

CURRENT TRENDS ON AUTOMATIC EXCHANGE OF INFORMATION

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(1) Introduction

As noted by the OECD, “[c]o-operation between tax administrations is critical in the fight against tax evasion and protecting the integrity of tax systems. A key aspect of that co-operation is exchange of information.”¹ The OECD has a long history of working with exchange of information, particularly through bilateral tax treaties, but also through the multilateral Convention on Mutual Administrative Assistance and, more recently, in the context of the Global Forum on Transparency and Exchange of Information.²

Up until very recently, the main platform and the legal basis through which there could be exchange of information was Article 26 of the OECD Model.³ Pursuant to this provision, exchange of information will take place when it is foreseeably relevant for the correct application of the tax treaty or to carry out the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States.⁴ The condition of “foreseeable relevance” of the information exchanged was introduced in 2005, replacing the term “necessary” of the OECD Model Convention 1977. Information was considered to be “necessary” when it was relevant to correctly carry out the provisions of a tax treaty or to implement domestic taxes in the contracting State requesting the information.

In its final version, Article 26 of the OECD Model and its Commentary were amended by the OECD Council in 2012 and this amended version was incorporated in the 2014 OECD Model Tax Convention. An important change was the introduction of the opportunity for the competent authorities to use the received information for other purposes than for the assessment or collection of taxes.⁵ Furthermore, the OECD Commentary now provides for three forms of exchange - on request, automatic and spontaneous - which may also be

¹ <http://www.oecd.org/tax/exchange-of-tax-information/automaticexchange.htm>

² The Global Forum covers not only the 34 official member countries of the OECD but also other jurisdictions including offshore financial centres and emerging countries. The Global Forum had 126 members as of July 2015, including Singapore.

³ See also the OECD’s Manual on Information Exchange, which provides practical assistance to officials dealing with exchange of information for tax purposes and may also be useful in designing or revising national manuals. It has been developed with the input of both member and non-member countries. The Manual follows a modular approach. See OECD, Manual on the Implementation of Exchange of Information Provisions for Tax Purposes: Approved by the OECD Committee on Fiscal Affairs on 23 January 2006, available on: <http://www.oecd.org/tax/exchange-of-tax-information/36647823.pdf>

⁴ Article 26(1) OECD Model

⁵ See para 2 of Article 26 OECD Model

combined.⁶ There is also a provision for group requests, arguably paving the way for large scale automatic exchange of information treaties and agreements.⁷

Apart from Article 26 of the OECD Model, another legal basis through which there could be exchange of information was the Model Agreement on Exchange of Information in Tax Matters. Following the OECD's work on the project on harmful tax competition, in 2002, the OECD published the Model Agreement on Exchange of Information in Tax Matters (the TIEA Model), which provided a version for bilateral and multilateral information exchange agreements. In this initial version of the TIEA Model, the proposed exchange of information was upon request only. In the Commentary to the TIEA Model, it was stated that it was up to the contracting States to extend the scope of the agreement in order to include also automatic and spontaneous exchange of information.⁸ On 7 August 2015, a protocol was published by the OECD which amended the TIEA Model to include automatic exchange of information, as such aligning it with Article 26 of the OECD Model and Articles 6 and 7 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, discussed below.⁹

Exchange of information could also be based on certain provisions of the Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters. The Convention is a multilateral agreement which was developed in 1988 and was originally open only to OECD members and EU Member States. As of 1 June 2011 the Convention is open to all countries, including non-OECD members.¹⁰

Again, this Convention provides for three types of exchange of information: on request, spontaneously and automatically.¹¹ Contrary to the Commentary of the OECD Model, in the Commentary of this Convention, there is some guidance on automatic exchange of information. It is noted that automatic exchange is typically used for bulk information and is aimed at improving compliance and the detection of fraud.¹² This form of exchange of information would require a preliminary agreement between competent authorities on the procedure to be adopted and the items covered.¹³ The amount and character of items which are fit for automatic exchange would depend on each State's own domestic administrative systems.¹⁴ The OECD Model Memorandum of Understanding on Automatic Exchange of Information for Tax Purposes was recommended as a helpful guide.¹⁵ Standardised forms

⁶ See para 9.1 of the Commentary to Article 26 of the OECD Model

⁷ See para 5.1 of the Commentary. The threshold of foreseeable relevance is arguably still high for the purposes of the type of automatic exchange of information envisaged under FATCA and the OECD's Common Reporting Standard, hence why the additional models were produced. Also see examples in para 8.1 which suggest that Article 26 cannot be used for the purposes of FATCA or the OECD's Common Reporting Standard.

⁸ See para 39 of the Model Agreement on Exchange of Information in Tax Matters

⁹ See Model Protocol for the Purpose of Allowing the Automatic and Spontaneous Exchange of Information under a TIEA. Available on: <http://www.oecd.org/ctp/exchange-of-tax-information/Model-Protocol-TIEA.pdf> Broadly, the new Article 5A and 5B mirror the contents of Articles 6 and 7 of the Multilateral Convention.

¹⁰ This was a result of the Multilateral Convention being amended by a Protocol in 2010, which aimed to align it with other instruments of international information exchange.

¹¹ See Arts 5-7 of the Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters

¹² See para 62 of the Commentary to Article 6 of the Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters

¹³ Ibid, para 64

¹⁴ Ibid, para 65

¹⁵ <http://www.oecd.org/tax/exchange-of-tax-information/2662204.pdf> Also see draft recommendation of the OECD council on the use of the memorandum: <http://www.oecd.org/tax/exchange-of-tax-information/2666393.pdf>

would help with automatic exchange of information and speed up the process, especially if a large number of countries participate in a standardising exercise.¹⁶

Notwithstanding references to automatic or spontaneous exchange of information in these various models, it should be emphasised that until relatively recently, exchange of information was to an extent mainly on request and rather sporadic. Exchange of information in general as an instrument for fighting international tax avoidance and tax havens got a major boost following the G20 Communiqué issued at the London 2009 Summit. In this summit, the G20 leaders agreed to take action against non-cooperative jurisdictions, including tax havens, and if necessary to deploy sanctions to protect their public finances and financial systems.¹⁷ The era of banking secrecy was declared to be over and countries were called to adopt and implement the international tax standards of transparency and information exchange – standards which had become top priority by then. This message was reinforced at the G8 meeting in July 2009 and subsequent G8 and G20 meetings, though no sanctions have yet to be taken.

Since 2009, the OECD has been publishing progress reports on the implementation of the internationally agreed tax standard¹⁸ by jurisdictions surveyed by the Global Forum. In these progress reports, jurisdictions are categorised in three lists: the white list,¹⁹ the grey list²⁰ and the black list.²¹ In the April 2009 progress report, there were four jurisdictions on the black list²² and numerous jurisdictions on the grey list. This list has been regularly updated and there are now no countries on the black list. All jurisdictions covered by the Global Forum have now committed to the international agreed tax standards and more than half have implemented them. Furthermore, a peer review process has begun to monitor jurisdictions, to assess their legal and regulatory framework, the actual implementation of standards and their tax treaties and tax information exchange agreements. To an extent, until the recent peer-review work by the Global Forum had commenced, the scope of exchange of information as proposed by Article 26 of the OECD Model was often limited in bilateral conventions, because of domestic constraints – it was often not included or if included not applied.²³

With exchange of information taking a central stage in the fight against tax avoidance and tax evasion, several international initiatives and developments have led to large-scale *automatic* exchange of information to become the norm rather than the exception. What will be shown in this paper is that, even though automatic exchange of information was before considered to

¹⁶ Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters, Commentary, para 66. It was recommended that the OECD standard transmission format or other updated standard should be used by States when exchanging information automatically.

¹⁷ G20 London Summit – Leaders’ Statement – 2 April 2009, para 15.

Available on: https://www.imf.org/external/np/sec/pr/2009/pdf/g20_040209.pdf

¹⁸ This is set out in footnote 1 of the Progress Report on the Jurisdictions Surveyed by the OECD Global Forum in Implementing the Internationally Agreed Tax Standard, on the progress made as at 2 April 2009. “*The internationally agreed tax standard, [...] requires exchange of information on request in all tax matters for the administration and enforcement of domestic tax law without regard to a domestic tax interest requirement or bank secrecy for tax purposes. It also provides for extensive safeguards to protect the confidentiality of the information exchanged.*”

¹⁹ This list included countries that have substantially implemented the internationally agreed tax standard.

²⁰ This list included countries committed to the internationally agreed tax standard but that have not yet substantially implemented it.

²¹ This list included countries that have not committed to the internationally agreed tax standard.

²² Costa Rica, Malaysia, Philippines, Uruguay.

²³ Ana Paola Dourado, “*Exchange of Information and Validity of Global Standards in Tax Law: Abstractionism and Expressionism or Where the Truth Lies*” (EUI Working Paper, RSCAS 2013/11)

be inconceivable, lately, intense international political interest has led to the advent of *global standards* for automatic exchange of information. In fact, in June 2015, at the G7 Summit held at Bayern in Germany, the G7 leaders reiterated their commitment to promoting the exchange of information on an automatic basis and urged other jurisdictions to implement the international standards for exchange of information expeditiously.²⁴

These developments are explored in this paper, after a brief analysis of the concept of automatic exchange of information. The author has reviewed materials available up to 1 December 2015.

(2) Automatic Exchange of Information

International automatic exchange of tax information generally involves the systematic and periodic transmission of a large amount of tax-relevant information regarding non-resident taxpayers by the tax administration of the source country to the residence country. The tax relevant information usually concerns various categories of income (e.g. dividends, interest, etc.).²⁵ It is thought that the information transmitted can provide timely information on non-compliance where tax has been evaded either on an investment return or on the underlying capital sum, even where tax administrations have had no previous indications of non-compliance.

Tax information, which is exchanged automatically, is normally collected in the source state on a routine basis, generally, through reporting by third parties; usually, financial institutions, that make or administer payments to non-residents. Automatic exchange of information enables the tax authority of a taxpayer's country of residence to check its tax records to verify that taxpayers have accurately reported their foreign source income. In addition, information concerning the acquisition of significant assets may be used to evaluate the net worth of an individual and to verify if the reported income reasonably supports the transaction.

The OECD report on automatic exchange of tax information divides this process of automatic exchange of information into the following seven steps:²⁶

- “1. Payer or paying agent collects information from the taxpayer and/or generates information itself.
2. Payer or paying agent reports information to the tax authorities.
3. Tax authorities consolidate information by country of residence.
4. Information is encrypted and bundles are sent to residence country tax authorities.
5. Information is received and decrypted.
6. Residence country feeds relevant information into an automatic or manual matching process.

²⁴ Leaders' Declaration G7 Summit 7-8 June 2015, p.3. Available on:

https://sustainabledevelopment.un.org/content/documents/7320LEADERS%20STATEMENT_FINAL_CLEAN.pdf

²⁵ OECD, Comm. Fiscal Affairs, *Automatic Exchange of Information: What It Is, How It Works, Benefits, What Remains to Be Done*, p. 9 (OECD 2012), available at www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-of-information-report.pdf. Page 8. Also see OECD, Council Recommendation C (81)39. See OECD, Recommendation of the Council concerning a Standardized Form for Automatic Exchanges of Information under International Tax Agreements (OECD 1981).

²⁶ OECD (2012), *fn.* 25, p. 9

7. Residence country analyses the results and takes compliance action as appropriate.”²⁷

The information to be exchanged automatically typically includes the name of the taxpayer, the tax identification number (TIN) assigned by the residence state, the taxpayer’s temporary and permanent addresses, the type and amount of the income earned, and the details of the payer in the source state. It can also cover other matters, such as information on financial assets, immovable property and VAT refunds.²⁸

Automatic exchange of information typically serves the residence state in determining the tax liability of its residents when that liability depends on the worldwide income or assets of the resident. It also helps to determine the accuracy of the income declaration of a resident taxpayer or the accuracy of the claims or proof asserted by the resident taxpayer in substantiating a tax declaration.

Automatic exchange is thought to be very beneficial as a tool to counter offshore non-compliance. It can provide timely information on non-compliance where tax has been evaded either on an investment return or the underlying capital sum. It can help detect cases of non-compliance even where tax administrations had no previous indications. Other benefits include its deterrent effects, increasing voluntary compliance and encouraging taxpayers to report all relevant tax information regarding foreign-source income to their residence states.

Overall, automatic exchange of tax information ensures the equal treatment of the domestic and foreign-source incomes of resident taxpayers, thereby eliminating the opportunity for the tax-distorted reallocation of economic and financial resources. To an extent, it also helps to educate taxpayers in their reporting obligations, increase tax revenues and lead to fairness – ensuring that all taxpayers pay their fair share of tax in the right place at the right time.²⁹

The idea of automatic exchange of information on a wide scale and on a mandatory basis was introduced for the first time, albeit in limited circumstances, through the Savings Directive.³⁰ This is examined next.

(3) Automatic exchange of information in the European Union

(a) The Savings Directive

The Savings Directive initiated automatic exchange of information as the standard for exchange of information relating to interest payments made to non-resident beneficiaries in the EU. The Savings Directive was part of the tax package intended to counter harmful tax competition. The Directive was adopted on 3 June 2003, but only became effective on 1 July

²⁷ Ibid, p.9

²⁸ Ibid, p.8. Also see Vokhidjon Urinov, “*Tax Amnesties as a Transitional Bridge to Automatic Exchange of Information*”, 69 (2015) Bulletin for International Taxation 168-176

²⁹ OECD, Comm. Fiscal Affairs, Automatic Exchange of Information: What It Is, How It Works, Benefits, What Remains to Be Done p. 9 (OECD 2012), available at www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-of-information-report.pdf, p.19

³⁰ Frans Vanistendael, “*EU Tax Agenda: Exchange of Information, Transparency and Abuse*”, January 12, 2015 Tax Notes International 163

2005 within the European Union and in relation to some dependent and/or associated territories and third countries.

The Savings Directive³¹ was repealed by the Council on 10 November 2015.³² This was in order to have just one standard of automatic exchange and to avoid legislative overlaps. The repeal of the Savings Directive is coordinated with the introduction of the revised Mutual Assistance Directive³³ which comes into effect on 1 January 2016 to ensure that no loopholes are created or left for tax evaders.

