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Purchasing stolen information and the theory of the original sin

Miguel Paquete*

Resumo: Desde 2008, a compra de informação ilegalmente obtida tornou-se uma prática comum e legítima em alguns países, como é o caso da Alemanha. O tema em questão tem dividido não só a doutrina estrangeira, mas também os tribunais que se debruçam sobre esta temática. O presente artigo tem como principais objetivos (1) abordar o actual padrão internacional de trocas de informação, ao abrigo do artigo 26 do Modelo de Convenção Fiscal da Organização para a Cooperação e Desenvolvimento Económico ("OCDE") bem como (2) aprofundar o debate relacionado com o uso de informação ilegalmente obtida por banqueiros e outros funcionários que estrategicamente se movimentam no contexto do setor bancário. Poderemos, em resumo, questionar se o uso de tal informação ilegalmente obtida será uma arma eficiente de combate à evasão fiscal, ao invés de uma prática ilegítima, metaforicamente considerada um "pecado original", capaz de contaminar a legalidade das investigações subsequentes.

Palavras-chave: Fiscal; Trocas; Informação; Bancário; Transparência.

Abstract: Since 2008, purchasing stolen information has been considered a common and legitimate practice in some countries like Germany. This problem has divided scholars, practitioners and the case law. In this sense, the paper is structured with a purpose (1) to tackle the current international standard of exchange of information under Article 26 of Organisation for Economic Co-Operation and Development ("OECD") Model Tax Convention and (2) to explore the debate related to the use of information that was previously stolen by senior bankers. Overall, one can ask if this is an efficient tool to avoid tax evasion crimes rather than an "original sin" that would contaminate the subsequent proceedings.

Keywords: Tax; Exchange; Information; Banking; Transparency.

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1. Article 26 of OECD Model Tax Convention

1.1. Brief analysis of the evolution

Throughout the years, the legal provision of Article 26 of OECD Model Tax Convention[1] (hereinafter "Article 26") has been subject to substantial changes since the original version of 1963. However, the wording of Article 26 remains unchanged since 2005, when the current international standard of exchange of information was introduced. Such amendments can be resumed through five periods of evolution:

a) In 1963, the very first version of Article 26 required both contracting states to exchange the necessary information for the carrying out not only of provisions of the tax treaty to be entered into between the contracting states, but also of the domestic laws of the relevant contracting state concerning taxes covered by the treaty "insofar as the taxation thereunder was in accordance with the treaty"[2];

b) In 1977, the legal provision of Article 26 extended the set of taxpayers covered by the OECD Model Tax Convention, allowing one contracting state to request information from the other contracting state in a third country resident[3]. That request would only be admissible if there was some sort of connection between said resident and the other State;

c) In 2000, the new above mention model applied the same logic to taxes. In other words, the legal basis at stake would be applicable to "taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities", according to paragraph 1, Article 26. As a result, in accordance with the last part of the same paragraph, the exchange of information would be not restricted by Article 1 ("Persons covered") and Article 2 ("Taxes covered");

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[1] OECD Model Tax Convention on Income and on Capital from 1963.

[2] Ana Paula Dourado, "Article 26: Exchange of Information" in *Klaus Vogel on double taxation conventions*, Volume II, London, 2015, p. 1864.

[3] "Component manufacturer A, resident in country A, sells components to a related distributor resident in country B and to unrelated distributors resident in country C. Country C's customs authorities record information on prices charged by A to country C distributors. In connection with an income tax audit of the transfer prices used by the distributor resident in country B, the competent authority of country B requests information from country C relating to the import prices charged by A to country C distributors". Example provided by *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes*, OECD, 2006, p. 11, available online: http://www.oecd.org/tax/exchange-of-tax-information/36647823.pdf.

d) In 2005, the word "necessary" was replaced by "foreseeable relevant" in paragraph 1 of Article 26[4] along with the introduction of rules on confidentiality that determines how this information should be treated, foreseen in paragraph 2 of Article 26. Such data should be disclosed only to persons or authorities for the purposes of this provision. The contracting states may also disclose the information in public court proceedings or in judicial decisions;

e) A brief note should be made regarding the amendment occurred in 2012. As a matter of fact, "both Article and Commentary were slightly modified in 2012"[5] allowing the Contracting State to use the information received for other purposes, when such use is permitted under the laws of both States and the competent authority of the supplying State authorises said practice.

