This book considers a single issue: ‘Is automatic exchange of tax information (AEOI) in line with EU data protection safeguards’. Viktoria Wöhrer unravels the various facets of this issue and examines the complexities and ambiguities hidden in the interplay between the current framework of AEOI and the right to data protection. This issue is hotly debated in tax legal scholarship, but also greatly neglected by the OECD and the EU, which are mainly concerned with promoting exchange of tax information and enhancing the efficiency thereof, considering this to be a tool to combat tax avoidance without intervening significantly in states’ tax sovereignty. However, contrary to the exchange of tax information issue that has been and continues to be extensively studied by scholars, its interference with the right to privacy has remained underexplored in legal scholarship, as it is only recently that some scholars criticized the lack of attention being paid to data protection as problematic. This book represents the first attempt to address this issue in a monograph and thus it is a cornerstone upon which further research on various questions can be based.

The inadequacy of protection for personal data is criticized in the Introduction (Chapter 1), where the author points out the risks to personal data created by the expansion of the scope of AEOI: potential leaks, infringements on confidentiality, misuse and inaccuracies of the data. Is AEOI a proportionate restriction on the right to data protection? Are there enough safeguards in place to assure that these data are not used for purposes incompatible with the original ones? What is the importance of providing for a clear data retention period? Is the non-granting of procedural rights to taxpayers under most states’ domestic law in accordance with the right to privacy?

These are some of the questions that the author addresses in her book. In order to answer them, it is considered necessary to examine the scope and requirements of both automatic exchange (Chapter 3) and data protection (Chapter 6). The main aim is to reach a conclusion as to whether AEOI falls within the scope of data protection provisions (Chapter 7); even though this might seem self-evident at first glance, the author considers this analysis essential – especially given that data protection is not recognized by all legislative instruments as an autonomous right; data of legal persons are not recognized as personal data in most cases; exchange of information may also take place between EU Member States and third countries; and ‘implementation of EU law’ or ‘falling within the scope of EU law’ are prerequisites for the Charter and the EU General Data Protection Regulation (GDPR) to be applied, but it is highly debatable what the meaning of these terms might be and thus whether they cover information exchange based on international agreements or if data protection provisions are applied in purely domestic situations.

Before dealing with the scope of the various legal instruments, the reasons why exchange of tax information is necessary (Chapter 2) are analysed, which also justifies why provisions for exchange of tax information have existed for over a century. However, even though the first exchange of information models (e.g. the UN League of Nations model, OECD Model Tax Convention, Council of Europe/OECD Multilateral Convention for Administrative Assistance, and the Mutual Assistance Directive (Directive 77/799)) were adopted quite early, the scope of these instruments has been expanded significantly over the years (e.g. amendments to the Directive), new tools have been added (e.g. tax information exchange agreements) and existing limitations on the exchange of information process have been abolished. In Chapter 3, the historical overview of the various instruments that exist at both the international level (sections 3.2, 3.3) and the European level (section 3.4), even though somewhat descriptive in nature, is necessary, as it allows the reader to realize the steadily expanding scope of information exchange and that all forms of cooperation (even the automatic one) are not entirely new phenomena. However, as most states did not make use of AEOI, the application of which was dependent on the willingness of contracting states to regulate its details, international and European efforts were focused on expanding the scope of the ‘upon request exchange’. Gradually, nonetheless, globalization and the increased mobility of capital made it necessary for states to turn to AEOI, as it allows for the prevention of tax evasion by revealing non-compliance with tax obligations in situations where there are no indications of non-compliance.
Thus, Chapter 4 is devoted to AEOI, which has now turned to become the new global standard. In this chapter, the author offers a rather detailed analysis of the various changes in the scope and procedure of automatic exchange (which were already highlighted in the previous chapter) that has developed from a system of voluntary disclosure based on request and foreseeability of information, to a mandatory disclosure of standardized information on financial accounts (Common Reporting Standard (CRS), US FATCA Agreements, the EU Exchange of Information Directive 2 (Directive 2014/107)), tax rulings and advance pricing agreements (APAs) (EU Exchange of Information Directive 3 (Directive 2015/2376), BEPS Action 5), country-by-country (CbC) reporting (EU Exchange of Information Directive 4 (Directive 2016/881), BEPS Action 13), while a proposal for AEOI on cross-border reportable tax arrangements is pending. Even though Wöhrer regards all changes as steps towards enhancing tax transparency, she expresses concerns on data protection and raises confidentiality issues especially concerning exchange of financial accounts information (page 122, 127). On the contrary, she argues that the exchange of tax ruling information and CbC reports does not cause significant concerns because the Directive on tax rulings excludes from disclosure those rulings issued to natural persons, while CbC reports concern only MNEs. However, she recognizes that in some cases even exchange of information regarding tax rulings and CbC reports might give rise to data protection issues, as (i) the EU Court of Justice (ECJ) has ruled that the data of legal entities might need protection under strict requirements and (ii) information on APAs (not tax rulings) issued to a particular natural person must be exchanged, while the Commission has recently proposed to make country-by-country reports public, which gives rise to great confidentiality concerns especially when commercially sensitive information is included. The author considers these cases exceptional, identifies that they will make a full analysis more complex and does not pretend to present a full review of the topic. Rather, she offers a thought-provoking review that can stimulate further research.