Although the instrument has now been repealed, it is useful to consider its provision and the balance achieved therein. Broadly, the Savings Directive was based on exchange of information and in the absence of that, the imposition of withholding taxes. All the Member States (through their competent authorities)³⁴ were ultimately expected to exchange information automatically on interest payments made by paying agents³⁵ to beneficial owners³⁶ who were individuals resident in another Member State.³⁷ If the recipient acted as a paying agent, or on behalf of a legal person, or on behalf of another individual who was the beneficial owner, the recipient was not the beneficial owner for the purposes of the Savings Directive.³⁸ The beneficial ownership concept was tailored to the demands of the Savings Directive.

For a transitional period,³⁹ Austria, Belgium and Luxembourg were able to impose withholding tax in lieu of exchanging information. This withholding tax was set at 15% for the first three years (i.e. since 2005), 20% for the following three years and 35% thereafter.⁴⁰

³¹ Council Directive 2003/48/EC of 3 June 2003 on Taxation of Savings Income in the Form of Interest Payments. The measures of cooperation provided by the Savings Directive will be progressively replaced by the implementation of Council Directive 2014/107/EU on administrative cooperation in the field of direct taxation which provides for automatic exchange of financial account information between Member States. See below.

³² See <http://www.consilium.europa.eu/en/press/press-releases/2015/11/10-savings-taxation-directive-repealed/>

³³ See Council Directive 2014/107/EU on administrative cooperation in the field of direct taxation which provides for automatic exchange of financial account information between Member States. See below, Part 3(b) of this paper.

³⁴ Competent authorities were defined in Article 5 of the Savings Directive. For the Member States, it was any of 'the authorities notified by the Member States to the Commission' (Article 5(a)). For third countries, it was 'the competent authority for the purposes of bilateral or multilateral tax conventions or, failing that, such other authority as is competent to issue certificates of residence for tax purposes' (Article 5(b)).

³⁵ A paying agent 'means any economic operator who pays interest to or secures the payment of interest for the immediate benefit of the beneficial owner'. *Ibid*, Article 4(1). The Savings Directive also extended the definition of paying agent to any Member State entity receiving interest for the benefit of the beneficial owner, *excluding* legal persons, certain collective investment vehicles and some other entities. *Ibid*, Article 4(2)

³⁶ Beneficial owner meant 'any individual who receives an interest payment or any individual for whom an interest payment is secured, unless he provides evidence that it was not received or secured for his own benefit'. *Savings Directive*, Article 2(1)

³⁷ Under Article 9 of the Savings Directive, the competent authority of the Member State of the paying agent had to communicate information to the competent authority of the Member State of residence of the beneficial owner. This communication of information was automatic and had to occur at least once a year.

³⁸ If the paying agent had indications that the recipient was not the beneficial owner, it had to take reasonable steps to identify the true beneficial owner. If unable to do so, it had to consider the recipient as the beneficial owner. *Savings Directive*, Article 2(2).

³⁹ The transitional period would end if and when the European Union entered into an agreement with Switzerland, and Andorra, Liechtenstein, Monaco and San Marino to exchange information on request as defined in the OECD Model Agreement on Exchange of Information on Tax Matters 2002 in relation to interest payments, and if and when the Council agreed by unanimity that the United States was committed to exchange of information in relation to interest payments on request as defined in the OECD Model Agreement mentioned. *Savings Directive*, Article 10.

⁴⁰ *Ibid*, Article 11

There were revenue sharing provisions for the tax withheld, i.e. 25% of the tax was retained in the source Member State and 75% was transferred (anonymously) to the Member State of residence of the beneficial owner of the interest.⁴¹ Since 1 January 2010, Belgium discontinued applying the transitional withholding tax and joined the other Member States in adopting the exchange of information regime. Luxembourg also stopped applying the transitional withholding tax as of 1 January 2015. Austria was to start exchanging information by September 2017 on a limited set of accounts.

A beneficial owner could authorize the paying agent in one of the derogating Member States to report information so as to avoid the imposition of a withholding tax. The Savings Directive stated that the derogating Member States must have procedures in place for taxpayers who want to opt for information exchange rather than withholding taxes. The Directive provided for two procedures of exception from withholding tax: certification and voluntary disclosure.⁴²

The Savings Directive only applied to interest paid by a paying agent established in a Member State to an individual beneficial owner in another Member State. Accordingly, there was wide scope for avoidance if the payment was routed from a non-EU paying agent to an EU-resident individual. That is why it was important for the same or equivalent measures, i.e. the exchange of information or withholding tax, to also apply, from 1 July 2005, in five European countries (Switzerland, and Andorra, Liechtenstein, Monaco and San Marino) and in 10 dependent or associated territories of the Member States (Anguilla, Aruba, the British Virgin Islands, the Cayman Islands, Guernsey, the Isle of Man, Jersey, Montserrat, the Netherlands Antilles, and the Turks and Caicos Islands).

Under the Savings Directive, it was also easy to circumvent the provisions of the Directive, for example, by routing interest payments through a non-EU paying agent, which was not in the list of countries that had agreed to apply same or equivalent measures. Alternatively, an individual could interpose a company to receive the interest on his behalf. As a result, these situations would fall outside the scope of the Savings Directive.

As far as the first practice was concerned, in a subsequent review of the Savings Directive,⁴³ the Commission had proposed for some intermediary structures to act as ‘paying agent upon receipt’ for interest paid from any upstream economic operator, wherever established. Under the proposed rules, certain entities or legal arrangements listed in a proposed Annex to the Directive would be caught if they were not taxed on their income or on the part of their income arising to their non-resident participants, under the general tax rules of their Member State of establishment.⁴⁴ Only entities and arrangements that were listed in the relevant

⁴¹ *Ibid*, Article 12

⁴² *Ibid*, Article 13. The Commission proposal amended this provision so that only the voluntary disclosure procedure would be available. See Proposal for a Council Directive amending Directive 2003/48/EC on taxation of savings income in the form of interest payments, COM(2008) 727 final.

⁴³ See Proposal for a Council Directive amending Directive 2003/48/EC on taxation of savings, *fn.* 42. See also Review of the Savings Directive – Frequently Asked Questions, IP/08/1697. For more information see chapter 2 in Christiana HJI Panayi, *European Union Corporate Tax Law* (Cambridge University Press, 2013)

⁴⁴ There were exclusions for investment funds covered under Article 6, pension funds relating to life insurance contracts, charities, cases of shared beneficial ownership where the economic operator had identified all beneficial owners.

Annex would be deemed to be paying agents upon receipt. The list contained entities and arrangements from each Member State.⁴⁵

As far as the second practice was concerned, there was a proposal for a selective look-through approach. Here, if the paying agent had obtained information in the performance of its anti-money laundering duties⁴⁶ that payment made to a legal person or arrangement was, in fact, for the ultimate benefit of an EU-resident individual beneficial owner, it had to look through this legal person or arrangement.⁴⁷ The proposed amendment did not apply the look-through approach to all legal entities. It only applied to *specific* legal persons and arrangements established in *selected* jurisdictions *outside* the European Union where appropriate taxation of interest income was *not* ensured. Again, there was an exhaustive list in the proposed Annex I.1. For Singapore, a trust would be a specific legal person for the purposes of this provision.

Certainly, the solution proposed was imperfect and strictly confined to entities and arrangements set out in the proposed Annexes. Therefore, not all intermediary structures would be covered, nor all entities looked through. Some would though, making the Savings Directive of relevance to persons other than individuals.

On 24 March, 2014 the EU Council of Ministers finally adopted the revised version of the Savings Directive⁴⁸ and changes were made to close existing loopholes and better prevent tax evasion. National rules transposing the revised Savings Directive were to be adopted by Member States by January 2016.⁴⁹

Ironically, just when the amendments to the Savings Directive were finally approved, it was recognised that the whole Directive would be repealed in the near future. This was because of the all-encompassing changes to the Mutual Assistance Directive 2011/16/EU which Member States agreed to at the ECOFIN meeting in October 2014. The exchange of information provisions of the Mutual Assistance Directive 2011/16/EU are considered in the following Part.

(b) The Mutual Assistance Directive on Exchange of Information

⁴⁵ For example, in the case of the United Kingdom, the following entities and/or arrangements (when receiving the interest payment) would be paying agents upon receipt: a general partnership, a limited partnership, a limited liability partnership, a European Economic Interest Group and an investment club (where members are entitled to a specific share of assets).

⁴⁶ More specifically, the obligations under Art. 2 of the Third Anti-Money Laundering Directive (Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, adopted on 26 November 2005) Official Journal L309, 25 November 2005, p.15. The Third Anti-Money Laundering Directive was adopted after the Savings Directive. It repealed an earlier Directive (91/308/EEC) and provided for improved standards relating to the identification of the customer and any beneficial owner and the verification and updating of their identity and address.

⁴⁷ This followed the suggestions of the Expert Group on Taxation of Savings. At its meeting on 22 March 2007, the Expert Group on Taxation of Savings recommended better alignment of the Anti-Money Laundering obligations and the Savings Directive 'with a view to prevent conflicting obligations and reduce the administrative burden for paying agents whilst improving the effectiveness of the Savings Directive'. See Expert Group on Taxation of Savings: Review of the operation of the Council Directive 2003/48/EC on taxation of income from savings.

⁴⁸ Official Journal L 155 of 15 April 2014, p.50

⁴⁹ See http://ec.europa.eu/taxation_customs/taxation/personal_tax/savings_tax/revised_directive/index_en.htm

There are two Mutual Assistance Directives: one for the recovery of taxes⁵⁰ and another for exchange of information.⁵¹ As the title of these instruments suggests, the Mutual Assistance Directives allow tax authorities from one Member State to seek assistance from another Member State in the recovery of taxes and for exchange of information. These Directives are not exclusively relevant to companies, as they have a wide scope of application. In fact, initially, these Directives were primarily used to deal with emigrating individuals that left outstanding tax bills. Nowadays they are increasingly relevant to companies.⁵²

For example, under the old version of the Mutual Assistance Directive for the Recovery of Taxes, the Directive applied to all claims relating, *inter alia*, to taxes on income and capital.⁵³ This would normally include capital gains and corporation tax. Request for recovery had to indicate ‘the name address and any other relevant information relating to the identification of the person concerned [...]’.⁵⁴ Therefore, an emigrating company could be such a person. Under the new version of the Mutual Assistance Directive, in force from 1 January 2012, again the Directive applies to claims relating, *inter alia*, to all taxes and duties of any kind levied by or on behalf of a Member State.⁵⁵ It is evident that companies are included in the concept of a debtor/addressee for the purposes of a claim.⁵⁶

Furthermore, under the 2011 version of the Mutual Assistance Directive on Exchange of Information, it is made explicit that exchange of information can relate to natural and legal persons, to associations of persons and any other legal arrangement. The latter Directive provides, *inter alia*, for exchange of information for specific categories of income,⁵⁷ the disclosure of information and documents under specific circumstances⁵⁸ and subject to rather limited safeguards.⁵⁹

An important aspect of the 2011 version of the Mutual Assistance Directive on Exchange of Information was that from 1 January 2015, it introduced automatic exchange of information

⁵⁰ Council Directive 2010/24/EU of 16 March 2010 Concerning Mutual Assistance for the Recovery of Claims Relating to Taxes, Duties and Other Measures, repealing Council Directive 76/308/EEC of 15 March 1976 on Mutual Assistance for the Recovery of Claims Resulting from Operations Forming Part of the System of Financing the European Agricultural Guidance and Guarantee Fund and of Agricultural Levies and Customs Duties and in Respect of Value Added Tax and Certain Excise Duties.

⁵¹ Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation, repealing Council Directive 77/799/EEC of 19 December 1977 Concerning Mutual Assistance by the Competent Authorities of the Member States in the Field of Direct Taxation and Taxation of Insurance Premiums. Also see implementing Regulation (EU) No 1189/2011 for Council Directive 2010/24/EU on strengthening mutual assistance between Member States in the recovery of taxes, reported at 2011 WTD 225-17. For commentary, see Marius Vascega & Servaas van Thiel, “Assessment of Taxes in Cross-Border Situations: The New EU Directive on Administrative Cooperation in the Field of Taxation”, 20 (2011) 3 *EC Tax Review* 148; Isabel Gabert, “Council Directive 2011/16/EU on Administrative Cooperation in the Field of Taxation”, (2011) 8 *European Taxation* 342-347

⁵² See Christiana HJI Panayi, ‘Exit taxation as an obstacle to corporate emigration from the spectre of EU tax law’, [2011] *Cambridge Yearbook of European Legal Studies* 245, 279-280

⁵³ See Article 2(g) of Directive 76/308/EEC, see *fn.50*

⁵⁴ See Article 7(3)(a) of 76/308/EEC

⁵⁵ *Mutual Assistance Directive for the Recovery of Taxes*, Article 1(a)

⁵⁶ See for example paragraphs 5 and 12 of the Preamble to the new Mutual Assistance Directive for Exchange of Information; Article 3(c)(ii) where companies are expressly included in the definition of ‘persons’, Article 6, Article 11(2)(a); Article 20 on costs etc.

⁵⁷ Arts 5-7, 9

⁵⁸ *Ibid*, Article 16

⁵⁹ *Ibid*, Article 17

for five types of income based on available information.⁶⁰ Income from employment, director's fees, life insurance products not covered by other Directives, pensions, ownership of and income from immovable property were subject to automatic exchange of information. This was in addition to exchange upon request and spontaneous exchange.⁶¹ There was an indication that the list could be extended to other categories of income and capital and especially dividends, capital gains and royalties, following Commission report to be submitted on 1 January 2017.⁶²

At the October ECOFIN 2014 meeting mentioned in Part 3(a), Member States agreed on a Commission proposal to apply the widest possible scope of automatic exchange of information within the European Union, to mirror the global standard of automatic information exchange agreed by the G20/OECD.⁶³ It was agreed that from 2017, Member State tax authorities would automatically exchange information with each other on most categories of income and capital held by private individuals and certain entities. Austria was to be given an additional year to apply the new rules, so as to have sufficient time to make the necessary technical adaptations.

