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GDPR Challenges in EU Tax Data Transfers Beyond EU Borders

"Conflict of Obligations: GDPR vs. OECD MTC in Cross Border Tax Data"?

by

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Summary

In an era characterized by rapid technological advancement, globalization, and the expanding reach of businesses across borders, the transfer of personal data from tax authorities of European Union (EU) Member States to tax authorities of third countries[1], has emerged as a critical aspect of international cooperation. This transfer is essential for combating tax evasion, ensuring compliance with tax regulations, and promoting transparency in cross-border financial activities. However, the process of transferring tax data faces significant challenges, particularly considering the GDPR[2] adopted by the EU.

This paper delves into the regulatory framework governing transborder data flows from the European Union (EU), with particular attention to recent legal and legislative advancements following the implementation of the GDPR. Since its implementation in 2018, GDPR has profoundly influenced data protection standards within the EU and beyond. By analysing the complexities of GDPR compliance concerning cross-border data transfers in the context of tax treaties between EU member states and third countries, this study aims to shed light on both progresses made and persisting challenges.

Through a blend of legal analysis and observational insights, this paper identifies key issues that continue to pose obstacles in regulating transborder data flows effectively within the realm of tax treaties. Despite the strides made with GDPR, concerns persist regarding the adequacy of safeguards for personal data during international transfers, as well as the efficacy of enforcement mechanisms and inter-jurisdictional cooperation frameworks. By critically evaluating the current regulatory landscape, this study offers detailed perspectives on areas warranting further attention and potential avenues for strengthening transborder data governance within the EU tax context. The primary objective is to analyse the complexities and legal implications surrounding the transfer of sensitive tax information while adhering to the principles and regulations outlined in the GDPR.

Keywords: Data Protection; Data Transfer; Tax Data Transfer, GDPR; Tax Treaties, International Cooperation, Tax Authorities; Legal Challenges.

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[1] The term third country refers to countries other than EU Member States, Norway, Liechtenstein and Iceland or the European Economic Area (EEA).

[2] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

Abbreviations

AEOI	Automatic Exchange of Information
CJEU	Court of Justice of the European Union
DPD	Data Protection Directive
EOI	Exchange of Information
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EDPB	European Data Protection Board
G20	Group of Twenty Finance Ministers and Central Bank Governors
GDPR	General Data Protection Regulation
MTC	Model Tax Convention
OECD	Organisation for Economic Co-operation and Development
SCC	Standard Contractual Clauses
TFEU	Treaty on the Functioning of the European Union
LED	Directive (EU) 2016/680 of the European Parliament and of the Council on the adequate protection of personal data by the United Kingdom

1 Introduction

1.1 Background

In recent years, the landscape of international tax cooperation has undergone significant transformations, driven by efforts to combat tax evasion, promote transparency, and enhance cross-border information exchange. Central to these initiatives is the OECD, which plays a pivotal role in shaping global tax standards and frameworks. Article 26[3] of the OECD MTC stands as a cornerstone of international tax cooperation, providing a legal basis for the exchange of tax-related information between jurisdictions.

Simultaneously, the GDPR[4] implemented by the EU in 2018, has brought in a new era of data protection and privacy regulation, establishing strict requirements for the processing and transfer of personal data. The GDPR safeguards fundamental rights to data protection and privacy for individuals within the EU, setting forth comprehensive principles and obligations governing the handling of personal data by organizations and authorities.

Against this backdrop, the intersection of tax law and data privacy has emerged as a complex and multifaceted legal terrain. EU tax administrations, tasked with fulfilling international tax cooperation obligations under Article 26 of the OECD MTC, are confronted with the challenge of transferring taxpayer information to non-EU jurisdictions while ensuring compliance with GDPR requirements and protections. This coexistence of obligations poses complex legal implications and challenges, necessitating a nuanced understanding of the interplay between tax law imperatives and data privacy principles.

Moreover, unforeseeable, or unavoidable events, such as sudden regime changes or geopolitical shifts in third countries, further complicate the landscape of international data transfers, requiring continuous adaptation and refinement of legal frameworks and practices. It is noteworthy that the protection provided by the GDPR travels with the data, meaning that the rules safeguarding personal data continue to apply regardless of where the data lands. This also applies when data is transferred to a third country.[5]

In this context, this master thesis seeks to address the pressing need for research and analysis of the legal complexities surrounding the transfer of taxpayer information by EU tax administrations to non-EU jurisdictions under Article 26 of the OECD MTC, considering GDPR requirements and protections. By examining the implications of recent judicial decisions, institutional tensions, and evolving data

[3] Exchange of Information.

[4] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

[5] European Commission website - What rules apply if my organisation transfers data outside the EU?

protection frameworks, this research aims to provide insights and recommendations for policymakers, tax authorities, and stakeholders navigating the challenges of balancing tax transparency objectives with data privacy imperatives in the global arena.

1.2 Purpose and research questions

The research question that this thesis aims to answer is: "What are the legal implications and challenges arising from the transfer of taxpayer information by EU tax administrations to non-EU jurisdictions under Article 26 of the OECD MTC, in light of the obligations mandated by the GDPR?"

The purpose of this master thesis is to investigate the potential discordance between the information exchange obligations of EU member states under the Article 26 of the OECD MTC and the obligations set forth in the GDPR. Specifically, the research aims to examine whether the obligations for exchanging information between EU member states under the OECD MTC align with the data protection standards outlined in the GDPR. The central research question seeks to explore whether these two sets of obligations, which govern information exchange and data protection, respectively, are compatible or if there exists a conflict between them.

Additionally, the thesis seeks to propose potential solutions to reconcile any inconsistencies between these obligations and to ensure compliance with both legal frameworks. By addressing this research question, the thesis aims to contribute to a better understanding of the intersection between international tax cooperation and data protection within the EU context.

The study will delve into the framework established by Article 26 of the OECD MTC, which governs the exchange of information between tax authorities of different jurisdictions and assess its compatibility with the provisions of the GDPR. It will analyse the legal basis and mechanisms supporting these transfers, examining issues of consent, necessity, proportionality, and safeguards to ensure compliance with GDPR principles of data protection and privacy.

Specifically, the thesis will explore the adequacy decision mechanism provided by the GDPR, which allows for the transfer of personal data to third countries that have been deemed to provide an adequate level of data protection by the European Commission. It will analyse the implications of the absence of an adequacy decision for non-EU jurisdictions receiving taxpayer information and examine the requirements for implementing appropriate safeguards to ensure an equivalent level of protection. Furthermore, the research will consider the derogations for specific situations outlined in the GDPR, such as explicit consent from the individual after being informed about the risks associated with the transfer. It will assess the practical implications and limitations of relying on derogations in the context of tax information exchange, balancing the interests of tax transparency and cooperation with the rights of taxpayers to privacy and data protection.

1.3 Delimitations

While the topic of exchange of information encompasses a broad spectrum, this thesis will exclude an exploration of similar provisions found within the United Nations (UN) Model Convention [6] and the United States (US) model.[7] Despite the fact that the OECD MTC is not a directly applicable EU regulation, its widespread adoption as the basis for tax treaties by numerous EU member states renders it highly important to the research topic at hand. The OECD MTC serves as the foundation for negotiating and interpreting over 3000 tax treaties. This extensive network coordinates the income and corporate tax systems of numerous countries, aiming to eliminate tax barriers to cross-border trade and investment.[8] Moreover, the OECD MTC influences global tax negotiations and international efforts on double taxation. Its provisions and Commentaries are widely adopted and serve as standard guides for interpreting most bilateral tax treaties.[9]

In delimiting the scope of this study, it's crucial to specify that tax treaties between EU member states and the exchange of information among EU countries will not be included in the analysis. Similarly, Convention 108 [10] will not be examined within the context of this research.

Furthermore, this study will not extensively explore the historical development of OECD Article 26. Instead, the primary focus will be on its most recent updates and implications.

Additionally, the Data Protection Directive (DPD), [11] which was succeeded by the GDPR in 2018, marked the initial legislative framework within the European Union to address data protection comprehensively and "*set a milestone in the history of protection of personal data in the European Union*".[12] Therefore, it is important to note that while this study will not discuss the Data Protection Directive (DPD). Instead, the focus will be solely on the GDPR and its relevance to cross-border data transfers in the context of international tax cooperation.

[6] United Nations Model Double Taxation Convention between Developed and Developing Countries 2017.

[7] United States Model Income Tax Convention.

[8] OECD iLibrary – Model Tax Convention on Income and on Capital.

[9] Model Tax Convention on Income and on Capital Condensed Version (as it read on 21 November 2017) – Introduction/ Influence of the OECD Model Convention.

[10] The Council of Europe's Convention for the Protection of Individuals with regard to Automated Processing of Personal Data (Convention 108).

[11] 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.

[12] European Commission, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, A comprehensive approach on personal data protection in the European Union, COM (2010) 609 final, page.1 (4 November 2010).

1.4 Method and materials

This thesis follows a traditional doctrinal legal methodology.[13] This method has to do with current positive law as laid down in written and unwritten European or (inter) national rules, principles, concept, doctrines, case law and the literature.[14]

This master thesis employs a methodology aimed at thoroughly investigating the legal implications and challenges arising from the transfer of taxpayer information by EU tax administrations to non-EU jurisdictions under Article 26 of the OECD MTC, in alignment with GDPR requirements and protections. The legal doctrinal method used in this paper will offer a systematic and structured approach to analysing legal issues. This involves a comprehensive review and analysis of existing legal literature, statutes, case law, and other legal sources relevant to this research topic.

