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Issues underlying the French blacklisting of Jersey, Bermuda and the BVI [1];

as at 4th September, 2013.

Without fullest information on the various outstanding notices about which the French are harping, it is still possible to isolate the pseudo-political issues underlying this from a legal perspective.

It is clear from the general position, that the information exchange procedures put in place by Jersey are considered sufficient, if not exemplary by the OECD. There is no doubt that Jersey has been leading the implementation of these arrangements through its vice-chairmanship of the Forum. The French are therefore making a political point about the entire process, as there is no doubt that Bermuda and the BVI have been equally professional in their implementation. More so, in relation to France than the latter's immediate neighbour, Switzerland. The French apparently would not dare to pull the same trick on a Treaty partner, apart from issuing mere threats to do so.

What the French appear to be unable to comprehend is that their domestic investigation procedure is based upon a concept of a secret investigation of the position prior to any action being taken by the administration is simply limited to their jurisdiction. That is known as the secret fiscal. It infers that the administration as *le juge des impôts* will then take a form of quasi judicial decision as to whether to initiate the control. . Within France, they are able to acquire information from the whole range of economic actors, be these banks, notaries *etc*, without starting off a procedure or becoming embroiled within one. Whilst this appears the same any other OECD country's domestic investigation procedures, on the surface, it is in fact is based upon very different quasi criminal concepts, which are alien to the common law. the *juge d'instruction* has a separate but not dissimilar rôle in criminal issues in deciding whether there is a case to answer. However that is not the issue here. The French administration are therefore deliberately overstepping their authority and, what is worse, attempting to extend it.

They have attempted to curtail the unseen evils lurking behind the *Government of India* case [1955] AC 491, without addressing the good that it was meant to preserve. One tax authority is not necessarily able to understand the legal position and therefore the proprietary position in another: that requires cooperation, not leaving the table of negotiation and cooperation.

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[1] *but not Switzerland*

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That, in a nutshell summarises what this is about.

France presupposes it is now an international norm that the same principles as an administration applies domestically are now in force worldwide, and recognised *de facto* throughout the remainder of the world.

That generalisation is badly thought through, and is a falsehood. Yet it is that reason why small cooperative jurisdictions, other than the admittedly uncooperative Switzerland[2], have been singled out, on the basis that the United Kingdom appears too weak to defend them. A type of fiscal Falklands, rather than malouines.

What is interesting is reading Senator Marini's diatribe against the Swiss authorities in his exposé to the Parliamentary Commission on the information request made to Switzerland in relation to Jerome Cahuzac[3]. To my knowledge, there was no appeal system in Switzerland regarding the Treaty, rather than TIEA request. If there were, UBS were able to avoid having to use it. The information made available to Senator Marini went outside the OECD model for confidentiality protection, as a matter of public record.

The underlying assumption that therefore the same domestic information and procedures are immediately available abroad, on an information request alone, is a flawed one.

That cannot be without the remainder of the planet adopting the French constitution, the *code général des impôts* and the regulations and practice which that entails.

What is therefore missing from the French presentation, is not only a justification for this unnotified change in the position of three jurisdictions under United Kingdom tutellage, for what that is now worth, but also a reasoning as to why the OECD visa on a set of arrangements is not sufficient for the French.

That will be impossible for them to achieve, conceptually, otherwise than by filibuster in the OECD Forum, and the silence of eth French representatives occupying the Chair and the seat of administration .

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[2] *See the explicit commentaries on the "Jaune" to the projet de loi de finances de 2013, which in fact indicate that the decision to blacklist Jersey was taken on a basis of principle, the right to an appeal, and not on one of fact. http://www.performance-publique.budget.gouv.fr/farandole/2013/pap/pdf/Jaune2013_reseau_conventionnel.pdf.*

[3] *Communication de M. Philippe Marini du 27 juin 2013 see pdf on webpage News Articles : http://www.overseaschambers.com/news-press/press-articles.aspx*

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The reason is that, in order to enable the obtaining of information requested by foreign states, under principles which are not local, the legislation in each OECD signatory has to include a provision where an administration can issue a notice stating that the person holding the information is required to produce it, on a confidential, not a public, basis. As that procedure, by definition, is outside the normal taxing powers of the jurisdiction[4], that has to take place within a legally enforceable regulatory environment, which is therefore subject to the rule of law, not the arbitrary concepts embodied in the French constitution and its appendages.

In other words in order to enable the local administrations to obtain the information, the counterparty is that the foreign administration has to accept that delays may be incurred where the local tax authority's laws do not encompass the information as tax information, but as general information which is otherwise confidential or private, and is not in the tax administration's immediate purview.

Hence the counterparty need for the process of information provision by notice to be subject to appeal, as approved by the OECD. That necessarily involves a notification, and it is not some French administrative sulking that will change that. Unless the OECD has changed its position, which it apparently has not yet done, France is therefore, as usual within the OECD, out on a limb.

