



FIELD COURT TAX CHAMBERS

Doing Business 2014 and Beyond
Data Protection, EU and
Constitutional Rights
v. Disclosure

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Outline

- PB's position – Oh brave new world
- A modest history – how we arrived at different disclosure regimes
- ECHR and Constitutional Rights
- Data Protection
- EU law
- Some concluding comments



PB's position

- Disclosure and transparency is necessary for the collection of taxes
- Cross-border exchange of information is an important and essential tool
- BUT
- Taxpayers have a legal right to adequate safeguards
- There has to be certainty of the legal obligations
- There has to be a proper balance between disclosure and privacy
- There has to be proportionality with respect to compliance costs



PB's position

- Cross-border exchange must be in accordance with the law and subject to adequate safeguards
- Not all foreign revenue authorities maintain adequate safeguards
- Not all foreign revenue authorities serve benign governments
- Not all foreign governments will always remain benign (for how long will exchanged information be retained?)



A modest history

- 1803 – Addington’s Income Tax Act – the schedular system
- Government of India v. Taylor [1955] AC 491 – general principle of public international law: one state does not assist in the collection of tax due to another
- Obligation of secrecy on tax officials
- Bemberg c. Fisc of Buenos Aires Cass. Civ., 3 July 1928, S. 1928, I, 356
- Re State of Norway’s Applications [1990] 1 AC 723



A modest history

- Provisions for exchange of information in tax treaties – Article 26 OECD Draft (1963) and Model
 - Exchange on request
 - Spontaneous exchange
 - Automatic exchange
- Council of Europe/OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters of 25th January 1988 (in force, 1st April 1995) (Strasbourg: Council of Europe, 1989 – convention no. 127) – now 84 signatories (most since 2009)



A modest history

- OECD, *Tax Information Exchange between OECD Member Countries* (Paris: OECD, 1994)
- OECD, *Improving Access to Bank Information for Tax Purposes* (Paris: OECD, 2000)
- 2005 – the International Standard on Exchange of Information (on request)
 - No bank secrecy
 - No domestic tax interest



A modest history

- OECD; *Harmful Tax Competition - An Emerging Global Issue* (Paris, 1998)
- Global Forum on Transparency and Exchange of Information (123 members)
- Tax Information Exchange Agreements (TIEAs)
- Peer review process



A modest history

- Global economic crisis – fiscal austerity in many countries
- G20 Summit, London, April 2009
 - to take action against non-cooperative jurisdictions, including tax havens. We stand ready to deploy sanctions to protect our public finances and financial systems. The era of banking secrecy is over. We note that the OECD has today published a list of countries assessed by the Global Forum against the international standard for exchange of tax information



A modest history

- Revelation of undisclosed Swiss bank accounts of US citizens
- Foreign Account Tax Compliance Act (in effect, March 2010) – plus regulations
- Inter-governmental Agreements (IGAs)

- 2013: UK-FATCA
- 2013: France, Germany, Italy, Spain and UK = EU-FATCA



A modest history

- Summer 2013 – new International Standard based on Automatic Exchange of Information
- Standard for Automatic Exchange of Financial Account Information – Common Reporting Standard
 - Approved by OECD Council 15th July 2013
 - Endorsed by the G20, September 2013
- 29th October 2014 – Multilateral Competent Authority Agreement (51 countries) – early adopters from September 2017



A modest history

- EU Mutual Assistance Directive:
- Council Directive 77/799/EEC of 19th December 1977
- replaced by Council Directive 2011/16/EU of 15 February 2011
- Commission Action Plan to fight Tax Fraud and Tax Evasion (COM 2012) 722 final
- October 2014 ECOFIN Council – agrees to extend AEoI under Mutual Assistance Directive



A modest history - summary

- We have moved very, very fast from the Government of India principle to automatic exchange
- We have several different, non-identical systems for exchange – Bilateral DTCs, TIEAs, FATCA, UK-FATCA, EU Mutual Assistance Directive, Common Reporting Standard
- Little if any attention has been given to effective safeguards



ECHR and Constitutional Rights

- Article 8, ECHR

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.



ECHR and Constitutional Rights

- Art. 7 European Charter of Fundamental Freedoms

Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.



ECHR and Constitutional Rights

- Article 7, Constitution of Gibraltar

Protection for privacy of home and other property

7.-(1) Every person has the right to respect for his private and family life, his home and his correspondence.

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

(a) in the interests of ... the economic well-being of Gibraltar
...

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.



ECHR and Constitutional Rights

- X (Hardy-Spirlet) v Belgium (7th December 1982 – European Commission on Human Rights)
- Funke etc v France (appln 10828/84, 25th February 1993, European Court of Human Rights)
- The collection / transmission of personal information must be proportionate
- Note: Art 14 ECHR – enjoyment of rights to be non-discriminatory



Data Protection

- Article 16 Treaty on the Functioning of the EU

1. Everyone has the right to the protection of personal data concerning them.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.