The current wording of Article 26 is the following:

> "1. 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."

1.2. "Foreseeable relevant" information

The introduction of the expression "foreseeable relevant" was considered a way to deal with the co-operation on tax matters and the sovereignty of States over its own tax policies. From a legal perspective, exchange of data would only be allowed when this requirement is justified.

The mentioned concept should now be verified following the checklist laid down in paragraph 5, Article 5 of the Model Agreement on Exchange of Information on Tax Matters[6]. Elements related, *inter alia*, to (i) identification of the person

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[4] "Foreseeable relevance and necessity are not different concepts in a qualitative sense, but rather in a quantitative one, meaning that demonstration of the relevance may be required to a smaller degree than that which would be required in the case of necessity". *Vide*. Ana Paula Dourado, *op. cit.*, p. 1895.

[5] Ana Paula Dourado, *op. cit.*, p. 1863.

[6] *Model Agreement on Exchange of Information on Tax Matters* by OECD, 2002, available online: http://www.oecd.org/ctp/harmful/2082215.pdf.

under investigation, (ii) the tax purpose for which information is requested, (iii) or grounds for believing that such data is held by the requested State should be provided to the competent authority of the requested State when the request is formulated[7]. In this sense, this is a way to ensure the transparency of the requesting and, simultaneously, to avoid "fishing expeditions" *i.e.* cases when tax authorities would be asking for random information of all their taxpayers whether or not such information was needed.

Under the current global context, one can say that the co-operation on this field is mainly orientated "to ensure that taxpayers who have access to cross-border transactions do not also have access to greater tax evasion and avoidance possibilities than taxpayers operating only in the domestic market"[8].

1.3. Methods of exchange

Under Article 26, there is no mention regarding the methods of exchange information between the contracting states. Taking this into account, a proper interpretation of the legal basis requires the use of the *Manual on Implementation of Exchange of Information Provisions for Tax Purposes* published in 2006[9]. It clarifies, *inter alia*, three manners of exchanging in an efficient way: **(a)** by request, **(b)** automatically or **(c)** spontaneously.

At the outset, the original version of Article 26 (in 1963) was drawn to allow the exchange data just upon request. It would only be permissible that the competent authority of one State to ask for a specific information from the competent authority of another contracting State.

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[7] "This means that any request for information has to be specific, detailed and relevant to the tax affairs of the taxpayer in question". See Alain Steichen, New Exchange of Information versus Tax Solutions of Equivalent Effect – Luxembourg Report in *New Exchange of Information versus Tax Solutions of Equivalent Effect*, Netherlands, 2016, p. 12.

[8] *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes*, p. 7, point. 1. paragraph 6.

[9] The mentioned Manual was approved by OECD Committee on Fiscal Affairs on 23 January 2006. In a general way, it provides technical and practical guidelines to ensure an efficient exchange between both contracting states. Despite being considered soft law, it has been considered a helpful Manual specially for tax administrations in designing or revising their own manuals.

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Differently, automatically and spontaneously manners of exchange of information were both introduced later, in 1977. In the case of automatic method, the information is exchanged when it is related to individual cases of the same type. "Normally, competent authorities interested in automatic exchange will agree in advance as to what type of information they wish to exchange on this basis"[10]. Data related to interests, dividends or royalties, for instance, may be provided on a regular basis that should be previously agreed. In addition to this, the topic of automaticity has been recently developed by OECD and Global Forum on Transparency and Exchange of Information for Tax Purposes[11]. This automaticity requires a standardization of technical reporting formats to ensure a quick and an efficient manner to provide data between the parties. Currently, paper and electronic formats have been used, namely the OECD 1997 Standard Magnetic Format (hereinafter "SMF") or the OECD Standard Transmission Format (hereinafter "STF 2.1."). Nevertheless, it is important to highlight that the new standard for automatic exchange ("Standard for Automatic Exchange of Financial Account Information in Tax Matters")[12] represents a new step forward in this field.

