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**A New Path Towards Tax Harmonization in
the European Union: A Prospective
Analysis of the Foreign Accounts Tax
Compliance Act's Effect on EU Tax Policy**

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Abstract

While tax harmonization is often considered the final stage of economic integration for the European Union and the creation of a single European market, longstanding political controversy and a commitment to Member State sovereignty have delayed most tax harmonization agendas. This paper addresses how an aggressive anti-abuse rule imposed by a third party government, the US, may serve to accelerate the EU's tax harmonization goals. Specifically, the Foreign Accounts Tax Compliance Act may help the EU reduce tax compliance costs and reduce inadvertent non-taxation and abuse. Indeed, a uniform tax law imposed equally to all EU Member States by an exogenous political influence may be even more effective than harmonization attempts led by endogenous EU actors. This is because third party governments do not have the same political constraints as EU leaders who must protect the interests of their own constituencies. Moreover, third party governments are not subject to the unanimity rule that requires agreement by all EU Member States on matters of tax policy.

Key Words: FATCA, EU Tax Law, Tax Coordination, Tax Harmonization, Tax Competition

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I. INTRODUCTION

Tax harmonization remains controversial in both political and academic commentary about the European Union, as well as in the commentary from those within the EU and from those abroad. Academics have hotly debated the desirability of harmonization and the appropriate means for its achievement, with some scholars championing the ECJ as the appropriate government instrument of harmonization and others declaring ECJ tax jurisprudence a “labyrinth of impossibility.”¹ Political actors have similarly proclaimed, disclaimed, proposed and rejected harmonization efforts, often multiple times over.²

Nevertheless, tax harmonization across EU Member States has long been understood as the final stage of the creation of a ‘United States of Europe’.³ Because taxation is so fundamental to the maintenance and stability of the welfare state, as well as the efficient operation of a single market, tax policy cannot be indefinitely compartmentalized as off limits so long as full market integration remains a long-term goal for the EU. Such harmonization will require a radical expansion of EU authority, however, with many intervening obstacles yet to come.

It is within this context that a sweeping new anti-abuse rule was passed in the US, the Foreign Accounts Tax Compliance Act (FATCA), which has the potential to propel

¹ For proponents of the ECJ’s handling of tax matters, *see* R. Mason and M. Knoll, What Is Tax Discrimination? 121 Yale L.J., 1014 (2012). For critics, *see* M. Graetz and A. Warren, Income Tax Discrimination: Still Stuck in the Labyrinth of Impossibility, 121 Yale L. J. 1118 (2012).

² CHARLES MCLURE, JR., THE LONG SHADOW OF HISTORY: SOVEREIGNTY, TAX ASSIGNMENT, LEGISLATION, AND JUDICIAL DECISIONS ON CORPORATE INCOME TAXES IN THE US AND THE EU (2007).

³ For example, Barnard posits unification of EU tax policy as the final stage of integration in the creation of a single market. CATHERINE BARNARD THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS (2010). p. 8.

the EU much closer to its tax long-term harmonization goals—perhaps even closer than what would be achievable on its own. This paper addresses the immediate and long-term implications of FATCA for tax harmonization in the EU.

The first section of this paper introduces the contentious history of tax harmonization in the EU and its various dimensions. The second section of this paper introduces the recently passed FATCA. The third section of this paper describes how FATCA may accelerate some of the stated tax policy goals of the EU. The paper concludes with some general observations about the role of third party countries in the development of EU tax law and calls for greater attention to the issue of privacy law within tax scholarship and policy.

II. EU TAX HARMONIZATION

This section introduces to the term “tax harmonization” as it is used in the European Union and understood in service to the goal of full unification. The section is organized as follows. I first define the term “tax harmonization” as used in EU scholarship and government documents. I then outline the underlying goals motivating EU tax harmonization efforts. I go on to provide a brief history of EU tax harmonization efforts and conclude with an overview of the obstacles to improved tax harmonization.

A. DEFINING TAX HARMONIZATION IN THE EUROPEAN UNION

The term “tax harmonization” is used inconsistently across both scholarly and government publications. This is likely an inevitable consequence of the controversial nature of the term, since many politicians or government agencies will avoid using the

term even though it is the appropriate language for the concept they are trying to convey. Despite the political expediency of using veiled terminology, the use of euphemisms also muddles the concept of tax harmonization.

