Universidade do Minho
Escola de Direito

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Optimizing Tax Assistance for a better world: a legal perspective

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Optimizing Tax Assistance for a better world: a legal perspective

Dissertação de Mestrado
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Trabalho efetuado sob a orientação da
Professor Doutor João Sérgio Ribeiro

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DECLARAÇÃO

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1. É AUTORIZADA A REPRODUÇÃO INTEGRAL DESTA TESE/TRABALHO APENAS PARA EFEITOS DE INVESTIGAÇÃO, MEDIANTE DECLARAÇÃO ESCRITA DO INTERESSADO, QUE A TAL SE COMPROMETE;

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“In this world, nothing can be said to be certain, except death and taxes”

Benjamin Franklin

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ABSTRACT

We live in an era where innovations in all fields occur at the fastest rate in all History of mankind. If you think about how the access to information has evolved in the last 20/25 years it seems unthinkable that anybody would predict the society we have today.

Society, as we live nowadays, was severely influenced by one phenomenon: Globalization. This has had such a great impact on our world that I think that it is fair to say that with the beginning of Globalization we stopped being in the Contemporary Age and the Digital Age began.

The pace at which things have changed in our lives is incredible if we compare it with the lives of our parents and grandparents. Although these innovations have made our life easier and more comfortable, attention must be paid to the "bittersweet" side of these developments, because as we know, humans' don´t always have the best of intentions with their creations and that is where the field of Law comes into action.

In a world that things can change at such a rapid pace it is difficult for the legal field to keep up with the speed of all the novelties that constantly appear. Economic and Financial systems have dramatically changed with Globalization and now most of the operations can be done through computers and by the Internet without even being in the country where the operation is happening. This leaves countries with the difficulty of knowing how and where to tax the person that performed that operation.

Tax Treaties and Mutual Assistance between States have tried to deal with this issue, as well as other tax rules, but they have been insufficient and incapable of keeping up with the technological advances and the globalization of tax issues. International Fiscal Aid and Assistance has been considered one of the cornerstones of International Tax Law although there are some questions regarding this, it is still viewed by many scholars as the best solution for the problems caused by the internationalization of the economy.

This research pretends to analyse the past, the present and foresee the future of exchange of tax information, considering some of its limitations and challenges.

Keywords: Globalization, Economics, Finance, International Tax Law, Double Taxation, Tax Treaties

RESUMO

Atualmente, vivemos provavelmente na era onde, em todos os campos científicos ocorrem inovações ao ritmo mais rápido da história da Humanidade. Se pensarmos em como o acesso à informação evoluiu nos últimos 20/25 anos parece quase impensável que alguém no período já acima mencionado poderia prever a sociedade que temos hoje em dia. A sociedade que vivemos hoje em dia sofreu a influência severa de um fenómeno: a Globalização. Esta teve um impacto tão grande no mundo atual que, na minha opinião, um dia poder-se-á dizer que com o início da Globalização deixamos de viver na Era Contemporânea e começamos a viver na Era Digital. Como já referido anteriormente, pode ser considerado estonteante a velocidade a que o progresso evolui na nossa geração se a compararmos com as gerações dos nossos pais e dos nossos avós. Contudo e apesar de grande parte destes desenvolvimentos ter trazido mais simplicidade e conforto para as nossas vidas, temos de ter em atenção o lado mais "agridoce" destes avanços, pois, como sabemos, o ser humano nem sempre tem as melhores intenções com as suas invenções e é aí que o ramo do Direito tem de agir. O problema está na questão que num mundo em que tudo se altera tão rapidamente é difícil para o Direito acompanhar o ritmo frenético de toda esta inovação. Com a Globalização, assistiu-se a toda uma alteração drástica dos sistemas económicos e financeiros sendo que agora a grande maioria das operações económicas e financeiras podem ser feitas através de computadores e/ou pela Internet sem ser necessário estar fisicamente no país onde se está a efetuar a operação. Isto deixa os Estados com dificuldades em saber como e onde tributar a pessoa/entidade que efetuou a operação em questão.

Os Tratados Fiscais e a Assistência Mútua entre Estados têm tentado lidar com este problema, bem como outras regras fiscais, mas têm sido incapazes de acompanhar a evolução tecnológica e a globalização dos factos tributários. A Assistência e Cooperação Fiscal Internacional é considerada como uma pedra basilar do Direito Fiscal Internacional, embora isto levante algumas dúvidas, esta é ainda vista por muitos académicos como a melhor solução para os problemas causados pela internacionalização da Economia.

Este trabalho pretende analisar o passado e o presente da Troca de Informações Fiscais e prever qual o rumo que o mesmo assunto tomará nos próximos anos, tendo em conta os desafios e as limitações do tema em questão.

Palavras-chave: Globalização, Economia, Finanças, Direito Fiscal Internacional, Dupla Tributação, Tratados Fiscais.

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ABBREVIATIONS

AETI- Automatic Exchange of Tax Information

BEPS- Base Erosion and Profit Shifting

CAA – Competent Authority Agreement

CoE – Council of Europe

CRS – Common Standard on Reporting and Due Diligence for Financial Account Information

CTPA – OECD Centre for Tax Policy and Administration

DAC- Directive on Administrative Cooperation

ECOFIN – United Nations Economic and Financial Affairs Council

EU – European Union

FACTA – Foreign Account Tax Compliance Act

FFI- Foreign Financial Institution

G20 – Group of the Twenty Major Economies

GDP/GNP- Gross Domestic Product/ Gross National Product

GFI- Global Financial Integrity

Idem- Same author, same publication

IGA – FACTA Intergovernmental Agreement

IETI- International Exchange of Tax Information (in general terms)

IFF- Illicit Financial Flow

NFI- Non Financial Institution

NGO- Non-governmental organization

OECD – Organization for Economic Co-operation and Development

PP./PP.s- Page/Pages

RFI- Reportable Financial Institution

TT – Double Tax Treaty

TIEA – Agreement on Exchange of Information on Tax Matters

TIJ – Taxpayer Identification Number

TJN – Taxpayer Justice Network

UK- United Kingdom

UN – United Nations

US – United States of America

WTO – World Trade Organization

INTRODUCTION

To start, it should be noted that this essay has the objective of completing the LL.M in European and Transglobal Business Law, a course where we learn and improve our skills in areas such as competition law, international economic law and tax law for example. This essay will be specifically about international tax law and more specifically tax assistance and exchange of tax information.

Through the technological advances in the last years and the constant movement of globalization of the tax elements, it has been considered imperative for tax authorities of each country to communicate among themselves, for the reason that, alone, they are not capable of keeping up with the impact of globalization and its effects on international transactions. This constitutes a series of difficult challenges for three fundamental reasons.

1. Because the vital information can be located in a foreign country's tax authority instead of the national country tax authority.
2. With all these new technologies it has become easier to hide information from tax authorities, creating an area where tax evasion and tax fraud can occur.
3. This evasion and fraud reduces countries revenue and weakens its monetary position globally.

For the abovementioned reasons, you can easily understand the importance of the exchange between tax authorities and why it is considered one of the cornerstone principals of International Tax Law.

In this project, I will try to answer some questions;

Should an automatic exchange of information be mandatory on a global level?

I would like to answer this question affirmatively, by trying to explain the evolution of this phenomenon, although numerous problems will be encountered.

Contemporary income tax laws have had a massive issue regarding the enforceability of these laws. The standard premise of today´s income taxation has been that a countries jurisdiction to tax its residents doesn´t stop at its borders[1]. In general, countries have jurisdiction to tax the

[1] League of Nations Economics and Finance Commission, *Report on Double Taxation* (Geneva League of Nations 1923)

income of its residents whether it originates from inside or outside the country[2]. This theory emphasizes that for fiscal purposes the treatment of domestic and foreign source income is equal, and the country's tax authority calculates the domestic and foreign source income and taxes it at the same rate. This system is called the *residence-based income taxation system* which is adopted by most of the states worldwide[3].

The enforceability of the tax law on foreign source income and foreign assets of resident taxpayers is the biggest challenge.

How does a country discover that residents have foreign valuables and source income?

How does one manage the enforcement of national tax laws on foreign source income?

In international law, a country cannot extend its jurisdiction to the territory of another and even in countries where the common law is applied, this principle of territoriality is also applied by the so called *revenue rule*[4].

Countries are losing billions in revenue that should be taxed and is not. Globalization of the economy and of financial systems has increased dramatically the number of people that have and control investments outside their country of residence. They normally manage their assets through offshore trusts, foundations, and companies, these being multi-layered, to make the process of tracking this income more difficult. Tax competition between countries to attract foreign investment is another reason why foreign assets are not taxed in countries where they originated.

Today, we have witnessed the rise of several cross-border economic activities as well as the free circulation of capital, goods, services and people, which have inherent tax obligations.

Economic and financial relationships are strongly affected by the phenomenon of globalization and are more and more out of the control of tax administrations. In addition to this situation, globalization has promoted the practice of procedures in taking advantage of tax benefits.

To complete the goals shared by every country in general such as, fair load shedding of the fiscal burden, obtaining of tax revenues, fighting tax evasion and tax fraud, as well as protecting the legal sphere of taxpayers, it has been realised all around the world the understanding that only with a coordination and harmonization of efforts between countries it can be possible to begin the battle to combat the problems most contemporary tax systems face today.

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[2] Idem.

[3] Sections 3 and 6 of Deloitte Country Taxation and Investment Guides 2014 https://dits.deloitte.com/#TaxGuides

[4] This is a very old rule existent in case law that defends the principle of territoriality in tax matters. The first reported case was in England and it is called Attorney *General v. Lutwydge* in 1729.

So, the ideas of tax cooperation, collaboration, coordination and harmonization are ideas that are trending in nowadays taxation debate, not only at an EU level but on a global level.

The mechanism of exchange of information has always appeared as a very strong mechanism in helping to know the cross border fiscal facts and realities, allowing tax administrations to present each taxpayer with the correct amount of tax due.

The OECD, having understood the importance of the survival of tax systems and of the perks obtained through the exchange of tax information, has concentrated most of its efforts in the cooperation between countries. In this subject, we can mention some legal frameworks developed by the OECD or with its influence such as the OECD Model Taxation Convention or the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.

The EU has also shared the same concerns, which are observed internationally regarding tax evasion and tax fraud. The European Commission has expressed the necessity of promoting cooperation between states and automatic exchange of tax information through legal frameworks such as the Directive 2011/16/EU (DAC), regarding administration cooperation in the fields of taxation, and also Directive 2003/48/EC regarding the exchange of information regarding the taxation of revenues of savings in the form of interest, repealed for a few years now.

Tax evasion and tax fraud that seriously compromise the end of harmful tax competition and the fair distribution of tax revenues and competences between states have reached seriously worrying proportions with very negative reflexes on fiscal systems worldwide, creating as well, complications for the development of the financial and economic markets.

Fighting this global issue is now a priority of all governments and so, the automatic exchange of tax information is now observed as a cornerstone mechanism to achieve this goal. The automatic exchange of tax information is a fundamental way of strengthening the efficiency of the levying of taxes, helping countries as a new and promising feature to eradicate cross border tax evasion and tax fraud.

Since there is a global awareness of the complexity and depth of this issue, and bearing in mind the rise of opportunities of cross border investment, in a huge variety of financial products, the mechanisms of international tax cooperation at an EU and global levels stopped being ready to face the new challenges. Due to the lack of mechanism ready for the developments reached, some new frameworks were presented with the purpose of revolutionizing the automatic exchange of information, promising the beginning of a new era in the field of international assistance and cooperation.

This new era gave its first steps in 2010, with the creation of FACTA, a legislative creation of the US but its real effect came in 2014. Due to the potential of success shown by the FACTA legislation, it didn´t take long to be envisioned a way to coordinate and harmonize automatic exchanges of tax information on a worldwide scale, with a truly multilateral and global framework. The OECD presented then, in 2014, the CRS, a global framework for the automatic exchange of relevant financial tax information, which was adopted in the EU, through the Directive 2014/107/EU (DAC2).

These three legal frameworks, present and evidence an era of innovation and a turning point in International Tax Law and the fields influenced by it. Assistance between countries has a new route given due to these ambitious but not very well known frameworks. For this reason, these frameworks have been given some special attention in the academic field.

In the present article we are going to analyse the whole issue of tax information, from its collection to its exchange and it evolved from an exchange "upon request" or "spontaneous" to the "automatic exchange" that now seems to finally be ready to prevail as the general way states will have with tax information from abroad, observing other issues like taxpayer confidentiality, banking secrecy laws and the situation in developing countries as well.

a) Hypothesis

I am trying to address the problem of enforcement of the modern tax system in which most countries around the world claim, through statutes worldwide, tax jurisdiction over their resident taxpayers, but this claim is weak, since they don't have the tools to enforce their laws regarding foreign source income due to lack of information that is material and relevant for applying those tax laws.

In these cases, this vital information for the application and enforcement of income taxes is extra-territorial (out of the country and not of easy access most of the times) and because of this the tax authorities are not capable to assess, collect and recover taxes because it's through this information that the taxpayer is identified, his residence verified, and the links between elements such as income and expenses are established.

There is a solution to this problem: strong cooperation between states and a system of automatic exchange of information between states gives a major potential to deal with this issue and with this essay we analyse and explore the difficulties of laying down such a system.

b) Methodology

The subject of an international exchange of tax information has been considered for a long time as one of the most important topics in international tax. Recently it has even gained some independence towards other subjects of international taxation having its own and *sui generis* set of concepts, legal principles, and rules.

Through this work, we analyse, interpret and develop all these concepts, principles and rules, and also try to evaluate how adequate they are, and predict how it will be in the future. Having this in mind the approach used in this work in mostly doctrinal.

The main sources of information to guide us will be the OECD Model Taxation Convention (drafted initially in 1963 but adopted in 1977 and updated periodically) and the UN Model Taxation Convention (1980 and updated periodically) and their commentaries regarding the exchange of information. Other documents such as, for example, the Multilateral Convention (1988) the Directives from the EU (the now repealed Savings Directive and the DAC's), the FACTA (2010), the IGA FACTA (2012) and the OECD Standard on Automatic Exchange of Financial Account Information on Tax Matters (2014) will also be analysed.

When necessary the interpretation of relevant concepts and principles of case-law and academic works will also be done.

c) Delimitations

Given that is impossible to present all of the information on this subject in this essay, it essential to draw some delimitations:

Firstly, it is important to point out that this is an essay on the exchange of tax information, so, aside from basic explanations of concepts and from the first part which is an introductory chapter this essay will not go into other fields of domestic or Transnational taxation, and it will focus mainly on income tax which the most important type of tax when it comes to this subject, although some occasional references to other types of taxes can appear for explanatory reasons.

Secondly, we will not analyse all international treaties and conventions (i.e. The Nordic Convention) because they have the same purpose and normally overlap the treaties and conventions we will analyse they just differ in their material, geographical scope.

Thirdly, alternative options to automatic exchange of tax information like the Rubik model and other topics like, for example, tax amnesty as a way of transition to an automatic exchange of information regime because, in my opinion, there are other topics who have more relevance than the topics I have mentioned.

Finally, this essay pretends to be very broad in its purpose from the start, but as mentioned, it will not cover all aspects of the international exchange of tax information so doubts or questions regarding other topics that are not analysed in this essay are obviously a delimitation.

PART 1. TAX INFORMATION: CONCEPT AND SOURCES;

1. Outline

In any article, it is important to give the reader a guideline of the information he is about to obtain. Since this an essay on tax assistance it seems essential, in my opinion, to begin with how countries around the world work in tax matters regarding the issue of tax information which is a key matter in this work. So, in this first part, we will talk initially about tax systems globally and more specifically on the approach countries use to collect tax information. We will analyse the concepts and sources of tax information in today´s income taxation. The fundamental problems with administration and enforcement of national tax laws that tax administrations face due to the absence or lack of data on the foreign-source income of resident taxpayers.

This part has the purpose to show how urgent it is to deal with the issue of the subject of study.

2. Income tax systems around the world

Throughout history, tax policy has obliged states to define legal benchmarks to establish their tax authority.[5] Initially, it was very common to use "territorial jurisdiction" since it was easily justifiable and it was applied in many other fields of international law.[6] Nonetheless, states have selected various legal benchmarks for income taxation instead. These benchmarks are "citizenship", "residence" and "source" or the combination of all three benchmarks[7], which can be broader or narrower than the territorial jurisdiction in their span but not equal to it.

2.1 Citizenship based income taxation system

Some states have taken up citizenship as a benchmark of tax authority.

In this system, countries charge taxes on their citizens', income having no influence on this, the place they live[8]. So, in this system, worldwide taxpayers' income is taxed just by the simple fact that they were born in the country giving bigger importance to the political instead of the

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[5] Rutsel Martha, The Jurisdiction to Tax in International Law: Theory and Practice of Legislative Fiscal Jurisdiction (Boston: Kluwer Law and Taxation Publishers, 1989).

[6] Cara Nine, *Global Justice and Territory* (Oxford, UK: Oxford University Press, 2012).

[7] Reuven Avi-Yonah, Nicola Sartori & Omri Marian, *Global Perspectives on Income Taxation Law* (New York, Oxford University Press 2011) pp 151.

[8] John Christie, Citizenship as a Jurisdictional Basis for Taxation: Section 911 and the Foreign Source Income Experience" (1982) 8 Brook. J.Int'L., pp. 10

economic and social factors regarding its taxpayers. Due to this, and to other issues such as its administrative challenges, out-dated nature and unfair outcomes[9], this system has faced fierce critics from scholars and curiously it is only applied in a few countries being the U.S[10] one of them.

2.2 Residence income taxation system

In this system, residence is the main factor used to define tax authority.

This taxation doctrine gives bigger importance if the person has substantial and economic ties to a particular jurisdiction which permits the tax authorities of that jurisdiction to levy taxes on the referred person without regard of the source it comes from[11].

Usually, the main factor to determine tax residence is the existence of economic and social ties with the particular jurisdiction such as having a job, family ties or owning a house in the referred jurisdiction. Occasionally, someone can be in a jurisdiction for a certain period of time without creating these ties, when this happens in this system the criteria is defined by if the person spends more than 183 days (+-6 months), where in that case he/she is considered a resident. The reason for this is that if someone stays for such a period of time in the country he/she is not different than the people who live there permanently, so this state obliges people in this situation to pay taxes.[12]

When it comes to companies, there is a rule used to define tax residence which is called place of incorporation, which means taxes are imposed in the state that the company was registered. Yet, in recent years, states have changed their emphasis to another aspect: central management, which means tax residence is attributed to the state where the company actually is controlled[13].

This system nowadays is also usually referred to as a "worldwide income tax system", but there is a distinguishing factor between the worldwide income tax system and the normal residence based income tax system in a country which has no restriction of tax jurisdiction on residents that occurs in the "worldwide income tax system". With this non-residents are also taxed but merely on their income gained in the territory. The residence state administers this tax system usually by

[9] Bernard Schneider, The End of Taxation Without End: A New Tax Regime for US Expatriates (2012) Virginia Tax Review.

[10] The US also apply a residence based tax system.

[11] Leland Badler, The Residence Concept and Taxation of Foreign Income (1951) 51:3 Columbia Law Review

[12] Article 16 of the Portuguese Income Tax Code

[13] This factor was first mentioned in the case De Beers Consolidated Mines v. Howe (1906). The company was resident in South Africa had its headquarters in South Africa and did its business of mining in South Africa but since the majority of the board lived and always did meetings in England taking there all the major decisions it was deemed a company resident in England.

levying on its residents the duty of withholding taxes on income payments that are made to non-residents. Having this is mind, the worldwide income tax system sums up the characteristics of both residence and source based tax systems which will be explained further on.

This system is the most common worldwide being used in all of the EU (only with few exceptions) and in the BRICS countries, for example.

2.3 Source income taxation system

In this system, the tax authority is based on the state from where income has originated. It applies taxes on business operations or income that take place in its territory without regard to who earns it is a resident or not. So, this system is also called the "territorial tax system". Having this in mind, if a resident taxpayer has economic activity both domestically and overseas, his/her foreign source income is liberated assuming that the foreign source income has already been taxed in the host country. So, in a more clear way, this system does not tax foreign income of resident citizens, resident foreigners and non-resident citizens contrary to residence based tax systems and citizenship based tax systems.

