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FATCA FROM THE US, EU AND CZECH PERSPECTIVES - GOVERNMENTS OF THE WORLD FOR TAX COMPLIANCE, UNITE!?

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Abstract:
The Foreign Account Tax Compliance Act (“FATCA”) is a US federal law which shakes a myriad of public administration, business and management concepts on both sides of the Atlantic. The principal objective of this paper is to research and investigate data via the Meta-Analysis while adding critical and comparative assessment. The research includes primary and secondary sources, from the US, EU and Czech Republic, including a case study and direct field observation. This mix of processed data brings more light in this dim and underestimated arena. It seems that the governments in the EU, including the Czech, have gone too far too fast in the name of FATCA. The awareness needs to be enhanced and stakeholders must engage in an educated and open-minded dialogue about how to battle for tax compliance.

Introduction

The current society is highly marked by the massive use of information systems and information technologies (“IS/IT”) leading to a virtualization of all aspects of private and professional life (MacGregor, 2014). Within the model of entrepreneurial economy, which seems more appropriate for the current setting than the model of a managed economy, public policy should both support tax generating activities (Audretsch & Thurik, 2004) and the collection of part of their proceeds. Public policy should stimulate economic competitiveness (Mandysová, 2014) as well as law compliance and the readiness to report and pay taxes due. The failure of public policy regarding the former is discussed, namely one of the main aspects of a budget non-fulfillment problem is the issue of tax evasion (Sokolovskyi &Sokolovska, 2013). Tax compliance and tax evasion are key issues of public policies, and developed countries have been attempting, during the last two decades, to analyze relevant empirical data about it (Berná & Špalek, 2015). Game-theoretic modeling suggests that the tax pressure has two key points - the optimal tax rate (beyond this, the real tax revenues fall) and the fatal tax rate (so high, that "nobody" pays it) (Sokolovskyi & Sokolovska, 2013). Testing done via experimental series suggests that the level of the penalty potentially imposed to the detected tax defaulter does not have any significant impact on tax compliance, unlike the level of detection probability (Berná & Špalek, 2015). Boldly, the tax compliance regarding optimal tax rate can be improved rather by an efficient audit system than by a robust sanction system. The US brought the hammer down to combat, perhaps even to prevent, tax evasion reaching annually USD 50 billion in annual losses for the US (Dhanawade, 2014). The 111th US Congress enacted public law 26 U.S.C. §§ 1471-1474 Foreign Account Tax Compliance Act ("FATCA"). It is a US federal law requiring US persons to report themselves and their accounts regardless whether they are in or outside the US territory. The leitmotif is to make it more difficult for US taxpayers to conceal their assets and transactions outside of the US territory, and so to avoid paying US federal and even state tax. These subjects are primary targets of FATCA and the positive and negative aspects of double taxation on a national level (Rosenberg, 2013), as well as an international level, are questioned and discussed. The US decided to give FATCA an international dimension, and the EU and EU member states decided to go with it. The US entered in a number of international treaties and ultimately many provisions from FATCA became "domestic" law in the entire EU and other countries. This is an extreme situation with non standard consequences, but the awareness about FATCA is rather low, just a few articles are published on it and they often contradict each other.

The aim of this paper is to lift the veil and look from three different perspectives, and based on various sources, on the FATCA topic. The principal objective is to locate available published data, consolidate it and project it to the case study and direct field observation of status quo, and this in all three settings, i.e. in the US, in the EU and in the Czech Republic. The leitmotif is to objectively describe the FATCA and its operations, and to subjectively identify, explain and argue various discrepancies, misrepresentations and misunderstandings. A well informed balance needs to be struck between national priorities on both sides of the Atlantic and FATCA is a milestone on a long journey towards harmonization, if not unification, of public policies in the US, EU and Czech Republic.

