, but withdrew this provision in 2014 after a recommendation of the Global Forum on Transparency and Exchange of Information on Tax Matters. It remains to be seen what the impact of the judgment will be on the exchange of tax information within the EU: will restrictions be imposed in legislative measures or will the data subject be notified even where this is against the recommendations of the Global Forum?

4.2.3 General Data Protection Regulation

In June 2015 the European Council reached political agreement on the proposal for a General Data Protection Regulation (5853/12, “Regulation”) which the European Commission proposed in January 2012.⁶⁴ This Regulation will replace the current Data Protection Directive. The Regulation was scheduled to be formally adopted by December 2015. The aim of the new Regulation is to harmonize the current data protection laws in place across the EU member states. Unlike a directive, a regulation is directly applicable in all EU member states without a need for national implementation legislation.

Article 41 of the Regulation sets out the criteria, conditions, and procedures for the assessment of an adequate level of protection,

⁶⁴ Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation). 25.1.2012 COM (2012) 11 final.
http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf (accessed 15 November 2015).

including the rule of law, judicial redress, and independent supervision. The article confirms explicitly the possibility for the European Commission to assess the level of protection provided for by a territory or a processing sector within a third country.

Article 42 of the Regulation requires appropriate safeguards, in particular standard data protection clauses, binding corporate rules, and contractual clauses for transfers to third countries. Article 44 spells out and clarifies the derogations for data transfers, in particular those necessary for the protection of important grounds of public interest, for example in cases of international data transfers between competition authorities, tax, or customs administrations. Article 45 provides for international co-operation mechanisms for the protection of personal data between the European Commission and the supervisory authorities of third countries, in particular those considered offering an adequate level of protection. In this regard, the OECD Recommendation on cross-border cooperation in the enforcement of laws protecting privacy was taken into account.⁶⁵

⁶⁵ The OECD Committee for Information, Computer and Communications Policy (ICCP) recommended that Member countries co-operate across borders in the enforcement of laws protecting privacy, taking appropriate steps to:

- a) Improve their domestic frameworks for privacy law enforcement to better enable their authorities to co-operate with foreign authorities.
- b) Develop effective international mechanisms to facilitate cross-border privacy law enforcement co-operation.
- c) Provide mutual assistance to one another in the enforcement of laws protecting privacy, including through notification, complaint referral, investigative assistance and information sharing, subject to appropriate safeguards.
- d) Engage relevant stakeholders in discussion and activities aimed at

4.3 Data protection in Japan

Article 23 (1) of the Act on the Protection of Personal Information (APPI)⁶⁶ states that a business operator handling personal information shall not provide personal data to a third party without obtaining the prior consent of the person, except in cases where the provision of the personal data is based on laws and regulations. A business operator can disclose personal information to a third-person without obtaining the prior consent of the person if the disclosure personal information is: (i) required under Japanese law; or (ii) necessary for cooperation with a Japanese national or local governmental agency.

Since the exemption of Article 23 (1)(i) of the APPI does not apply to FATCA provisions, there is a possibility that FFIs in Japan violate of the APPI by providing account information of non-residents to the IRS

furthering co-operation in the enforcement of laws protecting privacy.

OECD, Recommendation on cross-border cooperation in the enforcement of laws protecting privacy, (2007). <http://www.oecd.org/sti/ieconomy/38770483.pdf> (accessed 15 November 2015).

⁶⁶ In Japan, there are three main laws related to the protection of personal information:

- The Act on the Protection of Personal Information (APPI),
- The Act on the Protection of Personal Information Held by Administrative Organs, and
- The Act on the Protection of Personal Information Held by Independent Administrative Agencies, etc.

These were introduced in 2003 based on OECD guidelines. Many municipalities have introduced the Ordinance for the Protection of Personal Information.

without legal basis. Therefore, the National Tax Agency reports to the IRS the total number of non-consenting US accounts, instead of FFIs under model 2IGA.⁶⁷ If the IRS needs more detailed information on the specific account held in a non-consenting US account, the IRS should submit a request to the National Tax Agency on the basis of the terms of the Japan-US tax treaty. Then, the National Tax Agency can collect information from FFIs to report to the IRS, under the terms of Article 9 of the Act on Special Provisions for the Enforcement of Tax Treaties.

Under the common reporting standards, the National Tax Agency must transfer the financial account information of non-residents (individuals and corporations) to the tax authorities of each non-resident's country of origin once per year. Based on Article 10-6 of the Act on Special Provisions for the Enforcement of Tax Treaties, the reporting financial institutions must provide information regarding non-resident account holders to the National Tax Agency. Therefore, Japanese FFIs are required to submit the account details of non-residents to both the IRS and the Japanese tax authorities, in accordance with FATCA and CRS provisions. Thus, the Japanese Bankers Association requests to move to model 1IGA.

However under the APPI, there is a possibility that "once the personal information is disclosed to the Japanese governmental agency, then the data could be transferred overseas by the agency without the consent

⁶⁷ Statement of Mutual Cooperation and Understanding between the U.S. Department of the Treasury and the Authorities of Japan to Improve International Tax Compliance and to Facilitate Implementation of FATCA. <http://www.fsa.go.jp/inter/etc/20130611/01.pdf> (accessed 12 November 2015).

of the account holder.”⁶⁸

Regarding the cross-border data flows, under the APPI amended in 2015, Article 24 limits the transfer of information to third parties located in another country. A business operator handling personal information must obtain the consent to allow the transfer of personal information to a third party located in another country. However, the following cases are excluded:

- The third party in the country that is recognized as having a personal information protection system as the same level as Japan.
- The third party that established a system to meet the criteria by the Personal Information Protection Commission.

The Personal Information Protection Commission will be authorized as the data protection authority for dealing with cross-border data flows. It is expected to meet the adequacy level of protection required by the EU.

⁶⁸ Tsuyoshi Ito, ‘A Matter of FATCA and Compliance under Japanese Data Privacy Laws’, *Corporate Counselor*, 2012, No.12.
https://www.jurists.co.jp/ja/publication/tractate/article_13789.html (accessed 3 November 2015).

5 Conclusion

The importance of automatic exchange of information in combating tax fraud will further increase during the coming years. However, it must be born in mind that exchange of tax information entails serious liability and security risks.^{69 70} This article has shown that countries differ in the amount of information they exchange and the data protection they provide. It will be interesting to see whether the BEPS project will result in more alignment or whether differences between countries will increase in the coming years.

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⁶⁹ Ref. Ares(2012)746461 - 21/06/2012. http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2012/20120621_letter_to_taxud_fatca_en.pdf (accessed 15 August 2015).

⁷⁰ Kuner, C., 'Regulation of Transborder Data Flows under Data Protection and Privacy Law: Past, Present and Future', *OECD Digital Economy Papers*, No. 187, 2011. <http://dx.doi.org/10.1787/5kg0s2fk315f-en> (accessed 3 November 2015).