The research begins with an exhaustive review of existing literature encompassing scholarly articles, legal texts, case law, regulatory guidance, and policy documents relevant to the topic. This literature review serves as the foundation for identifying key legal principles, emerging trends, and best practices in international tax cooperation and data privacy, ensuring the research is grounded in established knowledge and insights.

A comprehensive legal analysis is conducted to examine the relevant legal frameworks governing cross-border tax information exchange, including Article 26 of the OECD MTC, GDPR provisions, CJEU rulings, and national and international laws and regulations. This analysis involves a review of legal texts and jurisprudence to elucidate the rights, obligations, and constraints faced by EU tax administrations in transferring taxpayer information to non-EU jurisdictions.

1.5 Outline

This master thesis begins with Chapter Two, which introduces the concept of exchange of information in international taxation, emphasizing its role in combating tax evasion. It discusses the significance of tax treaties in facilitating cooperation between jurisdictions and the necessity of exchanging data with third countries, while considering the challenges and benefits associated with such cooperation.

In Chapter Three, the focus shifts to how the GDPR impacts cross-border data transfers, particularly in interactions with third countries. It covers GDPR principles, extraterritorial application, provisions governing data transfers, challenges, compliance considerations, and future implications.

Chapter Four delves into the complexities of cross-border data transfers, exploring obstacles such as legal and technical challenges. It examines mechanisms for compliance with data protection regulations, including adequacy decisions and alternative safeguards, and discusses best practices for maintaining compliance

[13] Douma S, 2014 Kluwer: Deventer - Legal Research in International and EU Tax Law, pg.17– 18.

[14] Ibid, page 18.

while considering emerging trends in international data governance. Moreover, it examines the distinctions between third countries with and without adequacy decisions regarding data protection. It highlights the implications for cross-border data transfers, emphasizing the necessity of appropriate safeguards for compliance with data protection regulations.

Chapter Five investigates the intersection of GDPR compliance and tax treaties. It explores the legal implications for data transfers under both frameworks and addresses challenges faced by tax authorities and organizations in navigating these complexities. Chapter six is concluded with a summary of findings.

2 Tax Treaties Obligations on Information Exchange

2.1 Overview of Tax Treaties

> "Treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".[15]

Over the past century or so, the international tax system has typically assigned the authority to collect income taxes to either the country where a person lives or the country where the income originates. When both countries impose taxes on the same income simultaneously, it leads to double taxation.[16] Tax treaties were first created to encourage international trade and investment by preventing double taxation. This means that the main goal of tax treaties is to avoid taxing the same income twice.

In 1963, the OECD introduced its first model tax convention, which served as a blueprint for bilateral tax treaties between member countries.[17] This model convention aimed to address the challenges posed by double taxation, where the same income is taxed by more than one country, thereby creating barriers to cross-border economic activities.

Over the years,[18] the OECD has continued to refine its model tax convention, incorporating changes to reflect evolving economic realities and international tax practices. These revisions have been informed by ongoing discussions among member countries, as well as input from tax experts and stakeholders. In 2017[19], the OECD introduced a condensed version of its model tax convention, aimed at making the treaty text more accessible and user-friendly. This condensed version retained the key provisions of the full model convention but presented them in a simplified format, making it easier for policymakers, taxpayers, and practitioners to understand and apply.

The OECD Models have had considerable impact in shaping international tax law. They have served as a blueprint for other model tax conventions, and numerous states utilize the OECD Model as the foundation for their Double Taxation Conventions (DTC) negotiations.

[15] Vienna Convention on the Law of Treaties 1969, Article 2.

[16] OECD Model Tax Convention on Income and on Capital: Commentaries, Introduction (21 Nov. 2017).

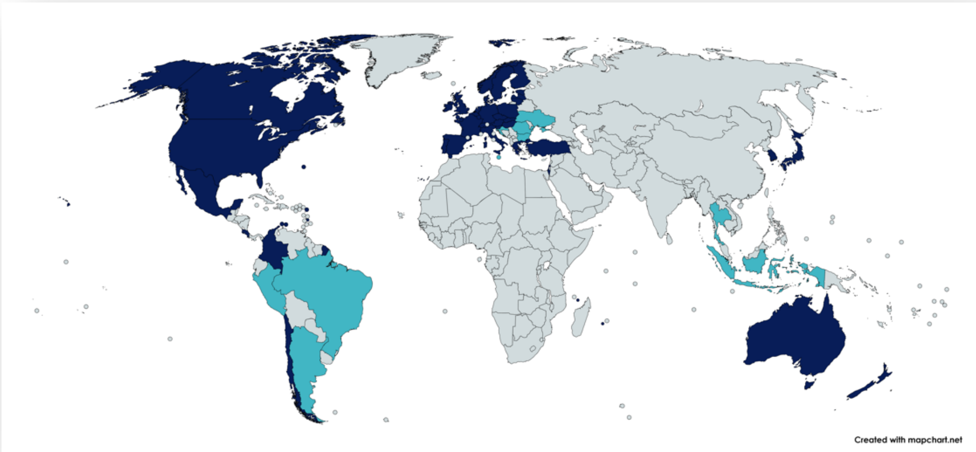
[17] 1963 OECD model has laid the foundations for the OECD's Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) agreed on by more than over 100 jurisdictions.

[18] OECD Model of 1963, 1992, 1998, 2000, 2003, 2005, 2008, 2010, 2014, 2017.

[19] Model Tax Convention on Income and on Capital: Condensed Version 2017.

These Double Tax Conventions, which are also referred to as Tax Treaties contain rules regarding the exchange of information, with article 26 OECD MTC being crucial.

The image below illustrates the OECD's focus on the Western World. The combined GDP of its 38 member states now accounts for nearly 50% of global GDP, down from over 60% in 2005 due to the economic rise of developing and non-member countries.[20]



Member states Applicants[21]

2.2 Obligations under Article 26 of OECD MTC

2.2.1 Historical Developments

The international exchange of tax information has a rich history. As far back as 1927, the League of Nations drafted a Bilateral Convention on Administrative Assistance in Taxation Matters, laying the groundwork for cooperation in tax affairs between nations.[22]

Effective collaboration among tax administrations is essential in combating tax evasion and safeguarding the integrity of tax systems. Central to this collaboration is the exchange of information between jurisdictions. This exchange plays a pivotal role in facilitating transparency, enhancing compliance, and enabling authorities to detect and prevent tax evasion effectively.

In the last couple years, several countries have committed to lifting banking secrecy for tax-related matters, sharing tax information with other governments, and

[20] Jorissen B, Archipel Tax Advice, 29 November 2022 - Clash of the Titans: OECD vs UN Model Treaty.

[21] Member States and Applicants of the OECD MTC – Wikipedia 2024.

[22] Huiskers-Stoop E, Breuer A & Nieuweboer M, Erasmus Law Review 2022 - Exchange of Information, Tax Confidentiality, Privacy and Data Protection from an EU Perspective, page 88, 2.1 International Exchange of Information.

increasing transparency surrounding asset ownership and financial transactions. This initiative was initiated by the OECD's standard for the Exchange of Information on Request (EOIR), enabling tax authorities in one country to request and obtain information from the tax authorities of another country. Then in 2014, the OECD developed a common reporting standard, which also provided for the automatic exchange of tax information (AEOI).[23] This framework was approved by the OECD Council on 15 July 2014, and it urges jurisdictions to collect information from their financial institutions and exchange it automatically with other jurisdictions on an annual basis. Hence, the work of European Parliament and the Council since 2011 on legislative series in facilitating Member States ability to exchange tax information through various channels which has established the framework for Exchange of Information on Request (EOIR), Automatic Exchange of Information (AEOI), spontaneous exchanges of information and feedback, as well as the presence of tax officials from one country in another's tax authority offices, their involvement in administrative inquiries, and other forms of administrative cooperation.

In addition, in February 2014, G20[24] Ministers of Finance endorsed the essential elements of a new global standard[25] for automatic exchange of information between tax administrations.[26] So, one of the most effective methods for achieving tax transparency is through information exchange between countries. However, striking the right balance between information exchange, tax confidentiality, and privacy poses a significant challenge.[27]

What began in 1927 has evolved into a vast network of bilateral and multilateral agreements. The OECD inherited the efforts of the League of Nations.

The competent authorities responsible for exchanging information are typically the highest tax authorities. These authorities are required to maintain the confidentiality of information received from the other contracting state. According to Article 26(2) of the OECD MTC, any information obtained by a contracting state must be treated with the same level of confidentiality as information gathered under its domestic laws. This information can only be disclosed to individuals or entities involved in tax assessment, collection, enforcement, prosecution, appeals related to taxes covered in the Double Taxation Convention (DTC), or oversight of these activities. Such recipients are limited to using the information solely for these purposes. In some cases, the information may be disclosed in public court proceedings or judicial decisions. Additionally, the information may be utilized for other purposes if both contracting states' laws allow it and the competent authority of the providing state grants authorization for such use.

[23] OECD, Global Forum on Transparency and Exchange of Information for Tax Purposes, Automatic Exchange of Financial Account Information – Common Reporting Standard, 13 February 2014.