Since its amendment on 9 December 2014, the Mutual Assistance Directive on Exchange of Information brings a list of financial information within the scope of the automatic exchange of information with effect from 1 January 2017. This information consists of interest, dividends and similar type of income, gross proceeds from the sale of financial assets and other income, and account balances. The revised Mutual Assistance Directive covers a wide scope of income and capital – including most of what was already covered by the revised Savings Directive – and matches all the financial information targeted by FATCA and the OECD's Common Reporting Standard, both of which are considered in this report. In order to have just one standard of automatic exchange and to avoid legislative overlaps, the Commission recommended the repeal of the Savings Directive to ensure that no loopholes are created or left for tax evaders – which eventually happened in November 2015.⁶⁴

Attention ought to be paid on certain novel aspects of the amended Mutual Assistance Directive on Exchange of Information. For example, there is a requirement that the data subject is notified of the proposed exchange in sufficient time to exercise his data protection rights.⁶⁵ It is not clear how this will be applied in the context of bulk information to be exchanged automatically. Arguably, notice could be deemed to have been given by some form of publication of the applicable tax rules on the relevant financial products. However, this is not guaranteed and the requirement of notification, if not properly addressed, could trump the underlying reasons behind the amendments.

Another important aspect of the Mutual Assistance Directive 2011/16/EU which remains in place following the amendments brought by the 2014 ECOFIN meeting, is the most-favourable clause. Under Article 19 of the Directive, where a Member State provides a wider

⁶⁰ See Article 8(1) which stipulated that the following would be subject to automatic exchange of information. Income from employment, director's fees, life insurance products not covered by other Directives, pensions, ownership of and income from immovable property.

⁶¹ Arts 5-7, 9

⁶² See Article 8(5)

⁶³ See Part 5 below

⁶⁴ See Part 3(a) above.

⁶⁵ See Article 1(5)(b) which require each reporting financial institution to inform each individual reportable person that data will be collected and transferred, and to do so in sufficient time for the reportable person to exercise his data protection rights.

cooperation to a third country than that provided for under the Directive, that Member State could not refuse to provide such wider cooperation to any other Member State wishing to enter into such mutual wider cooperation with that Member State. Also, under specific circumstances, information by a Member State from a third country may be transmitted to other Member States.⁶⁶

The combination of these clauses forced countries such as Luxembourg that entered into Intergovernmental Agreements with the US in the context of FATCA,⁶⁷ to provide financial information about capital, all income from capital and the balances of accounts to EU Member States. This was notwithstanding the fact that Luxembourg was not required to do so under the Savings Directive or Article 8 of the Mutual Assistance Directive. It is no surprise therefore that the exchange of information obligations under the Mutual Assistance Directive were subsequently officially amended to be aligned with FATCA and the OECD's Common Reporting Standard, without any disagreement by Member States. Most Member States would eventually be forced to exchange information at that level anyway, due to their FATCA-generated obligations.

The European Union is, however, going a step further in its initiatives on exchange of information. In the context of its Tax Transparency Package, in early 2015 the Commission published a proposal to further amend the Mutual Assistance Directive on Exchange of Information to include automatic exchange of tax rulings between Member States, on a quarterly basis. This proposal has recently been adopted and is reviewed below.

(c) Automatic Exchange of Tax Rulings – The Tax Transparency Package

On the 18 March, 2015, the Commission presented its Tax Transparency Package – the latest initiative of its ambitious agenda to tackle corporate tax avoidance and harmful tax competition in the EU. A key element was the proposal to introduce the automatic exchange of information between Member States on their tax rulings. The problem with tax rulings is that Member States shared very little information with one another about their tax rulings and it was at their discretion to decide whether a tax ruling might be relevant to another EU country. As a result, Member States were often unaware of cross-border tax rulings issued elsewhere in the EU which may impact their own tax bases. This lack of transparency was exploited by certain companies in order to artificially reduce their tax contributions.

As noted in the Commission Communication on tax transparency,⁶⁸ tax rulings which result in a low level of taxation in one Member State may entice companies to artificially shift profits to that jurisdiction. “Not only can this lead to serious tax base erosion for other Member States, but it can further incentivise aggressive tax planning and corporate tax avoidance.”⁶⁹

Under the 2011 version of the Mutual Assistance Directive on Exchange of Information, information on tax rulings can be exchanged on a spontaneous basis under certain

⁶⁶ *Ibid*, Article 24

⁶⁷ See Part 4 below.

⁶⁸ Communication from the Commission to the European Parliament and the Council on tax transparency to fight tax evasion and avoidance, COM(2015) 136 final (Brussels, 18.3.2015), p.4

⁶⁹ *Ibid*.

circumstances.⁷⁰ The Member State granting the tax ruling is, however, the only one to decide whether, and for whom, this information may be relevant. Moreover, it can refuse to spontaneously exchange information on the basis of its commercial secrecy laws or public policy. To address this situation, the Commission proposed new provisions on exchange of tax rulings to be built into the existing legislative framework for information exchange, through amendments to the Mutual Assistance Directive.⁷¹ This would enable the rapid implementation of automatic exchange of information on tax rulings, as the procedures and processes to do so were already in place.

This is not the first time that automatic exchange of tax rulings was considered within the European Union. During 2012, the Code of Conduct Group for Business Taxation had reviewed developments in Member States' procedures regarding tax rulings. The Group had identified the types of cross-border rulings on which information should be exchanged spontaneously and recommended the development of a Model Instruction that could be used by Member States for internal application.⁷²

Obviously, the scope of the Commission's proposal under the Tax Transparency Package is much more wide-ranging than this. Member States would be required to *automatically* exchange information on their tax rulings. Every three months, national tax authorities would have to send a short report to all other Member States on all cross-border tax rulings and advance pricing agreements⁷³ that they have issued after the date of entry into force of the suggested Directive, including those which were issued during the last 10 years but remain valid on 1 January 2016. Member States would then be able to ask for more detailed information on a particular ruling.

The exchange of information is expected to be carried out using a standard form that will be adopted by the Commission. The Commission will develop a database where information

⁷⁰ For example, if the country has grounds for assuming that there may be loss of taxation in another Member State and this information would be foreseeably relevant for the enforcement of the income tax law of that other Member State, or if a person liable to tax obtains a reduction in, or an exemption from, tax in one Member State which would give rise to an increase in tax or to liability to tax in the other Member State, or if the competent authority of a Member State has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises etc. See Article 9(1) of existing Mutual Assistance Directive 2011/16/EU, which sets out the scope and conditions of spontaneous exchange of information.

⁷¹ See Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, SWD(2015) 60 final, COM(2015) 135 final, 2015/0068 (CNS) Brussels, 18.3.2015. The proposed Directive would also update the rules in the existing Directive concerning the provision of feedback, the practical arrangements for information exchange and the evaluation of administrative cooperation so as to extend them to the automatic information exchange on advance cross-border rulings and advance pricing arrangements.

⁷² See Document 10903/12 FISC 77, mentioned in the proposal, p.3

⁷³ Under paragraph 5 of the proposed Article 8a of the Directive, (Scope and conditions of mandatory automatic exchange of information on advance cross-border rulings and advance pricing arrangements) the information to be communicated shall, as a minimum, include the following:

- (a) the identification of the taxpayer and where appropriate the group of companies to which it belongs;
- (b) the content of the advance cross-border ruling or advance pricing arrangement, including a description of the relevant business activities or transactions or series of transactions;
- (c) the description of the set of criteria used for the determination of the transfer pricing or transfer price itself in the case of an advance pricing arrangement;
- (d) the identification of the other Member States likely to be directly or indirectly concerned by the advance cross-border ruling or advance pricing arrangement;
- (e) the identification of any person, other than a natural person, in the other Member States likely to be directly or indirectly affected by the advance cross-border ruling or advance pricing arrangement

may be recorded and centralised for other Member States to detect certain abusive tax practices by companies and take the necessary action in response.⁷⁴ After the initial exchange, a Member State may request more details or the full text of the document if it can demonstrate that the information is foreseeably relevant.

The concept of advance tax ruling and advance pricing agreement are broadly defined to ensure there are no divergent interpretations which could enable Member States to circumvent their obligations.⁷⁵ Tax rulings and advance pricing agreements that cover purely domestic transactions or cross-border rulings that exclusively concern the tax affairs of natural persons are outside the scope of the proposal. It should be noted that the cross-border element does not seem to be restricted to EU Member States. To an extent, whether or not a transaction is a cross-border one does not appear to be well-defined.⁷⁶

The Mutual Assistance Directive provides for a general limitation, according to which the provision of information may be refused by Member States where it would lead to the disclosure of a commercial, industrial or professional secret, or of a commercial process, or of information whose disclosure would be contrary to public policy.⁷⁷ Under the proposal, this limitation would not apply with respect to the exchange of information on advance tax rulings and advance pricing agreements.⁷⁸ The Commission considers that such interests would be adequately protected under EU law and that the limited nature of the information that is required to be shared with all Member States should ensure sufficient protection of those commercial interests.

In its Communication accompanying the proposals of the Tax Transparency Package, the Commission argued that this initiative would encourage healthier tax competition, as tax authorities would be less likely to offer selective tax treatment to companies if this was open to scrutiny by their peers.⁷⁹ The automatic exchange of information on tax rulings would enable Member States to detect certain abusive tax practices by companies and take the necessary action in response.

In the Communication, the Commission also repeated its proposal to repeal the Savings Directive, as this text had since been overtaken by more ambitious EU legislation, which required the widest scope of automatic information exchange on financial accounts, including savings related income. Repealing the Saving Directive would also create a streamlined framework in this context and prevent any legal uncertainty or extra administration for tax authorities and businesses.

The Commission outlined a number of other initiatives to advance the tax transparency agenda in the EU. New transparency requirements for multinationals would be assessed, such as the public disclosure of certain tax information by multinationals. The Commission would

⁷⁴ See proposed paragraph 6 of proposed Article 8a which enables the possible creation by the Commission of a secure central directory concerning information communicated in the framework of this proposal.

⁷⁵ See proposed paragraphs 14-15 of Article 3.

⁷⁶ See amendment to Article 3 of the existing Directive – insertions of paras 14-15. Cross-border transaction is defined as follows: “[t]he cross-border transaction may involve, but is not restricted to, the making of investments, the provision of goods, services, finance or the use of tangible or intangible assets and does not have to directly involve the person receiving the advance cross-border ruling”.

⁷⁷ Article 17(4)

⁷⁸ Article 8a(9). Also see preamble, paragraph 5.

⁷⁹ Communication from the Commission to the European Parliament and the Council on tax transparency to fight tax evasion and avoidance, COM(2015) 136 final (Brussels, 18.3.2015), p.4

consider the benefits, costs and necessary safeguards in terms of data protection, protection of business secrets etc. It would also examine how it would affect international competitiveness. Impact assessment work would be launched to analyse the various possible options. The OECD's BEPS work on transparency requirements would also need to be considered, as well as the costs and benefits of transposing such rules into EU law.⁸⁰

Also, the Code of Conduct on Business Taxation was to be reviewed. It was noted that over the past years, the Code had become less effective in addressing harmful tax regimes as its criteria did not take into account more sophisticated corporate tax avoidance schemes. The Commission would therefore work with Member States to review the Code of Conduct as well as the mandate of the Code of Conduct Group in order to make it more effective in ensuring fair and transparent tax competition within the EU.⁸¹

Further work would also be undertaken towards the better quantification of the tax gap.⁸² The Commission, along with Eurostat, would work with Member States to see how a reliable estimate of the level of tax evasion and avoidance can be reached. The Commission would also continue to promote greater transparency internationally, furthering the OECD's efforts through its BEPS project.

As a follow-up, legislative proposals would be submitted to the European Parliament for consultation and to the Council for adoption. It was hoped that Member States would agree on the proposal for automatic exchange of tax rulings by the end of 2015, so that it can enter into force on 1 January 2016. On 6 October 2015, the Commission announced that Member States had reached an agreement on the automatic exchange of tax rulings,⁸³ with some amendments to the initial proposal.⁸⁴

The Commission's Tax Transparency package has been hailed as revolutionary by Commissioner for Taxation Pierre Moscovici, but also by the OECD Secretary-General Angel Gurría, who urged Member States to resist aggressive lobbying to weaken the legislation.⁸⁵ At a joint hearing by members of the Special Tax Rulings Committee and the

⁸⁰ *Ibid*, p.5

⁸¹ *Ibid*, p.6

⁸² *Ibid*, p.6. It was explained that the tax gap is the difference between tax that is due and the amount actually collected by national authorities. Tax evasion and avoidance were not the only contributors to the tax gap – administrative errors and bankruptcies also played a role.

⁸³ See Press Release on 6 October 2015, available on: http://europa.eu/rapid/press-release_IP-15-5780_en.htm

⁸⁴ E.g. the initial proposal would have required EU Member States to automatically exchange information on cross-border tax rulings and APAs that were issued over the last 10 years, on a quarterly basis. The revised proposal reduces the retroactive period to five years. Advance cross-border rulings and APAs issued, amended or renewed after 31 December 2011 would now fall within the scope of new rules, provided that advance rulings or APAs are still valid on 1 January 2017. Rulings that are no longer valid on 1 January 2017 would also fall within the scope of new rules, provided they are issued, amended or renewed after 31 December 2013. Rulings and APAs concerning SMEs that meet a group-wide annual net turnover of a maximum of €40 million, do not have to be exchanged if issued, amended or renewed before 1 April 2016. The exemption does not apply to companies conducting mainly financial or investment activities. There is some protection of trade secrets. The information to be disclosed would include a summary of the ruling, including a description of the relevant business activities or transactions, but exclude the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy. For an update, see Christiana HJI Panayi, "European Tax Law: Legislation and Political Initiatives", in *Gore-Browne EU Company Law* (Jordans Publishing).

⁸⁵ Stephanie Soong Johnston, "OECD Chief Hails EU Tax Transparency Package as 'Revolutionary'", 2015 WTD 62-1 (1 April, 2015)

Economic and Monetary Affairs committees, Moscovici repeated calls for measures ensuring tax fairness in the EU.⁸⁶ He called for a single market for taxation.

The European has certainly been living up to its pledge of tackling tax evasion and aggressive tax planning. Whether the measures on enhanced transparency will improve Member States' capacity to address harmful tax practices and profit shifting beyond EU borders, without having a detrimental impact on the international competitiveness of EU companies remains to be seen.⁸⁷

(d) Rubik Agreements

The so-called Rubik Agreements are agreements aimed at resolving past liabilities from undeclared assets and to enforce a withholding tax for the future. Specifically, the Rubik Agreements provide for source taxes on interest of saving accounts without disclosing the taxpayer's name. Switzerland has entered into such agreements with other Member States.⁸⁸ Although Switzerland is not an EU Member State, Rubik Agreements are considered in the context of automatic exchange of information in the European Union.