Yet, discovering the source of income is a very difficult challenge in the complex economic world we live in today, given the fact that there are several types of income sources for multiple economic activities and it is often a challenge to attribute them to a certain source or place. E-commerce is a very good example of this[14]. Generally, the way of defining the source of income is normally based on the nature of the income. Revenues from the performance of services are usually treated as originating where the services are done. Financing revenue is normally treated as originating where the financing user resides. Revenues from the use of immovable properties such as rents are in general treated as originating where the property is located. Revenues provided by the use of intellectual property such as royalties are normally treated as originating where that intellectual property is used.

Nowadays, states like Malaysia, Paraguay, and Panama operate with this system.[15]

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[14] Dale Pinto and International Bureau of Fiscal Documentation, *E-commerce and Source based Income Taxation* (Amsterdam: IBFD, 2003).

[15] Edward Kleinbard *Throw Territorial Taxation from the Train* (2007) http://www.taxhistory.org/www/features.nsf/Articles/5A846114FF6AC58F852579CD0064DE32?OpenDocument

2.4 Income taxation systems and international double taxation

International double taxation is one of biggest tests of the coexistence of all these systems. Due to lack of commitment between states of residence and countries of source to resolve their overlapping tax claims, it is possible that someone who has an overseas economic activity may have to pay taxes on the same income more than once, firstly in the country where the income is gained and afterwards in the country where he/she resides.

One of the main reasons for the origin of tax treaties is to try to solve this problem[16]. To do so, tax treaties/conventions include a foreign tax credit mechanism[17], which allows the taxpayer to discount the amount of overseas taxes earned on the income from the tax normally payable on this country to the residence country. If the amount of foreign earned is less than the amount normally payable, the resident taxpayer is obliged to pay the difference to the residence country. In another situation, if the amount of tax paid to the host country is similar to the amount of tax normally payable to the residence country, the taxpayer does not pay any tax to the residence country. Finally, if the amount of tax paid on the income to the host country is superior to the amount of tax normally payable, the last mentioned will not tax the income but it won't compensate its residents for the excess of foreign taxes[18]. The final result of the foreign tax credit system is that the taxpayer will pay the higher tax of the resident or the host countries, eliminating any possible advantage of earning revenues in low-tax jurisdictions.

[16] Peter Harris, *Taxation of Residents on Foreign Source Income* (New York United Nations 2013), pps. 12-28

[17] Article 23, OECD Model Tax Convention on Income and on Capital (OECD Committee on Fiscal Affairs, OECD 2010); There are other mechanisms to solve this issue but I explained the one that is used more often.

[18] Reuven Avi-Yonah, International Tax as International Law: An Analysis of the International Tax Regime (New York: Cambridge University Press, 2007) pps. 157-158

2.5 Supremacy of residence income taxation based systems

Nowadays, most countries use the residence based income tax system, which levies taxes on their residents on their worldwide revenues and allows foreign tax credits for the taxes paid on the foreign-source to host countries.

This can be explained by the fact that this system has a very firm support from various economic theories such as *capital export neutrality, economic allegiance, benefits and ability to pay.* Capital export neutrality states that a resident's call to do business or investments overseas or domestically should not be perverted by geographical tax factors or rates, and it is said that the residence based system aids this neutrality by keeping the tax burden equal on domestic and foreign source income of resident taxpayers avoiding a possible encouragement/discouragement by tax factors when doing geographical decisions.

The economic allegiance, benefits and ability to pay theories have a complementary relationship. To explain this we must first explain the economic allegiance theory. This doctrine begins with the premise that the purpose of income taxation is to provide financing for government services and unless there is proper and sufficient economic connection to the taxpayer there is no foreseeable authority for the country to tax. To find this proper and sufficient economic link, a trilogy of questions came up. The questions were first, where the revenues were made, secondly where was the place of ownership of this wealth and thirdly where was it discarded[19]. According to the answers of this trilogy, the source of income and the residence income were selected as two main connecting aspects.[20] Yet, the issue was to find the place of the genuine and main economic interests of the person and this is where the benefit theory comes into action. This position is an extension of the economic allegiance doctrine by stating that if a human being is resident in a jurisdiction which is largely defined through the reference to its economic and social ties as well as its physical connection over a period of time, it is very possible that the person is collecting a benefit from public services and goods given by that jurisdiction, and this provides a reason for that person to be taxed. This theory had a small defect, which was the possible implication that only those that pay taxes and are able to do so should be dubbed to relish the protection and benefits given by the government. To solve this defect, the ability to pay theory comes into action. This position answers the question of the distribution of the general tax burden throughout the members of a certain

[19] League of Nations Economics and Finance Commission. See supra note, pps. 22-se

[20] League of Nations, Double Taxation and Tax Evasion. Report and Resolutions Submitted by the Technical Experts to the Financial Committee of the League of Nations, Geneva 1925

society. It states that the total tax onus should be shared by its relevant taxpayers having in mind their capability to face it. Thusly, this doctrine puts a higher tax onus on the elements of society that possess a higher income and a fewer or none tax burden on the low-income elements of that society. Since that the quantity of income tax payable is given by the percentage of total income, the lack of income signifies no tax liability. Currently, most states have incorporated this theory into their national income tax systems. Still, one problem remains; the difficulty of assessing with accuracy a persons' ability to pay without considering all the sources of income whether domestic or foreign. The countries with the system try to solve this issue with a declaration of sources of income from its resident taxpayers.

Opposite to this, the source based tax system has various limitations. As the foreign source income of resident taxpayers in the source based tax system is non-taxable, tax payers have a strong reason to relocate their economic activities to states with lower taxes. This makes states to undergo an international tax competition amongst themselves undermining income basis and damaging the taxpayers' confidence. The residence based income system decreases such competition and the potential to harmonize tax rates globally.

An issue of stability in the classic source based system with the ability to pay doctrine can rise. In this system, the ability to pay of the taxpayer is only measured by taking into account his/hers income domestically since the foreign source income is non-taxable. Having the situation where the taxpayer gains income in its majority or totally from overseas, he/she unjustly escapes from taxes in his domestic country in spite of his/her general economic ability to pay taxes and the benefits he/she has got from the state of residence.

To conclude, the residence based tax system is inclusive, by this, we mean that it admits the source states' tax authority in its own territory through the foreign tax credit mechanism and in a broad analysis the referred tax system looks more all-inclusive, equitable and fair. But, it is not a perfect system and it faces the issue of enforceability, which we will discuss further on.

3. Tax information: Concepts and Categories

There are two equal factors to make the enforcement of income taxes work: Tax information and tax jurisdiction[21]. Tax information is the type of data that makes it possible for tax authorities to do their job properly. Tax jurisdiction is the true authority to impose and collect taxes[22]. It has been argued that tax information without tax jurisdiction/authority is powerless and that tax authority without tax information/data is useless, this meaning that only when these aspects are linked can tax enforcement be properly achieved[23].

Income tax is normally levied on a basis of time on the net gradual growth of a person's wealth prior to consumption. Therefore, the system obliges for taxpayers to fairly disclose this fact to tax authorities. Without this, countries would find it much harder to enforce their income tax laws.

Yet, there is a daunting task associated with completing such disclosure. Normally, human beings will only give information if they have interest in doing so or that this disclose of information will bring no problems to them or else the tendency is for people to hide the information. The belief that people enjoy paying income taxes is very unrealistic and if some enforcement mechanisms don't exist, taxpayers will have no interest in disclosing data of their income in a voluntary way. Having this in mind tools to see taxpayers periodical income are needed by countries and this is where the collection, recordkeeping, and reporting of tax information by public and private bodies comes into action.

Tax information is a type of data that is utilized by tax authorities do define, assess, collect and recover taxes, in general by identifying the taxpayer, verifying his/her income, expenses, and residence, then establishing connections between these aspects. This data covers a collection of documents and records very important for applying tax laws.

If a resident taxpayer is embraced in overseas investment and business activities, the information is normally out of the residential country's territorial amplitude, and international cooperation is needed to solve this.

Generalizing about tax information is a danger since it's a constantly changing, keeping track with developments in financial and economic systems worldwide. Normally, 5 categories of

[21] Thomas Greenaway, Worldwide Taxation, Worldwide Enforcement Tax Notes International vol. 54 no.9 (2009)

[22] Rutsel Martha, The Jurisdiction to Tax in International Law: Theory and Practice of Legislative Fiscal Jurisdiction (Boston: Kluwer Law and Taxation Publisher, 1989) pps. 54-66

[23] Supra note 22

information have the utter most importance for the enforcement of income taxes (1-identity, 2- residence status, 3- income status, 4- ownership status and 5- foreign taxes incurred)

3.1 Information on the identity of the taxpayer

Identifying the taxpayer is the first thing to be done in order to enforce tax laws. This is very important because tax is imposed on income but it is essential to know who the economic owner of this income is because it is he/she that has the tax liability. Tax laws in general, have progressive tax rates, levying different percentages of tax depending on people's income capabilities and the type of revenues they get.

Taxpayer's identification is normally done by the collection and verification of its personal data like name, date of birth and tax identification number (TIN), which is a number assigned by the tax authority to each taxpayer, revealing itself to be quite important and efficient dealing with identifying taxpayers since there are many cases of people that have the same name and date of birth.

3.2 Information on the residence status of the taxpayer

Data on the taxpayers' residence is also very important for applying income tax laws, allowing the state to define if it has the authority to tax the individual and in case of a positive answer to what range. Generally, most states apply taxes on their residents' worldwide income, taxing non-residents on their income generated in their territory[24]. With this in mind, the establishment of the tax taxpayers' residence status defines if his income is subject to tax at a flat or progressive rate, normally residents pay taxes at progressive rates and non-residents pay withholding taxes which are generally flat. The residence status normally provides any proof of the individuals' tax residence in a given jurisdiction such as owning a house and/or familiar, economic and social links to the given state.

3.3 Information on the income status of the taxpayer

Defining the income status of the taxpayer is the next point on the agenda of the efficient carrying of income tax laws. For this to be done, tax inspectors must identify the character and quantity of the taxpayers' income (employment income, capital gain, profit, etc...) and the character

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[24] Murphy and Nagel., Kevin Holmes, International Tax Policy and Double Tax Treaties: An Introduction to Principles and Application (Amsterdam: IBFD Publications 2007)

and amount of expenses. This is normally achieved by the declaration of this data by tax residents at the end of year tax returns.

3.4 Information on the ownership status of the taxpayer

The establishment of the taxpayers' ownership status would provide an easy tool to define his/her income status. Nowadays most investments and business are held and carried through corporations, partnerships and trusts which are normally separate taxpayers and with this the owner of the investment/business are hidden beneath the multi-layered entities in states with firm regulations regarding commercial secrecy hiding overseas property ownership. Some countries do not oblige the identification of directors or shareholders or the keeping of financial recording, complicating the job of tax inspectors.

Additionally, sometimes, resident taxpayers move their assets overseas and then transfer these assets back to their country but using a foreign company so it will be treated as foreign income having like this a better tax treatment. Bearing this in mind, having the ability to track the ownership of entities and investment is very important for carrying out of tax laws globally and tax information allows tax authorities to achieve this.

3.5 Information on the foreign tax status of the taxpayer

Contrary to domestic generated income, and as mentioned before (Section 2.4) foreign income is normally liable to tax in the host country as well. Whoever pays the income generally withholds the state's taxes and sends the after-tax payment to the non-resident tax payer. Thus, any enforcement of tax by the domestic country on the overseas income is the second tier of taxation which can lead to a situation of international double taxation. To solve this, when it comes to taxing the foreign income of its residents the domestic state generally allows foreign tax credit to taxes the resident taxpayer has already paid in the host country. Yet for this to be done properly, the residence country needs to have the information as to the quantity of tax paid by its resident regarding this foreign amount. The onus of providing this information is with the taxpayer who has to get the information from the tax authorities in the host country. Generally, this information consists of copies of certificates, documents, and receipts that confirm the amount and the payment of income taxes in the host country.

4. Tax information: Sources

4.1 Sources of tax information on domestic income

When only in a domestic scenario, tax authorities apply income tax laws taking into importance data gained from two main sources, which are self-assessment reports and third party's tax information reports.

4.2 Self-assessment reports

Normally, people who are considered tax residents are obliged to pay taxes by the state's constitution. This obligation generally involves three requirements tax registration, record keeping, and tax reporting.

The concept of tax registration is quite easy to explain. Normally, any entity or individual with the purpose of starting a business activity must be registered with the tax authorities. To complete this, the person/entity is obliged to do a basic identification process by given the tax authorities basic information such as his/her name, address or the declaration of the nature of the activity/business. After registration, the person is given a specific number normally known as tax identification number or social insurance depending on the country and this number is utilized to identify the taxpayer for tax or other socials ends.

Record keeping is the duty that normally the taxpayer is obliged to do after registration. The range of record keeping can vary having in mind the nature of the taxpayer and the type of economic activity followed. To exemplify, if a taxpayer is an employee the obligation of record keeping generally resides with the employer, whereas the recording keeping of personal expenses if the tax payers pretend to claim tax deductions is with the taxpayer.

On the other hand, corporate taxpayers are normally controlled with very firm record keeping rules; income tax laws oblige taxpayers to maintain their tax records in specific forms for certain period of time[25], allowing tax inspectors to identify the taxpayer, verify the source and type of revenues earned as well as deductible expenses, benefits and contributions. If these obligations are not fulfilled can result in the rejection of deductions, or even administrative, civil or criminal penalties.

[25] Chris Evans, Shirley Carlon and Darren Massey *Record Keeping Practices and Tax Compliance of SME's* (2005) 3:2 eJournal of Tax Research

Tax reporting stresses the fact that tax residents are obliged to do fairly complete and up-to-time statements of their taxable revenues to tax authorities. These statements or generally called "self-assessment reports" and are a written document addressed to the fiscal authorities by the taxpayer showing his/her incomes and deductible expenses applicable to a certain time period. It delimits the liability to pay tax and defines the quantity and period of time the tax is due.

Normally, self-assessment is done by the completion of a form of annual tax return given by tax authorities. By norm, there are three components of a tax return, firstly a declaration of income, secondly a statement of tax deductible expenses allowances and eligible tax credits and thirdly the calculation of the tax payable, through the subtraction of allowances of income and tax deductions with the application of tax credits and determination of the right tax rate which will conclude the general tax liability.

These reports are the most usual single source of tax data and the most used by tax authorities globally when it comes to tax administration methods. It gives a strong sign of trust in the taxpayers by making them assess themselves the amount of taxes they have to pay.

Of course, questions arise regarding self-assessment especially regarding the filling of false self-assessment forms. What has been evidenced over the years is that the decision taxpayers expect from the tax authority influences their honesty in the filing of annual tax reports. If the general expectation is that tax inspectors will detect the false reports, people tend to be more honest and the opposite effect happens if people feel that the tax authorities' won´t detect misreporting. This leads to another fact: the better tax authorities work in a state the more compliant are its taxpayers. This fact is often called the *visibility effect*[26].

However, there is another tool that can be used to help to inspect the veracity and accuracy of self-assessment reports. It is called *third party reporting*[27], and it is utilized when possible, as a secondary source of tax information.

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[26] Robert Kagan, *On the Visibility of Income Tax Law Violations* in J.Roth, J.Scholz and A.White, Eds., *Taxpayer Compliance* (Philadelphia: University of Pennsylvania Press, 1989), pp.77

[27] OECD Center for Tax Policy and Administration, Using Third Party Information Reports to Assist Taxpayers Meet their Return Filling Obligations- Country Experiences with the Use of Pre-populated Personal Tax Returns (Paris OECD 2006).

4.3 Third-party tax reporting

Corporate organisms play a vital part in the effort of administrating income taxes. Since they are taxpayers that follow stricter rules, they are required to have records of their income and expenditure for accounting and tax ends, recording as well all payments done to the employees, creditors, and suppliers so that they can benefit tax wise through the way of business expenditure. All this originates a paper trail of data that tax authorities have a great interest in because it allows them to control and verifies the liability of other tax payers. The interest of private parties in having tax deductions creates an informal alliance between these and tax authorities who take advantage of the data provided to achieve a better enforcement of tax laws.

Thusly, administrations ask facilitators of income (i.e. financial institutions) or payers of income (i.e. employers) to give tax authorities info on all payments done to other taxpayers through two types of reporting; automatic reporting (where there is no specific demand from the tax authorities) and specific reporting where the tax inspectors ask specifically for a determined situation. This is normally done by the completion of annual or monthly forms of information returns that contains dividends, wages, or interest income payments, for example, done by the taxpayer to employees or customers.

This mechanism gives tax authorities the chance to verify the veracity of taxpayers' annual income matching the data presented by the taxpayer and comparing with the info presented by the employer. This practice is called *income matching*[28]. Is was created to assess any potential strange situations in the reports, and if something suspicious is found, tax authorities can inquire the taxpayer for a reasoning.

Yet, this mechanism is not always possible, for example in the case the taxpayer is a self-employed individual. The absence of a link between the taxpayer and a third-party makes it nearly impossible to apply the mechanism and having this in mind taxpayers take advantage of this.[29]

4.4 Third-party tax withholding

In developed economies, the majority of income taxes are also collected by the use of third parties. This procedure is called *third-party tax withholding*. This procedure is an obligatory requirement for most income payers to deduct and withhold the tax at source of the payments

[28] James Alms, John Deskins and Michael McKee, Third Party Income Reporting and Income Tax Compliance (2006), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=895344

[29] Piroska Soos, Self-Employed Evasion and Tax Withholding: A Comparative Study and Analysis of the Issues (1990) 24 UC Davis L. Rev., at 120-122.

made to income receivers and transmit this to the tax authorities. The income payer basically retains a portion of the income and consigns it to tax authorities, for its application towards the payee's tax liability. Thusly, the government receives the tax indirectly from the person who pays the income. This withheld tax is then subject to a treatment as a prepayment on account of the receivers' final tax liability. This procedure is many times utilized in parallel or in substitution of third party information reporting[30].

Part of the withholding tax can be returned at the end of the tax period when the taxpayer files tax return and if it is found that the receivers annual assessed tax liability is less than the tax withheld, or the taxpayer can be obliged to make an extra tax payment if it is found that the assessed tax liability is higher is more than the tax withheld.

Nowadays, nearly every state uses third-party tax withholding mechanism, applying this tool principally in employment income like salaries or wages but not for business income such as interest and dividends, since the second type of income is only subject to info reporting except if the receiver is a non-resident taxpayer from who income would be difficult to collect in other circumstances.[31]

4.5 Existence of all three regimes

It can be discussed if the third-party information reporting mechanism or the third party withholding mechanism can make the self-assessment purpose redundant, since the administration has received already the information from third parties to levy income taxes on a given taxpayer (third party reporting mechanism) or has done the collection of income taxes of the taxpayer already (third-party withholding mechanism).

Pragmatically each of these regimes complements one another. Firstly, info reports that governments get from third parties are usually incomplete to define the taxpayer's final tax liability, since it doesn't give any data about personal expenses (i.e. healthcare and educational expenses), normally deductible for tax purposes because this info lies with the taxpayer. So, the ultimate tax liability can´t be found without using the taxpayer's self-assessment report. This also applies to the withholding tax regime since it is generally imposed on gross income at source. Thusly, the quantity

[30] Charlotte Twight, Evolution of Federal Income Tax Withholding: The Machinery of Institutional Change (1995) 14:3 Cato Journal.
[31] Idem; View also Esteban Ortiz-Ospina & Max Roser, *Taxation.*
Available at: https://ourworldindata.org/taxation

of tax withheld is not accurate until the end of the tax period when the gross revenues are adjusted with the deductible expenses of the taxpayer.

Secondly, the large majority of states levy progressive income tax rates for singular taxpayers. In the progressive income tax system, any raise in the taxable income base gives way to a marginal raise in the applicable tax rate. So, if the taxpayer gains revenues from several sources and from several locations, each tax-withholding or third party agent doesn´t have any information about the taxpayer other income sources. The ultimate tax liability and consequent applicable marginal tax rate can only be found through the tax information statements filled and submitted by all of the third parties involved and by the taxpayer at the end of the fiscal period. Any under or overpayment of tax is afterwards corrected with the overpayment being refunded and the underpayment is additionally charged.

5. Foreign income tax information sources

5.1 Self-assessment reports

As shortly talked before, a residence based income tax system obliges residents to report and pay tax and all their income, having no regard for its source, to their country of residence. Having this in mind, embracing overseas economic activities normally requires the exact same registration, recordkeeping and tax reporting as in domestic economic activities.