1. Methods, literature overview

A major task in all areas of science is the development of theory and theoretical concepts, ultimately the production of cumulative knowledge (Schmidt, 2014) and to model a phenomenon at a deeper level (Heckman, 2005). All studies contain measurements or other types of inaccuracies, and these deficiencies can be tackled by combining research, academic and other findings with the authors´ own personal knowledge and praxis observation (MacGregor, 2014). The principal objective of this paper is to consolidate the information from secondary legislative and academic sources about FATCA, its application and perception, and by an investigative Meta-Analysis process to complement it by primary observations and informal interviews of a micro-sample of subjects in order to describe the basic framework and point out discrepancies generated by various perspectives. It is critical to proceed with a deep and extensive study of academic literature about FATCA, published on both sides of the Atlantic, as well as of various statistics, such as provided by Eurostat and further published data, including legislative texts on FATCA. This secondary sources exploration needs to be complemented by direct data mining, done through a case study and direct field observation. One of the authors of this paper is a US citizen and has hands-on experience with FATCA application in the EU by various institutions regarding herself, as well as other US citizens residing in Prague. This heterogeneous conglomerate of information of a various degree of qualitative and quantitative features is predominantly exogenous, and needs to be studied and explored by an open-minded investigation. Both traditionally and conventionally, the quantitative approach and the qualitative approach are distinguished, but the opposition between them should not be exaggerated (Silverman, 2015). It is a process of searching for the essence, based on different methodological traditions (Oomsel, 2014), exploring social, economic and public policy dimensions of the FATCA phenomenon, while mining published data and investigating subjects close to one of the authors of this paper and sharing with her the experience of being a US citizen exposed to the FATCA application in the Czech Republic. The specificity of topic and resources implies the appropriateness of Meta-Analysis, which is a rigorous alternative to the casual, narrative discussions of research, it is an analysis of analyses (Glass, 1976) and is founded upon the conviction that there was discovered more than what was understood and it matches the FATCA issue (MacGregor, 2014). The Meta-Analysis in this paper rests on the exploration of already published as well as freshly generated data while involving three perspectives, the US, EU and it leads to the the description from various angles, while underlining discrepancies and inconsistencies and removing the ballast of rhetoric and to expose the attitude of the US, EU and Czech governments, academics, financial institutions and taxpayers makes the forensic multi-perspective study of FATCA with comments valuable.

2. Results and Discussion

A triad of perspectives based on primary and secondary sources regarding FATCA meanings and ramifications is illustrative. It is enlightening to expose and contrast the US, EU and Czech “versions” of FATCA. Indeed, FATCA and its regime are perceived differently and emotional statements by governments and individuals have been clashing. Has Big Brother gone too far, or is the European perception regarding global tax compliance immature? The homeland of FATCA – More sticks than carrots aka no more hide-and-seek tax games! The first decade of the new millennium brought sets of crises, and several of them originated in the US. The issue of the national debt of the US and its massive extent, beyond Maastricht criteria, are notorious. At the same time, the US is often presented as a model country regarding the enforcement of tax law and for tax collection. This can be demonstrated e.g. by the US pilot attempts to empirically analyze data on tax compliance (Berná & Špalek, 2015). By game-theoretic modeling and other methods, the US decided to pro-actively deal with the issue of the "not accepted", perhaps fatal, tax rate, i.e. the rate which taxpayers do not accept (Sokolovskyi & Sokolovska, 2013) and either go blatantly illegal or move their activities abroad. In both cases, the leak can often be stopped if information "from abroad" is available, and perhaps even the action beyond US borders is possible. Consequently, the mechanism of administrational trust and distrust and related strategies of private subjects on the global stage (Oomsel, 2014) needs to be matched by similarly efficient co-operation by national governments. The US government and legislature decided to take an opposite direction than the Belgian "governing without government" approach with an ad hoc coalition of the willing (Bouckaert & Brans, 2012). Instead, a radical and long-arm, perhaps intrusive, attitude prevailed and led to the world novelty, a state law reaching beyond state borders, perhaps in the name of the battle of world governments against tax evasion worldwide, or for sure against the US tax evasion.

