

Thesis: The automatic exchange of information between transparency and privacy

Supervisor: Reuven Avi-Yonah

Student: Gianluca Mazzoni – mail: gmazzoni@umich.edu

What's the scope and meaning of privacy in the US and EU?

Three different notions of privacy:

1. *Tort privacy*: Cooley (1888); Warren and Brandeis (1890): the right to be let alone
2. *Constitutional privacy*: *Grissold v. Connecticut*: the ability to engage in certain conduct free from governmental regulation
3. Westin (1967); Miller (1971) – *Informational privacy*: the claim of individuals, groups of institutions to determine for themselves when, how and to what extents information about them is communicated to others.
4. Comparison: US – privacy as an aspect of liberty; EU – privacy an aspect of dignity
5. Research questions:
 - Do individuals have the right to keep confidential the information concerning their income expenditures, investments and wealth? *Financial privacy*
 - Does the right to privacy have the same scope of protection in taxation and non-tax content?
 - Thresholds for limiting right of *financial privacy*

FATCA main issues:

1. What's the real aim of FATCA? Strengthen the fight against tax evasion or enforcement of citizenship-based taxation?
2. Extraterritoriality – does Congress have jurisdiction to impose reporting requirement on foreign banks?
3. Absence of reciprocity both political and technical
 - Result = the US is the 3rd world's most non-transparent jurisdiction for hosting financial activities shrouded in secrecy according to the 2015 Financial Secrecy Index of Tax Justice Network
4. Privacy: interaction of FATCA provisions with data protection rules of directive 95/46/EC
 - Legal basis
 - Purpose limitation – Will competent authorities use the received information for other purposes?
 - Necessity and proportionality – Are the required personal data the minimum necessary to meet the goals?
 - Data retention
 - Is the data subject's consent freely given and unambiguous with a 30% WHT penalty?
 - Right to access and rectify the data
5. Research questions
 - Does the US FATCA guarantee EU privacy standards for exchange of information?
 - Which are the possible solutions against the US unilateralism behind FATCA?
 - Does Cases C-293/12 and C-594/12 (data retention invalid) C-362/14 (safe harbour agreement between US and EU is invalid) have any affect on FATCA?

Solutions proposed so far:

1. Adoption of a minimum standard for the protection of taxpayers – IFA General Report (2015)
2. Implementation of same country exemption (Allison Christians)
3. Abandonment of imposition of income tax based on citizenship and institution of a new system for taxing individuals based solely on residence (Avi-Yonah, Blum and Singer)
 - Number of Americans renouncing their US citizenships hits all-time high: up 25% from 2014, 560% from Bush administration high
4. Time to re-evaluate the benefits principle? (Avi-Yonah)
 - Can current issues be solved if we tax passive investment income primarily at source and active income primarily at residence?
 - Evaluation of Avi-Yonah's proposal through empirical data