Basically, resident taxpayers are normally entailed to register with the residents' country tax authorities, follow recordkeeping requirements and do up-to-date statements on their foreign source income to their state of residence.

Yet, fiscal implications of foreign source revenues are somewhat more difficult to understand. An overseas economic activity can give way to some fiscal issues, such as the vulnerability of international double taxation. Differently, of domestic-source income, foreign source income is generally tax liable as well in the host state. The payer of these foreign sourced revenues (generally a foreign organism) withholds the host state taxes upon provision of the income of the non-resident taxpayer. Like when regarding domestic source income the question of what will happen if the resident taxpayer fails to report/falsifies his report on his foreign source revenues.

For example, a study estimated that up to 90% of foreign held goods property of rich residents of developing countries were never reported to the state of residence tax authorities[32].

This leads to the question if the residence country has mechanisms to access the information on foreign source income.

5.2 Third party tax reporting (or the lack of it)

Data regarding the foreign source income of resident taxpayers is generally situated out of the residence states amplitude, cause it has been stated as one the cornerstone principles of international law that a country is not allowed to extend his administrative authority to another country's territory[33], meaning by this that domestic tax tools like third-party tax withholding or third-party reporting have no legal effect in another country's territory

With this is mind, taxpayers have very few risks of their foreign source revenues being discovered by tax authorities of their residence country, and this makes resident taxpayers, in most cases not to report their foreign source revenues to their residence countries tax authorities. This is one of the main ways of tax evasion.

However, the problem worsens when the income of the taxpayer comes from an interest in a foreign company that is situated in a low-tax jurisdiction or a tax haven. In this situation, the taxpayer could delay the company's income distribution decisions to delay his tax-reporting duty to his residence state, given the fact that generally he has enough power to make the company not distribute the dividends, for example, and in this way evading taxes.

This used to be a very big problem, especially if the company was a separate taxpayer since if this company didn't allot its profits to the controlling shareholder, the latter would not have any income to report to his/her residence state. With the absence of rules to face this problem, the result of this would be a perpetual delay of the residence state taxes on foreign source income gained via foreign controlled companies. The amplitude of this tax delay is often immense, depending on the rate of return on the delayed taxes and the postponement period. With normal calculations, it is considered that this extend delay has practically the same effect of a tax exemption[34].

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[32] Markus Mainzer, *The Creeping Futility of the Global Forum's Peer* Reviews (London: Tax Justice Network 2012), pp. 25

[33] Asif Qureshi, *The Public International Law of Taxation: Text, Cases and Materials*, 1 ed. (London: Graham & Trotman, 1994), pps. 308 et seq.

[34] Brian Arnold & Michael McIntyre, *International Tax Primer* (The Hague Kluwer Law International 2002), pp. 89

To answer this problem, in 1962, the US came up with a set of special anti-deferral regulations, who are known as *controlled foreign company rules*[35] or *controlled foreign affiliate rules*, CFC rules for short. These rules oblige the resident taxpayers who have ruling powers in foreign organisms situated in tax havens or low-tax states to report part of the controlled foreign company's profits that are linked to the ownership interest of the corporation and allocate this profit to the resident taxpayer although dividends have not been distributed or paid (e.g. taxation on accrual basis). Tax reporting obligations are both applicable to the resident taxpayer and to the CFC[36]. Normal circumstances for CFC reporting regimes to be applied are the existence of a controlled foreign company by a domestic taxpayer and that this company is situated in a low/no tax jurisdiction originating a great tax benefit for the shareholder.

From the residence states point of view, these regulations look procedurally effective. Yet, they can only be applied to resident taxpayers' controlled foreign interests, not to their overseas portfolio interests.

CFC rules are applied in around 30 countries today[37], most of these states being very industrialized and capital exporting countries.

5.3 Tax whistle-blower reporting

Nowadays, a few states possess special regulations and programs that easy the flow of a certain source of data to tax authorities. Large money rewards are offered and protection from harm and retaliation is given to people who have info of abusive behaviour of other taxpayers and want to inform the authorities about this (i.e. *Public Interest Disclosure Act*[38] *or Tax Relief and Health Care Act*[39]).

Two quite known cases of whistle-blower reporting are the *HBSC case* and the *UBS case.*

In the first case, in late 2008, Hervé Falciani, a former worker of the HSBC bank, gave the French authorities a collection of secret banking data regarding about 130,000 foreign customers of the bank. The French government shared the data with other states like the US, Italy, Greece,

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[35] Michael Lang*, CFC legislation, Tax Treaties and EC Law*, vol. 8 Kluwer law international, 2004), pp. 17.
[36] Idem
[37] See note 34, pp. 87
[38]See Douglas Pyper, Whistleblowing and Gagging Clauses: the Public Interest Disclosure Act 1998 (London, The House Of Commons, 2014).
Available at: http://www.legislation.gov.uk/ukpga/1998/23/contents
[39] http://www.irs.gov/uac/Whistleblower-Informant-Award.

and Germany and with this HSBC had to pay a 1.9 billion dollar settlement with the US government. Curiously, Falciani always rejected any compensation for the information he gave[40].

In the second case, in 2007, a former employee of Swiss bank UBS offered to the US Internal Revenue Service data he stole from the bank containing info of thousands of U.S citizens that had undeclared accounts in Switzerland. This made around 30,000 U.S citizens to confess the holding of undisclosed foreign bank accounts and allowed the US Treasure to recover around 5 billion dollars in penalties and taxes[41].

Therefore, these programs and laws of protection of tax whistle-blowers are largely created to gather data on the foreign-source income of resident taxpayers. The amounts of rewarding "whistle-blower informants" are normally defined by a percentage of the tax income and penalties recovered because of the information given (i.e. the whistle-blower in the *UBS case* got 104 million dollars for the information he provided).

Surely, the whistle-blower programs and laws have helped to diminish the differences of information between tax authorities and taxpayers. People are also incentivised to report abusive taxpayer actions due to the existence of high rewards.

Yet, some legal and political problems have been caused by these laws and programs. Firstly, a whistle-blower normally obtains this data normally by violating foreign bank secrecy, contractual trust requirements or confidentiality laws, and with this, the data collected can be vulnerable in court[42].

Secondly, these laws have a great potential to originate conflicts between states, because these laws incentive and prize the act that is normally condemned due to privacy and confidentiality laws. No government would be happy if its laws were attacked by another government and having its financial institutions being a target for the foreign whistle blower, and this also with the support of another government.[43]

Additionally, due to these practises, states that have risk of being targets for whistle-blowers, are taking measures to fight such regulations by putting the argument that tax information

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[40] Martin Hesse, " Swiss Bank Leaker: 'Money Is Easy to Hide'" Spiegel International (16 July 2013). Available at http://www.spiegel.de/international/business/interview-hsbc-swiss-bank-whistleblower-herve-falciani-on-taxevasion-a-911279.html.

[41] 1 Laura Saunders & Robin Sidel, "Whistleblower Gets $104 Million" The Wall Street Journal (11 September 2012). Available at http://online.wsj.com/article/SB10000872396390444017504577645412614237708.html. 102 Martin Hesse, " Swiss Bank Leaker: 'Money Is Easy to Hide'" Spiegel International (16 July 2013). Available

[42] Http://www.jovennarwal.com/insights/potential-pitfalls-of-the-cra-offshore-tax-informant-program/.

[43] Eric Pfanner & Mark Landler, "Tax Inquiry? Principality Is Offended" New York Times (February 20, 2008). Available at: http://www.nytimes.com/2008/02/20/business/worldbusiness/20evasion.html?pagewanted=all&_r=0;

assistance will be declined if it is found that the information was obtained through any act punishable by the states domestic law, sending the message for states not to support the use of stolen and by this illegally obtained data for tax information purposes[44].

These events come to question this source of information viability as an independent enforcement tool. Regarding tax enforcement, these laws and programs only worked in a very limited number of cases and it can be said that although whistle-blower programs play an important part in the stockpile of data collection mechanisms it's not a proper tool for regular tax enforcement

5.4 Tax amnesty programs

Recently, administrations have also started to employ tax amnesty programs as an administrative mechanism in tax enforcement[45]. This consists of an offer by the government for a certain period of time to allow taxpayers to declare their undeclared tax liability, exchanging for this, no legal consequences for their tax felony. Basically, this is a special deal between taxpayers and tax authorities, in which the first agrees to disclose his/her past failure in declaring tax liabilities and/or underreporting and the latter consents to liberate the former from any civil and/or criminal felonies that can result from this non-compliance, allowing like this, for non-compliant taxpayer to sort out their fiscal past and be free of potential civil and criminal charges.

The programs normally begin when administrations realize that the tax income being raised is lesser then what they expect. So, the intention of this amnesty is to claw back non-collected income due to taxpayers' errors and/or omissions in the past and permit by this, a move from tax misbehaviour to a regulated tax situation assuming tax compliance in the future.

Pragmatically, these programs can affect all of the taxpayers or just a certain group of them. Yet, they generally are for the economic activities that have a high rate of non-compliance, such as having a foreign business and/or investment activities or/and holding offshore banking accounts, so information on those sources can be retrieved.

But, tax amnesty programs also have problems. To start, they affect the integrity of tax systems and negatively strike on the tax authorities' reputation. Then it also implies that the administration has issues with its normal tax enforcement mechanisms. Finally, equity questions also arise given that generally, only a few taxpayers benefit from them, making taxpayers that have

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[44] 8 Xavier Oberson, *Swiss Report: New Exchange of Information Versus Tax Solutions of Equivalent Effect* (Turkey: 2014), pp.15. Available at http://www.eatlp.org/uploads/public/2014/National%20report%20Switzerland.pdf

[45] Key Bell, "Cash-strapped States Turn to Tax Amnesties" Bankrate. Available at http://www.bankrate.com/finance/taxes/cash-strapped-states-turn-to-tax-amnesties-1.aspx.

always been compliant complain of unfair treatment since, in the end, the non-compliant can get the same treatments as them. Given this, it can be fully understood why this tool cannot be seen as a systematic fiscal enforcement mechanism.

6. Third-party tax reporting on foreign income: Theoretical support

6.1 The existing regimen implications

As stressed before, aside from self-assessment declarations, few cases of whistle-blower reports and tax amnesty programs on an occasional basis, systematic enforcement tax mechanisms are non-existing when it comes to the foreign source income of resident taxpayers.

This situation can be very significant for the income necessities of both residence and host states due to the international tax allocation rule in any given double taxation treaty is normally scheduler[46]. Income from overseas activities is divided into two main categories, active investment income, and passive investment income. The recommendation of international tax principles is that income arising from overseas activities should be taxed first in the state that holds the business[47], whereas revenues from cross-border investment activities should be taxed where the investor resides permanently. Having this international commitment in mind, most states enforce quite low withholding tax for non-residents gaining investment revenues from domestic sources or they are exempt from being taxed at all. So, most of the times, resident taxpayers pay a very low tax or no tax altogether on their foreign source income to host states. With this situation, if the residence country doesn't have an enforcement tool to tax the foreign source investment revenues of its taxpayer, this income may not be taxed, initially due to a withholding tax exemption under a double tax treaty in host state and then in the residency country simply through misreporting.

6.2 Tax withholding and third-party tax reporting as pillars of tax enforcement

Self-assessment, in alliance with third-party reporting or/and tax withholding tools, are the pillars of tax enforcement in the domestic context naturally reflecting a structural enforcement system. Scholars have argued that structural law enforcement is a type of law enforcement that

[46] In the schedular system, items of income are classified into various categories and then the primary right to tax is assigned to either the residence or the host jurisdiction.

[47] See Articles 7, 10, 11, 12, 13, 23 of the OECD Model Tax Convention (1977) and UN Model Tax Conventions on Income and Capital (1980) and their subsequent updates.

tries to regulate misbehaviours through cleverly planned ideas to dissuade the misbehaviour in the first place instead of applying firm penalties, focusing on the minimizing of the chances and the prevention of the misbehaviour instead of having to deal with the consequences of it.[48]

Two types of structural law can be described, but only one of them can epitomize both mechanisms at the same time[49]. The first type designs a process that makes a misbehaviour more prone to detection. The second type focuses more on the prevention of the misbehaviour of occurring in the first place by making it harder to achieve or troublesome to do so.

This classification is true to third party reporting and to tax withholding.[50] Third party reporting makes taxpayers that are not reporting or falsely reporting vulnerable to detection, giving tax authorities a trustworthy source of data regarding tax liabilities, without relying solely on the taxpayer's self-assessment report, increasing like this, the perceptibility of the taxpayers' revenues to the tax authorities. Since the information through third parties is already available it is a greater risk for taxpayers not to report or misreport their income.

Third party fiscal withholding does the function of the second type, by removing incentives and chances for underreporting or non-reporting through the application of an immediate tax on revenues at source previous to its arrival to the taxpayer, discharging the person's tax liability by paying the tax without the chance of it being used on any other end. This is an example of how the modern income tax system works in a domestic context.

Yet, by the moment resident taxpayers start to engage in cross-border activities, tax enforcement scope changes dramatically. Countries have no way to apply a third party tax withhold mechanism or a third party tax report, and thus they don't have access to important data regarding their taxpayer, leaving to the imposition of harsh penalties and/or criminal sanctions to enforce that their residents report their foreign source income. However, although the sanctions are costly, they have made taxpayers be more compliant since the taxpayer knows that without verifications in place the probability of tax evasion being detected is highly improbable and that is why offshore tax evasion is still a very big issue in our world today.

Undoubtedly, no foreign third party accepts regular tax information reporting or tax withholding towards foreign tax authorities and there are overwhelming jurisdictional and practical

[48] ; Edward Cheng, Structural Laws and Puzzle of Regulating Behaviour (2006) 100:2 Northwestern University Law Review; Arie Freiberg, Enforcement Discretion and Taxation Offences: Proceedings of the Australian Tax Forum, 1986, pps. 55-91

[49] Idem pp.664

[50] Idem pps. 675-67

limitations for the implementation of the mechanisms globally. Yet, in this context of increased globalization of the economy, cross-border economic activities are originating a bigger necessity for tax authorities to get information out of their territory, appealing like this for higher cooperation with in regards to taxation. Having the third party tax reporting system dealt with the enforcement of tax compliance regarding domestic source income of the resident taxpayer, the need of an international mechanism that has the same effect for foreign source income of taxpayers has also been observed. Without such a mechanism, taxing foreign source income of resident taxpayers will be continuously at risk.

7. Conclusions

Nowadays, most states have a claim of worldwide tax authority of their residents determined by legal statute which establishes the taxation of their domestic and foreign source income. Yet, the study done in this chapter gives the idea that regarding foreign source income the claim presented by states lacks force because governments have no access to tax information outside of their borders regarding their residents, therefore they can't know if their residents are lying or underreporting their foreign source income in their self-assessment reports. So, there is a lack of parallelism regarding the enforcement of taxes for both incomes.

To perform efficiently, tax systems must not only give a definition of domestic and foreign source revenues and determine they are taxable, but also an effective enforcement tool is needed. International cooperation is urgent is this field because countries cannot do this task on their own and it will be impossible without cooperation due to the highly globalized world we live in today.

Part 2. Banking secrecy laws; General Notions on Taxpayer Confidentiality

Banking secrecy laws

1. Outline

Nowadays, most overseas investments and trade are dealt through the international banking system, which is characterized by a number of banks and financial entities that establish connections to move money around the world. These banks and entities possess a great amount of financial information that is very important for fiscal ends. Normally, bank data that is important for fiscal ends are normally, accounts, financial goods, information of transactions and data regarding the identity and residence condition of account holders. Yet, procedurally, it has never been easy for tax authorities to collect this data from these entities, because banks and financial entities have declined several times to make public the financial data of their clients to third parties because of banking secrecy and other confidentiality laws[51], creating like this, the chance for taxpayers to use banks and financial institutions , especially in countries with rigid banking secrecy laws, to hide their assets and revenues from domestic fiscal authorities. Ultimately, the efficiency of international taxation and international tax exchange of information is largely dependent on the access to the fiscal important data in the possession of banks and financial entities.

In the final sections, some general notions of taxpayer confidentiality will be provided since it will be mentioned several times throughout this work, it's advisable to provide these notions sooner than further on.

This section has the purpose to explain the relationship between international exchange of fiscal data and domestic banking secrecy and some confidentiality regulations, proving that it can be an obstacle to exchange of tax information.

[51] One of the most strict bank secrecy laws exists in Switzerland. It is given the status of a constitutional ight as part of individual's right to liberty and freedom. Doron Herman, *Taxing Portfolio Income in Global Financial Markets: a Positive and Normative Exploration of Possible Solutions* (Amsterdam: IBFD, 2002), pps. 223-224; Jean Saugy & Pascale Chapius*, Bank Secrecy and Tax Law in Switzerland* in D. Campbell, ed., International Tax Planning (London Kluwer 1995) pp. 127.

1.1 Banking secrecy laws: Concept and historical background

Nowadays, banking secrecy as a cornerstone rule of banking services is relatively available all around the world[52]. It's commonly understood that is a financial entity's professional obligation to keep its clients' financial data as a secret. This confidentiality relationship grants the financial entity the right to decline a third party's investigations on this data with the intention of protecting the clients' interests, therefore maintaining clients' personal data, accounts, and financial outflows in these accounts from the investigations of third parties.

A prudent bank client wants protection for the above mentioned aspects for various reasons; Firstly, the banking data is a subject of privacy. The turning public of this data could show considerably about someone's earning situation, spending habits, and after all about his/her personality. Secondly, this disclosure could make the client physically, psychologically and politically weak. Thus, clients wouldn't likely trust banks with their money and financial information if the confidentiality of their financial issues was not guaranteed. Bearing this is mind, banks have as well, a business interest in keeping the secrecy of the banking data of their clients.

The notion of banking secrecy has quite a big history and its first records can be found right at the initiation of banks in the 1600's. At first, it was a banker's ethical obligation to keep the issues of the banks' clients a secret. With time, this obligation became a strong contractual connection between the banks and customers.

The first important date regarding this subject is probably 1685[53] when, in France, the king declared Protestantism illegal, leading to the exodus of nearly half a million to people to Switzerland and obviously moving most of their money to the Swiss banks. Curiously, at this time, one the best customers of the Swiss banks was the French king and so it was very important to keep the secret that the French king who declared Protestantism illegal was technically, lending money from the Protestants. Therefore the banks needed to preserve the identity of their borrowers and their depositors a secret.

The first recognized document regarding banking secrecy is of 1713 when the Great Council of Geneva adopted banking legislation that required bankers to maintain a register of their customers and their financial operations, but could not make this information public to anybody

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[52] View http://www.financialsecrecyindex.com/. This index contains the list of countries with solid banking secrecy tradition.

[53] Miroslav Jovanović, *The Economics of International Integration*, volume 423 (Edward Elgar Publishing, 2006), pp. 395

except the client, or with the expressed consent of City Council.[54] Soon after other states in Europe also started to formulate banking secrecy regulations

This pioneer modern banking secrecy legislation was again introduced in Switzerland with the coming into force in 1934, of the Federal Banking and Savings Bank Law, which made it possible, for the first time, the violation of banking secrecy law as a criminal offense[55]. This incident brought the notion of banking secrecy from a contractual relationship between banks and their clients into the domain of public policy by enlarging the protection of the accountholder further on then civil solutions. This development in the practices of banking secrecy has been considered to be related to two incidents; firstly, in 1932, two employees of a Swiss bank were arrested in Paris due to their advertisement of their employers "utmost discretion" to French nationals and ultimately advising them to move their assets to Swiss banks.[56] This issue eventually disclosed that over 1000 members of the French elite citizens had already undisclosed banks in Switzerland. The disclosure of these accounts to the French government made the confidence of French citizens in Swiss banks decline drastically and after this incident, several French customers started to withdraw their assets from Swiss banking institutions, so consequently Switzerland had to take actions and reinforced its

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[54] Idem, pp. 395

[55] The Federal Banking and Savings Bank Law (8 November 1934), Article 47 (original text):

a) as auditor or assistant to an auditor intentionally and seriously violates his duties during the audit or at the occasion of the drafting or rendering of the auditing report, whosoever intentionally omits the prescribed request to the bank to take the necessary measures or does not submit the prescribed reports to the Banking Commission.

b) As executive, official, or employee of a bank, as auditor or assistant to an auditor, as member of the Banking Commission, as official or employee of the Banking Commission's Secretariat intentionally violates the professional secret, induces or tries to induce others to do so, shall be punished by a fine not exceeding CHf. 20,000 or six months in jail. The penalties can be combined. If the act has been committed by negligence, the penalty shall be a fine not exceeding CHf. 10,000.