In 2009 the FATCA bill was introduced in the US Congress by two democrat representatives and, after a rather smooth approval process, was signed into law by President Barack Obama in 2010. Firstly, FATCA requires all US persons, i.e. US citizens regardless of the place of their residence, and US residents, to report themselves and their financial accounts, both inside and outside the US, to the US Internal Revenue Service ("IRS"). Secondly, and more interestingly, FATCA requires all Foreign Financial Institutions ("FFIs") to check their records and inform the US Treasury about suspected US persons and their assets. Let´s order third parties, often foreign, abroad, to disclose information regarding their customers, which perhaps do not pay their US tax duties, and to punish their reporting failure by withholding 30% of their income, let´s make FFIs and other states to pay the reporting costs, let´s use withholding not for tax collection but for punishment of third parties, often not American, not wanting to eagerly and at own costs work for IRS. This sounds perhaps effective, but definitely hardly desirable and acceptable on the public policy tax conceptual level (Dizdarevic, 2011) and in a global context of Western Civilization sharing the Christian tradition. Thus, it is critical to recapitulate FATCA's main provisions which target both taxpayers and FFIs and which are centered on the following points: (1) FFIs, e.g. European Banks in the EU, must search through their databases to indentify customers which may be US persons (and thus subjects of US tax) and disclose to IRS names, addresses, accounts and transactions of such customers, see form W-8BEN; (2) Compulsory reporting of US persons having accounts with balance over USD 50 000, IRS form 8938, and understatement punished by 40% penalty, 6 years statute of limitation; (3)Increasing penalties and the creation of negative presumptions. The enactment of these key points was done by FATCA which is more a set of novelty amendments of several already existing Acts than a homogenous new Act, see Tables 1 and 2.

TAB. 1: FATCA Part I – Increased Disclosure of Beneficial Owners (prepared by authors)

Sec. 501 Reporting on certain foreign accounts	Amending the Internal Revenue Code
Sec. 1471 Withholdable payments to FFIs Sec. 1472 Withholdable payments to other financial institutions	30% deduction from the withhold payment to not reporting FFIs Item, 30% deduct as a tax

Source: prepared by authors

Sec. 1471 and 1472 are addressed not to (not compliant) taxpayers, but to their (accomplice) FFIs. Specifically, FATCA imposes a 30% tax on “withholding payments” to FFIs, boldly FFIs had better co-operate, report and enter into FFI agreements (Dhanawade, 2014).

TAB. 2: FATCA Part I – Under Reporting with Respect to Foreign Assets (prepared by authors)

Sec. 511 Disclosure of Information with Respect to Foreign Financial Assets.	Inserting a new Sec. 6038D – duty to report if assets over USD 50 000
Sec. 512 Penalties for Undepayments Attributable to Undisclosed Foreign Assets	Amending Sec.6662 – increase in penalty for undisclosed foreign financial asset understatements from 20% to 40%.

Source: prepared by authors

Sec. 6038 is labelled “the people problem”, requires all individuals with assets over USD 50 000 to disclose these assets in the IRS form 1040 since the 2011 income tax return (Dhanawade, 2014).

Allegedly, FATCA should primarily go after US domestic taxpayers concealing their assets abroad, rather than after US citizens residing out of the US and having their activities and assets abroad (where they probably as well pay tax) and should be an effective and efficient instrument of public policy worldwide. The official FATCA Webpage of the US government, the IRS, is conceived by clearly targeting three groups – individuals, FFIs and foreign governments, see http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx. Well, even in the US, this statement was not unanimously shared and many aspects of FATCA became subjects of controversy, such as costs, benefits vs. cost, capital flight, relevance, fairness, extra-territoriality, discrimination, complexity, identity theft, security, etc. The FATCA reporting and withholding provisions depart from the norm of using withholding as a tax enforcement mechanism and instead use it as a coercive compliance measure (Dizdarevic, 2011). It is even suggested that FATCA brought drastic changes in the US tax policy which is truly alarming domestically and even more internationally, vis-à-vis international financial community (Behrens, 2013). Consequently, in 2014, the Republican National Committee passed a resolution to repeal FATCA and there was filed a lawsuit against FATCA's constitutionality, especially based on the alleged violation of the Amendment IV to the US Constitution, which is part of the Bill of Rights and prohibits unreasonable searches and seizures. It was filed in the US District Court for the Southern District of Ohio, Crawford v. US Department of Treasury, Civil Case No. 15-250, asking for granting the motion for preliminary injunction by declaring it unconstitutional and enjoining the enforcing of international treaties about FATCA, including the Tax Compliance Act and Art. 2 of the Czech IGA, i.e. Agreement between the US and the Czech Republic to Improve International Tax Compliance with Respect to the FATCA from 4th August, 2014 ("Agreement on FATCA").