[24] The G20 or Group of 20 is an intergovernmental forum comprising 19 sovereign countries, the European Union (EU), and the African Union (AU). It works to address major issues related to the global economy, such as international financial stability, climate change mitigation and sustainable development.

[25] The OECD MTC standard with strong support and input from the EU.

[26] European Commission Statement on the agreement on global tax transparency standard, 23 February 2014.

[27] Huiskers-Stoop E, Breuer A & Nieuweboer M, Erasmus Law Review 2022 - Exchange of Information, Tax Confidentiality, Privacy and Data Protection from an EU Perspective, page 86 Introduction.

2.2.2 Article 26 of OECD MTC

As the economy and finance became more globalized over time, tax avoidance and evasion schemes became more common and complex. In response to this trend, sharing information between Tax Administrations emerged as a key tool for monitoring cross-border operations.[28]

The introduction of Article 26 of OECD MTC came along with a detailed Commentary,[29] which since 2005 also refers to data protection. [30]

Article 26 of OECD MTC reads as follow:

> "The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2."[31]

Article 26 allows countries to share tax information, ensuring taxpayers meet their obligations globally. However, as Article 26 evolves to combat tax avoidance and evasion, it creates an unequal relationship between information exchange and taxpayers' rights. For instance, we can talk about the restrictions of Article 26(3) of the OECD MTC. These limits come into play when states have the option to exchange information, but taxpayers don't have a say in the matter.[32] In this context, the Commentaries on Article 26 suggest that national laws may allow affected taxpayers to be notified about the exchange process. However, it's emphasized that these notification rights should not obstruct or unreasonably hinder the exchange of information. Additionally, recommendations are provided for exceptions to these rights.[33]

As stated above, the standard of "foreseeable relevance" is set as a necessary condition for the exchange to become obligatory and for the provision to take effect. This principle helps to ensure that the exchange of information is not arbitrary and is only carried out when there is a genuine need for the information. To ensure clarity and consistency in interpretations, the Commentaries on Article 26 include specific explanatory guidelines. It offers guidance on the interpretation and application of Article 26, addressing various aspects such as the scope of information exchange, the standard of 'foreseeable relevance', and the rights of taxpayers.

[28] Castro M, López B H and Rodríguez E M, WP of the Iberoamerican Observatory, 2020 - Commentaries on article 26 of the OECD Model Tax Convention: exchange of information, Page 28.

[29] Most recent version: OECD, Model Tax Convention on Income and on Capital (2017).

[30] See OECD Commentary 2017, at Art. 26, para. 10.

[31] On 19 February 2024, the OECD Council approved an update to the commentary on Article 26 (Exchange of information) of the OECD Model Convention. This update clarifies that information received through administrative assistance can be used for tax matters concerning persons other than those in respect of which the information was initially received. It also provides interpretative guidance on confidentiality, in particular regarding the access of taxpayers to information exchanged when such information has a bearing on their tax situation and regarding reflective non-taxpayer specific information, including statistical data, about or generated on the basis of exchanged information.

[32] Commentaries to Art. 26 OECD MTC 2017, para. 17.

[33] Commentaries to Art. 26 OECD MTC 2017, para. 14.1.

The aim is to exchange information widely, as long as there's a reasonable chance it could be useful. This possibility must exist when the request is made, even if the relevance of the information is only confirmed after it's been shared. In essence, if the information turns out to be important later, it shouldn't be refused after it's already been shared.[34] The OECD Commentary states that all information that could be relevant should be exchanged. However, the term 'relevant' still isn't clearly defined. This raises a challenge since both states must assess the relevance standard. However, for the state receiving the request, it's not always clear whether the requested information is truly relevant for the other state. This requires a careful balance between the taxpayer's rights and the effectiveness of the exchange of information process.[35]

The standard of the 'foreseeably relevance' of the requested information also prohibits the so-called fishing expeditions, i.e. requests for information solely for collecting evidence. These are speculative requests with no clear connection to an ongoing inquiry or investigation. This provision primarily focuses on safeguarding taxpayers' rights while also aiming to prevent an overwhelming number of requests and the subsequent administrative burdens faced by the state receiving the requests.[36] The prohibition of 'fishing expeditions' is not explicitly mentioned in Article 26 OECD-model but is only described in the Commentary. This prohibition on 'fishing expeditions' allows the requested state to reject requests that aren't considered 'relevant'.

The Commentaries to the Model Convention reflect this, and their provisions have been acknowledged by the European Union Court of Justice.[37] Additionally, the Commentary discusses the different types of exchanges allowed under Article 26, including upon request, automatic, or spontaneous exchanges. Each type of exchange has its own procedures and requirements, but all aim to facilitate effective cooperation between tax authorities while balancing the rights of taxpayers and the administrative burdens on the requested state. At present, Contracting States have the liberty to opt for any form of exchange be it upon request, automatic, or spontaneous. As a result, the choice between these exchange methods doesn't lead to varying consequences regarding the obligatory nature of the process. [38]

The Commentary on Article 26 further emphasizes that upholding confidentiality within the receiving contracting state is subject to its domestic legislation. It specifies that penalties for breaching this confidentiality within that state are regulated by its administrative and criminal laws. As per the Commentary, if the requested state finds that the requesting state fails to uphold its obligations regarding the confidentiality of exchanged information, it has the right to suspend assistance. However, this

[34] Commentaries to Art. 26 OECD MTC 2017, para. 5.

[35] Debelva F & Diepven N, INTERTAX, Volume 44, Issue 4 - Exchange of Information. An Analysis of the Scope of Article 26 OECD Model and Its Requirements: In Search for an Efficient but Balanced Procedure.

[36] Ibid. page 302.

[37] Berlioz Investment Fund SA v Directeur de l'administration des contributions directes [2017] ECLI:EU:C: 2017:373, [66], [67], where the ECJ stated that : " *According to the commentary on that article adopted by the OECD Council on 17 July 2012, Contracting States are not at liberty 'to engage in fishing expeditions', nor to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. On the contrary, there must be a reasonable possibility that the requested information will be relevant''.*

[38] Commentaries to Art. 26 OECD MTC 2017, para. 9.

suspension is temporary and lasts until the requesting state provides adequate assurance that it will respect those obligations.[39]

Given the focus of this thesis on the OECD MTC, it's important to note that Article 26 of the OECD MTC governs the exchange of tax-related information between EU member states and third countries. This article provides a framework for information exchange between tax authorities, aiding in the enforcement of domestic tax laws. Many OECD-based tax treaties also include provisions to prevent tax evasion and ensure compliance. In the EU, these exchanges are often facilitated through bilateral or multilateral agreements endorsed by the EU. While the EU lacks direct taxation authority, it promotes cooperation to enhance transparency and combat tax evasion. Therefore, tax-related information exchange is governed by both national legislation and international agreements aligned with the OECD MTC.

Overall, the Commentary provides important guidance to ensure that the exchange of information under Article 26 is conducted in a fair, efficient, and transparent manner, benefiting both the requesting, and requested states in their efforts to combat tax evasion and ensure compliance with tax laws. The commentary highlights a conflict between the OECD's approach to data exchange and the GDPR's stringent data protection requirements. The OECD emphasizes international information exchange for tax purposes and combating financial crimes, but its guidelines do not specifically address the GDPR. The GDPR imposes strict data protection standards, requiring third countries to have adequate safeguards when receiving personal data from the EU. The EU insists that member countries ensure these safeguards, but it cannot enforce GDPR compliance on third countries. This creates a clash between the OECD's focus on efficient data exchange and the GDPR's stringent data protection requirements.

2.3 Tax treaties and Exchange of Data with Third Countries

European Union (EU) member states have the legal authority to negotiate and conclude tax treaties with third countries based on their sovereign rights. [40]

The sharing of tax information is viewed as a method to combat tax evasion and avoidance. However, it can also pose significant risks to the rights of taxpayers. While it is designed for tax-related purposes, the exchange of tax information has the capacity to infringe upon taxpayers' rights in a manner that extends beyond taxation, overstepping upon their fundamental rights.[41]

[39] OECD Model Tax Convention on Income and on Capital: Commentary on Article 26 para. 11.

[40] Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue [2007] ECLI:EU:C: 2007:161, [49]. The EU Treaty makes no explicit provision for legislative competences in the area of direct taxation. The European Court of Justice has consistently held that, in the absence of harmonisation, taxes on personal income fall within the competence of the Member States but they must respect the fundamental Treaty principles on the free movement of workers, services and capital and the freedom of establishment (Articles 39, 43, 49 and 56 of the EC Treaty).

[41] Cannas F, World Tax Journal May 2020 - Taxpayers' Right of Defence in the International Context: The Case of Exchange of Tax Information and a Proposal for the "English" Wednesbury Doctrine as the New OECD (BEPS) Standard., page 379.

Tax treaties between European Union (EU) member states and third countries are crucial for facilitating international trade and investment while addressing double taxation. They define taxing rights, establish information exchange mechanisms between tax authorities, and outline dispute resolution procedures. These treaties create a favourable environment for economic growth, attract foreign investment, and enhance the competitiveness of EU member states in the global market. Additionally, they promote transparency and cooperation, ensuring that tax obligations are met and reducing opportunities for tax evasion.