See Robert Vogler, *The Genesis of Swiss Banking Secrecy: Political and Economic Environment* (2001), Volume 8 part 1, Financial History Review; Cambridge University Press.

The current revised version of Article 47 reads as follows:

c) Whoever divulges a secret entrusted to him in his capacity as officer, employee, mandatory, liquidator or commissioner of a bank, as a representative of the Banking Commission, officer or employee of a recognized auditing company, or who has become aware of such a secret in this capacity, and whoever tries to induce others to violate professional secrecy, shall be punished by a prison term not to exceed 6 months or by a fine not exceeding 50,000 francs.

d) If the act has been committed by negligence, the penalty shall be a fine not exceeding 30,000 francs. e) The violation of professional secrecy remains punishable even after termination of the official or employment relationship or the exercise of the profession.

f) Federal and cantonal regulations concerning the obligation to testify and to furnish information to a government authority shall remain reserved.

View the Swiss Federal Law Relating to Banks and Savings Banks

Available at: https://assets.kpmg.com/content/dam/kpmg/ch/pdf/ch-banking-act-en.pdf

[56] Sando Sasako, *Farewell to the Swiss Bank Secrecy Tradition and Principle (Indonesia, Jakarta: 2010*), pp.4. Available at https://mayachitchatting.files.wordpress.com/2012/05/farewell-to-the-swiss-bank-secrecy-traditionand-principle.pdf

banking secrecy regulations; secondly, the super inflation originated from the first World War weakened national currencies in a great manner in the majority of countries in Europe[57]. After the war, harsh exchange control and monetary policies were seen in Germany[58]. In 1933, the Nazi German government approved a regulation that obliged all German residents to declare their wealth possessed out of German borders or risk jail time at least or even in some cases, the death penalty[59]. After this, another law was adopted, that made it possible to seize "anti-state or unpatriotic" assets. This law had the purpose to seize the wealth of Jews and opponents of the Nazi regime. So, the Gestapo[60] started to spy on the Swiss banks to search for German "anti-state and unpatriotic" deposits, and following the death of three German citizens with Swiss bank accounts, the Swiss authorities were finally convinced that there banking secrecy needed to be harsher[61].

With time, a lot of people all around the world started to notice the benefits of the Swiss banking secrecy law. Consequently, the Swiss state was also obtaining large revenues due to this secrecy aspect and so, the goals of keeping undisclosed foreign bank accounts have gone from protection from political persecution and perseverance of wealth to the evasion of national taxes from some of the richest companies and individuals in the world.

1.2 IETI frameworks and banking secrecy laws

Banking secrecy has become a pivotal principle of banking services in the majority of countries worldwide. Normally, banks and financial entities have legal requirements when it comes to confidentiality and secrecy regarding their customers with grounds on specific regulations (i.e. bank secrecy law or law on the civil contract between the financial entity and the customer)[62]. Bank

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[57] 7 Edouard Chambost, Bank Accounts: a World Guide to Confidentiality (Wiley, 1983), pp.5

[58] C. Todd Jones, Compulsion over Comity: The United States' Assault on Foreign Bank Secrecy (1991), pp. 455. Avaliable at: https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1342&context=njilb

[59] The Law stipulated: Any German national who, deliberately or otherwise, activated by a base selfishness or other vile motive, has amassed his wealth abroad or left capital outside the country, shall be punished by death. View Chambost, supra note 207, pp.5

[60] Gestapo is an abbreviation of Geheime Staatspolizei "Secret State Police" that was the official secret police agency of Nazi Germany before and during the World War II. It was formed in 1933 and existed until May 1945. Avaliable at: http://en.wikipedia.org/wiki/Gestapo

[61] Kurt Mueller, *The Swiss Banking Secret,* International and Comparative Law Quarterly Volume 18, part 2 (1969), pp. 361.

View also Adam LeBor, Hitler's Secret Bankers: The Myth of Swiss Neutrality During the Holocaust (New Jersey: Carol Publishing Group, 1997), pp.3

[62] *Bank secrecy law* is related to a type of laws that are intended to protect the secrecy of financial information gathered by financial institutions yet it is not necessarily limited to financial institutions. All countries provide to a greater or lesser extent, the authority and obligation for banks to decline to disclose client information to ordinary third parties

data for these ends contains all information provided by the customer to the bank or created by the bank itself when it comes to the client that can be utilized to personally identify the customer.

Normally, tax authorities of a large number countries have legal power to annul the bank secrecy regulations to perform their function, but, there are some states where banking secrecy regulations are so strict that they forbid even tax authorities from accessing tax-relevant data of bank accountholders. In this way, these regulations could be a major obstacle to the sharing of fiscal data.

Initially, this issue was analysed by the OECD in its article called *Improving Access to Bank Information for Tax Purposes*[63] in 2000. This article mentioned the absence of access to bank data for fiscal purposes as one of the most important barriers to efficient transnational tax information exchange amongst states. This research did set out as well an ideal standard of bank information access, especially, *that all member countries should permit access to bank information, directly or indirectly, for all tax purposes so that tax authorities can fully discharge their revenue raising responsibilities and engage in effective exchange of information with their treaty partners.*[64]In 2003, the OECD launched its second report that noted some positive evolution on the access to bank data for fiscal ends in the OECD and non-OECD states since the first part of the article was released, however, it was still observed that this big issue was still occurring. In 2004, the OECD shifted from reports and started to act. Article 26 of the OECD Model Tax Convention was reviewed and a new paragraph (Paragraph 5) was added to the article that addresses the issue of national banking secrecy laws. This paragraph specifically states that in any case the national law limitations set as guide by Paragraph 3 should be interpreted to allow a treaty counterpart to refuse the fiscal information appeal from its treaty partner just because the asked data is in possession of a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or it relates to ownership interests of a person[65] . When the requested data is not accessible in the fiscal records the requested state must utilize its data collecting mechanisms to try to get the information from those third parties[66]. The directive was definite *no restriction to international exchange of tax information could be caused by application of a domestic bank secrecy laws*. It can be noted that tax treaties concluded after 2005 generally have these new paragraphs in Article 26.

[63] OECD. View supra note 62
[64] Idem.
[65] View Article 26(5) of the OECD Model Tax Convention.
[66] View Paragraph 16 of the Commentary on Article 26 of the OECD Model Tax Convention.

Giving political backup for this new standard, the G20 Finance Ministers and Central Bank Governors in their meetings of 2004 and 2005, stated that they were committed to the new standard created by the OECD Committee in Fiscal Affairs[67]. They also appealed to financial centres inside and outside of the OECD that hadn't adopted these standards to do so and make the needed steps to permit their tax administrations to access in bank and ownership institution data.

The UN Committee of Experts on International Cooperation in Tax Matters followed the OECD and adapted the wording of the OECD Model Tax Convention for Article 26 of the UN Model Tax Convention of 2008.[68]

Naturally, Austria, Belgium, Luxembourg and Switzerland – all states with rigid banking secrecy regulations- went against this new move and put reservations on the 2004 alterations of the OECD Model Convention[69], indicating specifically that the new paragraph 5 of Article 26 of the Model Tax Conventions wouldn't be applied in their tax convention mediations.

The curiosity of the banking secrecy laws of Austria, Belgium, Luxembourg, and Switzerland was that their banking secrecy laws were so rigid that they normally forbid even national tax authorities from asking financial entities to give information about their clients' bank accounts[70].

Austria and Luxembourg stipulated that the bank secrecy provision was unnegotiable unless Switzerland agreed to do the same. Switzerland declined, arguing that OECD needed to guarantee that Austria and Luxembourg supported these new standards on information exchange before putting pressure on other states to adopt the standard. This plan worked for quite a while and the OECD pressure was not successful to produce any concrete development.

[67] Report on the Meeting of Finance Ministers and Central Bank Governors (Berlin, Germany: G20, 2004); Report on the Meeting of Finance Ministers and Central Bank Governors (Xianghe, China: G20, 2005).

[68] The Committee of Experts on International Cooperation in & Tax Matters, *Report on the Fourth Session, United Nations* (United Nations 2008)

[69] View the OECD Model Tax Convention on Income and on Capital: Commentary on Article 26, paragraph 24 (2005)

[70] View Articles 1, 2 and 4 of Grand-Ducal Decree of 24 March 1989 (Luxembourg). According to the Decree, credit institutions, other professionals of the financial sector, financial holding companies within the meaning of the act dated of 1929, undertakings for collective investment, family wealth management companies may not be asked to provide information that may be used to impose taxes on their clients.

1.3 Moving forward: end of banking secrecy

In 2009, international pressure for more proactive cooperation on fiscal matters grew substantially. The promising leap was given by the US in this year due to the enormous tax evasion claim against UBS, a Swiss bank. In the case, UBS was accused of making easier offshore tax evasion for US clients[71]. In the settlement agreement, UBS paid 780 million dollars to the IRS and committed to giving the name of nearly 4500 US accountholders with the bank.[72] But, UBS had argued in the court fillings that giving the names would breach Swiss regulations. Prior to giving the name, UBS needed to be protected from another criminal violation; Switzerland's penalties for the breaching of its legendary bank-secrecy regulations. The Swiss authorities interfered in the case arguing that such an issue should be discussed at the governmental level. Ultimately, the US obtained success in the renegotiation of the exchange of fiscal information of its double taxation convention with Switzerland as part of the settlement of the affair,[73] and the Swiss authorities did very tough concessions to the US because with the new agreement Swiss banking secrecy laws ceased to exist for US nationals.[74]

After all, Switzerland and others with rigid banking secrecy laws found it hard to fight the pressure from the international community since the precedent had now been created. In March of 2009, Austria, Belgium, Luxembourg, and Switzerland revoked their reservations and approved the new OECD standard for information exchange[75]. They committed to reviewing their tax conventions so that their national banking secrecy regulations were not utilized as a reason to decline information requests of treaty counterparts. They were also required to agree to the new standard in future tax convention mediations as well as to do or renegotiate 12 conventions that had the OECD standard regarding bank secrecy.

In April 2009, the Global Forum released a progress article on the implementation of the globally agreed fiscal standards in the OECD states[76], noting that all of OECD member states had

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[71] Anand Sithian, But the Americans Made Me Do It!': How United States v. UBS Makes the Case for Executive Exhaustion (2011) Volume 25, Part 1; Emory International Law Review

[72] Laura Szarmach, Piercing the Veil of Bank Secrecy? Assessing the United States' Settlement in the UBS Case (2010) Volume 43, Part2; Cornell International Law Journal.

[73] View Protocol on Amending the Convention between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income (23 September 2009)

[74] 5 Bradley Bondi, Don't Tread On Me: Has the United States Government's Quest for Customer Records from UBS Sounded the Death Knell for Swiss Bank Secrecy Laws?" (2009) Volume 30, Part 1 Northwesternn Journal of International Law and Business.

[75] View Global Forum on Transparency and Exchange of Information for Tax Purposes, G20 *Report on Moving Forward on the Global Standards of Transparency and Exchange of Information for Tax Purposes* (Mexico G20, 2009), at 3. The report can be found at: www.oecd.org/tax/harmfultaxpractices/43775637.pdf

[76] This report is available at: www.oecd.org/ctp/42497950.pdf

considerably established the new standards or agreed to so with the exception of four states: Costa Rica, Malaysia, the Philippines, and Uruguay. Yet, Austria, Belgium, Luxembourg, and Switzerland were on the grey list since they hadn't accomplished the minimum data exchange commitment beginning. In the G20 Summit that curiously was held on the same day the report was released (2 April 2009), the G20 stated that *the era of banking secrecy was over.* By the summer of that year, the abovementioned countries on the grey list were moved to the white list of the OECD report.

In March of 2010, in an interview, the leader of the Secretariat of the Global Forum, declared that "all these adavances mean the beginning of the end of banking secrecy in a fiscal context" and also said "banking secrecy is essential because it enables the protection of privacy. Neither you nor I would like our banking information to be displayed in the window of the agency of which we are customers. Access to certain information should only be authorized in limited cases and defined by law. Combating fraud and tax evasion is part of this, universally from now on"[77]

2. General Notions on Taxpayer Confidentiality

2.1 Taxpayer Confidentiality: Concept and Purpose

Nowadays, privacy is no longer a valid argument for taxpayers or third parties to decline tax administration's requests for making data public if that info is needed for the effective imposition of taxes[78]. It is not a valid reason for the state to decline transmitting tax-important data of non-residents to their countries of residence. The transnational tax systems are going in a direction where it has relatively free access to its resident taxpayer's financial data with no regard for where it is situated.

This trend has several privacy implications, some have been argued by scholars like Kristoffersson and Sharman[79], and these academic works concentrate on the privacy ramifications of the taxpayer data disclosure to tax administrations for the objective of exchange. One additional immediate worry, is how to ensure that the taxpayer data that has been collected by governments, particularly by tax authorities, through the new automatic exchange of information regime is

[77] Pascal Saint-Amans, Exchange of fiscal information: Test of truth (2010) Europolitics.
[78] Jason Campbell Sharman*, Privacy as Roguery: Personal Financial Information in an Age of Transparency* (2009) 87:4 Public Administration (the author argues that the right to financial privacy has been substantially eroded due to fiscal objectives and this is justified based on a "nothing to hide, nothing to fear" logic)
[79] Idem supra note 254; Eleonor Kristoffersson, Tax Secrecy and Tax Transparency: the Relevance of Confidentiality in Tax Law (2013).

properly secured from abuse, disclosure, and unauthorized use, or simply, in what way the confidentiality of reportable or reported data is assured in the custody of competent authorities.

Confidentiality normally regards a relationship where the info transmitted between parties is maintained in confidence and has a basis on the acknowledgment that persons/entities that are assigned with this info have the duty to respect that confidence deposited in them. Procedurally, this confidentiality and trust relationship can be implemented with the basis of ethical duty, contract or legal requirements[80]. Taxpayer confidentiality is normally integrated into the last category, therefore, it is secured through legislative mechanisms.

The concept of confidentiality is usually followed by the concept of privacy[81], and initially, it can be thought that they are identical. Yet these two concepts are different. Privacy is regarded as a *claim of an individual to determine what information about himself or herself should be known to others.*[82] Confidentiality is a relationship that the person to who this private data is made public, makes ethical, contractual or a juridical duty to maintain them in confidence. So, confidentiality is basically a partial or full recognition acknowledgment of the other person's privacy requirements and give them much needed protection, and therefore confidentiality can be described as a system were some privacy requirements turn into rights through ethical, contractual arrangements or legal regulations.

Yet, is must be stressed that no duty of confidentiality can be regarded as absolute in all situations[83]. Contracts and juridical provisions normally include exceptions where confidentiality can be revoked, such as public interest for example. Generally, any action that has been undertaken for the goal of securing public interest can annul confidentiality measures.[84]

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[80] R. G. Toulson & Charles Phipps, *Confidentiality*, Third edition ed. (UK, London: Sweet & Maxwell, 2012), pps. 15-16, 24, 47.

[81]Mark A. Rothstein, Genetic Secrets: Protecting Privacy and Confidentiality in the Genetic Era (New Haven: Yale University Press, 1997).

[82] Alan F Westin, *Social and Political Dimensions of Privacy* (2003) 59:2 Journal of Social Issues, pp. 431.

[83] Rose-Marie Belle Antoine, *Confidentiality in Offshore Financial Law*, 2 ed. (Oxford; New York: Oxford University Press, 2014), pp. 21.

[84] Osita Mba, Transparency and Accountability of Tax Administration in the UK: The Nature and Scope of Taxpayer Confidentiality (2012):2 British Tax Review, at 199;

Joseph J Darby*, Confidentiality and the Law of Taxation* (1998) 46 Am. J. Comp. L. Supp.

2.2 Reasoning for the protection of taxpayer confidentiality

Normally, tax administrations hold more private data regarding more people/entities than any other government department. In essence, they are archives of people's personal data that consist of personal and financial files containing names, dates of birth, marital situation, address and job for example, for any particular timeline tax reporting is done. These components can easily describe taxpayers since they show who they are, what they do, what they own and the way they obtained those possessions. As argued by scholars this specific personal data can be utilized to build a very precise profile of a person's individuality, containing even his/her personal behaviours, political preferences, and religious beliefs, so it can be very troubling for individuals and also for companies if this info is not properly disclosed or utilized.[85]

For individuals, the turning public of such info can result in personal security problems like blackmailers or kidnappers that can utilize this information to intimidate potential victims, or the disclosure of this data can alter peoples' behaviours towards the person in a manner that the person does not desire due to marginalization, favouritism or unwanted popularity/unpopularity. For companies, the improper turning public of its confidential data can lead to unfair competition, since competitors can utilize the collected info to acquire business benefits that they would not achieve if the data was maintained a secret.[86]

Confidentiality of fiscal data is also seen as a fundamental principle of building and developing cooperation and confidence amongst administrations and taxpayers. If there is a situation where taxpayers do not trust their tax authorities, which deal with their vulnerable financial data, they can feel very reluctant to share their data[87], voluntary compliance does not occur, and gets worse when taxpayers see tax authorities as a resource centre for several other interests[88]. Taxpayers will be wary to give their financial data, dreading where the provided information eventually will go, or the uses it can have.

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[85] Arthur Cockfield, Protecting Taxpayer Privacy Rights Under Enhanced Cross-Border Tax Information Exchange: Toward a Multilateral Tax-Payer Bill of Rights (2009) 42:2 University of British Columbia law review, pps. 437-438.

[86] Jon E Bischel, *Protection of Confidential Information in Tax Matters* (1993) 19 Int'l Tax J., pps. 60-62.

[87] Andrew Goodall, MPs Ask HMRC to Justify Taxpayer Confidentiality (14 October 2014). Available at: http://www.accountingweb.co.uk/article/mps-ask-hmrc-justify-taxpayerconfidentiality/566738?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+co%2FFxiZ+%28 AccountingWeb+UK+-+All%29

[88] Office of Tax Policy Department of the Treasury, *Scope and Use of Taxpayer Confidentiality and Disclosure Provisions* (US, Washington DC: Office of Tax Policy Department of the Treasury, 2000).

In general, guaranteeing confidentiality of taxpayer data and utilizing it solely for proper and stipulated ends permits a more cooperative manner of working between taxpayers and tax authorities.

2.3 Taxpayer Confidentiality: Principles

Some fundamental principles that rule taxpayer confidentiality in exchanges of fiscal information can be developed:

1) Principle of Access Restriction- Normally, the access to taxpayer data given by one treaty party to its counterpart is only limited to the people who are engaged, in the assessment, collection and levying of taxes or in related appeals, prosecutions, and oversights in the receiving country. So, once the information is passed on, only tax authorities and justice systems in case of court procedures have access to it. The data is not of free access for all agents, even within the tax authorities, because the laws, by norm, limit the access only to agents whose duties require access to such info, who go through proper security verifications and who have the knowledge to deal with this confidential info. Exceptionally, the exchange of information tools can permit the information receiving state to exchange the given info with other of its law enforcement entities, however, only when the domestic regulations give permission for this, and the information giving state allows it as well. Within this situation, the receiving law enforcement entities should handle the data obtained in the same form that applies to the first entity that collected the information.

2) Principle of Purpose Restriction- As the name means, the initial and principal end of government collection of fiscal data is to administer its tax regulations or to aid other states in doing so, and thus, as default rule, the obtained and exchanged data should be only used for assessment, collection, and levying of taxes, the so-called *principle of speciality* that signifies that the data shared should only be utilized for the ends in which the data has been given. Yet, there are some particular exceptions, since in practice, entities in a government mechanism usually aid and collaborate with each other, and so, sharing of information plays an important role in this cooperation, like for example, when tax authorities possess data that can be useful for other law enforcement ends, such as, public security, terrorism, and anti-money laundering situations, for example. Yet, if the government wants to utilize the obtained data for other ends than fiscal ends, a statutory determination of the limits and scope of the additional ends must be in place, as well

as notification to the supplying country of the data of its intentions when the information exchange agreement is started.