2.1. The dreamland of FATCA – the EU and Czech exaltation of FATCA – only sticks, please!

FATCA has netted a rather smooth welcome by the OECD, EU and EU member states. The shifting of the burden and working free for Big Brother, the issue of constitutionality, the mixing of tax collection and sanction mechanisms, have not been discussed. Instead, the EU and the majority of the EU member states have endorsed the US initiative, "brought" FATCA into their legal systems and even launched a discussion about using FATCA as a model to be followed domestically. The only loud criticism deals with data protection (Poptcheva, 2013) and even this is downplayed because (or perhaps despite) the Council Directive 2003/48/EC on taxation of savings income received in the form of interest payments ("Saving Directive"), Council Directive 2011/16/EU on administrative cooperation in the field of taxation ("Cooperation Directive") and primary law, i.e. TEU, TFEU and Charter, and even Art. 8 of the European Convention on Human Rights. The Cooperation Directive requires each EU member state´s competent authority to automatically report to other EU member states information regarding salaries, pensions, rents, etc., but not bank accounts. Plus, the mentioned EU data protection framework implies the issue of proportionality of screened and processed. A study of EU policies and legislative measures suggests that the EU and EU member states should be rather reluctant in re the FATCA wave and not be more catholic than the Pope. However, the politics are different, for in July 2012, the governments of France, Germany, Italy, Spain and the US made a Joint Statement with the US announcing an agreement to improve tax compliance and to implement FATCA

(Poptcheva, 2013). Soon after, the US managed to enter into model 1 IGAs with virtually all EU member states. This happy parade was not shared by Austria, which decided to give more value to bank secrecy and national legislation than other EU member states, and which ultimately opted for model 2 IGA as e.g. Switzerland. Nevertheless, the EU and EU member states seem determined to "reach and even exceed" the goals of FATCA and e.g. in March, 2015, the European Commission presented a proposal for a council directive repealing the Savings Directive linked to the amendment of the Cooperative Directive. The leitmotif is to avoid double IS/IT reporting and merely follow the OECD global standards on the automatic exchange of information, developed based on FATCA. It seems nobody cares that the US government assisted by EU and national member governments force FFIs and other private and public subjects to carry costs linked to US tax collection (Behrens, 2013) while challenging the privacy of many individuals and that this is not proportionate and could be done differently, more effectively and efficiently. The EU is a high tax area, the sum of taxes and compulsory social contributions reaches 39% in the GDP-weighted average, in US it reaches only 24% (Eurostat, 2014) and the future of European policies should be focused on increasing collection efficiency instead of raising tax rates. FATCA seems alluring for this purpose and its side-effects are tolerable, are they not?

The Czech Republic matches the above EU picture, i.e. the total tax-to-GDP ratio, including social contribution, reaches 35%, and taxation on labor is the main source of revenue (51.7%), followed by consumption (33.4%) and capital (14.9%) (Eurostat, 2014). The Convention between the US and the Czech Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion was signed back in 1993 ("Convention for the Avoidance of Double Taxation"). The exchange of information for tax purposes, including the exchange on an automatic basis, was set by Art. 27 of the Convention for the Avoidance of Double Taxation. This new and proactive intergovernmental approach was felt as not good enough in the light of FATCA and in 2014 a new bilateral treaty was signed between the US and the Czech Republic, the Agreement on FATCA between the US. Art. 4 of the Agreement on FATCA names steps needed to be done so as to treat FFIs from the Czech Republic as complying with, and subject to withholding under, Sec. 1471 IR code, i.e. FATCA provision about withholdable payments to FFIs. Thus, the Czech Competent Authority became the subject for the collection and transmission of all data demanded by FATCA by the operation of international law. The Czech government saw FATCA and the Agreement on FATCA as a priority needing swift transposing into domestic law and so the Act 330/2014 Coll., on exchange of information about financial accounts with the US for purposes of tax administration was enacted, taking effect in December 2014 ("Act"). The Act refers to the Agreement on FATCA, points out it is a part of the Czech legal system in Art. 1 and further describes the function of the Specialized financial office and deals with a number of substantive and procedural issues. In sum, it sets a clear compulsory mechanism how Czech "FFIs" report via data box to their tax administrator, i.e. a Czech “IRS” office, which passes the information along to the central contact authority, the Czech General finance directorate, which forwards it to the US IRS. The Act imposes the information duty to FFIs as well as subjects, individuals or entities. The official Explanatory Note to the Act, issued by the Czech Government (“Note”) stresses that the tax administrator can, at his discretion, and without prior notice, punish a non-reporting and so non-complying FFI by a fine, as provided by Art. 247a of the Czech Tax Order. The analysis of other provisions of the Act and of the Note also shows the determination of the Czech Government to meet, even exceed FATCA demands. The Note specifically states that the best option is to extend the application of the Act on FATCA itself as well as other instruments adopted by the OECD and EU in order to implement FATCA and that the automatic e-processing of information by modern IS/IT does not create any significant extra-costs, that at the most one more employee will have to be hired by the Czech IRS.