Similar to the initial version of the Savings Directive, under Rubik Agreements, the withholding tax acts as a substitute for reporting and enables taxpayers not to declare their offshore income in their country of residence. A bank acts as a paying agent – it withholds a tax on the accounts, without revealing the identity of the owners. In return, the country of residence receives anonymously the tax revenues generated by the withholding tax. As such, banking secrecy is preserved. The tax only affects private individuals resident in the countries covered by the agreements. Certain items of income are not included under Rubik Agreements (i.e. wages, directors' fees, royalties etc). Therefore, there is a huge incentive to transform interests into these kinds of income so as not to suffer withholding tax or face disclosure.

So far, Switzerland has entered into such agreements with the United Kingdom⁸⁹ and Austria.⁹⁰ A Rubik Agreement was also signed with Germany on 21 September 2011,⁹¹ but

⁸⁶ See comments made at Special Tax Rulings Committee and the Economic and Monetary Affairs Committees. Available on: <http://www.europarl.europa.eu/news/en/news-room/content/20150330IPR39428/html/Moscovici-Corporate-profits-should-be-taxed-where-value-is-created>

⁸⁷ For a discussion, see Christiana HJI Panayi, *Advanced Issued in International and European Tax Law*, (Hart Publishing, 2015), chapter 9.

⁸⁸ Some scholars consider the Savings Directive and the related equivalent agreements to be Rubik Agreements as well. See, generally, Pasquale Pistone, "Exchange of Information and Rubik Agreements: The Perspective of an EU Academic", [2013] 4/5 Bulletin for International Taxation 216-225; Vokhidjon Urino, "The Rubik Model: An Alternative for Automatic Tax Information Exchange Regimes?", [2015] 2 Bulletin for International Taxation; Xavier Oberson, "The Development of International Assistance in Tax Matters in Switzerland: From Evolution to Revolution" 53 [2013] 8 European Taxation 368-377; M. Joosen, Rubik Agreements, in Günther & Tüchler (eds.), *Exchange of Information for Tax Purposes*, Vol. 80, Linde, Vienna (2013), pp. 243-244; Leopoldo Parada, "Intergovernmental Agreements and the Implementation of FATCA in Europe", 7 [2015] 2 World Tax Journal; Miranda Stewart, "Transnational Tax Information Exchange Networks: Steps towards a Globalized, Legitimate Tax Administration", 4 [2012] 2 World Tax Journal 152-179

⁸⁹ The Switzerland-United Kingdom was signed on 6 October 2011 and modified on 20 March 2012. See Agreement between the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland on Cooperation in the Area of Taxation (6 Oct. 2011), supplemented by Protocol Amending the Agreement between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation on

the German Parliament rejected its ratification on 12 December 2012. It has been reported that negotiations for similar agreements were underway between Switzerland and Belgium, Greece and Italy.

In general terms, these agreements take a contrary approach to the prioritization of exchange of information. However, the recent conclusion of the EU-Switzerland Tax Transparency Agreement 2015 which formally implements the OECD's Common Reporting Standard, combined with the formal commitment of the UK and Austria to move to automatic exchange of information suggests that the current withholding tax agreements that Switzerland maintains with Austria and the United Kingdom will eventually cease to apply.

More specifically, on 27 May 2015, the European Union and Switzerland signed an agreement on the automatic exchange of financial account information, aimed at improving international tax compliance.⁹² Technically, the European Union and Switzerland signed a Protocol which amended their existing 2004 Savings agreement and transformed it into an agreement on automatic exchange of financial account information based on the OECD's global standard.⁹³ Under the revised agreement the European Union and Switzerland will automatically exchange information on the financial accounts of each other's residents, starting in 2018. The information to be exchanged relates not only to income such as interest and dividends, but also account balances and proceeds from the sale of financial assets.

The revised agreement represents a significant step forward for the European Union in its fight to combat tax fraud and tax evasion. The revised agreement also takes into account the provisions of the new Mutual Assistance Directive discussed in Part 3(b). The existing EU-Switzerland Savings agreement will continue to be operational until 31 December 2016. From 1 January 2017, financial institutions in the EU and Switzerland will commence the due diligence procedures envisaged under the new revised agreement to identify customers who are reportable persons, i.e. for Switzerland, residents of any EU Member State. By September 2018, the national authorities will report the financial information to each other.

The revised agreement is also aligned with the OECD's Common Reporting Standard examined in Part 5 below. Whilst the EU-Switzerland tax agreement is likely to override the existing Rubik agreements, nevertheless it is not inconceivable that such withholding tax

Cooperation in the Area of Taxation, Signed at London on 6 October 2011 (20 Mar. 2012). Also available at: www.hmrc.gov.uk/taxtreaties/ukswiss.htm

⁹⁰ The Austria-Switzerland was signed on 13 April 2012. See Abkommen zwischen der Schweizerischen Eidgenossenschaft und der Republik Österreich über die Zusammenarbeit in den Bereichen Steuern und Finanzmarkt (Agreement between Switzerland and the Austrian Republic on the Future Tax Treatment of Capital Investment Income and the Treatment of Previously Undeclared Funds) (13 Apr. 2012). Also available at:

www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2012_III_192/COO_2026_100_2_831370.pdf

⁹¹ Abkommen zwischen der Schweizerischen Eidgenossenschaft und der Bundesrepublik Deutschland über Zusammenarbeit in den Bereichen Steuern und Finanzmarkt (21 Sept. 2011), supplemented by Protokoll zur Änderung des Abkommens Zwischen der Bundesrepublik Deutschland und Schweizerischen Eidgenossenschaft über Zusammenarbeit in den Bereichen Steuern und Finanzmarkt (5 Apr.2012).

⁹² See agreement, available at: <http://data.consilium.europa.eu/doc/document/ST-8297-2015-INIT/en/pdf>. Also see Press Release 367/15, dated 27 May 2015, available at: <http://www.consilium.europa.eu/en/press/press-releases/2015/05/27-eu-switzerland-taxation-agreement/>

⁹³ See Decision on the signature and conclusion of an Agreement between the EC and Switzerland providing for measures equivalent to those laid down in the Directive, adopted by Council in 2 June 2004. The Agreement was signed on 26 October 2004

agreements may be used in the future by countries with negotiating power which refuse to adopt standards of automatic exchange of information.

(4) FATCA

A more far-reaching initiative on exchange of information is the Foreign Account Tax Compliance Act (FATCA),⁹⁴ which was enacted following the UBS offshore tax-evasion scandal and President Obama's campaign commitment to crack down on offshore tax evasion.⁹⁵ FATCA creates a new information reporting and withholding tax regime on financial accounts of US persons held in foreign financial institutions and other foreign entities. Congress enacted FATCA to make it more difficult for (resident and non-resident) US persons to hide financial assets which are not located in the US.

Under FATCA, foreign financial institutions (FFIs) such as banks, funds, certain brokers, trusts and trust companies must report information on financial accounts of US persons and foreign entities with significant US ownership directly to the Internal Revenue Service ("IRS"). Reportable accounts are financial accounts maintained by the FFI where the account holder is either a specified US person (which includes any individual who is a citizen or resident of the United States) or is a non-US entity with controlling persons that include one or more specified US persons. Controlling persons are individuals who exercise control over an entity. FFIs must report the account balance or value of each US account and the amount of dividends, interest, other income, and gross proceeds from the sale of property credited to a US account. There are certain thresholds. For natural person, the foreign financial assets must exceed \$50,000 to be reportable and for a legal person, they must exceed \$250,000.

The objective of FATCA is the reporting of foreign financial assets; withholding is the cost of not reporting. Non-compliance with the FATCA legislation leads to a 30% withholding tax. This is imposed on specified payments from US sources and on the proceeds from disposing of certain US investments ("withholdable payments") on FFIs that do not comply with FATCA and have not become participating FFIs. The withholding tax applies to a wide range of payments from the United States to the non-participating FFIs, regardless of whether the payments benefit US persons, non-US customers of the institution, or the institution itself. FATCA also requires that participating FFIs impose a withholding tax on payments to non-participating FFIs in cases where the funding for those payments could be attributed to withholdable payments.

At the early stages of the enactment of this legislation, FATCA was widely criticised. This was because compliance with FATCA in the manner provided for in the legislation required FFIs in many jurisdictions to violate contractual relationships as well as data protection, bank secrecy, and other laws of the jurisdiction in which they are located.⁹⁶ Moreover, it was clear

⁹⁴ US: Foreign Account Tax Compliance Act. This Act represents US: Internal Revenue Code of 1986 (IRC), chapter 4 and was introduced as an amendment of 18 Mar. 2010, enacted as Title V of Public Law 111-147 or the Hiring Incentives to Restore Employment Act. The salient sections of the IRC are sections 1471 to 1474.

⁹⁵ Itai Grinberg, *Beyond FATCA: An Evolutionary Moment for the International Tax System* (Working Paper, available on: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1996752)

⁹⁶ Itai Grinberg, "Taxing Capital Income in Emerging Countries: Will FATCA Open the Door?", 5 (2013) 3 World Tax Journal 325-367

even before FATCA came into effect that the US could not unilaterally achieve near-comprehensive participation of financial institutions.⁹⁷

Above all, the compliance and implementation costs for FFIs were also thought to be disproportionate, considering the rather limited projected benefits to the US fisc.⁹⁸ The Congressional Joint Committee on Taxation had estimated that FATCA would generate additional tax revenue of approximately \$8.7 billion over the next ten years.⁹⁹ Industry sources believed that overall private sector implementation costs could equal or exceed the amount that was projected to be raised from FATCA.¹⁰⁰ Furthermore, the IRS costs associated with long-term development and implementation of the FATCA regime had not been systematically quantified.¹⁰¹

Following intense lobbying by many countries and financial institutions worldwide, in 2012, the US Treasury announced a new multilateral approach to implementing FATCA. The US Treasury and the finance ministries of five large European governments (France, Germany, Italy, Spain, and the United Kingdom) issued a joint statement announcing that they had reached an intergovernmental agreement for implementing FATCA.¹⁰² In this joint statement, these countries committed to work together to achieve common reporting and due diligence standards for financial institutions in order to support a move to a more global system to combat offshore tax evasion. The intergovernmental approach adopted in the joint statement was based on reporting by financial institutions to the tax authority of the country in which they are located, followed by reciprocal *automatic* information exchange between governments. This intergovernmental approach would allow FFIs to rely on information they have already collected under anti-money laundering and “know your customer” rules to determine whether or not they have US taxpayers as clients and thus must collect and disclose information about them under FATCA.¹⁰³

By July 2012 the US Treasury and the aforementioned European countries had turned the joint statement into a detailed model intergovernmental agreement - the Model Intergovernmental Agreement to Improve International Tax Compliance and to Implement FATCA (the Model IGAs). Initially, two versions of the IGAs were issued: Model 1 and Model 2.¹⁰⁴ The Models were refined and updated in 6 June 2014.¹⁰⁵ For US purposes, the

⁹⁷ Itai Grinberg (2013), fn.96, p.331

⁹⁸ See KPMG, *FATCA and the Funds Industry: Defining the Path* (2011); Alicja Brodzka, “*The Road to FATCA in the European Union*”, 53 (2013) 10 *European Taxation* 517-521, referring to the Swiss-American Chamber of Commerce’s Report (2011) on FATCA; Leopoldo Parada, “*Intergovernmental Agreements and the Implementation of FATCA in Europe*”, fn. 88; Maryte Somare and Viktoria Wöhler, “*Two Different FATCA Model Intergovernmental Agreements: Which is Preferable? – A Comparison of FATCA Model 1A and Model 2 Intergovernmental Agreements*”, (2014) 8 *Bulletin for International Taxation* 395

⁹⁹ See JCT, JCX-5-10, JCT Estimates Budget Effect of HIRE Act (Feb. 23, 2010).

¹⁰⁰ See *Taxpayer Advocate Service — 2013 Annual Report to Congress — Volume One*, p. 243 and references in <http://www.taxpayeradvocate.irs.gov/2013-annual-report/downloads/REPORTING-REQUIREMENTS-The-Foreign-Account-Tax-Compliance-Act-Has-the.pdf>

¹⁰¹ *Ibid.*

¹⁰² See Press Release, US Dep’t of Treasury, Joint Statement From the United States, France, Germany, Italy, Spain and the United Kingdom Regarding an Intergovernmental Approach to Improving International Tax Compliance and Implementing FATCA (7 Feb. 2012), http://www.treasury.gov/press-center/press-releases/Documents/020712_Treasury_IRS_FATCA_Joint_Statement.pdf

¹⁰³ Brodzka (2013) fn. 98

¹⁰⁴ US Treasury Department, Treasury releases Model Intergovernmental Agreement for Implementing the Foreign Account Tax Compliance Act to Improve Offshore Tax and Reduce Burden, Press Center (26 July 2012), available at <http://www.treasury.gov/press-center/press-releases/Pages/tg1653.aspx>.

Treasury Department has adopted the position that an IGA, like a Tax Information Exchange Agreement, is an executive agreement and not a treaty, and as such does not require the approval of the US Senate.¹⁰⁶

There are two variations of the IGA Model 1.¹⁰⁷ Firstly, there is the reciprocal version (Model 1A) that provides for the United States to exchange information currently collected on accounts held in US financial institutions by residents of partner countries. Accordingly, the reciprocal version is available only to jurisdictions that have in effect an income tax treaty or tax information exchange agreement with the United States and with respect to governments which have in place robust protections and practices to ensure that the information remains confidential and that it is used solely for tax purposes. There is a policy commitment to pursue regulations and support legislation that would provide for equivalent levels of exchange by the United States.