3) Principle of Accountability- Taxpayer confidentiality regulations requires for the people that work with exchanged data to be held accountable in case of a breach of confidentiality, with a series of administrative, disciplinary or criminal sanctions being put in place, to discourage the occurrence of the confidentiality breaches. Consequently, the sanctions that can be applied can be harsh including, in some cases, even imprisonment.

4) Principle of Proportionality- This principle is a very usual principle in law since it is applied in multiple fields, like constitutional law and criminal law for example, as an indication of equity and justice.

In fiscal law, specifically in tax data exchange relationships, this rule can be utilized as a mechanism to implement the proper balance between the taxpayers' right to privacy and the administration's requirements for the taxpayer's disclosure. Essentially, governments must demand, obtain and utilize only the needed data to accomplish particular fiscal administrative end and not ask for more data than the necessary for the prosecution of this goal.

3. Conclusions

In this part we analysed the issue of banking secrecy laws, and noted that historically, these regulations were adopted with the greatest of intentions, like preventing political persecution, preventing extortion of property and preserving the privacy of individuals, but, with time, it was realised that these regulations could have other benefits for people, such as fiscal minimization and tax evasion through offshore banking secrecy protection. Banks made large profits with this, and states that had the secrecy factor in their banking industry, attracted enormous amounts of overseas funds, so the purpose of keeping undeclared overseas bank accounts has altered, to protect the illegitimate interests of the world's wealthiest companies and individuals. Given this, an excessive amount of bank secrecy procedures has arisen globally, because bank secrecy regulations began to protect their client's banking issues, even from tax authorities that could need that data to impose tax laws.

We concluded that progress has been achieved, and bank secrecy is soon not to be a major issue, because of developments like the upgrade of Article 26 of the OECD and UN Model Tax Conventions, that doesn't permit for treaty counterparts to refuse a tax information request of its treaty counterpart because of domestic bank secrecy laws, is a major evolution to improve transnational exchange of tax information relations.

Regarding Taxpayer Confidentiality the main conclusion that I consider appropriate for now, is that an improvement in the international exchange of data must be accompanied by an upgrade in confidentiality and protection in exchanged data. Other considerations regarding Taxpayer Confidentiality will be given in other parts of this article.

Part 3 - Exchange of Tax Information: First Steps (TT's and TIEA's)

1. Outline

After understanding how tax administrations work around the world the main conclusion was that there is lack of parallelism of the enforcement of taxes on domestic and foreign-source revenues of resident taxpayers, given that administrations don´t have the same level of accessibility to data on foreign-source income of their resident taxpayers as for how they have regarding domestic-source income. To solve this problem, some countries have made great efforts by implementing international cooperation on International Exchange of Tax Information (IETI).

IETI is normally an inter-governmental relationship in which the tax administration of one country requests and obtains tax-relevant data from its analogue entity in another country for the enforcement of domestic fiscal laws. Through the years, international legal frameworks have been developed by the international community to implement and make these exchanges easier. The first legal frameworks that appeared were international double taxation treaties/conventions (TT's) and tax information exchanges agreements (TIEA's). Both these legal frameworks are cornerstones for all legal systems because without this tax authorities would not be able to obtain data on their residents' foreign source income.[89] In this part, we will analyse these two legal frameworks.

2. Exchange of tax information through TT's

2.1 Introduction

TT's are normally bilateral agreements between two countries. They are the result of the necessity to solve the problem of international double taxation (when the same taxpayer is fully taxed twice or more times, firstly in the country where the income is originated, and then in the country of residence of the income-earner) in overseas economic activities[90]. TTs distribute the taxing rights on the revenues that result from overseas activities between host and residence states.

[89] Today over 3500 bilateral taxes are in force globally, based essentially on the *OECD Model Double Taxation Convention and the UN Model Double Taxation Convention*. View Global Forum on Transparency and Exchange of Information for Tax Purposes, *Report on Transparency and Exchange of Information for Tax Purposes,* (OECD, 2012), pp.3.

[90] Mogens Rasmussen, *International Double Taxation* (The Netherlands Wolters Kluwer, 2011).

Although the most commonly given reason is the reduction of double taxation, TT's also aim to help the contracting parties to prevent Transnational tax evasion, through a provision that permits tax administrations to exchange fiscal related data, that is very common in TT's.

Nowadays, TT's are normally based on the OECD Model Convention on Income and on Capital (1977) and/or the United Nations Model Convention on Income and Capital (1980),[91]that are very identical, especially when it comes to exchange of tax information provisions that are given by Article 26 of both conventions and this article is considered the most accepted legal basis for bilateral exchange of tax information and curiously, it is the only provision regarding exchange of fiscal information through TT's. Normally, the article typifies the taxes subject to exchange of tax information, has the rules that protect the confidentiality of the data exchanged, it limits to who the data can be disclosed to, it also specifies the purposes that the information can be used for and it normally has some exceptions to the obligation to provide the information.

2.2 Historical background

The first official available exchange of tax information clauses can be found in a treaty between France and Belgium in 1843 referring to administrative assistance[92], which provisioned that both contracting parties should exchange data related to estate and registration taxes[93]. Later, in 1920, identical clauses were put in a League of Nations framework called *Model Bilateral Convention on Administrative Assistance in Matters of Taxation* (League of Nations Model Tax Convention[94]:

These provisions were the first global commitment on the exchange of tax information between countries and it became part of the League of Nations Convention due to concerns on tax evasion[95], laying the foundations for the "upon request" exchange of information.

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[91] Michael Lang, The impact of the OECD and UN Model Conventions on Bilateral Tax Treaties (Cambridge, New York Cambridge University Press 2012).

[92] Curiously, this treaty lost force in 1870 but in 1960 it was reactivated and still is in force today, being considered the oldest convention of its type.

[93] Idem. Articles 1 and 2

[94] Committee of Technical Experts, Double Taxation and Tax Evasion: Report of Technical Experts on Double Taxation and Tax Evasion (Geneva: League of Nations 1927).

[95] Sunita Jogarajan, *The Drafting of the 1925 League of Nations Resolutions on Tax Evasion* (UK, Cambridge Melbourne University 2014), pps. 6-8, 11.
Available at http://www.law.cam.ac.uk/facultyresources/summary/sunita-jogarajan-the-drafting-of-the-1925-league-of-nations-resolutions-on-taxevasion/13625.

Yet, the provisions of contemporary TT's on the exchange of tax information were based on the OECD Model Tax Convention (1963) and it's Article 26.[96]

These provisions permitted contracting parties to exchange information that was essential for the enforcement of the Convention and domestic laws of the countries part in regard to the situation that the national tax in question was covered by the Convention. The scope of exchange of information was also determined to taxes on income and on capital.

In the late 70's changes came and a new version of the Model Tax Convention was adopted by the OECD. The exchange of information clauses in the 1977 Model Convention version was very similar to that of 1963, although with some changes such as a new clause where "the exchange of information is not restricted by Article 1". This means that exchange of information has no limits regarding residents of the contracting states as mentioned in Article 1 of the Model Convention, making possible the exchange of information towards residents of third states or bodies and individuals that were not entirely or partly subject to tax in accordance to the referred in Article 4 of the OECD Model Convention. Still, the application of exchange of tax information was limited to the "taxes covered by the Convention", having nothing regarding the taxes not covered by the Convention.

Additionally, in the 1963 OECD Model Convention tax data could only be given to authorities and people connected with the assessment or collection of taxes and in contrast, the 1977 Model Convention made a further clarification, including people or entities who were involved in the enforcement of prosecution in respect of, or the determination of appeals in relation to the taxes covered by the Convention, given the opportunity for information to be disclosed in court proceedings and/or judicial decisions.

In 1980, the UN adopted its Model Tax Conventions (UN Model Convention) for its use as a model for tax convention between developed and developing countries[97].

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[96] *OECD, Exchange of tax information between OECD Member Countries : a Survey of Current Practices* (Paris, France; Washington, D.C.: Organization for Economic Co-operation and Development 1994), pp 43.

[97] The OECD Model Tax Convention was originally intended for use between the OECD member states. The model tended to allocate taxing rights on cross-border economic activities mostly to jurisdiction where taxpayer resides not where taxpayer carries out its business to investment activities by restricting source country's tax jurisdiction. This left source jurisdictions (i.e. essentially, capital importing countries) with restricted taxing rights. Thus, developing countries found the model non-representative of their interest. In 1980, as a response to the concerns of the developing countries over the OECD Model Tax Convention, the UN published its first model that can be used as a model for double tax treaty negotiations between the developed and developing countries. Even though the UN model adopts almost the same structure as the OECD model, it has taken a greater account of developing country concerns by somewhat enlarging the scope of source country taxation. It has provisions such as broader permanent establishment definitions and higher source country withholding-rate ceilings on dividend, interest, and royalty

The OECD and the UN Model Tax Conventions are very identical, even in their posterior revisions, when it comes to tax information exchange provisions[98]. Therefore, wherever a tax convention exists, the exchange of tax information provisions are identical to those of other tax conventions regardless if it is based on the UN or the OECD Model Tax Convention.

In 2000, Article 26 of the OECD Model Tax Convention went through some revisions which established that the exchange of tax information is applicable to "taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions of local authorities"[99] and this revision was also adopted by the UN Model Tax Convention in 2001. The mentioned revisions try to assure that the exchange of tax information provisions go further than the taxes covered within the Model Conventions to all taxes under the domestic taxation laws as long as they are in accordance with the Conventions.

In 2003, the OECD Committee for Fiscal Affairs had another revision of the exchange of information clauses of the Model Convention, taking into notice the OECD report of the time called "Improving Access to Bank Information for Tax Purposes"[100]

In 2005, based on the review of 2003, Article 26 of the Model Convention of the OECD underwent big changes with the purpose of expanding the scope of the article and clarifying certain issues. The word "necessary" in Article 26 was replaced by "foreseeably relevant and this review pointed out the idea that signatory countries will exchange information in the broadest sense but they will not be part of "fishing expeditions".

These changes created two more paragraphs (4&5) in Article 26[101].

Paragraph 4 focuses on domestic tax interest requirement in international exchange of tax information. This concept of domestic tax interest describes a situation where a contracting state can only give info to another contracting state if it has an interest in the requested information for its own purposes. So, this requirement allows the competent authority of a contracting country to

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income. So, some TT's between developed countries tend reflect the OECD Model Tax Convention, while those between the developed and developing countries tend to reflect the UN Model Tax Convention.

View Sol Picciotto, International Business Taxation: a Study in the Internationalization of Business Regulation (London Widenfeld & Nicolson 1992), at 14-25.

[98] 1 Michael Lennard, The UN Model Tax Convention as Compared with the OECD Model Tax Convention—Current Points of Difference and Recent Developments (2009) Asia-Pacific Tax Bulletin, vol. 49, No. 8

[99] View Article 26 of the OECD Model Convention (2000) and the UN Model Tax Convention (2001)

[100] OECD, 2000 Report on Improving Access to Bank Information for Tax Purposes (Paris: OECD, 2000); OECD, Improving Access to Bank Information for Tax Purposes: The 2003 Progress Report (Paris OECD, 2003).

[101] OECD*, Changes to Articles 25 and 26 of the Model Convention* (2004); OECD, *The 2005 Update to the Model Tax Convention* (2005). Available at http://www.oecd.org/tax/treaties/33614065.pdf, and http://www.oecd.org/tax/treaties/34576874.pdf

refuse an exchange of tax information request if its treaty counterpart has no interest in the requested information for its own fiscal purposes. This requirement is now removed and now, the requested country must use its information collection mechanisms solely to get and provide the information to the requesting country.

On the other hand, Paragraph 5 handles with the situation where the requested data is not available in the possession of a requested treaty counterpart but instead in the possession of banks, financial institutions, nominees agents, and fiduciaries situated in is territory, providing that a treaty partner is not allowed to refuse the giving if this information just because the data is in custody banks, financial institutions, nominees agents and fiduciaries situated in is territory, expressing also that domestic banking secrecy regulations alone can't be used as a base for refusing to give tax information. This revision has also the goal to further clarify the limitations of paragraph 3 of Article 26.

These reviews were important for the new life gained by the exchange of information clauses of Model Tax Conventions[102], and the modifications were soon done by the UN Model Tax Convention in 2011.[103]

Article 26 of the OECD Model Tax Conventions was further changed in 2012. The second paragraph of the Article was changed to permit the competent authorities to use data received for other ends given firstly, such use is allowed under the laws of both States and secondly, the competent authority of the supplying State authorizes such use. Earlier models permitted the competent authorities to use data received only for assessment, collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes specified in the convention.[104]

It is also important to refer that a new framework was developed in 2017 by the OECD, this framework is called the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the sometimes called BEPS multilateral instrument). This multilateral instrument intends to "prevent treaty abuse, improve dispute resolution, prevent the

[102] The term was first used by the G20 Ministers of Finance at their sixth meeting in Berlin (Germany) in 2004. View Paragraph 9 of G20, *Statement on Transparency and Exchange of Information for Tax Purposes* (Berlin G20 Meeting, 2004)

[103] *The UN Model Tax Convention (2011*). Available at http://www.un.org/esa/ffd/wpcontent/uploads/2014/09/UN_Model_2011_Update.pdf

[104] OECD, Update to Article 26 of the OECD Model Tax Convention and its Commentary (2012), Available at: https://www.oecd.org/ctp/exchange-of-tax-information/120718_Article%2026-ENG_no%20cover%20(2).pdf

artificial avoidance of permanent establishment status and neutralise the effects of hybrid mismatch arrangements".[105] As of September 2018, 84 countries have signed this instrument making it cover more than 1400 bilateral TT's.[106]

2.3 TT'S: Scope

Both Model Tax Conventions authorize competent authorities of contracting countries to exchange information as it is foreseeably relevant for enforcing the provisions of this convention or the administration or carrying out of domestic laws of contracting states regarding taxes of every type and description levied on behalf of the contracting states, as of their political subdivisions or local authorities, as far as the mentioned taxation is in accordance to the Convention[107].

When it comes to the laws covered, the OECD Model Tax Convention gives the cornerstone principal that the data exchanged can be related to the administration of both tax treaty clauses and domestic laws. Data that can be exchanged under TT's normally includes, but is not limited to, data related to the processing of double taxation cases and similar issues of competent authority consideration, information considering a certain taxpayer or tax matter under appreciation, data found during an investigation or examination when there is a conceivable reason for noncompliance with the fiscal law of a foreign state and modifications in tax laws.

When it comes to the persons covered, Paragraph 1 of Article 26 clarifies that "the exchange of information is not restricted by Article 1 (i.e. the person resident of the contracting states) and Article 2 (i.e. the taxes covered under the convention)". As a consequence of this, a treaty partner can request for information on its residents as well as residents of a third state. For example, if a third-country resident has a permanent establishment in the other contracting state, the contracting party may request information regarding that permanent establishment, even though the third-country resident is not a resident of either contracting state. Additionally, the provisions of the OECD Model Tax Convention oblige one treaty partner to collect and grant to the other treaty partner all data in its territory without regard of who is in possession of it. Therefore, this requirement applies for data in the hands of tax authorities, other administration agencies, and private entities subject to procedural limitations applicable in the requested state. After receiving

[105] OECD, Frequently Asked Questions on the Multilateral Instrument (MLI) (2017), Available at: http://www.oecd.org/tax/treaties/MLI-frequently-asked-questions.pdf

[106] OECD, Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (2018) Available at: http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf

[107] See Article 26(1) of the OECD Model Tax Convention and the UN Model Tax Convention.

an information request, the authority of the requested state is required to firstly check if it has all the data deemed needed to answer to the request. If the data requested is not in the possession of the requested country's tax administration, it is contemplated that they will try to get it from other sources with the use of the same mechanisms for collecting information regarding domestic tax matters.

When it comes to taxes covered for the aims of information exchange under TT's make for a broader type of taxes. Article 26(1) of the OECD Model Tax Convention also makes it clear that the exchange of information is not restricted by Article 2 (Taxes covered). This also points out that the exchange of information clauses under TT's are applicable for the carrying out of taxes of every type levied by a contracting country, not only taxes covered in the treaty.

2.4 TT's: Principles

Treaty counterparts need to fulfil some principles when enforcing information exchanges. These principals are:

1-Confidentiality

2-Foreseeable relevance

3-Reciprocity

4-Subsidiarity

Regarding confidentiality, exchange of tax information, in the long run, is only possible if it is guaranteed between governments that they will the information obtained properly. Thus, the OECD and the UN Model Tax Conventions contain clauses that refer to tax confidentiality and the requirement to keep exchanged data as confidential[108]. These clauses oblige the requesting state to treat the data received as secret in similar ways to information collected through the domestic national laws and that this data can only be disclosed to the entities specified in the convention with regard to the taxes covered by the convention, protecting taxpayers' privacy rights[109]. The ongoing confidentiality in the requested country is also a subject of domestic laws, covering, for example, competent authority letters, which includes the latter requesting data. So confidentiality rules are applied to all kinds of data received, including data given in a request and/or data given as an answer to a request.

[108]The OECD and UN Model Tax Conventions, Article 26(2).
[109] Idem

In 2012, the OECD and the Global Forum released a Joint Guide on Confidentiality that defines the best procedures regarding confidentiality and gives useful orientation on how to get to the proper level of protection[110].

When it comes to foreseeable relevance, through TT's data should be exchanged it is "foreseeably relevant" for the use of the double taxation convention or for the administration or carrying out of the domestic laws of the treaty partner[111]. Therefore, a requesting country must show the foreseeable relevance of the asked information to its inquiry and, in general, to the administration and carrying out of its fiscal laws.

Yet, the norms to define foreseeable relevance are quite complicated. Information appeals should have clear sense to an open investigation, meaning by this that the appeal will not be seen as foreseeable relevant if it is not well motivated, not supported by a number of facts, aims at a high amount of unknown entities or essentiality if it is too general[112]. Generally, the principle of foreseeable relevance has the goal to prevent that the countries party of the convention do not go on "fishing expeditions"[113] or to ask for information that is not going to be relevant to the tax situation of a given taxpayer

Through the analysis of the commentaries of the 2012 version of the OECD Model Tax Convention it can be observed that the concept of foreseeable relevance was altered to keep up with procedural advances, by clarifying that an appeal for information cannot be considered as a "fishing expedition" just because it does not have any personal information of the taxpayer under inquiry[114]. It was also demonstrated that an appeal should not be refused in cases where a clear-cut assessment of the relevance of the data to a continuing inquiry can only be done after the reception of data.

When there are cases where the requesting country does not give the same personal info, such as name or address of the taxpayer under inquiry, the appealing country must give other information that can be enough to identify the taxpayer. But, when this request/appeal is related

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[110] Keeping it Safe: the OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax Purposes, (2012).Available at:http://www.oecd.org/tax/transparency/final%20Keeping%20it%20Safe%20with%20cover.pdf

[111] View Commentary to Paragraph 1 of Article 26 of the OECD Model Tax Convention.

[112] Roger Gordon, John Venuti and Arthur Galan, *An Analysis of Tax Information Exchange Agreements Concluded by the U.S.* (1991), Tax Management International Journal, pp. 93

[113] The term 'fishing expeditions' is metaphoric. It generally refers to unspecified information requests. View *OECD, Model Tax Convention on Income and on Capital (2010), Commentary to Paragraph 1*

[114] The OECD Model Tax Convention and its Commentary (France, Paris: OECD, 2012), Commentary to Paragraph 1 of Article 26. Available at http://www.oecd.org/ctp/exchange-of-tax-information/120718_Article%2026-ENG_no%20cover%20%282%29.pdf

to a group of taxpayers not identified individually, it is difficult not to conclude that the appeal is not a "fishing expedition", since the requesting country does not indicate to a continuing inquiry into the issues of a certain taxpayer, that in most cases would by itself dismiss the concept of the appeal being speculative. It is stated by the commentaries that in this case, it is needed that the requesting country gives an accurate description of the group of taxpayers, precise details that gave way to the appeal, a clarification of the applicable regulations, and why are there reasons to assume that the group of taxpayers under inquiry, has not been compliant with the law supported by an accurate and clear foundation[115]. It also obliges a demonstration that the asked data could assist in determining compliance by the groups' taxpayers'.

Regarding reciprocity, generally information exchanges through the OECD Model Tax Convention must be reciprocal, which is, given the situation a country asks its treaty counterpart to give tax data, the same information must collectable through the regulations and/or in the normal policy of administrative procedure of the requesting state itself[116]. So, the requesting country is able to provide help with data exchange, if the same request is done by the requested country. If this is not fulfilled, the requested state may refuse the appeal of data exchange on the foundation of the absence of reciprocity.