The various usages of the term harmonization can be grouped into three categories: unification, approximation and coordination.⁴ “Unification” is the most expansive understanding of the term and is also considered a political impossibility. It would entail a complete uniformity of tax legislation across all EU Member States. “Approximation” is the narrowest understanding of harmonization, understood in terms of Article 94 of the EC. By this understanding, tax harmonization is achieved through Community-level directives issued only for specific segments of the unified market. The final understanding, “coordination,” is the term used in the most recent communications issued by the Commission and refers to a dual strategy of both legislative and non-legislative approaches to harmonization. Tax policy reforms are merely “initiated, coordinated and assisted” by the Commission.⁵ Coordination is the most vague term for harmonization, in that it is inclusive of almost any tax strategy, so long as that strategy occurs within existing EU authority and does not seek to expand the Commission’s taxing power.

In contrast to these three definitions, I argue that it is best to understand harmonization not in terms of its means (e.g.; a common EU tax code, narrow directives, or coordinated federalism), but in terms of the outcome desired. Hence, I will use the term “tax harmonization” to refer to a specific bundle of *goals*, to be defined in the next

⁴ This tripartite schema is offered in its entirety in B. KIEKEBELD, HARMFUL TAX COMPETITION IN THE EUROPEAN UNION: CODE OF CONDUCT, COUNTERMEASURES AND EU LAW (2004). p. 38

⁵ *Id.* p. 39

section of this paper. By understanding harmonization in terms of goals, we are able to unify the many sides of the debate over the best means for achieving harmonization, seeing them all as part of a common effort.

B. THE GOALS OF EU TAX HARMONIZATION

The European Commission consistently articulates its tax harmonization goals through officially and publicly released communications. There are a variety of goals, some proposed simultaneously and some changing over time. This section will introduce the goals proposed in three communications of central importance, the ECOFIN meeting in Verona, the “Tax policy in the European Union: Priorities for the years ahead” communication, and the “Co-ordinating Member States' direct tax systems in the Internal Market” communication, from the years 1996, 2001 and 2006, respectively.

The ECOFIN meeting in Verona proposed three main priorities for EU tax coordination: the stabilization of Member States' tax revenues; the smooth functioning of the internal market; and promoting employment.⁶ From the outset, then, tax harmonization was seen as a means to achieve these broader objectives.

This understanding of tax coordination as embedded within a broader European project persisted in later communications. Communication 2001 260 is also explicit about this, stating that the “objectives of EU tax policy cannot be sought in isolation and their achievement must be compatible with other general EU policy objectives.” The Communication then goes on to enumerate five broader objectives that will be served through improved tax harmonization:

⁶ COM (1997) 495. Towards tax co-ordination in the European Union: A package to tackle harmful tax competition.

“[1] Underpin the Lisbon goal for the EU to become the most competitive and dynamic knowledge-based economy in the world; [2] support the continued success and development of the Internal Market by allowing, both before and after enlargement, all EU Member States to compete on a level playing field and extract the full benefits of the Internal Market; [3] contribute to a durable reduction in the overall tax burden in the EU, by ensuring that a balance between cutting taxes, investing in public services and sustaining fiscal consolidation is preserved; [4] reinforce EU economic, employment, innovation, health and consumer protection, sustainable development, environmental and energy policies; and, [5] support the modernisation of the European Social Model.”⁷

A more recent Communication from 2006, “Co-ordinating Member States' direct tax systems in the Internal Market,” provides the most straightforward articulation of EU harmonization goals. These three goals are stated as follows: “removing discrimination and double taxation; preventing inadvertent non-taxation and abuse; and, reducing the compliance costs associated with being subject to more than one tax system.”⁸ These three goals directly inform the analysis provided in §4 of this article, delineating the ways that FATCA may enhance the implementation of the EU’s own tax policy agenda.

C. A BRIEF HISTORY OF EU TAX HARMONIZATION

The founding treaty of the European Union, the EEC treaty, is understood to reserve the taxing power to European Member States and grants no legal authority for taxation by the European Community itself.⁹ Hence, matters of taxation are primarily left to Member States, creating the potential for a number of undesirable outcomes in the common market of the European Union. These negative consequences are generally understood as “harmful tax competition,” and have been described as a race to the bottom

⁷ COM (2001) 260. Tax policy in the European Union: Priorities for the years ahead.

⁸ COM (2006) 823. Co-ordinating Member States' Direct Tax Systems in the Internal Market.