There is also the non-reciprocal version (Model 1B), where no reciprocal exchange of information takes place. The non-reciprocal version is available in a format both for countries with and without a pre-existing income tax treaty or TIEA with the United States.¹⁰⁸

Under both versions of the IGA Model 1, there is a framework for reporting certain financial account information by FFIs to their respective tax authorities, followed by automatic exchange of such information under existing bilateral tax treaties or TIEAs. Both versions of the IGA Model 1 include the “most favoured nation” clause with respect to other partner jurisdictions,¹⁰⁹ in that a partner jurisdiction is entitled to the benefit of any more favorable provision agreed to in a comparable IGA with another partner jurisdiction, subject to certain conditions.¹¹⁰

IGA Model 2¹¹¹ provides for direct reporting by an FFI to the IRS under its FFI Agreement or registration process, with group or aggregate reporting of recalcitrant account holders by the foreign government in response to a subsequent US request for exchange of information. Under this model, foreign governments only get involved when there is a request for exchange of information by the IRS. Under IGA Model 2, the IRS is able to make group requests to the foreign country based on the aggregate information reported to it by an FFI

¹⁰⁵ More information about the IGA Models is available at <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx#ModelAgreements>

¹⁰⁶ Carol P. Tello, “*FATCA: Catalyst for Global Cooperation on Exchange of Tax Information*”, (2014) 2 Bulletin for International Taxation 88, 93

¹⁰⁷ A full text of the IGA Model 1A (6 June 2014) is available at <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Reciprocal-Model-1A-Agreement-Preexisting-TIEA-or-DTC-6-6-14.pdf>.

¹⁰⁸ See a full text of the non-reciprocal version IGA Model 1B (6 June 2014), with and without pre-existing Double Tax Treaty or TIEA, available at <https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Model-2-Agreement-Preexisting-TIEA-or-DTC-6-6-14.pdf> and <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Nonreciprocal-Model-1B-Agreement-No-TIEA-or-DTC-6-6-14.pdf>, respectively.

¹⁰⁹ Article 7 of the IGA Model 1A and IGA Model 1B

¹¹⁰ See Revised Timeline and Other Guidance Regarding the Implementation of FATCA, IRS Notice 2013-43, pp.3-4

¹¹¹ The IGA Model 2 was originally released by the US Treasury Department on 14 November 2012. See Tax Analysts, Treasury released Model 2 Agreement to implement FATCA, 2012 TNT 222-15 or Doc 2012-23541 (14 Nov. 2012). The full text of the updated IGA Model 2 (with and without pre-existing Double Tax Treaty or Exchange of Information Agreement) dated on 6 June 2014 is available at <https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Model-2-Agreement-Preexisting-TIEA-or-DTC-6-6-14.pdf> and <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Model-2-Agreement-No-TIEA-or-DTC-6-6-14.pdf>.

and based upon the standards in the relevant exchange of information treaty provision.¹¹² The foreign country then has six months to provide the information in the same format in which it would have been reported if the reporting FFI had reported it directly to the IRS. Under the IGA Model 2, the FATCA partner is again granted the “most favoured nation” status with respect to other partner jurisdictions. It should also be noted that Model 1 IGAs and Model 2 IGAs also contain a coordination provision, pursuant which a partner jurisdiction may permit its FFIs to use a definition in the relevant US Treasury Regulations in lieu of a corresponding definition in the IGA, provided that such application would not frustrate the purposes of the relevant IGA.¹¹³

As noted above, the mainstream FATCA legislation includes the threat of a withholding tax as a punitive measure. However, this sanction is only triggered in IGAs in certain specified circumstances. Financial institutions in Model 1 IGA partner countries will be treated as compliant if they report information regarding US reportable accounts to their domestic authorities annually and register with the IRS website to get a Global Intermediary Identification Number (GIIN). As the information will be exchanged between the competent authorities under this Model, reporting FFIs in Model 1 IGA countries are not required to enter into an FFI Agreement with the IRS. In addition to registration requirements, FFIs are required to comply with other reporting requirements set out in the model. Non-compliance with the requirements does not immediately activate the withholding regime. An FFI is reclassified as a non-participating FFI when the competent US authority identifies cases of significant non-compliance and such cases are not remedied within 18 months.

Under Model 2 IGA, FFIs will be deemed compliant if they register with the IRS on the relevant website, obtain a GIIN and comply with their FFI Agreement,¹¹⁴ which reporting FFIs in Model 2 IGA countries have to enter into (e.g. Switzerland and Japan). Again, if significant non-compliance is identified by the competent US authority, then the FFI will be reclassified as non-participating if it does not remedy the non-compliance within 12 months.

The information to be reported is in substance the same under both Models, though the procedure is different. The reciprocal character of Model 1A means that the competent authorities of the FATCA partner countries have much more responsibility than under Model 2. The competent authorities of FATCA partner countries subject to Model 2 IGA perform a supporting role in the exchange of information.¹¹⁵ The implementation and administration costs are much higher under Model 1 than Model 2, as under Model 2 the costs are largely shifted to the financial institutions.

To an extent, the overall application of FATCA through the IGAs does not really ensure reciprocity by the US to its FATCA partner countries and may not be as effective to them. Even Model 1A IGA which is considered the reciprocal one provides only for partial reciprocity. Partner countries are committed to collect information on all income earned through financial accounts of US persons, gross proceeds received in those accounts and the balance of those accounts. In contrast, the obligation of the US government to report is limited to those types of accounts on which the United States has authority to collect

¹¹² Art 2(2) of Model 2 IGA

¹¹³ See Revised Timeline and Other Guidance Regarding the Implementation of FATCA, IRS Notice 2013-43, p.4

¹¹⁴ See info on <http://www.irs.gov/pub/irs-drop/rp-14-38.pdf>

¹¹⁵ Somare & Wohrer (2014) *fn.* 98

information under current US laws.¹¹⁶ In fact, the limitations on reciprocity are acknowledged in the Model 1A IGA and the need for the US government to achieve equivalent levels of reciprocal automatic information exchange is raised.¹¹⁷ It is stated that the US is committed to further improve transparency and enhance the information exchange relationship with the FATCA partner country “by pursuing the adoption of regulations and advocating and supporting relevant legislation to achieve such equivalent levels of reciprocal automatic exchange”.¹¹⁸

Overall, it has been argued that the decision to modulate some of the most coercive and extraterritorial parts of FATCA is consistent with the joint statement declaration that a collaborative approach would ensure that other countries and institutions join an automatic information exchange system.¹¹⁹ Such a collaborative approach was more likely to achieve universal or near-universal compliance with FATCA than unilateral action. Moreover, the reporting and due diligence standards of Model 1 IGAs are widely viewed as being less commercially onerous than the original FATCA regulations.

Perhaps the ultimate contribution of IGAs is that they have not only served the purpose of eliminating the potential conflicts of laws issues of the initial FATCA legislation, but they have indirectly constituted an inspirational model for international cooperation in the automatic exchange of information. Certainly, the enactment of FATCA-generated obligations *in general* has accelerated and advanced progress towards the goal of efficient, automatic and global tax information exchange. FATCA and its by-products have undeniably been the catalyst for a general move towards automatic exchange of information as a norm, now encompassed in the OECD’s Common Reporting Standard discussed below.

(5) The OECD’s Common Reporting Standard

Following the development of the FATCA IGAs, several European countries announced their intention to develop and pilot multilateral tax information exchange agreements based on the Model 1 IGA. On 9 April 2013, the Ministers of Finance of France, Germany, Italy, Spain and the UK announced their intention to exchange FATCA-type information amongst themselves in addition to exchanging information with the United States. On 13 April, 2013 more countries expressed interest in this approach,¹²⁰ which by May 2013 had already been endorsed by 17 countries.¹²¹ Furthermore, the UK agreed to automatically exchange information, on the basis of the intergovernmental approach with its Crown Dependencies and many of its Overseas Territories.

Most importantly, on 19 April 2013, the G20 Finance Ministers made an important endorsement of automatic exchange of information as the expected new standard and requested the OECD to develop the legal framework for this standard. This was the first time

¹¹⁶ Grinberg (2013) fn.96, p.334. He notes that in fact the income that the US will provide is more limited and there is no account balance reporting.

¹¹⁷ See Article 6(1) of Model Intergovernmental Agreement to Improve Tax Compliance and to Implement FATCA. This is the reciprocal Model 1A IGA. Available on: <http://www.treasury.gov/press-center/press-releases/Documents/reciprocal.pdf>

¹¹⁸ Ibid.

¹¹⁹ Itai (2013) fn.96

¹²⁰ Belgium, the Czech Republic, the Netherlands, Poland, and Romania

¹²¹ Mexico and Norway joined the initiative in early June and Australia in July of 2013.

that automatic exchange of information was accepted at such a high-level internationally and plans for its standardisation foreshadowed. To an extent, it was recognised that a proliferation of different and inconsistent models would impose significant compliance costs on both governments and financial institutions. Uniformity and simplification would translate to higher effectiveness and lower costs for all stakeholders concerned. Following this official endorsement, the OECD published a report entitled “*A step change in tax transparency*” which set out the concrete steps that needed to be undertaken to put a global model of automatic exchange in practice.¹²² The report was welcomed by the G8 leaders on 19 June 2013.

On 6 September 2013, the G20 Leaders formally committed to automatic exchange of information as the new global standard and fully supported the OECD’s work in this area. The standard would oblige countries and jurisdictions to obtain all financial information from their financial institutions and exchange that information automatically with other jurisdictions on an annual basis. The standard drew extensively on the intergovernmental approach to implementing FATCA, with a view to maximizing efficiency and reducing cost for financial institutions. On 23 February 2014, the G20 Finance Ministers endorsed the Common Reporting Standard¹²³ for automatic exchange of tax information.¹²⁴

On 19 March 2014, there was a joint statement of an Early Adopters Group.¹²⁵ In this joint statement, more than 40 countries committed to early adoption of the Common Reporting Standard.¹²⁶ The Early Adopters Group committed to a specific and ambitious timetable leading to the first automatic information exchanges in 2017. The first exchange of information in relation to new accounts and pre-existing individual high value accounts would take place by the end of September 2017.¹²⁷ Information about pre-existing individual low value accounts and entity accounts would either first be exchanged by the end of September 2017 or September 2018 depending on when financial institutions identify them as reportable accounts. It was recognised that “only those financial centres which adopt the highest standards in tax transparency and work in close cooperation to tackle cross-border tax evasion will prosper in the future”.¹²⁸

¹²² OECD, *A Step change in Tax Transparency - OECD Report for the G8 Summit, Lough Erne, Enniskillen*, (June 2013). Available on: http://www.oecd.org/ctp/exchange-of-tax-information/taxtransparency_G8report.pdf

¹²³ In this paper, the terms standard, CRS and common reporting standard are used interchangeably.

¹²⁴ OECD, Standard for Automatic Exchange of Financial Account Information: Common Reporting Standard <http://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-financial-account-information-common-reporting-standard.pdf> (CRS Report)

¹²⁵ Joint Statement of Early Adopters Group available on: <http://www.oecd.org/tax/transparency/AEOI-early-adopters-statement.pdf>

¹²⁶ The early adopters were the following: Argentina, Belgium, Bulgaria, Colombia, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, the Faroe Islands, Finland, France, Germany, Greece, Greenland, Hungary, Iceland, India, Ireland, Italy, Korea, Latvia, Liechtenstein, Lithuania, Malta, Mauritius, Mexico, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Seychelles, Slovakia, Slovenia, South Africa, Spain, Sweden, and the United Kingdom; the UK’s Crown Dependencies of Isle of Man, Guernsey and Jersey; and the UK’s Overseas Territories of Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Gibraltar, Montserrat, and the Turks & Caicos Islands.

¹²⁷ Pre-existing accounts would be those that are open on 31 December 2015 and new accounts would be those opened from 1 January 2016. Hence, new account opening procedures to record tax residence would need to be in place from 1 January 2016. The due diligence procedures for identifying high-value pre-existing individual accounts would be required to be completed by 31 December 2016, while the due diligence for low-value pre-existing individual accounts and for entity accounts would be required to be completed by 31 December 2017.

¹²⁸ See Joint Statement of Early Adopters Group, *fn.* 125.

On 6 May 2014, the OECD Declaration on Automatic Exchange of Information in Tax Matters was endorsed by all 34 member countries along with several non-member countries.¹²⁹ The Declaration broadly affirmed the intention to adopt the OECD Standard for Automatic Exchange of Financial Account Information (the Standard) “swiftly, on a reciprocal basis”¹³⁰ and called upon “all financial centers to implement the new single global standard without delay.”¹³¹

In addition, the Declaration called on the OECD’s Committee on Fiscal Affairs, working with G20 members, to “proceed rapidly with the elaboration of a) a detailed commentary to help ensure the consistent application of the new single global standard and b) the remaining technical modalities and safeguards including information and guidance on the necessary technical solutions, a standard format for reporting and exchange, and minimum standards on confidentiality”.¹³² The remaining elements of the work would be finalized and approved by mid-2014. The Declaration also recorded the need for assistance to be provided to developing countries so that they may be able to reap the benefits of this form of co-operation.¹³³ The Declaration committed countries to implement the new single global standard on automatic exchange of information. More than 60 countries and jurisdictions had committed to early adoption of the standard by then, and additional Global Forum members were expected to join this group in the coming months.

On 21 July 2014, the OECD released the full version of the Standard for Automatic Exchange of Financial Account Information in Tax Matters.¹³⁴ The Standard was approved by the OECD Council on 15 July 2014.

The Standard provides for annual automatic exchange of financial account information between governments. It sets out the financial account information to be exchanged, the financial institutions that need to report, the different types of accounts and taxpayers covered, as well as common due diligence procedures to be followed by financial institutions. The financial information to be reported with respect to reportable accounts includes all types of investment income (including interest, dividends, income from certain insurance contracts and other similar types of income) but also account balances and sales proceeds from financial assets. The reportable accounts include accounts held by individuals and entities, which encompasses trusts and foundations. There is a requirement to look through passive entities to report on the individuals that ultimately control these entities.