While the European Union itself does not possess direct jurisdiction over taxation matters, the Treaty on the Functioning of the European Union (TFEU) empowers member states to engage in international agreements independently. Article 351 of the TFEU ensures the continuity of existing agreements between member states and third countries, as long as they do not conflict with EU law. Consequently, EU member states retain the autonomy to negotiate and finalize tax treaties with third countries, provided they comply with EU regulations and any pertinent international commitments. Moreover, these tax agreements must uphold fundamental EU principles such as non-discrimination and freedom of establishment. This legal framework enables EU member states to establish bilateral tax treaties that facilitate cross-border economic activities while ensuring compliance with EU law and international obligations.

3 Obligations of Data Protection Regulation (GDPR)

3.1 Introduction

As of 25th of May 2018 onward, the GDPR, serving as a comprehensive EU legislation governing data protection, came into effect, replacing the DPD.[42] The protection of personal data constitutes a fundamental right that is safeguarded by national constitutions.[43] [44] [45]

EU secondary data protection law extends to data processing governed by EU legislation as well as activities occurring solely within domestic contexts.[46]

[42] Apart from these horizontal legal acts, there are also sectoral ones such as Directive (EU) 2016/680 which had to be transposed into Member States legislations by 6 May 2018 and Regulation (EC) No 45/2001.

[43] Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) C 326/47 (2012), article 16.

[44] Charter of Fundamental Rights of the EU (CFR), article 8.

[45] Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, CETS No. 108 (1981), - *hereinafter Convention No. 108.*

[46] Wohrer V, WU Institute for Austrian and International Tax Law, Volume 10- Data Protection and Taxpayers' Rights: Challenges Created by Automatic Exchange of Information, Volume 10, page 282, chapter 6/6.3.9 – Data Protection Guarantees in Europe.

Furthermore, the transfer of personal data from an EU Member State to a third country is regulated by the GDPR.

Data protection within the framework of the GDPR is extensive, encompassing various activities involving personal data. These activities include, among others, the collection and transmission of information regarding an individual's income to a public authority, the exchange of such data between public authorities, and the re-publication of personal data already in the public domain.

Within the realm of taxation, personal data holds particular importance, covering details such as taxpayer identification numbers, financial transactions, and income records. Recognizing the complexities of personal data in tax matters is imperative, given the substantial volumes of data processed by tax authorities for regulatory compliance and enforcement purposes.

The regulations concerning the transfer of data to third countries and international organizations are outlined in Chapter V of the GDPR. In accordance with GDPR regulations, it's essential to verify that the recipient country complies to GDPR standards when managing personal data. Consequently, tax-related information exchange is governed by both national legislation and international agreements aligned with the OECD MTC, with additional safeguards to meet GDPR requirements.

3.2 Overview of GDPR

Article 4(1) of the GDPR defines personal data as “any information relating to an identified or identifiable natural person”. This means that EU data protection legislation ensures the protection of not just particular personal details related to private and family life but also covers any information regarding an individual. Therefore, information essential for tax calculations, including employment details, income, assets, and property, qualifies as "personal data" when related to individuals The transfer of personal data to recipients outside the European Economic Area (EEA) is subject to Article 4(2) of the GDPR and is typically restricted, unless the jurisdiction to which it's transferred ensures an adequate level of protection (as stated in Recital 107 of the GDPR).[47]

As an EU regulation, the GDPR has direct effect and does not require transposition into national law. However, it also allows individual member states some flexibility to adjust or deviate from certain provisions. The evolution of data protection laws, culminating in the implementation of the GDPR, reflects the growing recognition of the importance of privacy rights in an increasingly interconnected and data-driven world. As tax administrations face the challenges of cross-border tax compliance, the GDPR is key to ensuring the secure and lawful exchange of taxpayer information internationally.

[47] Favaloro G A C, European Taxation April 2021 - The Exchange of Tax Information between EU Member States and Third Countries: Privacy and Data Protection Concerns, Chapter 3: GDPR (Chapter V): Background and Case Studies.

3.3 Extraterritorial Application of GDPR

The legal basis for the extraterritorial application of the GDPR lies in Article 3 of the regulation. This article outlines the scope of the GDPR and specifies the circumstances under which it applies to the processing of personal data, both within and outside the European Union.

The Extraterritorial Application of the GDPR marks a significant shift in global data protection dynamics, as European data privacy regulations extend their reach beyond the borders of the European Union.

Prior to its enactment, enforcing EU privacy regulations on non-EU data controllers and processors was challenging due to jurisdictional limitations. However, the GDPR's expanded territorial scope now imposes obligations on organizations outside the EU that process data from individuals within the Union, including information handled by tax authorities, for specific purposes. This shift underscores the importance of understanding the criteria under which non-EU entities may fall within the scope of GDPR regulations.

Under the GDPR, tax authorities operating outside the EU that process personal data of individuals within the Union must adhere to EU data protection standards. This means that tax authorities in third countries must ensure that their data processing practices comply with the GDPR's principles of lawfulness, fairness, and transparency, among others. Additionally, data transfers to third countries must meet the GDPR's adequacy requirements or be subject to appropriate safeguards, such as standard contractual clauses or binding corporate rules, to ensure an adequate level of protection for the transferred data.

Overall, tax authorities must navigate the intersection of tax treaties with third countries and the GDPR's data protection requirements to ensure that cross-border exchanges of taxpayer information are conducted in a manner that respects individuals' privacy rights and complies with applicable legal obligations.

3.4 GDPR and Cross-Border Data Transfer

The transfer concept is not defined in the GDPR.[48] The European Data Protection Board (EDPB) has adopted a Guideline [49] which specifies three cumulative criteria that qualify a processing as a transfer:

1. The data exporter (a controller or processor[50]) is subject to the GDPR for the given processing. [51]

[48] Juliussen B A, Rui J P, Kozyri E, Johansen D, International Data Privacy Law, 2023, Vol. 13, No. 3 - The third country problem under the GDPR: Enhancing protection of data transfers with technology, page 227 Legal requirements for cross-border transfers.

[49] EDPB Guidelines 05/2021 on the Interplay between the application of Article 3 and the provisions on international transfers as per Chapter V of the GDPR Version 2.0.

[50] A data controller/processor can be a legal person, for example a business, an SME, a public authority, an agency, or other body. For the purpose of this thesis, hereinafter tax authorities.

[51] EDPB Guidelines 05/2021 on the Interplay between the application of Article 3 and the provisions on international transfers as per Chapter V of the GDPR Version 2.0. Chapter 2/2.1: "*The first criterion requires the processing to*

2. The data exporter transmits or makes available the personal data to the data importer.[52]

3. The data importer is in a third country or is an international organisation.[53]

According to this guideline, the processing will be considered a transfer, irrespective of whether the importer situated in a third country is already governed by the GDPR under Article 3 GDPR. If the EDPB's three criteria are met, Chapter V of the GDPR applies to the data transfer. This means the transfer can only happen if there's an adequacy decision from the European Commission or appropriate safeguards are in place.

Moreover, article 44 of the GDPR explicitly states that specific requirements must be met when transferring data to third countries, alongside the general rules for lawful data processing. [54] The transfer of data to a third country or international organization is permissible when the Commission has determined that said third country or international organization guarantees an adequate level of protection for personal data.[55]

4 Cross-Border Data Transfers: Challenges and Mechanisms

4.1 Mechanism for Ensuring GDPR Compliance

Chapter V of the GDPR allows the transfer of personal data to third countries under three exemptions. These are that:

i) transfers out of the protected area may be based on an adequacy decision from the European Commission (EC) stating that the third country has an adequate level of personal data protection.

meet Article 3 GDPR, meaning it is subject to the GDPR. Non-EU tax authorities under Article 3(2) must also comply with Chapter V when transferring data, with the same obligations as EU tax authorities".

[52] Ibid, Chapter 2/2.2: "The *second criterion requires the tax authorities to disclose or make data available to another tax authority. The roles of tax authorities are clarified in EDPB Guidelines 07/2020 and must be interpreted based on EU data protection law. Examples of making data available include creating accounts, granting access, or remote access from a third country. Chapter V doesn't apply to internal processing, where data isn't disclosed to another tax authority. The criterion isn't met if data is disclosed directly by the data subject to the recipient ".*

[53] Ibid, Chapter 2/2.3: "*The third criterion requires the importer to be in a third country or an international organization, regardless of whether the GDPR applies to the processing. This ensures GDPR protection isn't undermined when data leaves the EEA legal framework. Issues include the GDPR not applying to the importer, or data being subject to conflicting legal frameworks outside the EEA, like disproportionate government access. Enforcing GDPR compliance and obtaining redress against non-EEA entities are also relevant concerns".*

[54] Working document on a common interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995, 2093/05/EN, WP 114, page 8 (25 November 2005).

[55] Ibid, page 4.

ii) the transfer may be based on appropriate safeguards on a contractual level between the exporter and the importer pursuant to Article 46 GDPR. [56]

iii) the transfer may be based derogations on a case-by-case situations according to Article 49 GDPR.

