



Maitland

Solutions. Considered.

Privacy and CRS

Are the tables turning?

Nel Schoeman

What about Privacy?



- CRS – Have we gone too far?
- Implications of GDPR?
- What happens in practice?

CRS Story

- USA – FATCA
- OECD – CRS
 - US terminology
 - Anti-money laundering (FATF) input
- What changed?
 - Basis of exchange
 - Degree of exchange
- Basis: Curb tax evasion
- Increased violation – Hurdles? Proportionality?

Proportionality



Power of access
to information

Right to Privacy

Right to Privacy

- **Article 8**
European Convention on **Human Rights (ECHR)**
- Right to respect for private and family life/communications

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

Right to Privacy

- **Article 52**
European Union Charter of Fundamental Rights (**the Charter**)
- Reinforce ECHR

Subject to the principle of proportionality, limitations [to the exercise of the rights and freedoms recognised by this Charter] may be made only if they are **necessary** and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. (emphasis added)

Right to Privacy

- General Data Protection Regulations (**GDPR**)
- Extends the fundamental rights to privacy
- Must be necessary in relation to purpose

“Personal data shall be ... limited to what is necessary in relation to the purposes for which they are processed” Art 5(1)(c)

Right to **Privacy**

- Right to privacy can be limited
- Achieve objective – general interest
- Limitation must be *necessary* – achieve objectives

- Tax evasion: recognised
- What is **necessary**: objective curb tax evasion?

Proportionality Applied

- EU cases: Reigned in excesses of bulk data collection and retention
- *Big Brother Watch & Others v United Kingdom* (EU Court of Human Rights) 13 Sep 2018
 - Regulation of Investigatory Powers Act 2000
 - Bulk interception of communications
 - Could not be kept to what is *necessary*
 - Thus: Violated Art 8 ECHR

Proportionality Applied

- Petition Commission of EU Parliament (PETI):
 - FATCA is incompatible with GDPR
 - “fail[s] to narrow down reporting obligations to individuals suspected of tax evasion”
 - Hence: Not a necessary and proportionate measure
- EU Court of Justice: *Tom Watson & Tele 2 Sverige*
 - *Data Retention Directive* declared illegal
 - AEFI Group: Similarities of DRD to CRS identified

Proportionality Applied

- Decisions: provide strong basis to argue CRS incompatible with GDPR
- Key issue: Necessity
- Must show link between purpose and information
- No evidence for **potential** link to tax evasion
- What if **no potential** tax liability at stake?

Proportionality Applied

- No evidence for potential link to tax evasion:
 - Might be tax liability – we don't know
 - Shotgun: field where **might be** someone
 - All of CRS invalid: Trusts, Banks etc.
- No potential for tax liability at stake:
 - **Cannot be** any tax liability
 - No one in the field (FATF!)
 - Protectors
 - Beneficiaries no distribution
- Other dangers – Jurisdictions



What happens in practice?

- How CRS is being applied
- Standard approach?
 - Protector?
 - Settlor?
 - Always and full value?

Protectors

- Handbook: Always report and full value
- MCAA, CRS and Commentary (Purple Book)
 - *Account Holder*
 - FI Trust – who has *Equity Interest*
 - Deemed *Equity interest*
 - *Settlor*
 - *Beneficiary*
 - *“Person exercising ultimate effective control”*
 - No mention of protectors

Protectors

- “*Ultimate effective control*”
 - Defined in terms of domestic legislation
 - Factual question
- “*Controlling Persons*”
 - Commentary: Protector should be included regardless of powers
 - Only applies to Passive NFE trusts – i.e. Bank Reports

Protectors

- What about the handbook?
- Direct contradiction
- Handbook, page 6:
 - *“The objective of the Handbook is to assist stakeholders in the understanding and implementation of the Standard and should not be seen as supplementing or expanding on the Standard itself.”*
- Must disregard the handbook (or FAQ)
- Protectors – only if factually: *ultimate effective control*

Conservative?

- What is driving the current flow?
- Reconsider: New Stream
 - Decisions on proportionality ECHR
 - GDPR – Clarification and Penalties
 - Only according to the law
 - Penalties €20m or 4% Annual Turnover
- Err on a different side of caution?
- Even if just uncertain: Opt to hold back?



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Take away?

- CRS might be **trimmed back**
 - Watch this space
- Current application might be off target
 - Do not be afraid to **challenge** providers
 - Careful legal analysis and explanation

Questions?

End