Finally, spontaneous method of exchange information may be used when a set of information which is acquired through certain investigations is provided to another contracting state, assuming that such data will be of interest to that state. As the Manual stresses out "the effectiveness of this form of exchange (...) largely depends on the ability of tax inspectors to identify, in the course of an investigation, information that may be relevant for a foreign tax administration"[13].

There is also a possibility to combine these three methods through simultaneous tax examinations, visit of authorised representatives of the competent authorities or industry-wide exchange of information in the sense that the information provided may be not be concerned to a specific taxpayer but an economic sector *e.g.* pharmaceutical or oil industries[14].

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[10] *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes*, p. 7, point. 18.

[11] Global Forum is composed by 142 members that is currently involved in implementing measures related to exchange of information.

[12] This mentioned Manual was developed by OECD along with G20 countries. It "represents the international consensus on automatic exchange of financial account information for tax purposes, on a reciprocal basis. Over 60 jurisdictions have committed to implementing the Standard".

[13] *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes*, p. 7.

[14] To further details see *ibidem*, p. 8.

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1.4. Obligations with limits

Considering all the efforts of OECD and G20 members over the last few years, there is a clear intention to reduce the domestic barriers to an effective exchange of information. A limited set of cases has been introduced where the State may refuse to supply the information requested by the other State[15]. Prior to 2005, bank secrecy used to be one of most common arguments invoked by contracting states to turn down the request of information[16].

As far as bank secrecy is concerned, a long path has been taken under the Article 26. In a general way, bank secrecy is understood as "the right or the obligation of banker to keep secret information in the course of his or her activities"[17]. This legal definition covers a large set of financial information about the taxpayer including what it is so-called "negative information" *i.e.* confirmation that a specific taxpayer does not held any bank account in a certain financial institution, for instance.

Having said that, it is easy to predict that bank secrecy was the biggest challenge in the field of exchange of information. The introduction of paragraph 5 of Article 26 in 2005 represents a step forward in this non-consensual area. Currently, a contracting state cannot decline to supply information requested by other State "solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person"[18]. One can say that this was the result of multiple efforts taken by OECD throughout the years. Among such efforts, the following may be highlighted: (i) Harmful Tax Competition – An Emerging Global Issue Report (1998); (ii) Improving Access to Bank Information for Tax Purposes Report

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[15] Pursuant to paragraph 3 of Article 26, when said request of information imposes on a contracting state the following cases, there is no obligation to provide the information:
"a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public)".

[16] Interestingly, in Luxembourg, bank secrecy rules used to be included in its public policy provisions ("*ordre public*"). Hence it would be reasonable to refuse a request of exchange using this limitation under paragraph 3, indirectly.

[17] Alain Steichen, *Droit et Banque apud* Ana Paula Dourado, *ob. cit.*, p. 1927.

[18] Article 26, paragraph 5 OECD Model Tax Convention.

(2000 and updated version in 2007) and (iii) Model Agreement of Exchange of Information on Tax Matters (2002).

The absence of a consensus between countries was visible through some reservations presented to Article 26. Luxembourg, Austria, Belgium and Switzerland "indicated that they would not apply paragraph 5 of Article 26 in their tax treaty negotiations"[19]. However, due to international pressure, said countries took the initiative to withdraw those reservations and to review the existing tax treaties accordingly. As a result, Switzerland has revised or entered into 45 double tax agreements in accordance with the international standard, while Luxembourg amended 44 double tax agreements following the same policy.

2. Use of stolen information

2.1. The first fall: Klaus Zumwinkel's case

Having this mindset regarding the international standard of exchange of information, it is time to explore the core question regarding stolen information which remains under discussion.

In the judicial field, the debate on the legitimacy and legality of stolen information was raised in 2008 with the Klaus Zumwinkel's case[20]. Here, Klaus Zumwinkel, CEO of Deutsche Post AG, got two-year suspended sentence and a fine of € 1 million for an amount of € 1 million of evaded taxes. He admitted that he invested money in a foundation in Liechtenstein (at that time an Alpine tax haven), without declaring said funds to the German tax authorities. This could be a succeeded case where German tax authorities had followed the co-operation mechanisms set out in tax matters as they are foreseen in Article 26 but it was not.