The financial institutions that are required to report under the Standard include banks and custodians but also other financial institutions such as brokers, certain collective investment vehicles and certain insurance companies.¹³⁵ The range of financial institutions required to

¹²⁹ See OECD, *Declaration on Automatic Exchange of Information in Tax Matters, Adopted on 6 May 2014*. Available on: <http://www.oecd.org/ctp/exchange-of-tax-information/countries-commit-to-automatic-exchange-of-information-in-tax-matters.htm>

¹³⁰ See para 4 of the Declaration

¹³¹ See para 5 of the Declaration

¹³² See para 7 of the Declaration

¹³³ See para 6 of the Declaration. Also see Ernst & Young Global Tax Alert, 13 May 2014. Available on: <http://www.ey.com/GL/en/Services/Tax/International-Tax/Alert--Additional-countries-issue-statement-of-public-support-for-adoption-of-the-OECDs-Common-Reporting-Standard>

¹³⁴ See Standard for Automatic Exchange of Financial Account Information Report, available on: http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/standard-for-automatic-exchange-of-financial-account-information-for-tax-matters_9789264216525-en#page1

¹³⁵ Standard for Automatic Exchange of Financial Account Information Report, Section VIII A and B

report under the Standard is greater than under FATCA. Financial institutions subject to the Standard are referred to as Reporting Financial Institutions and exempt financial institutions are referred to as Non-Reporting Financial Institutions. Non-Reporting Financial Institutions are considered to be a low risk for use by non-residents to evade their tax obligations.¹³⁶ Each country is required to identify any other entities that are exempt from reporting.

Pre-existing financial accounts held by reportable entities will not be reported if the aggregate account balance or value does not exceed USD 250,000 as of December 31 of a reportable year. The account becomes reportable if the account balance exceeds USD 250,000 as of December 31 of any subsequent calendar year. New financial accounts held by reportable entities are to be reported irrespective of the account balance. There is no *de minimis* threshold as regards the reporting of pre-existing and new financial accounts held by individuals.¹³⁷

The Standard also describes the due diligence procedures that must be followed by financial institutions to identify reportable accounts. Reporting financial institutions are required to undertake due diligence procedures to identify financial accounts that have a non-resident account holder in a reportable jurisdiction.¹³⁸ The due diligence requirements vary depending on whether the account is held by an individual or entity. It also varies depending on whether the account is a pre-existing or a new account. It is more difficult and costly to collect information on pre-existing accounts. In addition, the due diligence procedures require financial institutions to look through certain entities (passive non-financial entities) to report on accounts that have a controlling person who is a non-resident. This is intended to limit the opportunities for taxpayers to circumvent reporting by using interposed legal entities.

The full version of the Standard includes commentaries and guidance for implementation by governments and financial institutions, detailed model agreements, as well as standards for harmonised technical and information technology modalities, notably a standard format and requirements for secure transmission of data. A country adopting the Standard must be or become a party to the Council of Europe/OECD Multilateral Convention on Mutual Assistance in Tax Matters which creates the legal framework for automatic exchange of information. It must also sign a Multilateral Competent Authority Agreement containing provisions of the Standard, to operationalise the automatic exchange of information.

Overall, the Standard provides a framework for governments regarding the financial account information to be collected by their financial institutions, and the different types of accounts and taxpayers covered, as well as common due diligence procedures to be followed by the financial institutions. The Multilateral Competent Authority Agreement specifies what information is to be exchanged and when. It contains detailed rules on confidentiality, safeguards and the existence of the necessary infrastructure for an effective exchange relationship. It also deals with practical issues, such as the timing and format of the exchange.

¹³⁶ The most significant Non-Reporting Financial Institutions are:

1. governmental entities, international organisations or central banks;
2. broad or narrow participation retirement funds, or Qualified Credit Card Issuers; and
3. any other entities that present a low risk of being used to evade tax, have substantially similar characteristics to any of the entities described in paragraphs 1 and 2, and are defined in the implementing legislation as a Non-Reporting Financial Institutions, provided that the status as a Non-Reporting Financial Institution does not frustrate the purposes of the CRS. See Standard for Automatic Exchange of Financial Account Information Report, Section VIII C17.

¹³⁷ Ibid, Section I, para 11

¹³⁸ Ibid, Sections II to VII

The Multilateral Competent Authority Agreement essentially links the OECD's Standard and the legal basis for the exchange, allowing the financial account information to be exchanged.

The Standard will need to be translated into domestic law, whereas the Multilateral Competent Authority Agreement can be executed within existing legal frameworks such as Article 6 of the Council of Europe/OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters or the equivalent of Article 26 in a bilateral tax treaty. Before entering into a reciprocal agreement to exchange information automatically with another country, it is essential that the receiving country "has the legal framework and administrative capacity and processes in place to ensure the confidentiality of the information received and that such information is only used for the purposes specified in the instrument".¹³⁹ Overall, the Standard draws extensively on the earlier work of the OECD relating to automatic exchange of information, the US FATCA and the EU's Savings Directive reviewed in Parts 3 and 2(a) respectively.

As far as the OECD's Standard was concerned, on 29 October 2014, 51 jurisdictions signed a Multilateral Competent Authority agreement to automatically exchange information based on Article 6 of the Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters. Since the Berlin signing ceremony on 29 October 2014, a total of 61 jurisdictions have signed a multilateral competent authority agreement to automatically exchange information based on Article 6 of the Multilateral Convention. On the same day, the Global Forum released the statement of outcomes, which included the status of commitments on automatic exchange of information. Committed jurisdictions are expected to start their first exchanges in 2017 or 2018, if the necessary legislative frameworks are in place.

On 7 August 2015, the OECD published three new documents that provide guidance on the implementation of the global standard on automatic information exchange. These documents included an implementation handbook,¹⁴⁰ a Model Protocol to the Tax Information Exchange Agreements,¹⁴¹ and an updated report on offshore voluntary disclosure programs.¹⁴²

The first edition of the handbook provides practical guidance to assist government officials and financial institutions in the implementation of the Standard. It sets out the steps needed for implementation; firstly, translating the reporting and due diligence rules into domestic law, secondly, choosing a legal basis to allow automatic information exchange, thirdly, setting up the necessary information technology, administrative infrastructure and resources and fourthly, protecting confidentiality and safeguarding data.

The handbook also contains a detailed section on the Standard and due diligence rules in chapter 4. There is also a chapter on the treatment of trusts in chapter 6, with guidelines, *inter*

¹³⁹ Ibid, Section 1, Para 15

¹⁴⁰ The Implementation handbook is available on: <http://www.oecd.org/ctp/exchange-of-tax-information/implementation-handbook-standard-for-automatic-exchange-of-financial-information-in-tax-matters.pdf> . For information, see Stephanie Soong Johnston, "OECD Releases Guidance Package for AEOI Implementation", 2015 WTD 153-3 (August 10, 2015)

¹⁴¹ See Model Protocol for the Purpose of Allowing the Automatic and Spontaneous Exchange of Information under a TIEA. Available on: <http://www.oecd.org/ctp/exchange-of-tax-information/Model-Protocol-TIEA.pdf>. Also see Part 1 above.

¹⁴² OECD, *Update on Voluntary Disclosure Programmes – A Pathway to Tax Compliance*. Available on: <http://www.oecd.org/ctp/exchange-of-tax-information/Voluntary-Disclosure-Programmes-2015.pdf>

alia, on how to determine the status of a trust as either a financial institution or a non-financial entity for the purposes of automatic exchange of information.

The handbook aims to help financial institutions and governments implement the Standard more efficiently by promoting the consistent use of optional provisions and addressing the operational and transitional challenges resulting from the staggered implementation of the Standard. The handbook highlights the differences and similarities between the OECD's Standard and the FATCA intergovernmental agreements, identifying areas for alignment with FATCA which could enable governments to adopt a single approach for both reporting systems. The handbook also contains an annex with answers to frequently asked questions received from businesses and governments. Overall, the handbook is intended to be a "living" document and is expected to be updated on a regular basis.

The second OECD document released in August 2015, the Model Protocol to the Tax Information Exchange Agreements, provides the basis for jurisdictions wishing to extend the scope of their existing tax information exchange agreements to also cover the automatic and/or spontaneous exchange of tax information. As explained in Part 1 of this paper, the previous Model Agreement on Exchange of Information in Tax Matters (the TIEA Model)¹⁴³ established in 2002 did not provide for automatic information exchange. As both the OECD Model and the Council of Europe/OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters gradually endorsed automatic exchange of information, the 2002 Model TIEA was an anachronism and had to be updated. This was especially important since some countries could choose to implement the common standard by extending the scope of their existing tax information exchange agreements to cover automatic or spontaneous exchange of tax information, without having to enter into new agreements. The new Model Protocol to the Tax Information Exchange Agreements, published by the OECD in August 2015 amends the existing model to include automatic exchange of information. As such, this Protocol would help align the model with Article 26 of the OECD Model and Articles 6 and 7 of the Council of Europe/OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters.¹⁴⁴

As regards the third OECD document released, the updated report on Offshore Voluntary Disclosure Programmes, this illustrated the OECD's substantial progress in the area of information exchange and transparency in tax matters. This second edition of the report contained a wealth of practical experience from 47 countries in relation to their voluntary disclosure programmes. The guidance on the design and implementation of such programmes was updated, particularly taking into account the views of private client advisers. This updated guidance was intended to encourage greater taxpayer compliance in the limited time before the OECD's Standard takes effect in many countries. This was the last window of opportunity for non-compliant taxpayers to voluntarily disclose. It was therefore a crucial moment to update the publication and reflected the OECD's policy of encouraging countries to examine voluntary compliance strategies that enable non-compliant taxpayers to come forward. The report outlined the principles for a successful voluntary disclosure program,

¹⁴³ See Part 1 above.

¹⁴⁴ See Model Protocol for the Purpose of Allowing the Automatic and Spontaneous Exchange of Information under a TIEA. Available on: <http://www.oecd.org/ctp/exchange-of-tax-information/Model-Protocol-TIEA.pdf>

including clarity about the program's goals and terms, deterrents to non-compliance, and consistency with generally applicable compliance and enforcement regimes.¹⁴⁵

(6) The OECD's Standard for Automatic Information Exchange versus FATCA

To an extent the OECD's Standard is the direct outgrowth of FATCA and is in fact perceived as an enhanced version of FATCA. It is "an indication that the rest of the world has accepted FATCA and is ready to embrace its benefits, and inevitably also its burdens."¹⁴⁶ The network of IGAs was an intermediate step on the path to automatic exchange of information. Under both methods, the costs of the administration of the tax information exchanged are to an extent internalised by multinational FFIs. Having a global standard for automatic exchange of information could help emerging economies on the reporting on financial accounts and as a corollary the collection of taxes. It could create a minimum playing field for automatic exchange of information and create consistency in the exchange of information in an international level.

However, in many ways, the OECD's Standard will impose a heavier operational burden on financial institutions than FATCA. Although the due diligence requirements are modelled on those of the IGA, there are several differences between the two regimes, as FATCA is much narrower in scope. For example, FATCA only requires a financial institution to identify and report US customers, whilst the Standard requires financial institutions to report non-resident account holders of all countries participating in the Standard. The Standard does not provide the option of electing a *de minimis* threshold for individuals (FATCA has an account balance review threshold of US 50K),¹⁴⁷ therefore increasing the number of customers in scope for further due diligence and reporting. The Standard does not provide all of the exemptions available to low-risk financial institutions currently existing under FATCA, bringing more financial institutions under its scope. The Standard provides a number of definitions that differ either from FATCA or from the IGAs.

Furthermore, there are some conceptual differences between the two systems. The Standard is designed more like an expansion of existing anti-money laundering regimes. The aim is to identify the person moving the assets. FATCA is more about identifying the beneficial owner of accounts from a US tax perspective. In addition, there are no provisions for a withholding tax under the Standard, raising doubts as to its ultimate effectiveness.

In any case, overall, the scale of reporting with the Standard is likely to be much higher than with FATCA and so is the operational burden from the implementation and execution of the standard. Furthermore, the intergovernmental approach to FATCA reporting deviates in certain aspects from the Standard. The differences are driven essentially by the multilateral nature of the system envisaged under the Standard. There are also other US specific aspects, such as the concept of taxation on the basis of citizenship and the presence of a significant

¹⁴⁵ For a review of how tax amnesties can be used as a transitional measure before the Standard becomes effective, see Vokhidjon Urinov, "Tax Amnesties as a Transitional Bridge to Automatic Exchange of Information", *fn. 28*

¹⁴⁶ Marie Sapirie, "The Common Reporting Standard and FATCA", 77 *Tax Notes International* 558 (16 February, 2015)

¹⁴⁷ See Part 4 above

and comprehensive FATCA withholding tax.¹⁴⁸ Of course the US is unlikely to relinquish FATCA in favour of the OECD'S Standard any time soon, which means that in some cases there will be multiplication of the compliance burden on financial institutions.

Nevertheless, the Standard at least reduces the risk that different countries would adopt different reporting standards unilaterally, which was a significant fear for financial institutions. Financial institutions would want to keep the momentum going and leverage what they have already done in preparation for FATCA to adapt to the OECD's global standard.¹⁴⁹ Once information exchange is fully operational under the IGAs and the Standard, a new era of international enforcement will have begun.

(7) Problems with Automatic Exchange of Information and the Various Standards

Certainly the principle of automatic exchange of information has had a big impact on systems and culture, especially in the financial services industry. Financial institutions today need to keep abreast of new reporting obligations around the world, manage relationships with multiple tax authorities, and educate staff and clients on reporting requirements and account opening procedures.¹⁵⁰ There is a major increase in reporting requirements with financial institutions (and other investment entities) having to collect sometimes complex information, which may vary in format and timing from jurisdiction to jurisdiction, with potential penalties for those unable or unwilling to comply fully.