In Chapter 5, two reasons are spelled out why the exchange of information regime could be regarded as offering insufficient protection to taxpayers, confidentiality and procedural rights. The author clarifies that all instruments examined refer to the confidentiality of the information exchanged, while they limit its uses and the circle of persons having access to this, or give states the discretion to refuse to provide information when it contains trade secrets and to grant to taxpayers the right to be informed/have access/rectify the data. However, she highlights that most of these provisions are not absolute or leave it to each contracting state to decide both the level of secrecy applicable and whether they will provide for procedural rights. Thus, Wöhrer concludes that because of this lack of harmonization, taxpayers’ personal data run the risk of being leaked, being used for unauthorized purposes or being inaccurate, or even that confidential information could be disclosed.

After examining the scope of AEOI, Chapter 6 turns to consider the scope of data protection rules existing in the EU. All instruments examined, namely the European Convention on Human Rights, the EU Charter of Fundamental Rights, and the Data Protection Directive (DPD) as repealed by the GDPR, provide – either explicitly or as part of the right to privacy – protection for personal data of individuals. Also, all instruments conceive ‘processing of data’ in a broad sense, and thus AEOI is covered by its scope, as long as Member States apply either the directives for administrative cooperation or the DPR/GDPR. More problems can be encountered when dealing with the exceptions from the scope of the DPD/GDPR. However, the author reaches the conclusion that these exceptions must be interpreted narrowly and should not influence the applicability of the GDPR in the case of AEOI. A different interpretation might also be supported here, as the new regulation for data protection was only recently adopted and therefore a definite answer or clarity on issues raised is not easily achievable.

The rest of Chapter 6 is devoted to spelling out the conditions that must be fulfilled in order for the restrictions on data protection to be justified. Interestingly enough, these conditions are the same in all legal instruments protecting personal data in the EU. However, the author distinguishes between the approach of the ECHR, under which every processing is an interference with personal data that can be justified if it has a legitimate basis, pursues a legitimate aim and is proportionate, whereas DPD/GDPR sees these conditions as criteria of a lawful processing. Regardless of the approach being followed, the author expresses doubts as to whether the current regime of AEOI fulfils these criteria. More specifically, and in light of some recent ECJ judgments, the author questions whether the law regulating exchange has the necessary level of quality; whether the vague purpose of ‘combating tax evasion’ complies with the purpose limitation principle; and whether the amount of data exchanged, the instances of processing, the people having access in combination with the lack of a maximum period of data retention and of safeguards against misuse complies with the data minimization principle.

These doubts are further explored in Chapter 7, which is the most argumentative and intellectually challenging part of the book. After a detailed and critical analysis, Wöhrer, contrary to other scholars, concludes that automatic exchange of financial account information is proportional and thus in accordance with data protection provisions. To reach this conclusion, she examines thoroughly the purposes being pursued by AEOI – which is not just the need to combat tax evasion, but also to enforce domestic tax laws in cross-border situations- and thus the great number of accounts covered by the regime is justified. As for the broad scope of information being exchanged and the huge number of authorities that will receive the information relating to a certain account because of
the broad definition of controlling persons, she states that it 'supports systematic and efficient risk review and thus increases the efficiency and effectiveness of tax collection and enforcement', while this bulk exchange ‘can have a deterrent effect, even if the tax authorities do not make use of the information’ (page 398). However, Wöhrer criticizes the absence of procedural rights under the US FATCA and the CRS, and of clear retention periods, as well as the lack of restrictions on possible further uses of the exchanged data, and expresses the view that domestic law must provide for these in order to ensure compliance with data protection standards. Finally, Chapter 8 summarizes the contents and draws some conclusions on the issues being discussed.

All in all, Wöhrer’s book is a great contribution to the academic dialogue. One of the strongest points is the presence of a clear research question. By answering it, she ultimately fills in an existing gap, as her book takes into account all recent changes in the tax and data protection fields. The changes in these fields are so drastic – especially after the financial crisis – that they make any prior consideration of the issue a bit outdated. At the same time, it provides readers with inputs for further academic research. This is because, even though it ultimately focuses only on financial account information, it raises many questions regarding procedural rights, confidentiality issues, data protection issues when tax rulings or CbC reports are exchanged, which are expected to be further explored in forthcoming books.

Until then, this book can be a starting point and most useful tool for those interested in scrutinizing the new proposals for further expansion of the scope of AEOI, while it provides national tax authorities, the Commission and the OECD valid grounds for reconsidering their own objectives. In any case, one should keep in mind what Baker has written: ‘There are precedents from the European Court for entire legislative arrangements for information processing to be struck down because they provide inadequate protection. It may yet be that large parts of the edifice being erected for automatic exchange of information will be struck down because the authorities concerned have, in their haste to establish a system for exchange, given inadequate attention to taxpayers’ rights.’

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