So far there is no information on how easy and low cost the application of FATCA and the Act are for the Czech state, namely the Czech IRS or to what extent the investment decisions are impacted by it. It must be emphasized that investment decisions are crucil for the performance of the economy with respect to both macro and micro perspectives (Jirásková, 2015). One can identify and interview ultimate “targets”, i.e. US citizens residing in Prague who have accounts in Czech banks with a balance over USD 1 000 but less than US 50 000 (thus under the FATCA target threshold). A sample of 10 such subjects with accounts with two of the quartet of the best known Czech banks, Česká spořitelna (“ČS”) a ČSOB, was interviewed, the yielded results are impressively disperse. ČSOB has not contacted them at all and the only manifestation of FATCA application by the ČSOB is on its information sheets regarding investment options, see https://www.csob.cz/portal/documents/10710/545120/parametry.pdf However, ČS takes a completely different attitude, declares its full compliance with FATCA and registration as FFI covered by IGA Model 1 under GIIN L99T2F.00037.ME.203 and truly “dogs” US citizens residing in Prague and having their accounts by ČS. Some are contacted by SMS, others by email or directly at the counter. Amusingly, one of the interviewed subjects, after having been contacted and supplying the information was contacted again and had to provide the same information again, and it seems there was confusion in the ČS dogging wave. The authors of this paper asked ČS about it and after a chaotic search for a competent person “knowing something about FATCA” were informed that ČS does not have any standard proceedings for contacting potential FATCA targets and that subjects must provide information, otherwise “ČS will denunciate them to US IRS and something bad will happen to them.” Nevertheless, it must be admitted that despite the rather confused manner of contacting subjects and comical misunderstanding of FATCA and Act operation, ČS always “wants” the same, namely the completing and signing of the IRS form W-9 form. No US citizens residing in Prague with accounts by the other two from the Czech banking quarter, Komeční banka and GE Money Bank, were identified and interviewed. Thus, their Websites are the only source of information about their attitued to FATCA and Act . According to the information provided on its own Website, Komerční banka is fully compliant with FATCA, see http://www.kb.cz/file/en/.

Such information was not located on the prinicipal Website of GE Money Bank. More research needs to be done, but it seems that so far the vigorous enthusiasm of the Czech governement and other governements in the EU causes confusion on the side of FFIs in the Czech Republic and that despite the massive public policy rhetoric, there is a lack of awareness. Even worse, those fews understanding FATCA and its EU and Czech „progenies“ question the legitimacy and appropriateness of the entire mechanism.

Conclusion

The recent crisis are rather caused by failure of authorities and of enforcment than by lack of theoretical knowledge of modern economic relations and processes (Kala, 2015). Tax evasion is not a uniquely US problem and the US government is basically right to enroll OECD and governments of other states in the eternal battle for improvement of tax compliance. However, considering the necessity of the close and eager co-operation, involvement of all stakeholders, and TTIP, the current misunderstandings and mystifications are not acceptable. It is deplorable that IS/IT are blindly used in this context and that the EU and EU governments have not critically assessed FATCA, its application and related issues and costs. Certainly, FATCA is an interesting and powerful contribution, perhaps even an inspiration. However, it has not yet reached the stage of perfection and the imposition of expensive compliance programs to FFIs (Behrens, 2013) and (dis)regard of privacy (Poptcheva, 2013) raise legitimate concerns. Even more, considering the constitutional challenge on its home territory, it seems logical to subject FATCA to an intense scrutiny. EU policy and EU member states policies, including Czech, should demonstrate consistency and recognition of the rule of law along with human rights and fundamental freedoms. FATCA is a powerful hammer, but it must be operated carefully and a blind follow-up of Big Brother instructions pushes European governments and public policies on thin ice, especially considering that the ultimate beneficiary of these efforts, made by governments and subjects from the EU, is outside the EU. The OECD, EU and EU member states and the public-at-large should engage in a critical and comparative study to reach an educated decision about FATCA and the manner, nature and intensity of its application.

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