NGOs have criticised the OECD's Standard because of its impact on developing countries.¹⁵¹ It has been argued that there should have been a period of non-reciprocity, where developing countries could simply receive financial data. Furthermore, there is concern that the OECD's Standard lacks provisions in favour of developing countries' engagement and as such shows "that having a global standard be designed by the OECD, a group of rich countries, rather than a much more representative and independent body such as the UN Tax Committee, entails the risks of having only the interests of developed countries included".¹⁵² To ensure that developing countries are able to implement automatic exchange of information, several issues emerge, such as capacity building, multilateral engagement, non-reciprocity (if needed), proportional confidentiality requirements and sanctions or incentives to guarantee that secrecy jurisdictions will send information to developing countries and not just between themselves.¹⁵³ It has been argued that it is developed countries' moral obligation and in their

¹⁴⁸ Standard for Automatic Exchange of Financial Account Information Report, Section 1, para 8

¹⁴⁹ Stephanie Soon Johnston, "G-20 Endorses OECD's Common Reporting Standard for Automatic Information Exchange", 2014 WTD 37-1 (25 February 2014)

¹⁵⁰ See KPMG, "Automatic Exchange of Information - The Common Reporting Standard: How financial institutions can adapt to new global standards" (KPMG, 2014). Available on: <https://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/frontiers-in-tax/Documents/the-common-reporting-standard.pdf>

¹⁵¹ See report of ICIJ, available on: <http://www.icij.org/blog/2014/07/oecd-plan-end-bank-secrecy-blasted-activists>. Also see views of Christian Aid: <http://www.christianaid.org.uk/pressoffice/pressreleases/July-2014/OECD-move-against-tax-dodging-will-not-benefit-poor-countries.aspx> and of Tax Justice Network: <http://www.taxjustice.net/2014/07/22/good-news-oecd-new-information-exchange-standard/>

¹⁵² Andres Knobel & Markus Meinzer, "The end of bank secrecy?" *Bridging the Gap to Effective Automatic Information Exchange, An Evaluation of OECD's Common Reporting Standard (CRS) and its Alternatives*, Tax Justice Network, p.51, para 68. Available on: <http://www.taxjustice.net/wp-content/uploads/2013/04/TJN-141124-CRS-AIE-End-of-Banking-Secrecy.pdf>

¹⁵³ Ibid, para 70

best interests to establish low-entry barriers for developing countries to engage in automatic exchange of information. For example, some developing countries may need to benefit from receiving information before they are convinced - and able - to collect and send information themselves.¹⁵⁴

On 22 September 2014, the Global Forum on Transparency and Exchange of Information for Tax Purposes delivered a Roadmap¹⁵⁵ to the G20 Development Working Group. This roadmap was aimed at facilitating developing country participation in the new OECD Standard on the automatic exchange of financial account information. This Roadmap was part of the efforts to curb multinational tax avoidance and offshore tax evasion in developing countries. As over half of the Global Forum's 121 member jurisdictions were developing countries, they stood to benefit from the Roadmap and its implementation.

Drawing on the Global Forum's extensive consultations with developing countries, the World Bank Group, other international organisations and civil society, the Roadmap provided a stepped approach to ensuring developing countries can overcome obstacles in implementing the new standard on exchange of information. The Global Forum's Roadmap identified the benefits, costs and the fundamental building blocks that developing countries need in order to meet the Standard.

Pilot projects with developing countries were suggested which would take a progressive approach to implementation, with a focus on meeting the particular needs of each developing country and ensuring that all confidentiality standards are reached. The pilot projects would be undertaken with the support of the World Bank Group and G20 countries, and would include partnerships with more experienced countries. The results of these pilot projects were expected to help redress the knowledge imbalance between tax administrations in developing countries and tax evaders.

Apart from criticisms relating to the lack of protection of the interests of developing countries, there have been some general criticisms relating to the actual drafting of the OECD's Standard. For example, it has been argued that the definitions of some of the terms are not very clear, such as that of Passive Non-Financial Entities (NFE) and Investment Entity.¹⁵⁶ Also, it has been argued that the cost of implementation and the ongoing cost of reporting under the Standard will be substantial, with the cost of reporting increasing as more jurisdictions sign up to it. It has been suggested that the burden could be reduced if reporting under the OECD's Standard could be more closely aligned with FATCA reporting, in terms of format and data requirements and of the dates the reports are due. In fact, this cost is proportionately greater for smaller financial institutions.¹⁵⁷

¹⁵⁴ Ibid, p.52, para 72

¹⁵⁵ See Global Forum on Transparency and Exchange of Information for Tax Purposes, *Automatic Exchange of Information: A Roadmap for Developing Country Participation*, Final Report to the G20 Development Working Group, 5 August 2014. Available on: <http://www.oecd.org/tax/transparency/global-forum-AEOI-roadmap-for-developing-countries.pdf>

¹⁵⁶ See HMRC, *Implementing Agreements under the Global Standard on Automatic Exchange of Information to Improve International Tax Compliance*. Available on: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417635/Implementing_Agreements_under_the_Global_Standard_on_Automatic_Exchange_of_Information_to_Improve_International_Tax_Compliance_-_summary_of_responses.pdf

¹⁵⁷ Ibid, p.11

Taxpayer rights and taxpayer protection is also very problematic, not just under the OECD's Standard but also under any system of automatic exchange of information. A global automatic exchange of information system can only be successful to the extent that taxpayers' rights are protected in the same manner if the rights of the tax authorities to access the information are granted. It has been argued, that there is a need for an international standardized system that recognizes the right to defence of the taxpayers, the right to be notified that an exchange of information is taking place, the right to participate in the exchange of information, the right to confidentiality and the right to exercise legal actions and to apply to judicial bodies.¹⁵⁸ More specifically, in the IFA 2015 General Report, Baker & Pistone argued that a standard catalogue of rights applicable to taxpayers should include the following:

- The right to privacy, including the protection of confidential information from disclosure
- The right to a fair trial, including a fair investigation prior to trial and appeal rights, having independent and impartial tribunal established by law and a determination within a reasonable time
- Freedom from discriminatory or arbitrary tax laws or procedures
- Freedom from self-incrimination at least in so far as criminal penalties are concerned
- Respect for the rule of law in tax legislation and tax procedures.¹⁵⁹

It has also been suggested that for taxpayers, transitional tax amnesties would provide a fair warning and an opportunity to come forward to settle their past tax liabilities on foreign-sourced income in a relatively amicable manner before the enhanced international tax information sharing regime becomes effective. Similarly, for tax authorities, tax amnesties would serve as an effective way to transition to the new regime in a fast and efficient manner.¹⁶⁰

Of course, there are no set rules and countries may confer rights under domestic law which go beyond the basic taxpayer rights outlined in OECD commentaries. For example, the Commentary to Article 26 of the OECD Model only deals with the issue of confidentiality and privacy and gives guidance on these issues only.¹⁶¹ There is no discussion of other taxpayer rights. The focus in the OECD's Standard is similar. In the preliminary introductory section on the Standard, the OECD acknowledges that all treaties and exchange of information instruments contain strict provisions that require information exchanged to be kept confidential and limit the persons to whom the information can be disclosed and the purposes for which the information may be used.¹⁶² It is emphasised that before entering into an agreement to exchange information automatically with another jurisdiction, it is essential

¹⁵⁸ OECD, *Taxpayers' Rights and Obligations: A Survey of the Legal Situation in OECD Countries* (OECD 1990). Available at: [http://www.oecd.org/ctp/administration/Taxpayers' Rights and Obligations-Practice_Note.pdf](http://www.oecd.org/ctp/administration/Taxpayers'_Rights_and_Obligations-Practice_Note.pdf). Also see Cihat Öner, "Using Exchange of Information in Regard to Assistance in Tax Collection", (2011) 4 *European Taxation* 123-136, 135; Leopoldo Parada, "Intergovernmental Agreements and the Implementation of FATCA in Europe", *fn.* 88. Also see Jose M Calderón, "Taxpayer Protection within the Exchange of Information Procedure Between State Tax Administrations", 28 (2000) 12 *Intertax* 462-475.

¹⁵⁹ Philip Baker & Pasquale Pistone, *General Report* (IFA Cahiers 2015 – Volume 100B) p.22. Reference was also made to *A Model Taxpayer Charter: Preliminary Report* by Michael Cadesky, Ian Hayes and David Russell, published by the Society of Trust and Estate Practitioners, in partnership with the Confederation Fiscale Europeenne and the Asia Oceania Tax Consultants' Association, 2013.

¹⁶⁰ Vokhidjon Urinov, "Tax Amnesties as a Transitional Bridge to Automatic Exchange of Information", *fn.* 28

¹⁶¹ See paras 11-13 of the Commentary to Article 26 OECD Model.

¹⁶² See Standard for Automatic Exchange of Financial Account Information Report, Section 1, para 15

that the receiving jurisdiction has the legal framework and administrative capacity and processes in place to ensure the confidentiality of the information received and that such information is used only for the purposes specified in the instrument.¹⁶³ Reference is made to the OECD's Guide on Confidentiality, "Keeping it Safe" which sets out best practices relating to confidentiality and provides practical guidance on how to ensure an adequate level of protection.¹⁶⁴ Other than this vague mention of confidentiality, there is no other reference to taxpayers' rights.

As Baker and Pistone noted in their IFA 2015 General Report, the rapid and recent developments have outstripped the discussion of the protection needed. Especially in the context of automatic exchange of information on a large scale, it might be impractical to notify each taxpayer individually of the proposed exchange of information. It may be sufficient that taxpayers will be made aware by financial institutions that the information held by them is subject to the new systems of FATCA/OECD's Standard.¹⁶⁵ That does not mean that there is no scope for improvement of measures for taxpayer notification and involvement in the process.

For automatic exchange of information, the essential safeguards would seem to be those required for large quantities of personal data, the processing of those data and their transmission to other countries. There is little discussion so far on access to information by the taxpayer, time limits for which the recipient State may retain the data supplied, or controls on the use that may be made of the data. This is not just a question of taxpayers' protection but arguably, also a question of good tax administration or good governance and (administrative) best practices.

It is noteworthy that the European Union has had an active involvement in the development of the concept of good governance. At an ECOFIN meeting in 2008, one of the conclusions of the Council was to promote the principles of good governance in the tax area, described as 'the principles of transparency, exchange of information and fair tax competition, as subscribed to by Member States at Community level'.¹⁶⁶ Good governance in the tax area was identified as an essential means for combating cross-border tax fraud and evasion and for strengthening the fight against money laundering, corruption, and the financing of terrorism.¹⁶⁷

Interestingly, as mentioned in Part 3 (b) above, in the amended EU Mutual Assistance Directive, there is a requirement that the data subject be notified of the proposed exchange in sufficient time to exercise his data protection rights.¹⁶⁸ Arguably, this newly inserted provision is reflective of the general stance that the European Union is trying to take in promoting good governance in tax matters and good administrative practices. How this requirement will be executed in practice and what other protections and rights it might trigger, remains to be seen.

¹⁶³ Ibid

¹⁶⁴ Ibid

¹⁶⁵ Baker and Pistone (2015), p.64

¹⁶⁶ Press Release, 2866th Council Meeting, Economic and Financial Affairs (8850/08 (Presse 113), Brussels, 14 May 2008) p.22

¹⁶⁷ For more information, see Christiana HJI Panayi, *Advanced Issued in International and European Tax Law*, (Hart Publishing, 2015) Chapter 1

¹⁶⁸ See Article 1(5)(b): requires that each reporting financial institution informs each individual reportable person that data will be collected and transferred, and does so in sufficient time for the reportable person to exercise his data protection rights.

Apart from the European Union, the OECD and the UN have similarly called for measures to improve governance through tax reform, as a catalyst for state capacity development.¹⁶⁹ Whilst the haste with which the international tax community is developing standards of automatic exchange of information is understandable, given the pretext of tackling tax avoidance and evasion, at the same time, some basic taxpayer rights ought to be established and protected with the same passion to ensure standards of good governance in tax administrations worldwide. Otherwise, too much state discretion may lead to abuse (intentional or unintentional) and in some cases, especially with developing countries, perpetuate arbitrary or corrupt practices.

(8) Singapore and Automatic Exchange of Information

Singapore became an independent republic following an ejection from Malaysia on 9 August 1965. In the 50 years since independence, Singapore has transformed itself from a “port hub in the Straits of Malacca to an international business and financial centre, as well as a cutting-edge manufacturing destination”.¹⁷⁰ The manufacturing and service sectors are the twin engines of Singapore’s economy.¹⁷¹ Singapore has one of the most open economies in the world¹⁷² and is highly integrated into the global economy. It also has one of the most business-friendly economies¹⁷³ with a competitive corporate tax rate of 17% and a partial exemption for the first SGD 300,000 of normal chargeable income, resulting in an effective tax rate of 8.36% for the first SGD 300,000.¹⁷⁴

Singapore is also considered an excellent holding company location for a multinational to manage its investments in Asia. In fact, almost half of the multinationals with Asia-Pacific operations have a substantial business presence in Singapore in the form of headquarters and many emerging Asian multinationals use Singapore as a platform for growth beyond the Asian markets.¹⁷⁵ Singapore and in general the Asia-Pacific have a fast growing market of high net worth individuals. In fact, Asia-Pacific is forecast to become the largest market of high net worth individuals in the world.¹⁷⁶

¹⁶⁹ Ibid. Also see Alicja Brodzka & Sebastiano Garufi, “*The Era of Exchange of Information and Fiscal Transparency: The Use of Soft Law Instruments and the Enhancement of Good Governance in Tax Matters*” [2012] 8 *European Taxation* 394; Gemma Martinez Barbara, “*The Role of Good Governance in the Tax Systems of the European Union*”, [2011] 5/6 *Bulletin for International Taxation* 270

¹⁷⁰ F. K. Han *et al*, *Lee Kuan Yew: Hard Truths to Keep Singapore Going* (Singapore: Straits Times Press, 2011), p. 138.

¹⁷¹ *Ibid.*

¹⁷² R. Z. Lawrence, M. D. Hanouz and S. Doherty (eds.), *The Global Enabling Trade Report 2012* (Geneva: World Economic Forum, 2012), p. xvii.

¹⁷³ See Stephen Phua and Chai Sui Fun, ‘Resolving Tax Treaty Disputes: Singapore’ in *Resolving Tax Treaty Disputes: A Global Analysis* (Cambridge University Press, forthcoming)

¹⁷⁴ See Chris J. Finnerty, Christian Pellone, Nico Derksen and Sandie Wun, “*Tax Strategies for Investing and Structuring into Asia-Pacific – Use of Hong Kong and Singapore as Regional Holding Companies*”, 17 (2011) 5 *Asia-Pacific Tax Bulletin* 332-339, p.335. The rate applies to income sourced in Singapore and on income from sources outside Singapore if received in Singapore.

¹⁷⁵ Ibid. Also see Daljit Kaur, “*Asia’s Leading Holding Company Jurisdictions – Hong Kong, Malaysia and Singapore’s Fight for Global Business*”, 17 (2011) 1 *Asia-Pacific Tax Bulletin* 30-35; Finnerty *et al.*, fn. 175

¹⁷⁶ Satoru Araki, “*Regional Cooperation and Tax Information Exchange among Asia-Pacific Tax Authorities*”, 21 (2015) 4 *Asia-Pacific Tax Bulletin* nyr

Historically, Singapore has adopted practically all OECD initiatives, though first taking a look, wait and see stance before full adoption. In this regard, the various reports/papers published and uploaded on the OECD's website would be a useful indicator of what Singapore is likely to follow.