Data Protection

• **Treaty on European Union (TEU): Article 39**

In accordance with Article 16 of the Treaty on the Functioning of the European Union and by way of derogation from paragraph 2 thereof, the Council shall adopt a decision laying down the rules relating to the protection of individuals with regard to the processing of personal data by the Member States when carrying out activities which fall within the scope of this Chapter, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.



Data Protection

- **Art 8, Charter of Fundamental Rights of the EU**

Everyone has the right to the protection of personal data concerning him or her.

Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

Compliance with these rules shall be subject to control by an independent authority.



Data Protection

- **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
- Art 1(1) “Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.”



Data Protection

- Directive 95/46/EC
- Art 11 – right of data subject to know of collection of data from third party
- Art 12 – right of access and to rectify the data
- These rights may be modified for important economic and taxation reasons, when it is a necessary measure
- Art 23 – right to compensation for unlawful processing of data



Data Protection

- Directive 95/46/EC
- Art 25 – transfer of personal data to third countries
- “the transfer to a third country of personal data ... may only take place if ...the third country in question ensures an adequate level of protection”



Data Protection

- **Article 29 Data Protection Working Party**

- Letter of 21st June 2012 with regard to FACTA and Directive 95/46

“16.1 The WP29 shares the concerns expressed by some in relation to dual compliance with FATCA and the Directive. Without an appropriate legal basis justifying both sets of obligations imposed on European FFIs would result in the unlawful processing of personal data.”



Data Protection

- **Article 29 Data Protection Working Party**

- Letter of 18th September 2014 with regard to the OECD Common Reporting Standard (plus detailed Annex)

“The practical roll-out of CRS in Europe based on existing FATCA IT solutions currently lacks adequate data protection safeguards, notwithstanding the EU proposal to amend the Directive 2011/16/EU regarding mandatory automatic exchange of information in the field of taxation. This Directive – which could be considered as transposition of the US FATCA and CRS in EU law – so far falls short of data protection safeguards.”



Data Protection

- Note:
- **Digital Rights Ireland Ltd** (Cases C-293/12 and 594/12) – CJEU, Grand Chamber, 8th April 2014
- The retention of and access data relating to telephone usage and internet access for anti-crime and anti-terrorist purposes
- Declared invalid Directive 2006/24/EC ... on the retention of data generated or processed in connection with the provision of publicly available electronic communications services
- Directive was a disproportionate interference with the right to privacy inter alia because it required retention and access to data of entirely innocent persons, not under suspicion



EU law

• **Art 63 TFEU – Free movement of capital**

“1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.”

- Applying a disclosure regime to financial accounts held by residents abroad, where there is no similar regime for identical accounts at home is prima facie discriminatory
- If so, it can only be justified on very narrow grounds
- Even if justifiable, it must not be disproportionate



Concluding comments

- PB is not the only person expressing concern – see the Art 29 WP
- Challenges to FATCA:
 - Ginny Hillis and Gwen Deegan v AG of Canada, Federal Court of Canada
 - Action commenced 11th August 2014
 - Based on Constitution of Canada, “the principle that Canada will not forfeit its sovereignty to a foreign state”, Canadian Charter of Rights and Freedoms (Arts 7, 8, 15 and 24), the US-Canada Double Taxation Convention



Concluding comments

- Will the IGAs and EU-FATCA survive challenge – e.g. on Data Protection grounds?
- What safeguards are needed?
- What is the potential liability of financial institutions that wrongly supply information?
- The problem of account balances: how can it be proportionate to require disclosure of account balances for overseas accounts, when they are not required from accounts at home?



Concluding comments

- **FATCA unlawful discrimination by banning US customers**
- April 10, 2014

The American X has lived in the Netherlands since 1970 and also has US citizenship in addition to Dutch. He had an investment account with BinckBank. On December 1, 2013 BinckBank ended the relationship because X had not shown that he is not liable for taxes in the United States.



Concluding comments

X approached the Netherlands Institute for Human Rights to claim that BinckBank engaged in unlawful discrimination due to citizenship. BinckBank argued that it had terminated all 150 US customers who met the definition of “US Person”, used by the US Internal Revenue Service (IRS), because it refused to comply with requirements resulting from the planned Dutch legislation in response to the US Foreign Account Tax Compliance Act (FATCA) to provide all transactions and historical transaction data by US Persons to the Dutch Tax Authorities.



Concluding comments

According to BinckBank the discrimination was based on a generally binding regulation, because the agreement on December 18, 2013 between the Netherlands and the US Intergovernmental Agreement (IGA) for the implementation of FATCA forced it to do so.

The Institute left open the question whether the IGA was a generally binding regulation because the IGA did not require BinckBank to close its customer accounts because of their US citizenship.

The Institute concluded that BinckBank had engaged in unlawful discrimination in the provision of services on grounds of citizenship.



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