This case was highly criticized foremost from the proceeding perspective. The German government, assisted by German Intelligence agency (*Bundesnachrichtendienst* hereinafter "BND")[21], bought data on a DVD format for € 5 million from a bank

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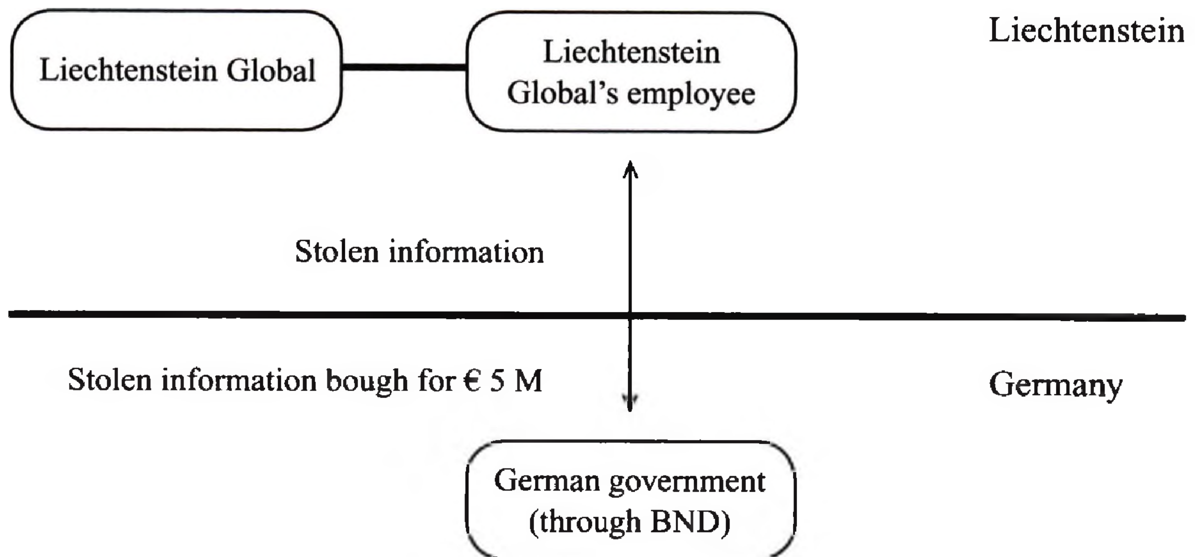
[19] Alain Steichen, New Exchange of Information versus Tax Solutions of Equivalent Effect – Luxembourg Report, *op. cit.*, p. 7.

[20] Decision of *Landgericht Bochum*, 26.01.2009, 12 KLs 350 Js 1/08.

[21] BND collects information on different fields such as international non-state terrorism, organized crime, drug trafficking, money laundering, or illegal migration.

employee of a Liechtenstein bank. Schematically, the situation would be represented as follows:



Using the information contained in such CD together with Kaul's confession, the tax evasion was effectively proved and the case ended with a settlement between the prosecution and the defendant. Regarding the core issue of stolen banking information, "the case did not merit the question whether stolen bank data can be used in criminal proceedings"[22]. Under German judicial field, the most significant contribution was provided later, in 2010, by the German Federal Constitutional Court (*Bundesverfassungsgericht* hereinafter "BVerfG")[23].

Moreover, it should also be highlighted that "since [the Klaus's case], German authorities, state or federal, have repeatedly purchased such CDs from employees in Liechtenstein and Switzerland – and they continue to do so to the present day"[24].

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[22] WOLFGANG KESSLER / ROLFF EICKE, *To Buy or Not To Buy: German's Quest Against Tax Evasion* in Tax Notes International, Volume LVII, N.º 9, p. 778. Available here: http://www.steuerlehre-freiburg.de/fileadmin/repository/lehrstuhl/Aufsaetze/To_Buy_Or_Not_To_Buy.pdf.