As noted, there is a strong element of protection against any unauthorised disclosure of confidential taxpayer information by the Inland Revenue Authority of Singapore (IRAS).¹⁷⁷ In fact, it is a legal obligation for any official of IRAS having contact with taxpayer information to swear a declaration before a magistrate or comptroller to observe the law against unauthorised disclosure. "This formality not only has obvious legal force but also serves to instil the seriousness of the duty of preserving confidentiality in the official."¹⁷⁸

Since 2009, Singapore authorities have come under intense global pressure to strengthen their framework for international cooperation in the context of exchange of information.¹⁷⁹ In February 2009, the Singapore government made public its intentions to adopt the OECD's internationally agreed tax standard for exchange of information mentioned in Part 1.¹⁸⁰ In the April 2009 OECD progress report,¹⁸¹ there were three lists of jurisdictions: the white list,¹⁸² the grey list¹⁸³ and the black list.¹⁸⁴ Four jurisdictions were found to be on the black list¹⁸⁵ and numerous jurisdictions on the grey list. Singapore was placed on the grey list, as it had not fully implemented the internationally agreed standard.

Subsequently, Singapore endorsed the internationally agreed standard for exchange of information and began the process of renegotiating its tax treaties with treaty partners to implement the standard. By November 2009, Singapore had signed 14 protocols with some of its treaty partners to amend its tax treaties to incorporate the internationally agreed standard. The domestic tax laws were also amended to implement the new treaty obligations. Singapore moved to the OECD's white list on 13 November 2009.¹⁸⁶ In December 2009, the Singapore tax legislation was amended and the provisions came into force in February 2010.¹⁸⁷ In April 2013, the Global Forum on Transparency and Exchange of Information for Tax Purposes affirmed that Singapore's exchange of information regime was in line with the international standard.¹⁸⁸ It was noted that Singapore had efficient and effective information exchange

¹⁷⁷ Singapore report, IFA 2015, 100B. Report by Sim Ho Ong.

¹⁷⁸ Singapore report (2015) p.715

¹⁷⁹ Lee Fook Hong, "Commitment to the Internationally Agreed Standards of Transparency and Exchange of Information for Tax Purposes," 16 (2010) 4 Asia-Pacific Tax Bulletin 316-320

¹⁸⁰ *Singapore Parliamentary Debates: Official Report*, vol. 85 at col. 2590 (10 February 2009) (Senior Minister of State for Finance Mrs Lim Hwee Hua).

¹⁸¹ See OECD, *A Progress Report on the Jurisdictions Surveyed by the OECD Global Forum in Implementing the Internationally Agreed Tax Standard, Progress Made as at 2nd April 2009*. Available on: <http://www.oecd.org/ctp/42497950.pdf>

¹⁸² This list included countries that have substantially implemented the internationally agreed tax standard.

¹⁸³ This list included countries committed to the internationally agreed tax standard but that have not yet substantially implemented it.

¹⁸⁴ This list included countries that have not committed to the internationally agreed tax standard.

¹⁸⁵ Costa Rica, Malaysia, Philippines, Uruguay.

¹⁸⁶ Daljit (2011) fn. 175, p.34

¹⁸⁷ See Stephen Phua and Chai Sui Fun, 'Resolving Tax Treaty Disputes: Singapore' fn. 173

¹⁸⁸ OECD, *Global Forum on Transparency and Exchange of Information Peer Reviews: Singapore 2013: Phase 2: Implementation of the Standard in Practice* (Paris: November 2013), pp.87-106. Available at:

http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes-peer-reviews-singapore-2013_9789264192140-en#page93. Also see OECD, *Global Forum on Tax Transparency Shifts Focus to Effectiveness of Information Exchange* (11 April 2013), available at:

communication channels which involved face-to-face meetings or telephone conferences to facilitate the process with principal exchange of information partner authorities such as Australia, India, Japan and New Zealand.¹⁸⁹

Eventually, more than half of Singapore's tax treaties conformed to the internationally agreed standard. Where a tax treaty incorporated the internationally agreed standard, Singapore would extend exchange of information assistance upon the request of the treaty partner. The new treaty obligations included, in addition, the removal of banking secrecy and lack of domestic tax interest as statutory barriers to the exchange of information on request. Furthermore, IRAS could obtain bank and trust information from financial institutions without having to seek a court order.

On 29 May 2013, Singapore also became a signatory to the Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters, mentioned in Parts 1 and 4.¹⁹⁰ As a result, Singapore expanded its network of exchange of information partners by 13 jurisdictions,¹⁹¹ including Brazil and the United States. In addition, the Ministry of Finance announced a decision to extend reciprocal exchange of information assistance to all tax treaty partners notwithstanding that some treaties had not been amended to incorporate the internationally agreed standard. In addition, on 1 July 2013, tax evasion and serious fraudulent tax evasion offences were designated as serious offences under Singapore tax legislation.¹⁹² They are now predicate offences for money laundering under Singapore's main anti-money laundering legislation.¹⁹³

Singapore was also under pressure to adopt the US FATCA initiative. Indeed, on 9 December 2014, in response to industry feedback,¹⁹⁴ Singapore agreed to enter into an IGA with the US to help Singapore-based FIs (SGFIs) manage their FATCA compliance burden, as without the IGA, SGFIs would have to enter into individual FFI agreements with the US to avoid the withholding tax.¹⁹⁵ The US-Singapore IGA is based on Model 1 IGA.¹⁹⁶ On 17 March 2015, the Singapore-US Foreign Account Tax Compliance Act (FATCA) Model 1 Intergovernmental Agreement (IGA) and regulations¹⁹⁷ were enacted, setting out the due diligence and reporting obligations of SGFIs. The regime entered into force entered into force

<http://www.oecd.org/tax/transparency/globalforumontaxtransparencyshiftsfocustoeffectivenessofinformationexchange.htm>

¹⁸⁹ Satoru Araki (2015) fn. 176

¹⁹⁰ See Press Release of the Singapore Ministry of Finance, available on:

http://www.news.gov.sg/public/sgpc/en/media_releases/agencies/mof/press_release/P-20130529-2/AttachmentPar/0/file/PRESS%20RELEASE%20-%20SG%20signs%20the%20Convention%20%2829May13%29.pdf

¹⁹¹ These countries were Argentina, Belize, Brazil, Colombia, Costa Rica, Ghana, Greece, Guatemala, Iceland, Moldova, Nigeria, Tunisia and the USA.

¹⁹² See Stephen Phua and Chai Sui Fun, 'Resolving Tax Treaty Disputes: Singapore' in *Resolving Tax Treaty Disputes: A Global Analysis* (Cambridge University Press, forthcoming), referring to Part XII, Second Schedule, *Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act* (Cap 65A, 2000 Rev Ed).
¹⁹³ Ibid.

¹⁹⁴ From 22 September 2014 to 17 October 2014, the Ministry of Finance, the Monetary Authority of Singapore and the IRAS conducted a public consultation on draft versions of the Regulations and the e-Tax Guide. On 17 March 2015, the MOF, MAS and IRAS issued their responses to feedback from the public consultation.

¹⁹⁵ See analysis in Part 4 above.

¹⁹⁶ See Agreement between the Government of the Republic of Singapore and the Government of the United States of America to Improve International Tax Compliance and to Implement FATCA, available on: https://www.iras.gov.sg/irashome/uploadedFiles/IRASHome/Quick_Links/International_Tax/FATCA-Singapore_IGA.pdf

¹⁹⁷ Income Tax (International Tax Compliance Agreements)(United States of America) Regulations 2015

on 18 March 2015. On the same day, the IRAS issued the e-Tax Guide on Compliance Requirements of the Singapore-US Intergovernmental Agreement on Foreign Account Tax Compliance Act. This e-Tax Guide covered the main aspects of the due diligence and reporting requirements under the Agreement by explaining:

- The financial institutions that must report;
- The account holders and US reportable accounts;
- Exempt financial institutions and excluded financial accounts;
- The due diligence procedures required to be performed by Reporting SGFIs to identify the US reportable accounts;
- The information to be reported; and
- The timeline for such reporting.

With the IGA, SGFIs will benefit from simplified compliance procedures with regard to identifying and reporting on financial accounts held by US persons. SGFIs will also avoid the withholding tax on relevant payments that they receive from the US. According to the IGA, a Singapore-based financial institution (SGFI), for the purposes of FATCA, is a financial institution which is tax resident in or organised under the laws of Singapore, but excluding any branch of such financial institution that is located outside Singapore; or any branch of a financial institution not tax resident in or organised under the laws of Singapore, if such branch is located in Singapore.¹⁹⁸

SGFIs will need to perform due diligence checks to identify financial accounts held by US persons. Thereafter, the SGFIs will need to transmit information pertaining to such accounts to IRAS, which will in turn transmit the information to the US IRS.

As for the OECD's Common Reporting Standard, on 6 May 2014, a declaration signed by several countries including Singapore endorsed the OECD's global standard.¹⁹⁹ This declaration comes after the earlier joint statement issued by the Early Adopters Group on 19 March 2014.²⁰⁰ Singapore did not participate in this earlier statement and is not part of the Early Adopters Group. However, the subsequent endorsement of this declaration by Singapore shows that support for the OECD's Standard is growing and that Singapore is committed to adopting it. Singapore is expected to undertake its first exchange by 2018.

As of 3 December 2015, Singapore had not yet adopted the Multilateral Competent Authority Agreement containing provisions, to operationalise the OECD's Standard of automatic exchange of information.²⁰¹ It is expected to do so in the future.

It should be noted that in the context of the European Commission's recent Action Plan on Corporate Taxation,²⁰² a map of non-cooperative tax jurisdictions has also been published, in

¹⁹⁸ See Article 1(l) of the agreement

¹⁹⁹ <http://www.oecd.org/mcm/MCM-2014-Declaration-Tax.pdf>

²⁰⁰ See Part 5 above.

²⁰¹ See list, available on: <http://www.oecd.org/tax/exchange-of-tax-information/MCAA-Signatories.pdf>

²⁰² Communication from the Commission to the European Parliament and the Council, *A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action*, COM(2015) 302 final, 17.6.2015. This latest Action Plan is intended to improve the corporate tax environment in the EU, making it fairer, more efficient and more growth-friendly. In addition to the map of non-cooperative jurisdictions, the other key actions discussed include a strategy to re-launch the Common Consolidated Corporate Tax Base (CCCTB) and a framework for effective taxation where profits are generated.

a move to reinforce the EU's response to external threats to Member States' tax bases.²⁰³ Non-cooperative jurisdictions are assessed in the context of standards of tax good governance (transparency, exchange of information, and fair tax competition). The map shows the results based on Member States' lists up to 30 June 2015. It is based on how the various EU Member States assess countries and territories around the world in their compliance with standards of tax good governance (transparency, exchange of information, and fair tax competition). The criteria used by the relevant EU Member States in their assessment are partly common and partly their own. The Commission is expected to amend this list at least once a year to reflect changes to Member States' national lists.²⁰⁴ Singapore is currently listed as a non-cooperative jurisdiction by Finland and Greece.²⁰⁵

Although the frameworks of regional cooperation in Asia and Oceania are considered to be underdeveloped in comparison with other regions of the world, one of the growing trends is a demand for information exchange.²⁰⁶ In this respect, Singapore seems to be leading the way, though there is scope for improvement.

²⁰³ See map available on:

http://ec.europa.eu/taxation_customs/taxation/gen_info/good_governance_matters/lists_of_countries/index_en.htm?wtdebug=true

²⁰⁴ Indeed, in October 2015 the Commission carried out a technical update of the consolidated version of Member States' lists of third countries for tax purposes, for the first time. The update reflected changes in Member States' assessments of third countries tax good governance standards, corrections to national lists and Estonia's decision to withdraw all countries from its national list. See <http://europa.eu/rapid/midday-express-12-10-2015.htm>

²⁰⁵ Hong Kong seems to be leading the way, being listed by numerous jurisdictions: Bulgaria, Croatia, Greece, Italy, Latvia, Lithuania, Poland and Portugal.

²⁰⁶ Satoru Araki (2015) fn. 176

ANNEX

ARTICLE 26 OECD MODEL

EXCHANGE OF INFORMATION

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.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

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*).

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information 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.

PROTOCOL TO THE MODEL AGREEMENT ON EXCHANGE OF INFORMATION IN TAX MATTERS

“[Article 5A Automatic Exchange of Information

With respect to categories of cases and in accordance with procedures which they shall determine by mutual agreement, the Contracting Parties shall automatically exchange information for the purposes referred to in Article 1 (Object and Scope of the Agreement).]

[Article 5B

Spontaneous Exchange of Information

1. The competent authority of a Contracting Party shall, without prior request, forward to the competent authority of the other Contracting Party the information specified in Article 1 of which it has knowledge in the following circumstances:

- a. the first-mentioned Contracting Party has grounds for supposing that there may be a loss of tax in the other Contracting Party;
- b. a person liable to tax obtains a reduction in or an exemption from tax in the first-mentioned Contracting Party which would give rise to an increase in tax or to liability to tax in the other Contracting Party;
- c. business dealings between a person liable to tax in a Contracting Party and a person liable to tax in the other Contracting Party are conducted through one or more countries in such a way that a saving in tax may result in one or the other or in both Contracting Parties;
- d. a Contracting Party has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises;
- e. information forwarded to the competent authority of the first-mentioned Contracting Party by the competent authority of the other Contracting Party has enabled information to be obtained which may be relevant in assessing liability to tax in the latter Contracting Party.

2. Each Contracting Party shall take such measures and implement such procedures as are necessary to ensure that information described in paragraph 1 will be made available for transmission to the other Contracting Party.]

OR

[Article 5B Spontaneous Exchange of Information

The competent authority of a Contracting Party may spontaneously transmit to the competent authority of the other Contracting Party information that has come to the attention of the first-mentioned competent authority and that the first-mentioned competent authority considers foreseeably relevant to the accomplishment of the purposes referred to in Article 1 (Object and Scope of the Agreement). The competent authorities of the Contracting Parties may determine the procedures to be used to exchange such information.]”