Furthermore, exemptions and derogations outlined in articles 44-50 of the GDPR offer additional flexibility. Nonetheless, even if one of these exemptions or derogations is applicable, the general data protection safeguards applicable to data processing within the European Union must still be upheld.[57] In a recent decision by the CJEU, the importance of maintaining data protection standards across borders was emphasized:

> "GDPR must be interpreted as meaning that the appropriate safeguards, enforceable rights and effective legal remedies required by those provisions must ensure that data subjects whose personal data are transferred to a third country pursuant to standard data protection clauses are afforded a level of protection essentially equivalent to that guaranteed within the European Union by that regulation, read in the light of the Charter".[58]

Article 45 of the GDPR sets out broader requirements for assessing whether a third country provides adequate protection for personal data. These requirements include considerations such as whether the third country has made international commitments and other obligations regarding data protection. When the European Commission issues an adequacy decision, confirming that a particular jurisdiction offers sufficient protection for individuals' rights and freedoms, personal data can be transferred between an EU Member State and that third country under the same conditions as data transfers within the EU. This means that no additional safeguards are needed for such transfers, as they are considered to meet the necessary standards of data protection.

When the Commission first reviewed the situation, it looked at how countries and territories improved their data protection laws since getting the adequacy decisions. It also checked the rules about government access to data for law enforcement and national security. If a country or territory with an adequacy decision makes changes that lower the level of data protection, the Commission can stop, change, or cancel the decision.[59] Moreover, if an adequate country or territory makes changes that would harm data protection, the Commission can pause, change, or cancel the adequacy decision.[60]

In total there are 16 adequacy decisions in place, respectively for Andorra, Argentina, Canada (commercial organisations), Faroe Islands, Guernsey, Israel, Isle

[56] One such contractual safeguard is Standard Contractual Clauses (SCCs) adopted by the Commission under Article 46 (2) (C).

[57] Wohrer V, WU Institute for Austrian and International Tax Law, Volume 10- Data Protection and Taxpayers' Rights: Challenges Created by Automatic Exchange of Information, Volume 10, page 248, chapter 6/6.3.2.4 – Transfer of Data to third countries.

[58] Data Protection Commissioner v Facebook Ireland Limited, Maximillian Schrems [2020] ECLI:EU:C:2020:559, [105].

[59] Press Release of European Commission on the Report on the first review of the functioning of the adequacy decisions adopted pursuant to Article 25(6) of Directive 95/46/EC. 15 January 2024.

[60] Article 45 (9) of GDPR.

of Man, Japan, Jersey, New Zealand, Republic of Korea, Switzerland, the United Kingdom (under the GDPR and the LED), the United States and Uruguay.[61]

However, it's worth noting that several significant trading partners of the EU, particularly larger countries, do not currently have adequacy decisions in place. Countries like China, India, and Brazil,[62] which have substantial economic ties with the EU, are yet to be granted adequacy status. This lack of adequacy decisions for key trading partners raises concerns about the seamless flow of data between these countries and the EU, potentially impacting various sectors such as manufacturing, technology, and services. Finding ways to address this gap in data adequacy arrangements could be crucial for facilitating smooth data transfers and maintaining strong economic relations with these important partners.

4.2 Adequacy Decisions and their Significance

An adequacy decision means the Commission has decided that a third country offers a similar level of personal data protection as the EU. This allows EU member states to transfer personal data to third countries without needing extra protections or permissions.

When evaluating the adequacy of the level of protection, the Commission shall specifically consider the following elements:[63]

- The Commission considers the rule of law, human rights, relevant legislation (including public security, national security, and criminal law), data protection rules, and security measures. It also assesses the implementation of these laws, the rights of data subjects, and the availability of effective administrative and judicial redress in the third country or international organization.

- The Commission also evaluates whether there are independent supervisory authorities in the third country or international organization, responsible for enforcing data protection rules. These authorities should have adequate enforcement powers, assist data subjects in exercising their rights, and cooperate with supervisory authorities of EU Member States.

- The Commission also considers the international commitments of the third country or international organization, including obligations from legally binding conventions or agreements, as well as its participation in multilateral or regional systems related to the protection of personal data.

These documents require close monitoring and adjustment in the event of changes affecting the level of protection provided by the third country.

[61] European Commission Report on the first review of the functioning of the adequacy decisions adopted pursuant to Article 25(6) of Directive 95/46/EC. 15 January 2024.
[62] European Commission – EU trade relationships by country/region.
[63] Article 45 of GDPR.

4.2.1 Third Countries with Adequacy Decisions

4.2.1.1 Procedural Aspects

The process of the Commission adopting an adequacy decision involves several steps. It begins with the approval of the draft adequacy decision by the College of EU Commissioners. Subsequently, the European Data Protection Board (EDPB) provides an opinion on the draft decision.[64] The EDPB should be provided with all the necessary documents and conclusions reached by the Commission.[65]

The Commission needs to provide comprehensive information to the EDPB so they can evaluate the level of protection in the third country. Based on the Commission's findings, the EDPB will give an opinion and point out any deficiencies in the adequacy framework, if there are any. They may also suggest changes or adjustments to address these issues.[66]

If the Commission oversteps its implementation powers, the European Parliament and the Council can still ask the Commission to uphold, modify, or revoke the adequacy decision, even though they don't have a formal role in the process. In practice, the Parliament often adopts resolutions to encourage the Commission to enhance certain aspects of its actions. For instance, this occurred with the European Parliament resolution on the adequacy of data protection by the EU-US Privacy Shield.[67] However, these resolutions are not legally binding.

4.2.1.2 Assessment of the third country system

The adequacy finding involves a careful examination of the third country's data protection rules, including how personal data is accessed by public authorities for law enforcement and national security purposes.[68] It is important to note that the adequacy standard doesn't mean third countries have to copy EU rules exactly, as clarified by the Court of Justice in its 2015 Schrems ruling.[69]

4.2.2 Challenges and Limitations of Adequacy Decisions

The European Commission, according to Article 45(2) of the GDPR, assesses if a third country provides essentially equivalent protection in adequacy decisions. Only the CJEU, not national supervisory authorities, can invalidate such a decision.[70] The CJEU has invalidated adequacy decisions in both the Schrems I and II judgements. It's noteworthy that both these invalidations stem from the efforts of one individual,

[64] GDPR, recital 105.
[65] Article 70(1)(s) of GDPR.
[66] Carvalho S L D, 2019 - Key GDPR Elements in Adequacy Findings of Countries That Have Ratified Convention 108, page 57.
[67] European Parliament, 'Resolution on the adequacy of the protection afforded by the EU-US Privacy Shield' (6 April 2017).
[68] Carvalho S L D, 2019 - Key GDPR Elements in Adequacy Findings of Countries That Have Ratified Convention 108, page 58.
[69] Maximillian Schrems v Data Protection Commissioner, Case C-362/14, ECLI:EU:C:2015:650, [73],[74].
[70] Juliussen B A, Rui J P, Kozyri E, Johansen D, International Data Privacy Law, 2023, Vol. 13, No. 3 - The third country problem under the GDPR: Enhancing protection of data transfers with technology– page 229.

Maximillian Schrems, rather than from Data Protection Authorities or enforcement by Supervisory Authorities.

As of 2023, the CJEU has only evaluated Adequacy Decisions concerning EU–US transfers. Other similar legal assessments have been made for the adequacy decision such as for Japan[71] and Israel[72] which were concluded that do not offer “essentially equivalent” protection for EU data subjects. This suggests that if these Adequacy Decisions undergo CJEU evaluation, they might face invalidation.

So, even though the European Commission has the responsibility to assess if a third country provides essentially equivalent protection in adequacy decisions, it is only the CJEU who has the authority to invalidate such decisions, not national supervisory authorities[73].

In conclusion, when dealing with third countries where adequate protection has not been confirmed, ensuring data protection safeguards within the instrument governing tax information exchange becomes crucial.

4.2.3 Potential for inadequate adequacy

Recent judicial decisions by the CJEU, particularly in the landmark cases Schrems I[74] and Schrems II,[75] have further heightened the complexities surrounding international data transfers. The CJEU's rulings, like in Schrems II, showed that some third countries' data protection rules, especially in places like the US, don't match EU standards due to broad surveillance laws. The invalidation of the Privacy Shield decision by the CJEU in the Schrems II judgment underscored the challenges and uncertainties faced by data exporters in the EU, who must now navigate alternative legal bases for transferring personal data to third countries.

The present situation regarding cross-border transfers of personal data to third countries is described as disproportionate, ineffective, and unpredictable.[76]

The situation is unbalanced because the CJEU has twice ruled US laws don't match EU standards for data protection. Yet, transfers to the US haven't stopped completely after Schrems II, but they rely more on other legal methods. It's also not very effective because tax authorities have to do complicated checks on the laws in the country, they're sending data to when using SCCs. These checks are a hassle and might lead to just meeting rules on paper rather than actually improving data protection. Plus, things keep changing, so it's hard for tax authorities to know what to do.

Adequacy decisions and appropriate safeguards, as interpreted by the CJEU, require the implementation of the GDPR and Charter rights to be essentially implemented

[71] Ibid.

[72] Douwe Korff, 23 February 2022 - Israel’s Privacy Protection Act amendments and EU adequacy.

[73] Article 288 of the Consolidated version of the Treaty of the Functioning of the European Union OJ 2012.

[74] Maximilian Schrems v Data Protection Commissioner [2015] ECLI:EU:C:2015:650.

[75] Data Protection Commissioner v Facebook Ireland Limited, Maximillian Schrems [2020] ECLI:EU:C:2020:559.