⁹ TRACY KAYE, TAX DISCRIMINATION: A COMPARATIVE ANALYSIS OF US AND EU APPROACHES (2007). pp. 191-261.

by EU Member States that results in “the erosion of tax bases, a shift in the tax burden from capital to labor, and a distortion of the market mechanism.”¹⁰

In order to address these concerns, the Council of Ministers for Economic Affairs and Finance drafted a Code of Conduct for business taxation that was adopted by the Commission in 1997.¹¹ The Code provides a definition of the types of tax regimes that are considered “harmful” and a Code of Conduct group was later established in 1998 to review the tax policies of Member States to see if they violated the Code.

The Code of Conduct identifies five key characteristics that are deemed “harmful.”¹² First, any tax regime that appears to be designed solely for the purpose of attracting income from other Member States and grants preferential treatment to such income. Second, a tax regime that has no impact on the domestic tax base, yet affects the tax base of other Member States. Third, a tax regime that rewards certain transactions that appear to have no underlying economic substance or presence other than preferential tax treatment. Fourth, a tax regime that deviates from international norms in the definition of a profit set forth by the OECD. And fifth, tax regimes that lack transparency, as in regimes that give a great amount of discretion to tax enforcers, enabling private agreements between tax administrators and taxpayers that are not codified.

The Taxation and Customs Union of the European Commission is quick to explain, however, that “the Code is not a legally binding instrument.”¹³ Indeed, the very

¹⁰ B. KIEKEBELD, HARMFUL TAX COMPETITION IN THE EUROPEAN UNION: CODE OF CONDUCT, COUNTERMEASURES AND EU LAW. FOUNDATION FOR EUROPEAN FISCAL STUDIES (2004), pp. 1-2.

¹¹ *Id.* p. 21.

¹² Code of Conduct, Para. B(3), No. (1) through (5).

¹³ EU Customs and Taxation. Harmful Tax Competition. Accessed on April 8th, 2012. Available at: http://ec.europa.eu/taxation_customs/taxation/company_tax/harmful_tax_practices/index_en.htm

preamble of Code itself begins with an explanation that it is a “political commitment and does not affect the Member States’ rights and obligations or the respective spheres of competence of the Member States and the Community resulting from the Treaty.”¹⁴ Hence, the influence of the Conduct group’s periodic reports is largely confined to political peer pressure from fellow Member States.

Till now, the most legally binding tool for enforcing tax policy at the EU-level, and not the Member State level, has been the ECJ’s authority to enforce the four fundamental freedoms. Because these EC Treaty provisions have been incorporated into member states’ constitutions, the ECJ’s protection of the free movement of goods, persons, services and capital takes precedence over a member state’s own tax laws.¹⁵ Indeed, the ECJ has rejected the idea that direct taxation is strictly sovereign.¹⁶ The ECJ has also been increasingly vigilant over the past five years in striking down direct taxes that it viewed as discriminatory, spanning across such matters as dividend tax credits, income tax refunds, and pension deductions.¹⁷

Enforcement of the fundamental freedoms by the ECJ does little to guarantee tax harmonization, however. This is because, while a Member State is made to treat all of its EU taxpayers equally, independent of Member State origin, its neighboring member states remain unconstrained pursuing their own independent tax policies. These

¹⁴ Code of Conduct, quoted in Kiekebeld, p. 50.

¹⁵ T. KAYE, TAX DISCRIMINATION: A COMPARATIVE ANALYSIS OF US AND EU APPROACHES (2007) , pp. 191-261.

¹⁶ S. VAN THIEL, FREE MOVEMENT OF PERSONS AND INCOME TAX LAW: THE EUROPEAN COURT IN SEARCH OF PRINCIPLES (2001).

¹⁷ R. AVI-YONAH. WHAT CAN THE US SUPREME COURT AND THE EUROPEAN COURT OF JUSTICE LEARN FROM EACH OTHER’S TAX JURISPRUDENCE? IN AVI-YONAH, HINES & LANG (EDS.), COMPARATIVE FISCAL FEDERALISM, (2007) PP. 465-469.