Yet, different states have different tools to collect and give information. Alterations in procedures should be not given as a reason to refuse a request unless the aspect of these alterations could limit in a big way the requesting country's general capacity to give and collect the data if the requesting country itself got a proper appeal from the requested state[117].

The question of reciprocity can be discussed in the developed and developing states context since the developed countries have better administrative, financial and legal capabilities than the developing countries to process and distribute information appeals. The commentary to the UN Model Tax Convention provides that a developed state cannot deny the provision of data to a developing state on the basis that the developing state doesn´t have the administrative capability as the developed state. Reciprocity has to be analysed by reference to the general aspects of a convention, not regarding only the trappings of a single article[118]. It is then assumed that a too strict

[115] Idem, supra note 73

[116] 3 Commentary to Paragraph 2 of Article 26 of the *OECD Model Tax Convention (the 2010 update)*. View paragraph 15 of the commentary.

[117] Idem

[118] Commentary to the OECD Model Tax Convention (the 2010 update). View paragraph 1.3, Article 26.

application of the principle of reciprocity can baffle effective exchange of data and that reciprocity must be interpreted in a broad and practical sense.

Regarding the principle of subsidiarity, a treaty counterpart can ask for information from another counterpart as long as it has used all mechanisms to collect data under its domestic fiscal practice, this meaning that a country can make an information request to its treaty party after it has used all domestic administrative tools to collect the mentioned information domestically but was incapable to obtain it[119].

2.5 TT's: Methods

Both commentaries of Article 26 of the OECD Model Tax Convention and UN Model Tax Convention, refer three regimes of tax information exchange: on request, spontaneous and automatic.[120]

Exchange of information on request is the most usual method of exchange of information between tax administrations under TT's. It mentions a situation where the competent authority of a state requests for certain data regarding a specific case from the competent authority of another treaty party, and this request should always be related to a specific case. Many appeals come from analysis of a person's tax return, however, some requests can emerge from collection activities or criminal inquiries. Generally, the answer to such appeals contains a series of statements and records about revenues and financial accounts of the resident taxpayer of the requested jurisdiction. Normally, for the requested country, the data is available through reports of its taxpayers by the filling of tax returns or through payment to non-residents (i.e. withholding agents).

For spontaneous exchange of tax information, data is exchanged when one of the treaty parties has collected information in the administration of its domestic tax laws and believes that this data can be useful to its treaty counterpart, so it transfers it without the counterpart having asked for it. This data can be related to a certain taxpayer's situation and the connection of that situation to the given taxpayer's accountability in the receiving country provided that the information was obtained through the administration of tax laws such as tax audits for example. The efficiency

[119] 7 Commentary to the OECD Model Tax Convention (the 2010 update),
View Paragraph 9(a), Article 26.

[120] View paragraph 5.4 of the Commentary on Article 26 of the 2011 update of the UN Model Convention and the Inventory of Exchange Mechanisms at paragraph 30. Also view the 2006 OECD Manual on Information Exchange, available at http://www.oecd.org/ctp/exchange-of-taxinformation/cfaapprovesnewmanualoninformationexchange.htm

of this method of exchange of information relies on the capability of tax authorities to foresee while doing an inquiry, data that could be useful for a foreign tax administration.

With automatic exchange of tax information, the exchange of information is not dependent on the appearance of an appeal, and so data is exchanged consistently (i.e. annually) between the administrations of treaty counterparts. This data normally includes certain details of revenues emerging in the source country, such as dividends, interest or pensions, for example, and are paid to the residents of the convention counterpart. Generally, administrations with interest in automatic exchange of tax information agree in advance to the kind of data they want to exchange and the time frequency of these information exchanges.

It should be noted that both the OECD and the UN Model Tax Conventions do not limit, in theory, the ways that information exchange can occur.[121] These three ways can also be combined, but, only the exchange of information by request is compulsory[122].

2.6 TT's: Limitations

OECD and UN Model Tax Conventions give a number of occurrences where a treaty party may decline the request from its treaty counterpart.[123]

Having in mind Article 26, Paragraph 3, none of the countries is required to give the data to its treaty counterpart if one of these situations occur:

1- The treaty partner has to enforce administrative mechanisms that are in conflict with its laws and administrative procedures. Is must be noted that a treaty party is obliged to collect the asked data as if the tax in question was a tax of the requested state. The reasoning is that the requested state should be obliged to the same procedure as if it was its own taxation at stake, but not less and also not more than that. But, in specific situations, an appeal for data can impel the requested country to use specific investigation powers given by its regulations for the imposition of its domestic taxes, although the requested country doesn't need the data for these ends. Therefore, the requested country has no direct fiscal interest in the situation that the request is related to. Paragraph 4 of Article 26 of the OECD Model Tax

[121] OECD, *Tax Information Exchange between OECD Member Countries : a Survey of Current Practices* (Paris, France; Washington, D.C.: Organization for Economic Co-operation and Development 1994).

[122] View Paragraph 1 of the Manual on the Implementation of Exchange of Information Provisions for Tax Purposes in the OECD Model Double Taxation Convention. OECD Committee on Fiscal Affaires, *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes* (Paris: OECD, 2006).

[123] Article 26, Paragraph 3 of the OECD Model Tax Convention and the UN Model Tax Convention.

Convention narrows the right of the requested country to refuse giving information in such case, by providing that the requested country should utilize its data collection mechanisms, although it is only to give information to the requesting country and regardless if the data can be utilized for domestic fiscal ends. Yet, this paragraph does not force the requested country to provide data in the situation that it has tried to collect this information but concludes that the information is inexistent due to the expiration of a domestic record retention period. Ultimately, it is advised that each contracting country should adopt the necessary mechanisms, including administrative, legislative and rule-making tools, to assure that the competent authority has enough powers in its domestic law to collect data for transnational exchange of information regardless of whether the contracting country may need the information for its own fiscal ends.

2- The data cannot be collected within the domestic and/or in the general proceedings of administration. So, the requested country is free to refuse to give data if the data cannot be collected within domestic laws and can´t be collected in the regular course of administration. The commentary of the OECD Model Tax Convention clarifies that data is considered to be obtainable in the regular course of administration if it is in the custody of the tax authorities or can be collected by these in the regular procedure of fiscal determination, that can include special inquiries of the business accounts kept by the taxpayer or other entities, proven that the tax administration would make equal inquiries for their own ends.[124] Yet, paragraph 5 of the OECD Model Tax Convention addresses particularly these situations where the tax administrations data collecting powers regarding information in the possession of banks or other financial institutions which are subject to different obligations than those that are normally applicable regarding the data in the possession of other entities other than banks or other financial entities. It states that the requested country can´t use this limitation to refuse an appeal where the requested country's incapability to collect the data was particularly related to the situation believed to be in the possession of banks or other financial institutions in its territory and its domestic bank secrecy laws do not permit the disclosure of this data even for tax

[124] View Commentary to Article 26(3) of the OECD Model Tax Convention (2010), Paragraph 16.

purposes. So, paragraph 5 overrides this limitation that could otherwise allow a requested country to refuse to give information.

3- Data that can disclose any kind of business, commercial, industrial or professional secret/trade process/information that is subject to attorney client privilege, providing such data can be declined. A business/trade secret is normally understood as facts and circumstances that have considerable economic importance and that could be explored practically and its unauthorised utilization could lead to a great damage for the owner of the secret. Commercial, industrial or professional secrets corporations, their inventions and investments and boost economic competition. But, the commentary of Article 26, paragraph 3 of the OECD Model Tax Convention stipulates that financial data in books or records, cannot be considered a business, trade or any other kind of secret and the assessment or obtaining of taxes should not be constituted as serious damage.[125]Refusal for the provision of information can also occur in cases where the data is considered a secret communication between a client and an attorney, solicitor or other legal representatives. However, the regulations on what can be considered a secret communication must not be applied or interpreted in such an expansive way as to frustrate efficient exchange of information

4- To conclude, the requested country can also refuse to provide data if it would be against its public order. The notion of public order is normally determined by domestic laws and administrative procedures. Thus, the content of these notions changes considerably from state to state.

Yet, the commentary to the OECD and UN model tax conventions states that this limitation can only be relevant in extreme cases, such as a tax inquiry that emerged based on racial, religious or political ill-treatment. Limitations can also be conjured if the data is considered a state secret and which its disclosure would be against the requested country's interests[126].

[125] View Commentary to Article 26(3) of the OECD Model Tax Convention (2010), Paragraph 19.2

[126] View Commentary to Article 26(3) of the OECD Model Tax Convention (2010), Paragraph 19.5.

2.7 TT's: Costs and Timing

When it comes to costs, administering, processing and answering to data appeals involves costs. Cost become major concerns in situations where a large number of photocopies of volumes of documents are asked for and/or big documents need to be translated or when the flow of data is one-sided. No standard clause regarding costs exists in the Model Conventions. So, the clauses of recuperation of costs acquired in giving assistance are agreed normally on a case-by-case basis in each TT.

Generally, costs that are the responsibility of the normal functioning of the appeal, such as getting and giving photocopies of documents would normally be anticipated to be covered by the requested state. However, if the amount of work in the collecting and the provision of information is extensive and causes extraordinary costs, the onus of paying these costs can be altered to the requesting country.

It should be mentioned that a data appeal from a developed state to a developing state could origin an excessive material stress on the administration of the developing country because of the difference in resources between both countries. This problem is many times solved with the requesting state covering the extraordinary costs of the request for information. The UN Model Tax Convention clarifies the question of if an extraordinary cost in gathering requested data could be defined not regarding an absolute sum but regarding to the relative cost to the full budget of the tax authority requested to provide the data, because a small absolute cost might be material for a tax authority with very small resources, while a larger absolute cost may not be material for a wealthy tax authority.[127]

When it comes to the timing of the exchange of information, a specific timeline is not stipulated by the Model Conventions. So the administrations of contracting countries can commit to the time limits between themselves. But, the Commentary of the OECD Model Tax Convention stresses that in the lack of agreement regarding timing, data should be given as soon as possible with the exception of when there are delays for legal reasons within these time limits:

1- If tax administrations of the requested country have custody of the requested data, the data should be given to the competent authority of the requesting country in the period of two months after the reception of the information request/appeal.

[127] View the Commentary to Article 26 of the UN Model Tax Convention (2011), Paragraph 29.3

2- If tax administrations of the requested country do not have the custody of the requested data, the data should be given to the competent authority of the requesting country in the period of six months after the reception of the information request/appeal. As mentioned, these regulations do point out a default standard for timing that can be applied when the administrations have not made a particular agreement on timing. Nonetheless, the default standard for timing and timing limits agreed, administrations can come to diverse commitments on a case-by-case ground, such as, when they agree more time is necessary, due to the emersion of a complex request.

2.8 Confidentiality and TT'S

The OECD Model Tax Convention delineates particular confidentiality provisions applicable to the international information exchanges through TT's, in the second paragraph of Article 26 of this legal framework[128]

Therefore, the Model Tax Convention determines that the taxpayers' data collected by a competent authority must have the same treatment for information obtained according to this receiving state domestic regulations.

The making public of such data is limited to authorities and persons (administrative bodies and courts included) engaged in assessment, collection, and administration or levying of taxes covered, or related to appeals, oversights and prosecutions and the obtained data can be utilized for the abovementioned ends.

Yet, in particular situations, these circumstances can restrict in an undesirable way the utility of the data and receiving state's capability to utilize for other legitimate ends, such as corruption and combat money laundering. So the 2014 review of the OECD Model Tax Convention provided for an exemption provision to the confidentiality clauses. This provision basically permits the receiving country to use the given data for other ends as long as two conditions are verified[129]: (i) this use is permitted by the competent authorities of both states and (ii) the laws of both countries allow this use. This allows the tax administration of an info receiving country to transmit

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[128] The OECD Model Tax Convention on Income and Capital (updated in 2014)
Available at: http://www.oecd.org/ctp/treaties/2014-update-model-tax-convention.htm

[129] 8 The OECD Model Convention on Taxation of Income and Capital with commentaries (updated in 16 July 2014), Commentary 12.3 to Article 26(2).
Available at http://www.oecd.org/ctp/treaties/2014-updatemodel-tax-concention.pdf

the collected information to other government departments and judicial authorities of the state for other reasons than fiscal reasons. The Commentary to the OECD Model Tax Convention makes a clarification that when a receiving country wants to utilize the data for another end, it should detail to the giving country the end it wants to use the info and verify that the receiving country may use this data for such other objective under its regulations[130].

Ultimately, a party to a TT can normally suspend exchanges of information given that the other party does not comply with confidentiality provision or whether a breach of the rules has occurred and the supplying country is not satisfied on how the situation has been resolved by its treaty counterpart.[131]

3. Exchange of information through TIEA's

3.1 Introduction

A distinct usual way for international exchange of tax information is Tax Information Exchange Agreements (TIEA's)[132]. As the name means, TIEA´s are specific legal frameworks created to promote transnational cooperation in fiscal matters through exchange of information. Most TIEA´s have by model the OECD Model Agreement on Exchange of Information on Tax Matters of 2002[133]. In excess of than 1000 TIEA's have been done amongst countries worldwide lately.[134]

3.2 TIEA's: Historical background

Throughout History, states with thorough income taxation systems have never tried to do TT's with jurisdictions that do not levy any income tax or levy a very low rate of income tax[135], the so-called *tax havens*[136]. They do not see reasons to have a convention to prevent double taxation

[130] Idem.

[131] Idem.

[132] OECD Model Agreement on Exchange of Information on Tax Matters (France, Paris OECD, 2002).

[133] Available at http://www.oecd.org/ctp/exchange-of-tax-information/2082215.pdf

[134] Global Forum on Transparency and Exchange of Information for Tax Purposes, *Report on Transparency and Exchange of Information for Tax Purposes* (OECD, 27 June 2012), pp. 3.

[135] Timothy Addison, *Shooting Blanks: The War on Tax Havens* (2009) volume 16 number 2 Indiana Journal of Global Legal Studies, pp. 717.

[136] Tax havens, also known as 'non-cooperative jurisdictions' are commonly understood to be jurisdictions which are able to finance their public services with no or very low income taxes and offer themselves as places to be used by non-residents to evade taxation in their countries of residence. The OECD has identified three typical 'confirming' features of a tax haven: (1) lack of effective exchange of information, (2) lack of transparency, and (3) no requirement

with these jurisdictions since the exchange of fiscal information was normally done through TT's and there were no big reasons for a TT with a tax haven. This lack of reasons can explain how TIEA's originated. TIEA's are a distinct legal framework created with the aim of establishing a tax exchange relationship and serving as a tool for information exchanges between states where there is no TT in force.

TIEA's are normally a bilateral agreement that is settled amongst two states to provide an inter-governmental mechanism for the exchange of tax information. They are normally more detailed than TT's on the procedures for information exchange.

TIEA's are quite a new phenomenon, although they were originally created in the 70's, they only became "famous" in the late 90's. In 1996, the G7 Summit requested the OECD to indicate and report on malicious fiscal practices and to come up with mechanisms to solve the bad effects of harmful tax competition on the matters of investment and financing decisions and analyse the consequence for domestic tax bases.[137] The aspect that accelerated the intention to battle harmful tax competition was the understanding that the options of finance and jurisdiction would firstly be tax driven, obliging administrations to get involved in competitive tax bidding. Answering to the request, the OECD's Committee on Fiscal Affairs created a project on harmful tax competition and compiled a first report with the *Harmful Tax Competition – An Emerging Global Issue* in 1998.[138] This reported mentioned a list of four facts that should be analysed in order to define if a country is engaged in harmful tax competition. These facts were: 1) a lack of efficient exchange of information; 2) a lack of transparency; 3) none or only nominal taxes; 4) no substantial business activity.[139] Therefore, this work pointed out the absence of an efficient exchange of tax information as one key factor in defining malicious tax practises.

Shortly after this report, in 2000 the OECD established the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) whose members were OECD and non-OECD states. One of the initial mandates of the Global Forum was to create a transnational mechanism that could be utilized to establish an efficient exchange of fiscal information with states

for substantial activities. Adittionaly, they often offer preferential tax treatment to non-residents in order to attract investment from other countries

View a discussion on the matter: https://en.wikipedia.org/wiki/Tax_haven

[137] OECD, Harmful Tax Competition: An Emerging Global Issue (Paris: OECD, 1998), pp. 3.

[138] Idem

[139] OECD, Harmful Tax Competition: An Emerging Global Issue (Paris: OECD, 1998), pps. 16, 52, 62-68

without a very thorough tax system.[140] So, the OECD via the Global Forum started conversations with a number of states outside the OECD to formulate a model convention on exchange of tax information. The working group was formed by representatives of OECD members and also delegates from various tax havens such as Cyprus, Malta, Mauritius, San Marino and Seychelles, for example. Then in 2002, the Global Forum come up with the Model Agreement on Exchange of Information on Tax Matters (OECD Model TIEA).

The Model TIEA is a soft-law mechanism and has two versions, one a multilateral version, the other a bilateral version, but in most parts they are identical.

Nowadays, most TIEA's were concluded having this model as a base. Curiously, the majority of them were signed between 2002 and 2011 when the "name and shame" strategy towards uncooperative states started to be used by the OECD[141]. In 2009, the OECD made a list that reflected the status of its member states regarding the implementation of the globally agreed legal standards regarding taxation[142]. Countries were divided into three categories: white, grey and black listed states. The *white list* was for the states that had considerably established the globally agreed OECD standard in exchange for information by that year. They *grey list* was for the states that had agreed to the standard but had not established it considerably yet. The *black list* was for jurisdictions that hadn't agreed to the standard at all.

Aside from fulfilling other factors of the standard, a state is recognised to have considerably established the standard of exchange of information for the purpose of the Global Forum if it had agreements or unilateral mechanisms for the provision of the exchange of tax information with 12 states at least.[143] This reference point seemed to be a proper divider at that stage in time, between states that are establishing the standards and states that aren't. Additionally, in 2009 the OECD via its Secretary General issued a report that defined that if a state had agreements with 12 other states regardless of being OECD countries or not it would be considered to have considerably established the standard on exchange of information

Yet, these agreements couldn't be finalised only with countries without economic significance, and if it appeared that a country was declining to enter in agreements or negotiations

[140] View the *Introduction section of the OECD Model Agreement on Exchange of Information on Tax Matters*. Available at http://www.oecd.org/ctp/exchange-of-tax-information/taxinformationexchangeagreementstieas.htm

[141] For the complete list of TIEA, please view at http://www.oecd.org/ctp/exchange-of-taxinformation/taxinformationexchangeagreementstieas.htm

[142] The list is available at www.oecd.org/ctp/42497950.pdf

[143] *Taking the Process Forward in a Practical Way* (France, Paris: Global Forum on Transparency and Exchange of Information for Tax Purposes, 2008).

with other countries that want to properly administer and carry out tax laws, this should be reported to the Global Forum as a lack of commitment to establishing the standards.

3.3 TIEA's: Scope

Article 1 of the OECD Model TIEA exhibits a basic intention of the agreement and shows the scope of information that can be exchanged.[144]

These provisions are identical to those of Article 26 of the OECD and UN Model Tax Convention but the OECD Model TIEA provides more detailed regulations in its subsequent articles.

When it comes to the taxes covered, exchange of information through TIEA's normally covers at least four kinds of direct taxes: taxes on capital, taxes on income and profits, taxes on net wealth and estate, inheritance or gift taxes unless both contracting states agree to renounce one or more of them.[145]It also allows the inclusion of taxes levied by on the behalf of political sub-divisions or local tax departments. These taxes are only part of the agreement if they are listed in the mechanism of acceptance, approval or ratification.[146] Treaty counterparts can agree to broaden the agreement to cover other taxes such as VAT[147], being this identical with the stated in the OECD and UN Model Tax Conventions that cover "taxes of every kind and description".