[76] Juliussen B A, Rui J P, Kozyri E, Johansen D, International Data Privacy Law, 2023, Vol. 13, No. 3 - The third country problem under the GDPR: Enhancing protection of data transfers with technology– page 230.

in a third country. This can be achieved through diplomatic negotiations between the Commission and the third country or via a contract between the exporter and importer. However, it's unlikely that a third country with distinct legal norms and rights instruments would replicate data protection rights to an essentially equivalent level as in the EU. Additionally, a contract between private parties cannot restrict third-country governmental access to transferred personal data.

4.2.4 Schrems II

The Schrems II judgment serves as a compelling illustration of the complex institutional tensions between the European Commission and the CJEU, highlighting the need for a comprehensive analysis of the interrelation between legal requirements and privacy-enhancing technologies.

Schrems II invalidated the EU-US Privacy Shield, which served as an "adequacy decision" enabling data transfers between Europe and the US under Article 45 of the GDPR. While the Court upheld the validity of SCCs as an alternative mechanism for such transfers, it set forth conditions for their ongoing use, which added more uncertainty to this legal area. It failed to provide clear guidance on securely transferring data while navigating conflicts between EU and local laws. This effectively narrowed down the options for transferring personal data from the EU to third countries. The judgment restricted the interpretation of "adequacy" as outlined in Article 45 and appeared to broaden the scope of "accountability" under Article 46 to encompass the responsibility for verifying the adequacy of third-country laws.

Schrems II is a significant case involving Max Schrems, an Austrian lawyer, who challenged data transfers between the EU and the US. It stemmed from concerns about privacy and NSA surveillance. The CJEU invalidated the EU-US Privacy Shield, prompting the need for a new data transfer mechanism. It started when Schrems challenged Facebook's data transfers using Standard Contractual Clauses (SCCs), leading to the CJEU's decision in July 2020, which upheld SCCs but struck down the Privacy Shield. This decision had widespread implications for global data flows, forcing companies to consider foreign data access laws. During the case, the CJEU assessed the EU-US Privacy Shield's compliance with GDPR regulations. It found that US laws and access by US authorities to EU data didn't meet EU standards. Specifically, the CJEU noted the extensive access US authorities had to EU data and the shortcomings of the Ombudsperson mechanism. Regarding SCCs, the CJEU stressed the importance of considering both the contractual clauses between the EU data exporter and the recipient in a third country, and the legal framework in that country regarding access by public authorities. It reiterated that EU supervisory authorities could halt data transfers if the recipient country failed to meet EU standards.

In response, the EU Commission introduced new sets of SCCs[77] for Tax authorities, as well as guidelines on supplementary measures for transfer tools. These measures provide a framework for evaluating third countries and implementing necessary

[77] Commission Implementing Decision (EU) 2021/914 of 4 June 2021 on standard contractual clauses for the transfer of personal data to third countries pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council OJ 2021 L 199/31.

safeguards. The EDPB also issued final recommendations on supplementary measures for transfer tools, offering a roadmap for assessing third countries and implementing necessary measures.

This judgement has raised a lot of questions about the requirements now needed to lawfully sustain cross-border data transfers. It presents key points, particularly regarding Article 45 adequacy and Article 46 appropriate safeguards. The CJEU highlighted concerns about the Privacy Shield's inadequacy, primarily focusing on national security. Additionally, the decision blurred the lines between Article 45 and Article 46, effectively merging them into a single, impractical adequacy test. This consolidation has rendered Chapter V mechanisms less effective in practice.[78]

Schrems II revolves around personal data, but it prompts inquiries regarding tax data, which is also considered personal data. Schrems II undermines the effectiveness of the Article 45 adequacy test. According to the GDPR, the European Commission assesses whether a non-EU country provides a sufficient level of data protection. To meet the adequacy criteria, the data protection standards in a third country must essentially mirror those provided within the EU.[79] The CJEU determined that SCCs can still be used if the controller implements "supplementary measures" to address legal shortcomings that affect equivalence. However, the Court did not offer clear direction on the specific measures needed in such cases. The problem with SCCs lies in their nature as contractual arrangements between private entities, which lack the authority to bind foreign governments. Therefore, if the laws or practices of a third country conflict with GDPR requirements, SCCs alone cannot resolve this discrepancy.

Having in mind all these uncertainties, might the validity of all pre-Schrems II adequacy decisions come into question, given the possibility of being invalidated on similar grounds as the EU-US Privacy Shield adequacy decision?

4.3 Other tools available for international data transfer in the absence of an adequacy decision?

Chapter V of the GDPR offers three options for the legal cross-border transfer of data, and apart from adequacy decision, it also offers:

- Transfers subject to “appropriate safeguards” by the tax authorities on condition that enforceable data subject rights and effective legal remedies for data subjects are available.[80]
- Derogations for specific situations.[81]

In the absence of an adequacy decision, data transfers can be enforced in light of appropriate safeguards, mainly through legally binding instruments (article 46(2)(a)

[78] Compagnucci M C, Fenwick M, Aboy M & Minssen T - Supplementary Measures and Appropriate Safeguards for International Transfers of Personal Data after Schrems II, page 11-12.

[79] Recital 104 GDPR.

[80] Article 46 of GDPR.

[81] Article 49 of GDPR.

of the GDPR), standard contractual clauses (SCCs, article 46(2)(d)) or binding corporate rules (BCR, article 47). However, in the absence of an adequacy decision or appropriate safeguards, specific derogations (article 49) may apply. For instance, in respect of important reasons of public interest, an "international data exchange between ... tax or customs administrations," [82] shall be authorized. However, as codified in article 49(1) of the GDPR, "repeated, mass or structural" transfers of personal data (mainly AEoIs) cannot rely on such derogations. [83] However, the European Data Protection Board (EDPB) has emphasized that these derogations from article 49 should be narrowly interpreted. Unlike the safeguards and adequacy criteria outlined in Article 45 and Article 46, respectively, Article 49 derogations do not offer ongoing protection for personal data once it leaves the European Economic Area (EEA). This means that data importers may handle the transferred data according to their domestic laws or further transfer it to other countries without following the GDPR's strict transfer rules. Of all these tools, the SCCs are widely regarded as the predominant means of ensuring appropriate safeguards under article 46 for cross-border data transfer.

Furthermore, in the absence of an adequacy decision, to transfer personal data to third countries, the tax authorities must ensure the availability of suitable safeguards, enforceable rights for data subjects, and effective legal remedies.[84] Article 3 of the GDPR focus on whether data processing occurs "in the context of the activities of an establishment of the controller in the EU." The controller, is defined as the entity "determining the purposes and means of the processing of personal data". [85]

Article 46(1) of the GDPR explicitly allows the transfer of data to a third country for which no adequacy decision has been adopted only if "the tax authorities have provided appropriate safeguards, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available". So, in any case when the Commission hasn't determined that a third country has adequate data protection, tax authorities must use methods that ensure data subjects can enforce their rights and enjoy protections in the EU.[86] Essentially, the third country must provide guarantees for an adequate level of protection equivalent to that in the EU, especially when personal data is processed in specific sectors. This includes ensuring effective independent data protection supervision, cooperation with EU Member States' data protection authorities, and providing data subjects with effective, enforceable rights and administrative and judicial redress.[87] This was also confirmed on the Schrems II judgement: [88]

> "Article 46(1) and Article 46(2)(c) of the GDPR must be interpreted as meaning that the appropriate safeguards, enforceable rights and effective legal remedies required by those provisions must

[82] Preamble, Recital 112 GDPR (2016/679).

[83] WP29, Working document on a common interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995WD p. 9 (25 Nov. 2005).

[84] Wohrer V, WU Institute for Austrian and International Tax Law, Volume 10- Data Protection and Taxpayers' Rights: Challenges Created by Automatic Exchange of Information, Volume 10, page 249, chapter 6/6.3.2.4 – Data Protection Directive and General Data Protection Regulation.

[85] For the purpose of this thesis are the tax authorities.

[86] Recital 114 of GDPR.

[87] Recital 104 of GDPR.

[88] Data Protection Commissioner v Facebook Ireland Limited, Maximillian Schrems [2020] ECLI:EU:C:2020:559, [105].

> ensure that data subjects whose personal data are transferred to a third country pursuant to standard data protection clauses are afforded a level of protection essentially equivalent to that guaranteed within the European Union by that regulation, read in the light of the Charter".

In addition, in the absence of an adequate level of protection, the exchange of data is also permitted under certain circumstances if this exchange is necessary for important reasons of public interest, including the exchange of data between tax authorities with a view to tackling tax evasion and avoidance. An example of this is the Convention between the Kingdom of Netherlands and the Republic of Kosovo.[89]

In the area of cooperation between tax authorities, ensuring data protection guarantees becomes crucial. Therefore, treaties facilitating information exchange should incorporate provisions that address data protection concerns, especially in cases where adequate protection has not been confirmed for a third country.[90] Additionally, cross-border data transfer may occur even without enforceable data subject rights and effective legal remedies, provided that it is deemed necessary or legally mandated for significant public interest reasons.[91] The GDPR preamble specifies that this exception to the usual data transfer requirements to third countries applies, among other scenarios, to international data exchange among tax or customs administrations, or between financial supervisory authorities.[92]

For "repeated, mass or structural" transfers of personal data to third countries, such as those occurring within the framework of automatic exchange of tax information, data protection measures must be ensured through an agreement.[93]

5 Interplay Between GDPR Compliance and Tax Treaties

5.1 Legal Implications

Certainly, the invalidation of the European Commission's adequacy decisions by the Court in the Schrems I and II rulings raises fundamental questions about the

[89] Convention between the Kingdom of the Netherlands and the Republic of Kosovo for the avoidance of double taxation with respect to taxes on income and the prevention of tax evasion or evasion, 2021-2022. *With Kosovo being out of the European Union, the Government of the Netherland assessed that an adequate level of protection is guaranteed in Kosovo based on its national legislation, [25], [26].*

[90] Article 46(2)(a) of GDPR.