limitations of the ECJ are most forcefully critiqued by Graetz and Warren:

the European Court of Justice's reliance on nondiscrimination as the basis for its decisions did not (and could not) satisfy commonly accepted tax policy norms, such as fairness, administrability, economic efficiency, production of desired levels of revenues, avoidance of double taxation, fiscal policy goals, inter-nation equity, and so on... We argue that the court cannot achieve consistent and coherent results by requiring nondiscrimination in both origin and destination countries for transactions involving the tax systems of more than one member state. We demonstrate that—in the absence of harmonized income tax bases and rates—the court had entered a “labyrinth of impossibility.”¹⁸

D. CHALLENGES TO EU TAX HARMONIZATION

A wide swath of political challenges stand in the way of tax harmonization in Europe. Some of the barriers that have been identified include the lack of any specific provision requiring harmonization, the sovereignty of Member States, and the principle of subsidiarity.¹⁹ Perhaps the most important procedural obstacle is the unanimity requirement for the European Commission. Kiegebeld points out that the relatively few tax harmonization achievements “are in sharp contrast to the number of Commission proposals relating to direct taxation that are currently being considered (18) and the number of proposals withdrawn by the Commission owing to lack of agreement in the Council (30).”²⁰ This contrast also calls into doubt the efficacy of the “coordination” approach which relies primarily on soft power, accented by existing treaty powers with only limited authority regarding taxation.

¹⁸ M. Graetz and A. Warren, *Income Tax Discrimination: Still Stuck in the Labyrinth of Impossibility*, 121 *Yale L. J.* 1118 (2012). This is a summary of their earlier arguments, made in M. Graetz and A. Warren, *Income Tax Discrimination and the Political and Economic Integration of Europe*, 115 *YALE L.J.* 1186, 1188-94 (2006).

¹⁹ KIEKEBELD, p. 37.

²⁰ KIEKEBELD, p. 37, footnote 7.

Due to the political volatility of harmonization, the EC has itself conceded that there is no need for complete tax harmonization and that this is neither an immediate nor long-term goal.²¹ In particular, it has disavowed a desire for common tax rates across the EU, and has instead proposed the more politically neutral term of tax “coordination” and a “soft power” approach relying on existing EU treaties.²²

In contrast to this timid approach, however, is a new political solution that may provide transformative influence on EU tax harmonization through the unique advantage of being exogenous to the politicking of EU statesmen. The aggressive tax enforcement by a third party government may impose uniformity on the EU marketplace that may ultimately serve EU tax harmonization goals. The following section will discuss this new development, commonly known as the Foreign Accounts Tax Compliance Act.

III. THE FOREIGN ACCOUNTS TAX COMPLIANCE ACT

This section offers a brief introduction to the recently passed Foreign Accounts Tax Compliance Act. It summarizes the two most salient features of the law, its reporting requirements and its due diligence requirements, and then describes which institutions are most likely to be affected. The section concludes with a brief consideration of the political climate that enabled FATCA’s passage.

A. THE BASIC ELEMENTS OF FATCA

The Foreign Accounts Tax Compliance Act is an aggressive anti-abuse rule

²¹ See COM /2001/260 and COM /2006/823

²² Id.

passed by the U.S. Congress on March 18th, 2010 and coming into effect on January 1st, 2013.²³ The new rules target US taxpayers with income producing assets that are held abroad, either by foreign financial institutions (FFI) or non-financial foreign entities (NFFE). Should these foreign institutions fail to comply with FATCA's strict reporting requirements, the US Internal Revenue Service will impose a 30% penalty tax, called a "withholding," on all US sourced income with these institutions. Insofar as any foreign institutions holds assets of a US entity or individual beyond a nominal amount, they will be subject to FATCA's reporting requirements for all their US accounts.

B. FATCA'S REPORTING REQUIREMENTS

In order to avoid the 30% tax penalty under FATCA, the FFI or NFFE must become a "participating" FFI or NFFE. This is achieved through entering an FFI or NFFE Agreement with the IRS, legally binding them to obtain, verify, and report specified account information about the US entity or individual who holds accounts with the FFI or NFFE.

According to the terms of the law, any of the following transactions will be considered a withholdable payment:

- (1) any payment of interest (including any original issue discount), dividends, rents, salaries, wages, premiums, annuities, compensation, remunerations, emoluments and other fixed or determinable annual or periodical gains, profits and income from sources within the United States; (2) interest paid on deposits by foreign branches of domestic banks (which normally would be foreign source income); and (3) gross proceeds from the sale or other disposition of US stocks and

²³ The new rules are listed in §§1471-1472 of the Internal Revenue Code of 1986 and are sometimes referred to tax compliance experts as "Chapter 4." The summary provided in this section was guided by Deloitte's (November 28th, 2011) "Foreign Account Tax Compliance: Initial Guidance Issued on Chapter 4" available at: http://www.deloitte.com/view/en_US/us/Industries/Private-Equity-Hedge-Funds-Mutual-Funds-Financial-Services/9b3b7876f18ca210VgnVCM3000001c56f00aRCRD.htm

securities.²⁴

As evidenced by the many categories of income listed in the provision, the law was clearly written to be widely inclusive and broadly applied.