Regarding the persons covered, through the OECD Model TIEA in its Article 2, the requirement to give information is not confined by the residence and/or the nationality of the person to who the information is related and/or by the residence and/or the nationality of the person that has custody of the requested information.[148]

3.4 TIEA's: Principles

TIEA counterparts are obliged to follow some principles when enforcing information exchanges. The principles applicable through TIEA's are the same the ones that are applicable through TT's (i.e. confidentiality, foreseeable relevance, reciprocity, and subsidiarity. Yet, some differences should be mentioned. The OECD Model TIEA has more clear facts to determine the "foreseeable relevance" of an information appeal. The authority of the requesting should give the

[144] Article 1 of the OECD Model Agreement on Exchange of Information on Tax Matters (2002). Available at http://www.oecd.org/ctp/exchange-of-tax-information/2082215.pdf
[145] Article 3 of the OECD Model TIEA.
[146] View Paragraph 1 of the Commentary to Article 3 of the OECD Model TIEA.
[147] View Paragraph 2 of the Commentary to Article 3 of the OECD Model TIEA.
[148] View Article 2 of the OECD Model TIEA.

following data to the authority of the requested state to show the “foreseeable relevance” of the data requested:[149]

1- The identity of the person under inquiry.
2- A declaration of the information desired including its nature and the manner the requesting country wants to obtain the data from the requested country.
3- The tax purpose for what the information is wanted.
4- Basis for the belief that the information asked for is in possession of the requested country and/or is held by a person within the requested country.
5- To what is known, the name and address of any person thought to have in custody the requested information.
6- A declaration that the appeal is in conformity with the regulations and administrative procedures of the requesting country , that if the requested data was in the jurisdiction of the requesting country then the authorities of the requesting country would be capable to gather the data under its domestic laws or in the normal functioning of administrative procedures and that it is in conformity with the agreement
7- A declaration that the requesting country has tried all ways available in its own jurisdiction to collect the data, with exception to those that would arise enormous difficulties.

One other distinctive trait of TIEA’s is that exchanges can happen on appeals related to certain civil or criminal tax matter under inquiry. Therefore, it is required to a contracting party to answer the information appeal from its treaty partner although the appeal is not related to tax fraud or any other criminal charge.

3.5 TIEA’s: Methods

The OECD Model TIEA clearly demonstrates that the exchange of tax information is the only mode of information exchange through TIEA’s[150]. So, in the way it is currently designed, the OECD Model TIEA does not assume an automatic or spontaneous exchange of information.

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[149] View Article 1 of the OECD Model TIEA.
[150] View Article 5 of the OECD Model TIEA.

3.6 TIEA's: Limitations

Clauses that deal with the limitation of information exchange in TIEA's are covered by Article of the OECD Model TIEA. These clauses are identical to the ones applicable through the OECD Model Tax Convention, but with some differences, that must be referred.

The OECD Model TIEA clarifies that the requested country can refuse to give information that could reveal secret communications between a client and an attorney or any other legal representative if such communications are, firstly, done with the aim of looking for or giving legal counsel and secondly if they were done with the aim of being used in contemplated or existing legal proceedings.[151]

Additionally, a requested state can refuse the appeal for information if the data requested by the applicant state to carry out a provision of tax law of the applicant state discriminates against a national of the requested country in comparison with a national of the applicant state in the same circumstances. The intention of this is to make sure that there is no discrimination in exchange of tax information.

Although these limitations are the ones that are generally applicable, the requested country is not prohibited from giving tax data at its discretion even though facts for the application of some of these limitations are not found.

3.7 TIEA's: Costs and Timing

Regarding costs, the OECD Model TIEA hasn't got particular rules on costs distribution. It simply states that the payment of costs of the provision of assistance must be agreed by the treaty parties[152]. The commentaries on the OECD Model TIEA stipulate that flexibility should be observed in defining the proportion of costs to account aspects like the probable flow of information appeals between the contracting states if both states have income tax administrations, the capability of the state to collect and give information and the amount of data involved.[153] It is also suggested by the commentaries that authorities can desire to implement a proportion of fees for the treatment of requests that could take into account the volume of work involved in answering a request.

[151] View Article 7(3) of the OECD Model TIEA
[152] View Article 9 of the OECD Model TIEA
[153] View Paragraph 99 of the Commentary to Article 9 of the OECD Model TIEA

When it comes to timing, the OECD Model TIEA gives an implicit time limit for the requested country to answer the information appeal of its treaty counterpart. It stipulates that the authorities of the treaty counterpart should provide the requested information "as promptly as possible"[154]. It also stipulates that to ensure a quick response the authorities of the requested state should confirm the reception of an appeal in writing to the authorities of the applicant state and should warn the authorities of the applicant state if there exist, within 60 days of the reception of the appeal. Granted that the authorities of the requested country have been incapable to gather and give the data within 90 days of the reception the appeal, including that it finds barriers in providing the information or declines to provide the information, it should immediately warn the applicant state, giving its reasoning for its incapability, the nature of the barriers found or the reasoning for its decline.

3.8 Confidentiality and TIEA's

TIEA's have identical confidentiality provisions to TT's. This can be found in Article 8 of the OECD Model Tax Information Exchange[155]

The development of the confidentiality clauses of the OECD Model TIEA is essentially identical to the one of the OECD Model Tax Convention and both stipulate that the data collected must have a confidential treatment. They allow for the permitted ends of disclosure and also to who the info can be made public.

Yet, the confidentiality clauses of the OECD Model TIEA don't make references to domestic regulations of the receiving country and the OECD Model Tax Convention makes. The Model TIEA implicitly assumes that the receiving state has laws and safeguards set up to assure the confidentiality of the given info, and therefore this state handles this collected data in a similar way as if was collected internally. The OECD Model TIEA does also not express, conditions or clauses where the giving of info can be utilized for non-fiscal reasons in the receiving state. It mentions only that the data cannot be disclosed to any other authority, entity or person or any other jurisdiction without the written agreement of the competent authority of the information supplying country.

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[154] View Article 5(6) of the OECD Model TIEA.

[155] The OECD Model Agreement on Exchange of Information on Tax Matters (2002). Available at: http://www.oecd.org/ctp/exchange-of-tax-information/2082215.pdf

3.9 Tax information exchange upon request: Limitations of TT's and TIEA's

Exchange of tax data standards through the OECD and UN Model Tax Conventions, and the OECD Model TIEA have considerably improved from their first introduction, yet, one of the biggest questions is, are these standard still important in the extremely globalized world we live in today? In this section, we pretend to analyse this situation in a comprehensive way.

A) Limitations of tax information exchange through TT's

The method in which data sharing happens is still today, one of the biggest issues of exchange of data standards through TT's. Nowadays, fiscal data exchanges through TT's are still mostly upon request, which means that the state that desires data on the foreign-source income of its taxpayer, can obtain this data solely by making a particular data request to its treaty counterpart. Indeed, the OECD and UN Model Tax Conventions determine this mechanism of exchange as the unique mandatory mechanism for data exchanges under TT's.[156]

The prerequisite for the giving of data is that asked information should be "foreseeably relevant" to the imposition of a tax treaty and the national domestic regulations of the partner states. In general, this "foreseeable relevance" of the data is defined grounded on two criteria:

Firstly, the data appeal should be done with the highest degree of specificity related to the taxpayer(s) about the information is desired[157], usually meeting an official list of features that a requesting country normally has to give in order to fulfil this requirement[158]:

(I) Name of the taxpayer (for legal institutions and individuals);
(II) Registration number (when it's a legal institution) ;
(III) TIN and address (to the range known) ;
(IV) Declaration of the info desired (nature of it included) ;

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[156] View Paragraph 1 of the Manual on the Implementation of Exchange of Information Provisions for Tax Purposes in the OECD Model Double Taxation Convention. View Paragraph 1 of the Manual on the Implementation of Exchange of Information Provisions for Tax Purposes. OECD Committee on Fiscal Affaires, *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes* (Paris: OECD, 2006).
[157] View Paragraph 5 of the Manual on the Implementation of Exchange of Information Provisions for Tax Purposes in the OECD Model Double Taxation Convention.
[158] View Paragraph 5 of OECD Committee on Fiscal Affairs, *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes* (Paris OECD, 2006). View also Article 5 (Paragraph 5 (a)) the OECD Model Exchange of Tax information Agreement (2002).

(V) Fiscal purpose the information is desired;

(VI) Reasoning for the belief that the data desired is in custody of the requested state or is in custody or control of a person in the jurisdiction of the requested state;

(VII) Name and address of any person considered to be holding the requested data (to the range known)

(VIII) A declaration that the requesting state has done all mechanism done in its territory to collect the data, with the exception of those that could emerge disproportionate difficulties

Secondly, most of bilateral conventions also require that a requesting country must show compelling evidence in its information appeal that the taxpayer, about who the data is desired, is suspected of tax evasion, tax fraud or any type of criminal action[159]. So, this data request must have proper backup by evidence connecting the taxpayer to these illegal actions and hence the data requests that do not fulfil these requirements are usually rejected since they are considered faulty.[160]

These requisites have the intention to demonstrate that contracting states are not free to get involved in unspecified data appeals or to ask for data that is very likely to be irrelevant to the fiscal issues of a certain taxpayer, the so-called "fishing expeditions".[161]

Yet, these requisites also give the idea that the requesting state has obtained significant data regarding its resident taxpayer and her/his foreign assets prior to doing a fiscal information request to its treaty counterpart. If more initial data is asked from the requested state, the more unlikely it is that the exchange of tax data will happen. The issue lies in the fact that administrations don't always know if their tax residents possess overseas assets and derive foreign-source revenues; nor are they able to assess if the taxpayer in question is engaged in tax evasion or fraud without having previous information on the existence of the overseas assets, and consequently, states are usually incapable to do tax data requests to their treaty counterparts through TT's.

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[159] View Article 7(1) the OECD Model Exchange of tax information Agreement (2002); paragraph 5 of the Manual on the Implementation of Exchange of Information Provisions for Tax Purposes in the OECD Model Double Taxation Convention; the Commentary to Article 26 of the UN Model Double Taxation Convention (2011), Paragraph 25.

[160] View the report of the Federal Department of Finance of Switzerland. The report indicates that any tax information request to Switzerland's from its treaty partners is declined if it does not include the name and address of person about whom information is sought. The report is available at: http://www.efd.admin.ch/aktuell/medieninformation/00462/index.html?lang=en&msg-id=37645.

[161] The term 'fishing expeditions' is metaphoric. It normally refers to unspecified information requests. View Commentary to paragraph 1 of Article 26 of the OECD Model Tax Convention. OECD, *Model Tax Convention on Income and on Capital* (2010)

As an example in March of 2009, Swiss fiscal authorities announced that a total of merely 30 incoming fiscal data request had been done in the 10 previous years[162]. This was seen as a joke because it was believed at that time, that Switzerland held one-third of global overseas wealth, so, the system of exchange of information upon request through TT's is considered " highly restrictive, maddeningly slow and unproductive process" by some governmental officials[163].

Acknowledging these issues, in 2012, the OECD did a review on the subject by updating the Commentary to Article 26 of the OECD Model Tax Convention of 2010, in which it clarified and to some extent simplified the principle of "foreseeable relevance". It stated that an appeal for data cannot be seen as a "fishing expedition" only because it does not give the name, address or both, of the taxpayer under inquiry.[164]

In these cases, the requesting country should include other data enough to identify the taxpayer. Yet, when the request regards to a group of taxpayers not individually identified, it is usually hard to determine that the request is not a "fishing expedition", since the requesting country cannot indicate to a continuous inquiry into the issues of a certain taxpayer that in the majority of cases would be itself separate from the concept of the appeal being random. The commentaries stipulate that in these cases it is thus needed that the requesting country gives:

1) A specific description of the group and the particular circumstances and facts that have led to the appeal;
2) A clarification on the applicable law and why is there reason to think that the taxpayers in the group for who data is asked about have not been compliant with that law assisted by clear factual grounds;
3) The requested data would aid in establishing compliance by the taxpayers in the group.

Therefore, the update of 2012 of the Commentary to Article 26 of the OECD Model Tax Convention supported "group requests" and determined that these requests could fulfil the standard of foreseeable relevance. The importance of this update of the commentaries on the

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[162] Jean-Rodolphe Fiechter, Exchange of Tax Information: The End of Banking Secrecy in Switzerland and Singapore? (2010) 36:6 International Tax Journal, pp.59.

[163] David Voreacos, *Credit Suisse U.S. Clients in Limbo as Probe Inches Ahead* Bloomberg Business (7 March 2014). Available at: http://www.bloomberg.com/news/2014-03-07/credit-suisse-u-s-clients-in-limbo-as-probe-inchesahead.html

[164] Paragraph 5.2 of the Commentary to Article 26 of the OECD Model Tax Convention (2010). Available at http://www.oecd.org/ctp/exchange-of-tax-information/120718_Article%2026-ENG_no%20cover%20%282%29.pdf

OECD Model Tax Conventions is that although they considerably alter the form the information requests are handled, they don't need any improvement to the relevant treaty, nor to the TT's that derive from it. Naturally, the commentaries have the purpose to clarify the existing clauses of Model Conventions, and so these clauses have been applied since July of 2012.

This has been an exceptional development in international tax law, since it makes states able to collect data on the revenues of their residents in the territory of treaty counterparts without giving specific information, like this bringing the exchange of data upon request standard a little closer to the automatic exchange of data system.

This development still seems inadequate because:

Data exchanges through TT's happen upon request. A contracting state is still obliged to do a written request to collect fiscal data from its treaty counterpart and this request still needs some onus of evidence that proves that the request is specific (no fishing). Additionally, in this system, countries still need to do various data requests to several states even if the data they ask for is needed for normal carrying out of its fiscal laws and whether the data they ask for every time is related to the same type of taxpayers and to the same kind of revenues. Therefore, why should these exchanges be automatic? This question will be analysed comprehensively in the following sections.

B) Limitations of tax information through TIEA's:

TIEA´s have the same issue as TT's: exchanges only happen upon request. Indeed, the provisions of the Model TIEA clearly mention that the exchange of tax information "upon request" is the only mode of data exchange[165]. Additionally, TIEA's utilize more rigid obligations for the data requests to be accepted. The OECD Model TIEA determines that a request for data must have the following data:

1) Name of the taxpayer (for legal institutions and individuals), registration number (given the case of a legal institution), to the range known, TIN and address;
2) Statement of data desired, its nature included;

[165] View Article 5 of the OECD Model Exchange of Tax information Agreement (2002). (It should be mentioned that the exchange of tax information upon request is the only form of information exchange under the Model Exchange of Tax Information Agreement).

3) Fiscal purpose for which the information is desired;

4) Reasoning for the belief that the data desired is in the possession of the requested state or is in the possession or control of a person within the jurisdiction of the requested state;

5) To the range known, the name and address of any person thought to be in custody of the requested data ;

6) A declaration that the request is in harmony with the administrative procedures and the laws of the applicant state, and that if the requested data was within the jurisdiction of the applicant state, the competent authority of the applicant state would be capable to collect the data under its normal administrative procedure or through its laws;

7) A declaration that the applicant state has tried all measures possible in its territory to collect the data, with exception to those that would create enormous difficulties.

After the examination of this thorough list, lack of efficiency of these agreements becomes clear. In most situations, it's practically impossible for tax authorities of the state that desires this data, to know this information beforehand. Thus, there are many doubts of the sensibleness of TIEA's in the majority of situations.

4. Conclusions

In this section, we did a comprehensive analysis of TT's and TIEA's. These frameworks can be considered still to be the prevalent form of international exchange of information, but the amount of data shared through these mechanisms is incredibly small. This can be explained by the existence of the default rule, which requires that exchanges of tax data, can only happen in response to a tax data request. To do these requests, a country must have specific information regarding the taxpayer such as her/his foreign revenue, assets, where the assets and revenues are located, and the name and details of the foreign entities and third parties that possess this information. Indeed, countries usually desire the exact same data from their treaty counterparts, to administer their fiscal statutes.

Thus, these frameworks are relatively symbolic and absent in practical value, the only thing being possible, test checks on the actual or estimated volume of taxable foreign-source revenues of resident taxpayers in a very small number of situations, those that the requesting country already knows about, and we concluded that these frameworks are not good enough for today's world.

Part 4. International Automatic Exchange of Information: A Global View from the Multilateral Convention to the CRS

1. Outline

So until now, we have analysed how countries tax administrations collect their fiscal information have seen a brief part on bank secrecy laws while discussing their problems and limitations have observed some general taxpayer confidentiality notions and we have seen as well the first ways of exchange of information (TT's and TIEA's). All we analysed before to a certain degree explains what we are going to analyse now. TT's and TIEA's work in the way that information is only sent upon request and only between the parties of the treaty. These frameworks are just not enough for the globalized world we live in, today, and so a legal trend has emerged asking for a better mechanism. This mechanism is regarded by most legal academics as an automatic exchange of tax information available to all countries without exception. Several legal frameworks have been developed in the last 30 years to try to come up with this mechanism. In this part, we will analyse several of these frameworks and discuss comprehensively the latest framework to achieve this mechanism (The Standard), as well as some taxpayer confidentiality specific notions that will be present in several sections of this part. There will also be a section on Developing Countries and Automatic Exchange of Tax Information to demonstrate how and if this mechanism can work in the so called "third world countries".

2. International Automatic Exchange of Tax Information: Concept, Historical Background and Purpose

2.1. Concept

International automatic exchange of tax involves information exchange, normally from to time-to-time, and methodical sending of tax-relevant data of non-residents taxpayers by tax administrations of one state to the tax administrations of another state where the taxpayers have residence[166]. This exchange of data is automatic, meaning that it happens on a constant basis

[166] The OECD Council Recommendation C (81)39. View Recommendation of the Council concerning a standardized form for automatic exchanges of information under international tax agreements from May 5, 1981. Available at http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=84&InstrumentPID=81&Lang=en&Book=

(normally annually) and the extent of information to be reported has already been agreed, instead of the occurrence of a particular request[167]. This fiscal information is gathered in the source state, which collects the data on a regular basis via reporting of third parties (i.e. financial entities) in this territory who do payments to non-residents. The source state then, can just confirm the veracity of the accumulated data and then transmit it to the taxpayer's state of residence. The OECD Information Brief breaks down the simple procedure of automatic exchange into 7 different actions[168]:

a) The payer of host country gathers data from the taxpayer and/or produces the data on itself. Most tax systems work in this way, but some oblige the taxpayer to file a refund claim straight to the tax authorities. From this refund claim, tax authorities collect the information to exchange;
b) Payer sends the data to the national tax administration bearing in mind, the identity if non-resident taxpayers and the payments done to them also;
c) Tax administrations concentrate all data collected and set up independent state-by-state bunches depending on the non-residents taxpayers' country of residence;
d) Data is encrypted and bunches are transmitted to residence state tax administration.
e) Data is obtained and decrypted;
f) Residence state provides important information into an automatic or manual matching procedure.
g) Residence state does an analysis of the results and takes compliance action as appropriate;

This procedure can be understood much easily with a standard example. For example, a Portuguese resident taxpayer has a deposit of 100,000 € in a Swiss bank. Imagining that the mentioned deposit gives a 10% interest rate over the year, the Portuguese resident earns a foreign-source income of 10,000 € annually. In the automatic exchange of tax information regime, the Swiss bank must inform the Swiss tax authorities of the revenues on an annual basis then the

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[167] Global Forum on Transparency and Exchange of Information for Tax Purposes*, Automatic Exchange of Information: A Roadmap for Developing Country Participation* (France: Paris Global Forum on Transparency and Exchange of Information for Tax Purposes 2014), pp.4

[168]OECD, Automatic Exchange of Information: What it is, How it Works, Benefits, What Remains to Be Done (Paris OECD, 2012), pp. 9.
Available at http://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-ofinformation-report.pdf

Swiss tax authorities' forwards this information to the Portuguese tax administration. Normally the information is sent electronically and straight from one state's exchange of information portal to the other states exchange of information portal. Then the Portuguese tax department can compare this data with the information the taxpayer gave them through his/her self-assessment report and confirm if the taxpayer has done a proper declaration of his earning for the time in question. Grounded on the results of this matching process, tax authorities can start to compliance actions against the taxpayer that could not have complied with his reporting requirements.

The data to be traded normally contains the name of the taxpayer, his/her identification number (TIN) given by the residence state, both addresses (temporary and permanent), the kind and the number of revenues gained for the given time period and the details of the payer in the source state. It can contain as well, other data like information on financial goods, immovable property or value added tax refund, for example.[169]

2.2. Historical background

The notion of automatic exchange of tax information first referred in the commentary of the Article 26, Paragraph of the OECD Model Tax Convention of 1963 as of three ways of exchange between treaty parties: 1) exchange on request; 2) spontaneous exchange; 3) automatic exchange[170]. Yet, this way of exchange obliged treaty parties to have another administrative commitment in order for these exchanges to happen, with this agreement having the function of defining logistics and functional elements of automatic exchange of fiscal information. However, there was no counselling or standard for these agreements, so this manner of exchange of information was essentially an idea instead of a common procedure.