[91] Ibid 49(1)(d).

[92] Preamble of GDPR paragraph 112.

[93] Wohrer V, WU Institute for Austrian and International Tax Law, Volume 10- Data Protection and Taxpayers' Rights: Challenges Created by Automatic Exchange of Information, page 250, chapter 6/6.3.2.4 – Data Protection Directive and General Data Protection Regulation.

reliability and effectiveness of the adequacy mechanism for facilitating data transfers to third countries.

Firstly, the Court's decision to invalidate the EU-US Privacy Shield adequacy decision underscores the need to re-evaluate the adequacy mechanism itself. It raises important questions about the Commission's criteria for determining adequacy and whether they sufficiently align with the GDPR's requirements for protecting personal data.

Moreover, the Court's action calls into question the legal certainty of adequacy decisions and their ability to provide a reliable basis for cross-border data transfers. Countries relying on such decisions may now face uncertainty about the legality of their data transfer arrangements, particularly when dealing with jurisdictions subject to invalidated adequacy decisions. Furthermore, according to the new modernised SCC decision, if there's a risk that the transfer won't meet the requirement of being essentially equivalent, the authorities should implement extra measures to protect the transfer. Determining whether a transfer, with additional measures, offers "essentially equivalent" protection depends on the unique circumstances of each transfer. It hinges on the risk of data protection breaches in the third country, considering its laws and practices, and whether the agreed-upon measures address these risks. If the measures don't achieve this equivalency, the transfer cannot proceed lawfully.[94] If tax authorities transfer personal data to third countries where authorities may access the data in a manner not equivalent to the GDPR, they could face fines of up to €20 million or 4% of their global turnover.[95] Nevertheless, challenges persist in reconciling the obligations under tax treaties with the strict data protection requirements of the GDPR. While tax treaties emphasize the need for cooperation and information exchange between tax authorities, the GDPR imposes strict limitations on the transfer of personal data to third countries without adequate safeguards. In this complex regulatory landscape, countries must carefully assess the legal frameworks and practices of third countries to ensure compliance with both tax treaties and the GDPR. Moreover, ongoing monitoring and evaluation of tax data protection measures are essential to address emerging risks and vulnerabilities associated with tax data transfers.

Additionally, the Court's invalidation of the Commission's decisions highlights the potential limitations of the adequacy mechanism in addressing concerns related to government surveillance and access to personal data. It prompts discussions about whether adequacy decisions adequately consider and reduce risks associated with governmental access to tax data in third countries. If the court were to begin validating the Commission's adequacy decisions, particularly in light of the previous invalidations in the Schrems cases, it would undoubtedly raise suspicion and concern within the legal community.

Furthermore, the ruling raises broader questions about the role of EU institutions and national data protection authorities in overseeing data transfers to third countries. It invites scrutiny of the mechanisms in place to ensure ongoing compliance with

[94] Juliussen B A, Rui J P, Kozyri E, Johansen D, International Data Privacy Law, 2023, Vol. 13, No. 3 - The third country problem under the GDPR: Enhancing protection of data transfers with technology– page 228.

[95] Article 83 (5)(c) of GDPR.

GDPR requirements and the adequacy of safeguards for protecting personal tax data transferred outside the EU. Given the inherent tension between the need for cross-border data transfers for tax administration purposes and the strict data protection requirements of the GDPR, legal uncertainties abound. It begs the question: can adequacy decisions truly provide sufficient assurances regarding the protection of personal data when transferring tax-related information to third countries? Moreover, the potential clash between tax treaties and GDPR obligations raises significant doubts about the legal framework governing cross-border data transfers. Are current mechanisms adequate to address the complex interplay between tax laws and data protection regulations? Or do they risk exposing individuals' privacy rights to undue risks and infringements?

In essence, the prospect of validating adequacy decisions in the face of previous invalidations and the approaching uncertainties surrounding tax treaties and GDPR obligations leaves the legal landscape fraught with doubt and scepticism. It underscores the pressing need for comprehensive reassessment and potentially significant revisions to the existing legal frameworks to ensure robust protection of individuals' privacy rights in the context of cross-border data transfers.

Moreover, the misalignment between GDPR data protection principles and OECD tax treaty obligations poses significant challenges. EU countries may prioritize GDPR compliance, while the OECD tax treaty emphasizes cross-border data exchange for tax enforcement. This conflict raises concerns about the legality of data transfers and hinders international cooperation against tax evasion. Resolving these issues requires balancing data protection and tax enforcement goals through harmonization efforts and stakeholder collaboration.

Another important legal issue is that GDPR applies to the processing of personal data by tax authorities established in the EU, regardless of where the data subjects are located. However, this may conflict with the laws and regulations of third countries, particularly those with stricter data protection regimes or conflicting legal requirements regarding data access by government authorities. This raises questions about the extent to which EU authorities can enforce GDPR requirements on entities operating outside the EU and the potential for diplomatic tensions or legal disputes between the EU and third countries.

Overall, the Court's invalidation of the Commission's decisions in the Schrems II case prompts critical reflections on the adequacy mechanism's effectiveness, legal certainty, and ability to address evolving challenges in the global data protection landscape.

Now, when we look at real-life situations, sharing tax information stands out as a prime example of how taxpayer protection falls short. The risks involved in sharing this information make it clear that the current system doesn't provide sufficient protection.[96] The increasing exchange of tax information across borders carries a risk of misuse, although not all exchanged data is disclosed publicly. Usually, the

[96] Cannas F, World Tax Journal May 2020 - Taxpayers' Right of Defence in the International Context: The Case of Exchange of Tax Information and a Proposal for the "English" Wednesbury Doctrine as the New OECD (BEPS) Standard, page 384.

exchanged information is meant to stay confidential within the recipient country's tax authority. Mechanisms for this often include provisions for secrecy. Breaches in confidentiality may lead other countries to stop sharing information with the offending jurisdiction. However, there's debate about whether tax information should remain private, with some arguing that protecting tax information privacy can shield unethical behaviour.

Aligning the sending and receiving countries' safeguards for tax data under Article 26 and GDPR principles presents a legal challenge due to conflicting requirements. Article 26 of the GDPR mandates that international data transfers only occur if adequate protection is ensured in the receiving country, often requiring contractual agreements or other legal mechanisms. However, when it comes to tax data, confidentiality is crucial, and the principles of data minimization and purpose limitation can conflict with the extensive data-sharing required for tax enforcement. Balancing the need for effective tax data exchange with strict GDPR protections requires carefully negotiated agreements and strong legal frameworks to ensure both compliance and data security. The risk of sensitive taxpayer data falling into unauthorized hands, especially through cyber breaches, is a concern not only for cross-border exchanges but also for jurisdictions with inadequate administrative systems. For instance, the US tax authorities experienced a significant loss of sensitive taxpayer data due to a cyberattack, while the UK tax agency faced a similar issue in 2007. During that incident, disks containing personal information on approximately 40% of the British population, including almost every child under 16, were lost after being sent out unregistered via a private delivery system.[97]

In the area of information exchange, the OECD issued a report concerning the safeguarding of confidentiality for tax-related information exchange and provided guidelines for maintaining privacy and managing cross-border personal data flows.[98] However, these resources are only general guidelines and the decision to implement them lies with the respective countries. Therefore, it's essential to examine how information exchange mechanisms ensure the protection of taxpayers' rights throughout the exchange process.

Despite the exemptions outlined in article 2(2) of the GDPR, they do not preclude the exchange of tax information between EU Member States and third countries from being subject to the GDPR. Even if EU law doesn't directly regulate a particular case, the GDPR must still be considered unless any of the specified exemptions apply.

As a result, tax authorities within the European Union and those in a third country can exchange personal tax information based on various provisions such as tax treaties or OECD Multilateral Convention. However, any provision used for this exchange must adhere to data protection safeguards. Despite the absence of an adequacy decision or appropriate safeguards, cross-border cooperation between tax

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[97] Wohrer V, WU Institute for Austrian and International Tax Law, Volume 10- Data Protection and Taxpayers' Rights: Challenges Created by Automatic Exchange of Information, Volume 10, page 174, chapter 5/5.2 – Exchange of Information and the Risks for Taxpayers.

[98] OECD, Recommendation of the Council concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data, OECD/LEGAL/0188.

authorities can occur under specific conditions outlined in Article 49(1)(d) of the GDPR.