[23] Decision of BVerfG, 09.11.2010, 2 BvR 2101/09. Available here: http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/11/rk20101109_2bvr210109.html.

[24] VALENTIN PFISTERER, *Walking a Fine Line – A Contextual Perspective on the Purchase of "Stolen" Banking Data by German Authorities* in German Law Journal, Volume XIV, N.º 7, p. 928. Available here: https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56b14d687da24f29eaf3110e/1454460264745/GLJ_Vol_14_No_07_Pfisterer.pdf.

2.2. "*Fraus omnia corrumpit*"?

Before tackling the position held by BVerfG on this matter, it is crucial to explain the arguments presented by both positions in the debate that takes place not only in the academia but also in the political arena[25].

Regarding the German legal background, part of scholars and practitioners consider that the use of stolen information cannot be admissible for three reasons:

a) Firstly, "the official who personally carried out the transaction committed an offense under the German law"[26]. These set of authors invoke domestic law to justify the unlawfulness of the act, namely through § 17 *Gesetz gegen den unlauteren Wettbewerb* ("UWG")[27] and § 27, § 257, § 259 § 266 from *Strafgesetzbuch* ("StGB")[28].
In a general way, the first legal provision from UWG determines that a person who violates the commercial or industry secrecy, as employee of a company, shall be punished with imprisonment of no more than three years or with a fine. The remaining articles of StGB are related with cases of illegal favour (§ 257) or misuse of power (§ 266) that may be applicable depending on each case. Finally, § 259 StGB refers to the purchase of stolen goods frequently invoked which is also forbidden under German criminal law[29].

b) In addition to this, the assistance provided by BND to German government equally violates the domestic public law. According to § 1 *BND-Gesetz* ("BNDG")[30], BND has only competences in terms of foreign and security policy. Therefore, when acting upon cases of tax evasion, BND is exceeding its authority powers.

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[25] Under the German federal parliament, political parties as Social Democratic Party (SPD) and the Greens were in favour of the purchase of the said CDs, while Christian Democratic Union (CDU), the Freedom Democratic Party (FDP) and the representatives of the Federal Government were "less enthusiastic" about this measure. Nevertheless, "*Chancellor Angela Merkel eventually decided to buy the data, potentially sparked by political calculus. The government loses much more from not buying the data.*". In this sense, Wolfgang Kessler, and Rolf Eicke, *op. cit.*, p. 780.

[26] Valentin Pfisterer, *op. cit.*, p. 931.

[27] UWG corresponds to the German Act Against Unfair Competition.

[28] StGB corresponds to the German Criminal Code.

[29] There is a broad list of German authors claiming this position. See Valentin Pfisterer, *op. cit.*, p. 931, Notes 6 and 18.

[30] *BND-Gesetz*, applicable law to the mentioned agency.

c) Finally, it is argued that such use of stolen data entails a breach of international law. Buying this sort of CDs "violates applicable law enforcement treaties or the sovereignty of Liechtenstein and the Swiss Confederation respectively"[31]. As expected, the result is the inadmissibility of the use of the information for criminal or tax purposes.

Defending a different approach, some authors present the following arguments.

a) Firstly, it is claimed that said purchase of data does not entail a violation of German law mainly because § 259 StGB is not applicable. Such data would not be a tangible good as this legal provision implicitly requires. Having said that, under the German criminal law, there is no rule forbidding the use by tax authorities.

b) As far as BND is concerned, those actions, which are outside of its original area of authority (foreign and security policy), were authorized for administrative assistance purposes based on § 116 *Abgabenordnung* ("AO")[32] which refers to the possibility of reporting tax offenses. For this reason, it is frequently said that BND does not act by its own.

c) Finally, the act of using such information does not involve the breach of international law or the sovereignty of Liechtenstein or Swiss confederation because the "theft" of the information "cannot be attributed to the Federal Republic of Germany in the first place"[33].