1. Preliminary Search for Indicia of US Sourced Income

The most basic reporting requirements of FATCA begin with a company's internal investigation of whether any of its accounts contain indicia of US income. Such indicia will then trigger further reporting requirements to the IRS. The indicia to first be uncovered by the foreign institution are:

- (i) a US place of birth for an account holder;
- (ii) a US residence address or a US correspondence address (including a US PO box);
- (iii) standing instructions to transfer funds to an account maintained in the United States;
- (iv) an "in care of" address or a "hold mail" address that is the sole address shown in the FFI's electronically searchable information for the account holder; or,
- (v) a power of attorney or signatory authority granted to a person with a US address.²⁵

Once such indicia have been identified, the foreign institution must then submit additional materials to the US. Although guidance is still being sought as to the extent of these materials, and many of them require tailoring to the specific business circumstance, the Treasury has provided the following summary of the type of documentation requested:

if an account holder is identified as a US resident or citizen... the FFI shall request a Form W-9 from such individual. If the account information includes a US birthplace or address... the FFI shall request either a Form

²⁴ Internal Revenue Code §§1471-1472

²⁵ US Treasury Notice 2011-34, Supplemental Notice to Notice 2010-60 Providing Further Guidance and Requesting Comments on Certain Priority Issues Under Chapter 4 of Subtitle A of the Code. p. 14

W-9 establishing US status, or a Form W-8BEN (or a substitute certification as may be provided in future guidance) and a non-US passport or other government-issued evidence of citizenship in a country other than the United States. In addition, to establish non-US status in the case of any account holder identified as having a US birthplace, the account holder will be required to provide a written explanation regarding the account holder's renunciation of US citizenship or reason that the account holder did not acquire US citizenship at birth.²⁶

2. Due Diligence Requirements

In order to determine whether a foreign institution has satisfied their due diligence in looking for indicia of US sourced income, the US office of the Treasury issued the following proposed regulations on February 12, 2012:

“the proposed regulations rely primarily on electronic reviews of preexisting accounts. For preexisting individual accounts that are offshore obligations, manual review of paper records is limited to accounts with a balance or value that exceeds \$1,000,000 (unless the electronic searches meet certain requirements, in which case manual review is not required). In addition, the proposed regulations provide detailed guidance on the precise scope of paper records required to be searched. Additionally, with respect to preexisting accounts, individual accounts with a balance or value of \$50,000 or less, and certain cash value insurance contracts with a value of \$250,000 or less, are excluded from the due diligence procedure. With respect to preexisting entity accounts, a number of burden-reducing measures are proposed, including exclusions of accounts of \$250,000 or less and extended reliance on information gathered in the context of the due diligence required to comply with anti-money laundering/“know your customer” (AML/KYC) rules, and simplified procedures to identify the chapter 4 status of preexisting entity accounts.”²⁷

Clarity on these due diligence standards is essential for avoiding further penalties from the IRS and potentially criminal sanctions from the US Department of Justice.

C. INSTITUTIONS MOST LIKELY TO BE AFFECTED BY FATCA

²⁶ *Id.* pp. 15-16

²⁷ Department of the Treasury, 26 CFR Parts 1 and 301 [REG-121647-10], p. 17

The range of institutions to be affected by these new reporting requirements is immense. Deloitte describe just a sliver of such institutions, including, “holding companies, certain financial service companies, start-ups and companies in the process of liquidating or reorganizing, insurance companies, retirement plans, controlled foreign corporations , entities with identified owners, and foreign financial institutions with US branches.”²⁸ Also included in the new requirements are: “investment funds, such as a private equity, venture capital or leveraged buyout funds, or vehicle intended to acquire or fund the start-up of companies and then hold those companies for investment purposes for a limited period of time.”²⁹