What is also becoming evident is that the French civil servants drafting these information requests have not been sufficiently schooled in the foreign administration's legal position or language to be able to draft effective requests. It is common knowledge that this is the case throughout the OECD Forum. Their attempts to invent vocabulary as what they consider to be acceptable legal concepts, which fit their own, is a perennial difficulty which is not limited to this area. The number of French information requests that have had to be refused on the basis of inaccurate or undefined general information, or on the basis of fishing expeditions, shows that their civil servants are deficient, not the receiving authorities. There is a lack of courtesy involved, in that the French from school age are taught to be clear in asking question as any lack of clarity renders a question ambiguous. The number of times that the French have had to be assisted in reformulating their information requests into something that the receiving authorities can understand and cope with will probably never be made public: for good reason.

[4] *It would otherwise produce the information immediately.*

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That is one excuse, however, that does not deal with the public admissions by Pierre Marini in Parliamentary Commission on 27th June, 2013[5].

These excerpts relate to the Swiss information, exchange arrangements in the context of Jerôme Cahuzac's declarative omissions merit attention in relation to the Minister's decision in principle to attack certain jurisdictions at paragraph 3.2 of the "Jaune" and its Conclusion as a matter of principle rather than on a case by case basis of non-supply. Jersey had until end 2011 responded adequately to all requests made by the French under the arrangements. it is only, apparently, those which have been appealed by the intermediaries questioned, which is their absolute right under the arrangements agreed with the OECD Forum. The OECD model lays a ground for correction of the request by communication and negotiation to render the Request valid, where it is not [aside those where the terminology grammar and language may have needed correction...].

What is more the OECD Request Template actually requires at note iv to point 8 that the requesting country to state the reason why the requested state should not notify the persons concerned of the request, where the Requested State 's laws require such notification.

On Marini's page 3[6], he confirms that in the Cahuzac case the administration had every intention of attempting to obtain information to which it was not entitled under the Treaty:

My hasty translation : "The affirmed will of the inspection services was to put in hand and to anticipate every argument and requests to obtain from the Swiss that they accept to reply beyond what is permitted under the Convention. They thought therefore that they were going very far, and that the obtaining of a reply would be in itself a victory."

"La volonté affirmée par les services du contrôle fiscal était de tout mettre en œuvre et d'anticiper tous les arguments et les demandes pour obtenir des Suisses qu'ils acceptent de répondre au delà de ce que permet la convention. Ils estiment donc qu'ils allaient très loin et que l'obtention d'une réponse constituait en elle-même une victoire".

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6 *see http://www.overseaschambers.com/media/16546/marini%2027%207%2013.dat.pdf, taken from the minutes of the Commission*

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On his page 5

My hasty translation : "We need to put this information before the World Forum so that States that do not play the game be placed as soon as is possible upon the OECD grey or blacklists or be reevaluated by the Peer Review group. These reviews often encourage advances by the States more reticent in tax information exchange".

and

'*Nous devons faire remonter ces informations au niveau du Forum mondial afin que les États qui ne jouent pas le jeu rejoignent le plus vite possible les listes grise ou noire de l'OCDE ou fassent l'objet de nouveaux examens par le Peer Review Group. Ces examens suscitent en effet souvent des avancées dans les États les plus rétifs à l'échange d'information en matière fiscale*'.

*I*n other words France, or perhaps Senator Marini, is looking to use the Peer Review group to force through its own conceptualisation of what a gathering of information prior to a *contrôle fiscale* should entail, rather than what it is, in the Requested jurisdiction. The reason for the "attack" is to consolidate French concepts of exchange rather than that so-far agreed by the Forum as the level of the playing field. The considerate treatment given by France to Switzerland is not "Peer", under these circumstances.

This is little more than State financial terrorism using the OECD Forum as a playing field, wielding a unilateral, not even a bi-lateral, precedent.

Quite how the release in a public document of the details provided by the administration to an elected representative relating to Jérôme Cahuzac cannot be considered a breach of article 8 of the OECD TIEA model is another matter of concern, upon which it is not necessary to dwell here.

However, the issue is now whilst the principles upon which information exchange is based are clear, their implementation is not.

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What is annoying the French is simply that their rules do not apply abroad, they are not able to marshal the details requested into the OECD coded language which they were instrumental in forcing upon the remainder of the planet. They therefore fear that their own arbitrary procedures, which rely on the impartiality of the administration as *juge des impôts*, are not so understood abroad, and are therefore increasingly aggressive.

However, international cooperation is limited to what is achievable and, short of conquering the planet, French principles remain French as to their application, and the remainder of the planet is allowed to consider whether their implementation in the manner proposed by the French are capable of cooperation or otherwise. To make requests which are not capable of inducing cooperation in an administrative assistance agreement is a *non-sequitur*.

The underlying question remains as to how the actual data requested can be better formulated. With respect to the average French civil servant, speaking a foreign language is one thing, being able to understand the concepts of a foreign jurisdiction and its underlying legal culture is a privilege that it takes a lifetime's experience to earn. None of those resident in the isolated building in Bercy appear to be there, yet. For example, they are still working on a badly thought through theory that a trust, under its governing law, is a contract, in other words for consideration, and basing their analysis on an appropriative basis, rather than upon an objective consideration of the concept. It is therefore false, and therefore has to give room to a compromise, rather than unlearned cooperation, which in legal terms should not be permitted, if the object is an exchange of information, rather than a mockery of the truth.

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