2.3. BVerfG and its contribution

In November 2010, BVerfG had the chance to tackle the question at stake and to give its own contribution to the debate[34]. Prior to 2010, one could say that there was a huge expectation about the answer addressed to this problem[35]. However,

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[31] Valentin Pfisterer, *op. cit.*, p. 932.

[32] AO (*Abgabenordnung*) which corresponds to German tax code.

[33] Valentin Pfisterer (2013), *op. cit.*, p. 932.

[34] Decision of BVerfG, 09.11.2010, 2 BvR 2101/09.

[35] Just a few months before, it was mentioned that "the answer to this crucial question will be given by Constitutional Court". See Wolfgang Kessler / RolfF Eicke, *op. cit.*, p. 778.

BVerfG analysed the case in a different (but closely) perspective, namely if the information included in a CD "could legally establish an initial suspicion which in turn justifies the initiation of a criminal investigation"[36]. Pursuant to the facts of the case, the Local Court of Bochum issued a search warrant to find out some sort of evidence of tax offenses. Here again, the search warrant was based on an information contained in a CD that was previously purchased by BND from an employee of a Liechtenstein bank. Collection of such data was made *in absentia* of the employer, being considered "theft information".

When the search was carried out, the law enforcement authorities found evidences of tax evasion of approximately € 100.000,00, meaning that these funds were not declared to the German tax authorities[37].

In this context, BVerfG analysed the case mentioning that there is a slightly difference between (i) the use of stolen information as a basis of a sufficient suspicion and (ii) a direct application of a prohibition on the use of such evidence. Among other arguments, BVerfG highlights that there is no constitutional principle foreseeing that the illegal collection of data cannot be admissible in further criminal proceedings.

From this perspective, such use should be balanced with interests and fundamental rights that may be at stake. This assessment should be firstly determined by "specialised courts", *i.e.* courts of first instance, and then by the BVerfG only if it violates the core of constitutional rights.

In other words, one can say that when the use of stolen information does not significantly affect the fundamental rights of the taxpayer, BVerfG considers that such use is admissible for criminal purposes. In this case, there was not a breach of fundamental rights because the sound suspicion of tax evasion legitimates the issue of the search warrant. Therefore, the absolute core of the right to a private life was not contaminated.

Bearing in mind this reasoning, the use of information was considered admissible, even after the ordinary court highlighted that the conduct of BND allegedly violated both domestic public law and criminal law. BVerfG underlined that "it was not BND which made the private individual "steal" the data, but that the individual independently directed himself to the BND. In such a case, the BND was in fact

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[36] Valentin Pfisterer, *op. cit.*, p. 933.

[37] At that time, the defendant appealed to the District Court of Bochum that dismissed the arguments and confirmed said search warrant.

allowed to receive the data and to refer it to the competent authorities as a measure of administrative assistance."[38]-[39].

2.4. What about WikiLeaks and Panama Papers?

Over the last years, the world has been shaken by different scandals specially on tax policy matters. WikiLeaks or the case of Panama Papers are suitable examples of this.

Regarding the first case, it refers to a non-profit organization founded in 2006 by Julian Assange. Through a virtual database, WikiLeaks has the main role to "bring important news and information to the public"[40]. Those documents are obtained from anonymous sources, in a way to ensure the proper transparency in some important fields as Intelligence, International Politics, War, among others.

As far as tax evasion is concerned, WikiLeaks was put on the spotlight when in January 2011, Rudolf Elmer, a senior Swiss banker, provided to WikiLeaks' members banking information regarding approximately 2,000 individuals and institutions who are allegedly tax evaders[41].

From my perspective, there is no exchange of information *per se* here, *i.e.* all the banking data is just put online through this platform. In most of the cases, it is also difficult to determine how the information was collected from financial institutions. Moreover, it is important to note that the State only takes the initiative to start criminal investigations against the taxpayer and it does not assume any responsibility in the previous transactions made to obtain such information. All the relevant data was freely provided in said virtual database. For these reasons, questions upon stolen data are not relevant.

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[38] Valentin Pfisterer, *op. cit.*, p. 937.

[39] Regarding the breach of international law's complaint, BVerfG considered it as irrelevant. The requirements of the invoked agreements were not met (European Convention on Mutual Assistance in Criminal Matters of 1959 and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990), as already determined by the ordinary courts.