DLA Piper organized the list of liable companies into three categories: (1) entities that accept deposits in the ordinary course of business; (2) entities that hold financial assets for others as a substantial portion of their business; and, (3) entities primarily engaged investing.³⁰ The proposed roster of institutions include: “commercial banks, savings banks, savings and loan associations, thrifts, credit unions, building societies and other cooperative banking institutions... broker-dealers, clearing organizations, trust companies, custodial banks and entities acting as custodians with respect to the assets of employee-benefit plans... mutual funds, private equity and venture capital.”³¹

By either DLA or Deloitte’s estimate, the scope of liability is immense and has the potential to encompass nearly every financial institution in the European Union,

²⁸ *Id.*

²⁹ *Id.*

³⁰ DLA Piper, The Foreign Account Tax Compliance Act (FATCA) Alert (2011). Available at: www.dlapiper.com/files/Uploads/Documents/FATCA-Alert.pdf

³¹ *Id.*

insofar as that institution has US sourced income on its books.

As a slight qualifier, it should be noted that tax industry professionals have a direct monetary incentive for presenting the new law as threatening, complex, and of near universal application, as this creates a bevy of new clients. FATCA may ultimately have a narrower scope than is articulated by purveyors of tax compliance products would have their customers believe. On the other hand, the IRS may downplay the broad implications of the new law in order to be more politically palatable, thus underplaying its applicability. Only time will tell what the full scope of application will be.

The broad definition of all liable entities should also be understood within the context of the transatlantic marketplace, which accounts for 40% of all global trade and over \$3 trillion annually.³² The US and the EU are each other's largest trading partners and each account's for about 20% of the others total trade in goods or services.³³ The scope of integration between these two economies guarantees a massive exposure to FATCA compliance liability for EU institutions and the threat of a 30% haircut for noncompliance.

D. HOW FATCA OVERCAME ENTRENCHED POLITICAL OBSTACLES

The severity of FATCA's reporting requirements is beyond what could ever be mandated by the EU. Beyond its lacking of legal authority, such disclosure requirements would also be unprecedented. Yet the US, as a political actor outside of the EU, was able to act independently of these limitations.

³² José Manuel Barroso, Strengthening the Transatlantic Economy (2007). Available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/261&format=HTML&aged=0&language=EN&guiLanguage=en>

³³ Communication of Sir Leon Brittan, Mr. Bangemann and Mr. Monti, The New Transatlantic Marketplace (1998). Available at: <http://www.eurunion.org/partner/ntm/ANNEX.HTM>

The most compelling evidence of the political expediency created by a third country intervention in the EU's tax harmonization agenda is the preemptive collaboration of five EU Member States in the enforcement of FATCA. In February of 2012, Britain, France, Germany, Italy and Spain all agreed to collaborate with the US in the enforcement of FATCA as a means to combat international tax evasion.³⁴ This agreement entails reporting information directly to Member State governments, who will then pass the information on to the US. This will help satisfy concerns about the violation of domestic privacy law by financial institutions seeking to comply with FATCA. The collaboration also creates an unprecedented opportunity for massive information sharing and tax transparency, which are both key elements of an EU tax harmonization agenda. These advantages will be discussed in the following section.

IV. HOW FATCA WILL AFFECT EU TAX HARMONIZATION GOALS

With the largest bilateral trade relationship in the world, economic exchanges between the United States and the European Union are integral to both economies. Indeed, the European Commission itself released a statement to the New York Times saying that Member State collaboration with the US in enforcing FATCA would greatly reduce "the administrative burden, compliance costs and legal difficulties."³⁵ Most importantly, FATCA has the potential to increase transparency across Member States, and reduce tax law compliance costs, two key aspects of tax harmonization.

³⁴ David Jolly and Brian Knowlton, *5 European Nations Agree to Help U.S. Crack Down on Tax Evasion*, N.Y. TIMES, February 8, 2012.

³⁵ *Id.*

A. Standardized Reporting Requirements and Increased Transparency

While some taxpayers may rely on EU Member States to harbor US sourced assets in order shelter them from US taxes, such Member States could also be harboring the income of other EU countries and not just that from the US tax base. An expanded version of FATCA could address issues of inadvertent non-taxation and abuse in the EU, particularly in matters of direct taxation. While the US is unique in taxing worldwide income rather than territorial income, the reporting mechanisms and due diligence requirements of FATCA could be leveraged as an enforcement tool for protecting the tax bases of EU Member States.