In conclusion, the tax authorities responsibility to assess all circumstances of the transfer, implement suitable safeguards for data protection, and inform both the supervisory authority and the data subject about the transfer, underscores the importance of maintaining EU-standard data protection safeguards in cross-border data exchanges. Therefore, when tax data is exchanged between an EU Member State and a third country, it is crucial to ensure that data protection safeguards consistent with EU standards remain in place even after the data leaves the European Union.[99] This ensures a high level of data protection not only within the EU but also when personal information is transferred to third countries.

6 Conclusion

6.1 Summary of Findings

In exploring the intersection of tax treaties between the EU and third countries with the GDPR, several crucial findings have emerged, shedding light on the complex legal landscape surrounding cross-border transfers of tax data.

One of the central challenges identified is the natural conflict between the objectives of tax treaties, which prioritize the exchange of tax-related information for enforcement purposes, and the GDPR, which prioritizes the protection of personal data. This conflict raises pressing legal questions about the justification for data transfers, the adequacy of data protection safeguards, and the reconciliation of individual rights with treaty obligations.

The analysis found uncertainties about the validity of existing GDPR adequacy decisions, especially after recent CJEU rulings like Schrems I and II. If these decisions are invalidated, it could bring legal risks for tax authorities and data controllers involved in cross-border data transfers. The influence of individual legal actions, like those by Schrems, over regulatory oversight reveals potential gaps in enforcement mechanisms. This reliance on individual advocacy suggests shortcomings in proactive enforcement by Data Protection Authorities and raises concerns about the adequacy of legal frameworks for cross-border data transfers, particularly after the collapse of mechanisms like the Privacy Shield. It also calls for an assessment of the roles of other regulatory bodies, like tax authorities, in upholding international data standards and ensuring data protection within their jurisdictions.

Moreover, the research highlighted the need for clearer guidance and standards regarding supplementary measures required to ensure the adequacy of data

[99] Wohrer V, WU Institute for Austrian and International Tax Law, Volume 10- Data Protection and Taxpayers' Rights: Challenges Created by Automatic Exchange of Information, Volume 10, page 327, chapter 7/7.2.2 – exchange of information involving third states.

protection in third countries, especially in the absence of an adequacy decision. The lack of clarity surrounding these measures poses significant challenges for compliance and enforcement efforts. Striking a balance between the public interest in combating tax avoidance and evasion and safeguarding a taxpayer's personal data presents a complex challenge. As indicated by the analysis above, it's clear that any potential misuse of exchanged information should be carefully evaluated on a case-by-case basis. Recent developments in case law suggest that the tools provided by the GDPR may not offer adequate protection for taxpayers against subsequent domestic transfers or the utilization of such data in third countries. Therefore, conducting thorough reviews of each data processing procedure becomes imperative.

The potential issue between tax treaties of the EU and third countries and the GDPR lies in the clash between the obligations and objectives of these two legal frameworks. Tax treaties between the EU and third countries often involve the exchange of sensitive tax-related information to prevent tax evasion and ensure compliance with tax laws. This exchange of information is crucial for effective taxation and financial transparency. On the other hand, the GDPR aims to protect the privacy and personal data of individuals within the EU. It imposes strict rules on the processing and transfer of personal data outside the EU, ensuring that such transfers adhere to EU standards of data protection. The conflict arises when tax authorities exchange personal tax information with third countries, as this involves the transfer of personal data across borders. While tax treaties prioritize the exchange of information for tax purposes, the GDPR prioritizes the protection of personal data, including during international transfers.

Moreover, the EU Commission needs to address significant shortcomings in establishing adequacy decisions with more countries, especially crucial economical trading partners. Additionally, while Article 26 of the OECD MTC aims to facilitate the flow of tax information, the GDPR imposes strict requirements to protect that data, making it challenging to balance these objectives. Adequacy decisions play a crucial role in reconciling these goals by providing a legal framework that meets GDPR standards while allowing tax authorities to exchange necessary information. However, the lack of adequacy decisions for key trading partners leaves significant gaps, exposing both businesses and tax administrations to legal risks and operational inefficiencies. Moreover, the evolving nature of third-country laws poses challenges, as there is no guarantee that these laws will not change during negotiations. Additionally, not every EU state may have the resources or influence to compel third countries to comply with GDPR standards. The ability to enforce GDPR standards on third countries often depends on a country's diplomatic, economic, and political clout. Smaller EU states may face challenges in exerting pressure on third countries due to their limited resources and influence on the global stage. As a result, achieving universal compliance with GDPR standards among third countries may involve coordinated efforts and collaboration among EU member states, along with strategic engagement with third-country governments.

Hence, the main legal issue revolves around finding a balance between fulfilling the obligations imposed by tax treaties and ensuring compliance with the requirements of GDPR. This may involve implementing appropriate safeguards, such as standard contractual clauses or obtaining explicit consent from the data subjects, to ensure that the transfer of tax data meets the standards set forth in GDPR while still allowing for effective cooperation between tax authorities.

The recent judgments by the Court of Justice of the European Union (CJEU) regarding data processing have highlighted the great importance of individuals' right to data protection. The annulment of an entire directive, as seen in the Schrems case, is a rare occurrence in the court's history, highlighting the gravity of the matter.[100]

To conclude, taxpayer protection is entrusted to the legal framework of each jurisdiction, facilitating tax authorities in collecting information. However, once information crosses borders from its originating jurisdiction, there's no real assurance that the receiving jurisdiction won't misuse or distribute it further using legal mechanisms different from those governing tax information exchange.

[100] Huang X, INTERTAX, Volume 46, Issue 3 - Ensuring Taxpayer Rights in the Era of Automatic Exchange of Information: EU Data Protection Rules and Cases, page 239 - *(E. Stoeva, The Data Retention Directive and the Right to Privacy, 15(4) ERA F. 590–591 (2014). Stoeva notes that EU laws used to be annulled, but more often partly rather than wholly).*

References

Official documents

European Union

Charter of Fundamental Rights of the European Union (2000/C 364/01).

Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) C 326/47 (2012).

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance).

EDPB Guidelines 05/2021 on the Interplay between the application of Article 3 and the provisions on international transfers as per Chapter V of the GDPR Version 2.0.

European Commission, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, A comprehensive approach on personal data protection in the European Union, COM (2010) 609 final, page.1 (4 November 2010).

European Commission Statement on the agreement on global tax transparency standard, 23 February 2014.

OECD

Model Tax Convention on Income and on Capital: Condensed Version 2017.

Commentaries on the Articles of the Model Tax Convention.

Update to the Commentary on Article 26 of the OECD Model Tax Convention, 19 February 2024.

OECD, Global Forum on Transparency and Exchange of Information for Tax Purposes, Automatic Exchange of Financial Account Information – Common Reporting Standard, 13 February 2014.

Literature

Books

Wohrer V, WU Institute for Austrian and International Tax Law, Volume 10- Data Protection and Taxpayers' Rights: Challenges Created by Automatic Exchange of Information.

Articles

Cannas F, World Tax Journal May 2020 - Taxpayers' Right of Defence in the International Context: The Case of Exchange of Tax Information and a Proposal for the "English” Wednesbury Doctrine as the New OECD (BEPS) Standard.

Cannas F, Tax Cooperation and Exchange of Information, 2022 - The Issue of' Circulation of Evidence’s.

Carvalho S L D, 2019 - Key GDPR Elements in Adequacy Findings of Countries That Have Ratified Convention 108.

Castro M, López B H and Rodríguez E M, WP of the Iberoamerican Observatory, 2020 - Commentaries on article 26 of the OECD Model Tax Convention: exchange of information.

Compagnucci M C, Fenwick M, Aboy M & Minssen T - Supplementary Measures and Appropriate Safeguards for International Transfers of Personal Data after Schrems II.

Debelva F & Diepven N, INTERTAX, Volume 44, Issue 4 - Exchange of Information. An Analysis of the Scope of Article 26 OECD Model and Its Requirements: In Search for an Efficient but Balanced Procedure.

Douma S, 2014 Kluwer: Deventer - Legal Research in International and EU Tax Law.

Favaloro G A C, European Taxation April 2021 - The Exchange of Tax Information between EU Member States and Third Countries: Privacy and Data Protection Concerns.

Huang X, INTERTAX, Volume 46, Issue 3 - Ensuring Taxpayer Rights in the Era of Automatic Exchange of Information: EU Data Protection Rules and Cases.

Huiskers-Stoop E, Breuer A & Nieuweboer M, Erasmus Law Review 2022 - Exchange of Information, Tax Confidentiality, Privacy and Data Protection from an EU Perspective.

Jorissen B, Archipel Tax Advice, 29 November 2022 - Clash of the Titans: OECD vs UN Model Treaty.

Juliussen B A, Rui J P, Kozyri E, Johansen D, International Data Privacy Law, 2023, Vol. 13, No. 3 - The third country problem under the GDPR: Enhancing protection of data transfers with technology.

Case law

The Court (Grand Chamber)

Judgement of 6 October 2015, Maximillian Schrems v Data Protection Commissioner, Case C-362/14, ECLI:EU:C:2015:650.

Judgement of 16 July 2020, Data Protection Commissioner v Facebook Ireland Limited, Maximillian Schrems, Case C-311/18 , ECLI:EU:C:2020:559.

Judgment of 16 May 2017, Berlioz Investment Fund SA v Directeur de l'administration des contributions directes, Case C-682/15, ECLI:EU:C:2017:373.

Judgement of 13 March 2007, Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue, Case C-524/04, ECLI:EU:C:2007:161.