[40] Quoted from the website https://wikileaks.org/.

[41] Mark Hennessy, "WikiLeaks given data on alleged tax evasion by 2,000 including politicians" in *The Irish Times*, 18 January 2011.

A different scenario is the case of Panama Papers. The relevant documentation on tax offenses – approximately 11.5 million documents – was broadly disclosed by the media in April 2016. Such files were collected from the world's fourth biggest offshore law firm, Mossack Fonseca[42]. It is now considered the biggest leak of History.

The information revealed names of individuals as well as institutions that have allegedly been using offshore tax regimes, without declaring its funds to tax authorities. There is a huge speculation upon purchasing of information by some countries, namely Denmark. Pursuant to The Guardian newspaper, "Denmark has become the first country in the world to apparently buy data from the Panama papers leak and now plans to investigate whether 500-600 Danes who feature in the offshore archive may have evaded tax"[43]. Paying 1 million for the information, it is expected a worthwhile out-come, *i.e.* a higher amount of undeclared funds.

In accordance with the Denmark's tax minister (Karsten Lauritzen) it is highly likely that other governments will be interested in purchasing data through the same resources. Here again, German government is a strong candidate but also Belgium that "has taken a tough approach to tax offenders"[44] in the past.

In my opinion, once revealed the sources that collected the data, those cases of purchasing data may lead to a problem of "theft" of information since it is highly predictable that the documentation is obtained through unlawful acts. Apart from BVerfG, courts from other jurisdictions would possibly deal with the same question, assuming its own legal position on this matter.

2.5. Position adopted and the Portuguese case

From my perspective, it is important to balance all arguments that are invoked by both parties in the debate.

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[42] Once again, said information was collected through anonymous sources by German newspaper Süddeutsche Zeitung which shared it with the International Consortium of Investigative Journalists. All the documentation is online: https://panamapapers.icij.org/.

[43] This announcement was published online: https://www.theguardian.com/news/2016/sep/07/panama-papers-denmark-becomes-first-country-to-buy-leaked-data.

[44] According to the press that quotes the Denmark's tax minister in September 2016: https://www.theguardian.com/business/2016/sep/07/all-you-need-to-know-about-denmark-buying-the-panama-papers.

Against the purchase of information, many authors claim material reasons related to criminal and public domestic laws. In this case, those legal provisions would prevail and the use of this information would be considered illegal.

It would be important to start mentioning that some authors go further than the positions explained above in relation to the inadmissibility of using stolen information, considering that the exchange of data is not legally admissible when the request is based on "infringement of public policy provisions (*«ordre public»*)"[45]. Pursuant to the example given, "just imagine that German tax authorities post an advertisement in the press indicating their willingness to pay a substantial sum for any stolen CD data regarding the clients of Luxembourg banking subsidiaries of German parents and requesting thereupon Luxembourg to verify at the relevant Luxembourg banking subsidiary the information obtained"[46]. Under this case, the Author argues that Luxembourg would be legally able to deny this request.

With the due respect, the direct application of stolen data should be analysed in a different perspective, closer to the BVerfG which applied a proper balance as a solution.

Regarding the safeguarding of fundamental rights, I consider that the position of BVerfG should be followed, when it is mentioned that purchasing information does not affect the core of the taxpayers' rights. In 1996, namely in the case of *FS. v. Germany*[47], the European Court of Human Rights had already mentioned that exchange of information between German and Dutch authorities would not collide with Article 8 of European Convention on Human Rights that foresees the right to respect the private and family life. Though, paragraph 2, Article 8 is clear when refers that this right can be restricted to ensure "interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime (...)". Therefore, even in the situation of data that was stolen, I believe that this reasoning should be applicable as well. The amount of evaded taxes could work as an useful criteria under this balance.

Other arguments based on Portuguese domestic law should also be analysed, namely under the principle of the material truth. In case of prevailing the arguments against the use of "theft" of data, that would lead to the impunity of the tax evasion crime, considering that the information would be available to them but they could not use as it qualifies as stolen information.