B. Reduced Compliance Costs of Harmonization by Piggybacking on US regime

FATCA's greatest potential is in reducing the compliance costs for EU businesses that are subject to more than one tax system. This is somewhat counterintuitive in that the lobbying immediately preceding the passage of FATCA emphasized the enormous new compliance costs associated with the measure. And it is true that many institutions are now liable for an entirely new scope of reporting that they were not responsible for prior to 2013.

But the reporting requirements of FATCA could also be seen as a new standardized framework to be applied across all Member States since so many of Member State institutions will now be required to follow them. Moreover, the decision by the largest Member State economies of the EU to collaborate with the US means that the infrastructure for sharing information is already being developed.

C. Emphasis on Transparency Is Consistent with ‘Soft Power’ Approach

The EU Commission’s preferred strategy for harmonization, one of coordination and peer pressure best evidenced by the EU’s Code of Conduct group, is consistent with FATCA’s emphasis on reporting. Both strategies rely on reporting and transparency, rather than more coercive legal remedies. This makes FATCA a particularly useful tool for advancing tax harmonization in the EU in that it is congruent with existing policy preferences.

D. THE LIMITS OF FATCA

To be sure, FATCA will neither create EU tax harmonization immediately nor in its entirety. As a matter of timing, FATCA will require years of implementation before its full effects will be known, since even after issues of noncompliance arise, alleged violators of the law will likely challenge the withholding penalty in US Tax Court. As with many facets of the US Tax Code, judicial interpretation of Congressional intent will be required before knowing the full enforcement potential of the law.

Moreover, FATCA will not affect those institutions that do not hold any US sourced assets. While this might be a small minority of institutions, there are already reports that FATCA has lead to swift changes in the accounting and business practices of some EU financial institutions. Some companies may choose not to do business with US sourced income altogether. Others may spinoff the US sourced components of the business or find other legal remedies for compartmentalizing the funds and thus minimize their FATCA reporting liabilities. It has yet to be seen what kind of aggressive

maneuvers EU businesses might pursue, ultimately blunting the impact of FATCA on broader tax harmonization goals.

The interaction between FATCA and the laws of individual Member States is also unknown. While conflicts with the ECJ are unlikely given the lack of issues related to the four fundamental freedoms, the reporting requirements of FATCA are likely to conflict with the privacy laws of some Member States. This is because reporting is required even if a proportion of the funding for an account comes from EU sourced income, as only a certain threshold of US sourced income is required for reporting to mandated by FATCA. Hence, many shared investments with a mix of US and EU assets will require detailed reporting to the IRS. This conflict may, over time, be resolved through bilateral tax treaties at the Member State level, but until then, litigation is likely, particularly in those Member States that have not already forged agreements with the US. Such uncertainty may also blunt the effect of FATCA on EU tax harmonization goals.

V. CONCLUSIONS

Tax harmonization remains a symbol of the ultimate unification of the European economy and the formation of a single market. As such, steps towards tax harmonization presage the ultimate creation of a 'United States of Europe'. Despite longstanding political obstacles internal to the EU, the impending implementation of FATCA, going into effect on January 1st, 2013, will have dramatic consequences on both the financial institutions and non-financial institutions of Europe. Indeed, based on the proportion of the EU economy that is accounted for by the transatlantic marketplace, it is difficult to imagine a single large-scale financial institution that will remain entirely unexposed to

FATCA reporting requirements.

The scope of FATCA's impact on the EU is yet to be known, but the implications of such a sweeping new tax law imposed on EU institutions by a non-EU entity raises a number of questions about tax harmonization strategies in the EU. Internal political efforts are clearly only one instrument for achieving harmonization, while outside political forces can continue to be leveraged for even further harmonization efforts. Ultimately, this global perspective not only addresses the harmonization goals of the EU, but the broadly recognized trend that a truly effective tax enforcement regime must account for all worldwide income due to the increasingly cross-border nature of the economy and multinational structure of business enterprises.

The importance of new reporting requirements for achieving tax harmonization in the EU also raises an often overlooked category of harmful tax competition: competitive privacy law. The challenge of harmful tax competition in the EU may need to be expanded to include the problem of harmful privacy law competition, wherein Member States do not adjust any tax laws specifically, but adjust privacy protections that enable harmful competition that operates behind closed doors. The combative use of privacy laws that siphon revenue away from the tax base of neighboring Member States should be a necessary component of the long-term tax harmonization agenda in the EU.