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[45] In this sense Alain Steichen, *op. cit.*, p. 16.

[46] Alain Steichen, *op. cit.*, p. 16.

[47] Decision of the European Court of Human Rights, 27.11.1996, Case *FS. v. Germany*, proc. 30128/96, accessed through the platform: http://freecases.eu.

Having said that, I also consider that Article 26 and its international standard of exchange of information was not thought to include this sort of cases, as previously demonstrated. Article 26 was initially drafted to regulate exchange of information upon request and all the remaining situations where the information is obtained through other means falls outside of its scope. Therefore, a solution to this absence of regulation may be achieved through the reinforce of an automatic exchange of data mechanism between countries, entailing the responsibility of a certain state when the data that it holds is not properly reported.

None of the Portuguese courts had the opportunity to analyse this problem so far. Nevertheless, the question of whether using stolen data in judicial proceedings is admissible or not has been discussed under the civil and criminal law fields. The courts have already answered the claim of whether the proof obtained through unlawful acts can be legally used in the courts, following a moderate position, *i.e.* in a sense that the proof illegally collected may not necessarily lead to its inadmissibility in the subsequent proceedings. The courts have been considering that a balance of rights should be made in order to determine which right should prevail[48].

Finally, the decision to purchase information – stolen or not – is necessarily a political measure. Considering that Portugal is frequently involved in cases of tax evasion[49], this choice could be a priority for the Portuguese government. It is difficult to predict over the next few years if Portugal would be acting like Germany or Denmark, when purchasing relevant information from other countries.

3. Conclusions

a) Since 1963, the legal provision of the Article 26 of OECD Model Tax Convention has significantly changed and in a solid way. OECD members together with G20 members adjusted Article 26 to different realities.

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[48] The Lisbon Court of Appeal assumed this position in 2004, regarding the civil law in a case of domestic violence. See Judgment of the Lisbon Court of Appeal, 03.06.2004, proc. 1107/2004-6, available online (http://www.dgsi.pt).

[49] For instance, Panama Papers revealed approximately 34 Portuguese names that are allegedly involved in cases of tax evasion. The information is available online: http://expresso.sapo.pt/internacional/2016-04-05-Ha-mais-do-que-34-portugueses-nos-Panama-Papers.

b) This justified the introduction of two more methods of exchange of information (automatic and spontaneous methods), when initially this legal basis was designed only to include exchange upon request.

c) Though, the obligation of exchange of information is not absolute. Pursuant to the legal background, paragraph 3 of Article 26 foresees specific cases where a state is not obliged to provide the information requested.

d) As far as bank secrecy is concerned, a long path has been taken. According to some political voices, the era of bank secrecy is starting to die. Currently, it is not a legal limitation to exchange the data, as mentioned in paragraph 5 of Article 26.

e) Nevertheless, the legal provision at stake was not thought to deal with a new trend of using stolen information by States. Such data is normally collected by senior bankers and subsequently sold to an interested state.

f) The question is whether such information can be used in subsequent criminal or tax proceedings, even considering that it was illegally collected.

g) Among the arguments against such use, some authors argue that the domestic law (criminal and public laws) is being violated. However, there are also other interests at stake that should be considered.

h) Pursuant to BVerfG, the violation of taxpayer's rights (right to a private life) is not significant when there is a sound suspicion of a tax crime.

i) WikiLeaks and Panama papers may lead to the same question in case of being revealed the method of collecting data. It is expected that other countries like Denmark will buy some of this information intending to find out more cases of tax evasion.

j) Considering the Portuguese cases of tax evasion, this could be a priority for the Portuguese government over the next years.

l) From my perspective, one can say that the problem should not be treated as an "original sin" in a sense that the information collected through unlawful acts would not necessarily lead to its inadmissibility. The discussion remains on-going and it will be interesting to examine the positions taken by the courts from others jurisdictions in the future.

m) I truly believe that buying information can be considered an efficient tool to prevent tax evasion crimes under a proper legal basis. However, a higher level of compliance with the procedural rules that govern the criminal investigations, namely in respect to collection of data, should be implemented.