One of the first international legal frameworks that set up a procedural basis for automatic exchange of tax information between countries was the Nordic Convention on Mutual Assistance in Tax Matters (Nordic Convention)[171]. The Nordic Convention was an agreement done by Denmark, Finland, Iceland, Norway, and Sweden at the beginning of the 1970's and was modified in 1967, 1981 and 1987. In 1989 this regional treaty was again changed and saw the inclusion of the Faroe

[169] OECD Committee on Fiscal Affairs, Automatic Exchange of Information: What It Is, How It Works, benefits, What Remains to Be Done (Paris: OECD, 2012), pp. 7.

[170] 1963 and 1977 OECD Model Income Tax Treaties and Commentaries: A Comparative Presentation (France, Paris: Organisation for Economic Co-operation and Development, 1987).

[171] Nordic Convention on Mutual Administrative Assistance in Tax Matters as amended in 1989 (Copenhagen 1972).

Islands and Greenland (regions of Denmark yet independent in fiscal matters) as new counterparts of the treaty[172].

The Convention on Mutual Administrative Assistance in Tax Matters (Multilateral Convention) was another of the legal frameworks that were developed. It was developed in 1988 in a joint effort of the CoE and the OECD[173]. Article 6 of this Convention, mentions the possibility of automatic of tax information amongst treaty parties. Yet, this mechanism required as well of a supplementary commitment between administrations of interested treaty counterparts to make automatic exchange of fiscal information, so in practical terms, such administration agreements were rarely done.

Some bilateral agreements on automatic exchange of information started to appear, like the Canada-US agreement of 1997, where information of certain kinds of revenues, like interest payments made to one resident individual taxpayer of one of the states on their bank deposits in the other states territory, can be automatically transmitted.[174]

The OECD then started a project called *Harmful tax competition: an emerging global issue*, in 1998, which was an answer to the appeal of the OECD member states to create mechanisms to combat the dissemination of malicious fiscal practices[175]. This work had its focus on the worries of the OECD states that were exposed to great income losses due to unhealthy fiscal competition[176]. This work resulted in a series of orientations and a schedule for OECD member states to point out, report and eradicate toxic features of their preferred regimes. It specifically orientated; firstly the identification and eradication of malicious characteristics of preferred fiscal regimes in OECD member countries; secondly the identification of *tax havens* and pursing their commitments to the principles of efficient exchange of information and transparency, and finally the encouragement of other non-OECD states to join this work. OECD member states gladly received this Report and authorized the OECD to fulfil this work. The intention was to make sure the distribution of taxation

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172 The Global Forum on Transparency and Exchange of Information for Tax Purposes, Combined Peer Review Report: Norway, paragraph 210.
Available at http://www.keepeek.com/Digital-AssetManagement/oecd/taxation/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes-peerreviews-norway-2013_9789264205888-en#page1

173 Council of Europe/ OECD, Convention on Mutual Administrative Assistance in Tax Matters (as amended by Protocol in 2010) Council of Europe/ OECD 1988).

174 View Article 27 of the Convention between Canada and the United States with Respect to Taxes on Income and on Capital from September 26, 1980, as amended by the Protocols done on June 14, 1983, March 28, 1984, March 17, 1995, July 29, 1997, and September 21, 2007.

175 OECD, Harmful Tax Competition: An Emerging Global Issue (Paris: OECD, 1998). The project and its agenda have evolved over time and following the gradual commitments made by the OECD member states

176 Andrew P Morriss & Lotta Moberg, Cartelizing Taxes: Understanding the OECD's Campaign against Harmful Tax Competition (2012).

is equally shared, and that tax must be the deciding factor when making capital distribution choices. Although the project of the OECD didn't mention specifically the issue of automatic exchange of information, its call for exchange of information on requested tax matters and global tax matters was certainly going in that direction.

At the beginning of 2001, OECD eventually launched the for- so-long anticipated standard administrative commitment in the form of the Model Memorandum of Understanding on Automatic Exchange that could be utilized to make function the automatic exchange of information mechanisms in TT's and the Multilateral Convention[177].

The EU has also had an approach to this issue. The first framework that appeared in EU Law was the Directive 77/799 ECC. This Directive regarded mutual assistance of competent authorities of member states in the field of direct taxation, like this being one of the pioneer EU legal frameworks being designed to combat tax evasion and to develop the phenomenon of tax data exchange. This Directive sets one of the cornerstones that hold the EU tax system, by establishing the correct sense of a tax foreseeing, 1) automatic and spontaneous exchanges (and not only exchanges upon request); (2) if, by agreement, a Member State authorizes the presence of tax officials of another Member State in its territory; (3) "triangular" exchanges provided that the State of the source of information authorizes; (4) additional limits on the exchange of information. This legal framework was also reviewed and updated to guarantee the highest possible degree of practical application and effectiveness being eventually replaced in 2011, by the Directive 2011/16/EU, the so-called Directive on Administrative Cooperation on Tax Matters (DAC) which has a new version of 2014 provided by the Directive 2014/107/EU (DAC2).

In 2003, the EU had another contribution to the automatic exchange of information procedures. With the free movement of capital and the liberalization of capital markets within the EU, the importance of the implementation of cooperation amongst member states with the aim of the prevention of tax evasion in overseas financial operations was demonstrated. Major issues due to taxpayers allocating their investments to other member states that didn't levy taxation at the source and the simultaneous under-report or non-report by the same taxpayers to their state of residence started to occur in a growing number of cases. To combat this, the EU launched a new regime, with the so-called *Savings Directive* (2003/48/EC). This Directive levies the onus on each EU country to automatically inform about interest payments made by their residents to residents

[177] OECD, Model Memorandum of Understanding on Automatic Exchange for Tax Purposes (Paris: OECD, 2001).

of other EU countries, and by this, the Directive tries to guarantee that each EU Member State has data to tax the savings revenues of its residents, having like this, their savings revenues from other EU countries. This Directive was in force since July 2005 but it has been repealed in recent years being replaced by the DAC 2 legal framework. The DAC, which repealed the old Directive 77/799 / EEC, brought with it the effort to combat the problem of fraud and tax evasion by allowing Member States to exchange information in the three known modes: exchange on demand, exchange spontaneous and automatic exchange. The urgency to follow the developments in the movement of goods, capital and payments which could suggest an increase in the opportunity for tax evasion problems to arise has made the Directive 77/799 / EEC not fit for these new challenges. In addition to the DAC being prepared for all the forms of exchange of information as we have mentioned, it has also made this exchange of information a broader spectrum, given the set of liabilities it covers (people individuals and groups, associations of persons who have been recognized to have capacity to practice legal acts and any other legal structure, irrespective of its nature or form, endowed with legal personality, whose assets it owns or/and their income is subject to any of the income categories of the Directive)[178] and on which the information will be exchanged, in the absence of restrictions on the nationality or residence of these liabilities.[179]There are still more advantages in relation to the former directive. When it comes to taxes covered, the DAC covers most taxes, even including local taxes, consumer taxes excluding only VAT and special contributions to social security[180]. In this way. The DAC came to face new challenges, replacing very adequately Directive 77/799/EEC since this one besides other reasons we have already mentioned like the expansion to other ways of tax information exchange, it only covered income and property taxes. Assistance has become quicker and more efficient, with this ensuring the raise of quantity and quality levels of exchanged data, especially with the elimination of bank secrecy (member states cannot argue the fact that the information is in the possession of a financial institution to refuse giving tax information), establishing a mandatory automatic exchange of tax data for certain categories of income and foreseeing a new administrative structure to facilitate things procedurally. The DAC

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[178] View Article 3 number 11 of Directive 2011/16/UE

[179] João Sérgio Ribeiro, *A diretiva relativa à cooperação administrativa no domínio da fiscalidade,* Tomo II- Ano de 2013- Ética e Direito, Escola de Direito da Universidade do Minho, Departamento de Ciências Jurídicas Públicas, 2013 (e-book) pps. 93-109

For further information please view:

João Sérgio Ribeiro, Estudos de Direito Fiscal da União Europeia (Tributação Direta), ELSA UMINHO,

2014; João Sérgio Ribeiro, *Exchange of information and cross-border cooperation between tax authorities,* IFA Branch Report Portugal, Cahiers de Droit Fiscal Internacional, Volume 98b (2013), pp. 639-653.

[180] Article 2 number 2 , Directive 2011/16/EU

obliges as well, for the European Commission to present the European Parliament reports on its application.

It should be noted as well, that in 2014, the DAC2 was approved adding the automatic exchange of information regarding financial revenues. In 2015, the Directive 2015/2376 also changed the DAC regarding automatic exchange of information in the sense of promoting transparency in the issue of transfer pricing.

Bearing these developments in mind, and resuming their best practices, the OECD at the beginning of 2010, launched the *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes*, which analysed the procedural elements of the establishment of automatic exchange of information, revealing the legal grounds of this exchange.[181]

In the 2010's, the approach towards the automatic exchange of information regime was substantially altered. Interests of politics and of scholars on the benefits of this regime have started to grow increasingly, mainly due to the financial crisis of 2007-2009.

Vitalized by the shock of the financial crisis on income, the international community started to want more transparency worldwide for fiscal ends. Having this in mind, in 2010, it was the US that made a huge breakthrough through the approval of the Foreign Account Tax Compliance Act (FACTA)[182]. This regulation obliged financial entities abroad from the US to log-on with the US IRS and agree to constantly inform about their US customers' accounts to the IRS. This quite disputed regulation was a consequence of the revelation of some abuse cases in the existing tax regime of the US regarding foreign-source income declared by US taxpayers with the assistance of some foreign financial entities.[183] The abroad consequences of this regulation ultimately gave way to the appearance of the FACTA intergovernmental agreements (IGA's)[184]. By the IGA's, the foreign administration has to collect the relevant information from its financial institutions and send it to the US, and they get back from the US information regarding their resident taxpayers. Therefore, the IGA's have basically altered FACTA from a national law to a series of bilateral agreements, and

[181] OECD Committee on Fiscal Affairs, Manual on the Implementation of Exchange of Information Provisions for Tax Purposes (Paris OECD, 2006).
Available at
http://www.oecd.org/ctp/exchange-of-taxinformation/cfaapprovesnewmanualoninformationexchange.htm

[182] Itai Grinberg, Beyond FATCA: An Evolutionary Moment for the International Tax System (Georgetown: Georgetown Law: Scholarly Commons 2012).

[183] Josepf Erwin, The UBS Affäre: A Qualified Intermediary and "John Doe" Summons, Steuerbetrug, and Bankgeheimnis (2009) Volume 38, Part 8, Tax Management International Journal.

[184] US Treasury Department, 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 (February 8, 2012).

with a bigger importance, this US attitude has served as a motivation to set the subject of automatic exchange of information one more time on the agenda of the OECD, however with more importance and energy.

In the summer of 2012, a report on automatic exchange called: *What it is, how it works, benefits, what remains to be done* was released by the OECD[185]. This article explained key elements of automatic exchange of information, specifically, 1) what is automatic exchange of information; 2) how does it work; 3) what is the legal basis?; 4) What is the current status ?; 5) Does it work?; and 6) What is being done by the OECD in this area and what is still to be achieved.

In 2013, another big step in international tax policies was taken, when the G20 states took an official action towards the establishment of the automatic exchange of information procedures by supporting automatic exchange as the anticipated new model for international tax information exchanges and queried to the OECD the task of the creation of a new multilateral standard on automatic exchange of information, and the G20 states called as well all other states to support this initiative as soon as possible.[186]

In the beginning of 2014, the OECD launched its initial proposal of the Standard of the automatic exchange of financial account information in tax matters, which basically obliges financial entities globally to embrace in the role of tax agents, by developing a mechanism that identifies their customers and to send data on accounts possessed by non-resident entities (foundations and trusts included) and individuals to the local tax department, which will then forward the information to the tax authorities in the country of residence of the accountholder, annually[187]. To make sure that the data is exact and exhaustive, the model also details the data collection practices to be followed by the financial entities. Briefly after this, in July more precisely, the complete version of the Standard for Automatic Exchange of Financial Account Information in Tax Matters.[188]

All the mentioned events demonstrate that the notion of automatic exchange on a transnational level has transformed itself from just a small idea to a procedure in a fast period of

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[185] For more information, please visit at: http://www.oecd.org/ctp/exchange-of-tax-information/improvinginternationaltaxcooperationoecdreleasesreportsonautomaticexchangeandtaxconfidentiality.htm

[186] *G20 Meeting of Finance Ministers and Central Bank Governors - Communiqué* (Washington DC: G20, 2013). Paragraph 14. Document can be found at http://www.g20.utoronto.ca/2013/2013-0419-finance.html; View also G20, G20 Leaders' Declaration (Russia, Saint Petersburg G20, 2013). http://www.g20.utoronto.ca/2013/2013-0906-declaration.html

[187] OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters (with commentaries) (France: Paris OECD, 2014).

[188] Document available at: http://www.oecd.org/ctp/exchange-of-tax-information/standard-for-automatic-exchange-offinancial-information-in-tax-matters.html

time. All the mentioned frameworks have had influences for previous frameworks and influenced the most recent frameworks on the matter and these have surpassed the major issues of the first legal instruments.

In the following sections, some of the legal frameworks regarding automatic exchange of information will be analysed thoroughly.

2.3. Purpose

Automatic exchange of tax information can assist countries to have an efficient assessment of their residents' earnings when their fiscal liability is dependent on their global revenues or assets. It can help as well, to confirm the veracity of the taxpayers' income statements or the veracity of the claims or proof declared by the residents' taxpayers in explaining their fiscal declaration.

This regime also makes tax compliance increase, by encouraging resident taxpayers to declare all relevant tax data on foreign-source revenues to their states of residence, since they have access to his information via the automatic exchange mechanism.

To conclude, the automatic exchange of fiscal information guarantees the same treatment with domestic and foreign source revenues, like this eliminating the chances for tax-distorted redistribution of economic and financial assets.

3. Automatic exchange of information: A continued progress

Each legal framework of the automatic exchange of information has an independent accent due to its different origin, but there have been firm influences from other legal frameworks and a high number of elements are very identical. Therefore, and due to those mentioned in the delimitations in the Introduction of this article, not all frameworks will be analysed only those that are, in my opinion, the most important.

3.1. Multilateral Convention: Historical Background

The Multilateral Convention on Mutual Administrative Assistance in Tax Matters (Multilateral Convention) is the result of a joint effort by the Council of Europe and the OECD, introduced in 1988. It started in 1978, in a Council of Europe Parliamentary Assembly resolution[189]

[189] View the Council of Europe Parliamentary Assembly recommendation 833 (24 April, 1978) on cooperation between the Council of Europe member states against international tax avoidance and evasion. Available at http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta78/EREC833.htm

and the outline convention was ratified by the OECD Fiscal Committee in 1986. The Multilateral Convention was then open for signature by countries of both international institutions in January 1988 and entered into full force in 1995.[190]

The goal of the Multilateral Convention is to enable its signatory counterparts to battle international fiscal evasion and to improve the enforcement of domestic tax regulations via transnational administrative cooperation, as well respecting the main rights of taxpayers. The Multilateral Convention gives all means of administrative cooperation amongst member states and accumulation of taxes. It tries to facilitate transnational cooperation in three simple ways;

1) International exchange of tax information, including simultaneous tax examinations and participating in tax examinations abroad;
2) International assistance in the recovery of taxes, including measures of conservation;
3) International service of documents.[191]

Therefore, this agreement to give administrative help in fiscal lead to a tax administration to take the abovementioned acts in the favour of another country at any stage of taxation, not solely to tackle fiscal evasion but to improve the implementation of fiscal regulations as well. Practically, a tax authority will, generally, act solely when it receives a request from tax authorities of another country's tax authority. In doing so, the assisting country uses its power through domestic laws to collect data, analyse taxpayers' accounts, and to recover funds on the behalf of that country, and normally to enforce the other county's tax regulations.

Assistance between the Multilateral Convention's signatory parties was enormously made easier due to the fact that the CoE and OECD states have legal systems based on the same principles of justice and law and interrelated economies also.

The biggest support to the Multilateral Convention comes from the G20 group. In its summit of 2009, the G20 emphasized the importance of making better transnational cooperation

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[190] Paragraph 39, *Introduction to the OECD Model Tax Convention on Income and Capital* (2010). Available at: https://books.google.ca/books?id=jrPNxB24MYC&pg=PA16&lpg=PA16&dq=Multilateral+convention+on+mutual+administrative+assistance+in+tax+matt ers+came+into+force+in+1995&source=bl&ots=3XDL4GKcJv&sig=B98jqIUZYRClFQuxzF0WnIBVARk&hl=en&sa=X &e i=-erWVLenEoqyATwroFQ&ved=0CDAQ6AEwAw#v=onepage&q=Multilateral%20convention%20on%20mutual%20administrative %20assistance%20in%20tax%20matters%20came%20into%20force%20in%201995&f=false

[191] Article 1 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. Available at: http://www.oecd.org/ctp/exchange-of-taxinformation/conventiononmutualadministrativeassistanceintaxmatters.htm

in fiscal matters specifically through exchange of data and appealed for a multilateral attitude towards the exchange of information matter[192]. The Convention was seen as a conceivable, thorough, multilateral framework in that direction. In 2010, the Multilateral Convention was improved by a protocol to answer the appeal of the G20. The Protocol put in line the Multilateral Convention to the globally agreed models on exchange of information and transparency and included states that didn't belong nor to the OECD nor to CoE, and efforts and encouragements have been made to make more jurisdictions to sign the Multilateral Convention.

Any country that was to sign the Convention may adjust the range of its requirements, due to a detailed mechanism of reservations specifically provided by this Convention.

Nowadays, the Multilateral Convention is seen as a solid legal framework that makes easier transnational tax cooperation via inter-states exchanges of fiscal data, being described by the OECD as a multilateral commitment created to increase international cooperation for better functioning of domestic tax regulations, and through the respect of the main rights of taxpayers.

Today, over 100 jurisdictions have signed the Multilateral Convention.[193]

3.2. Multilateral Convention: Scope

Information exchanges are the most prompt way of administrative help between tax administrations within the Multilateral Convention. It establishes that the parties of the Convention should share any data that is foreseeably relevant to the estimation and gathering of taxes, the enforcement, and recovery of tax claims, and finally, the prosecution before an administrative authority or the start of a prosecution of a judicial entity.[194]

The Multilateral Convention, in theory, covers all taxes imposed by administrations at the national and local level. They are categorized, just like in the OECD classification, which is the internationally agreed classification.[195] Taxes on income, taxes on capital gains and taxes on immovable property are some examples of taxes that this Convention covers.

Different from other tax international frameworks like TT's and TIEA's, the Multilateral Convention also covers all forms of compulsory payments to the general administration except for customs duties.

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[192] For more details on the official website of the G20's London Summit, visit at http://www.londonsummit.gov.uk/en

[193] See the chart of signatory parties of the Multilateral Convention. Available at http://www.oecd.org/ctp/exchange-of-taxinformation/conventiononmutualadministrativeassistanceintaxmatters.htm

[194] View Article 4 of the Multilateral Convention.

[195] View Article 2 of the Multilateral Convention.

It should be referred that not all states are capable, or have the willingness to give assistance for all kinds of taxes, so, having this in mind the Convention permits states to make reservations on the application of the Convention on particular taxes and specific ways of assistance, such as, the assistance in the collection of taxes.

Yet, no reservation can be done regarding taxes imposed at central government level on income or revenues, on capital gains or on net wealth, so all states are obliged to provide administrative assistance regarding these three types of taxes.

Regarding the persons covered, the Multilateral Convention clarifies that administrative aid between parties is not limited by the nationality or residence of the taxpayer, or of any other person involved. The Commentary to the Convention points out that if the tax authorities of State A ask from some aid in fiscal matters from State B, this is for the obvious reason of estimating, collecting or recovering a tax due in State A from an individual that can or cannot be a resident or a national of State A. If the person is not liable to tax in State A, there is no basis for assistance in fiscal matters. These clauses are created to clarify that an individual who is subject to tax in a country, cannot prevent that country from asking for aid from another treaty party on the basis that he/she is not a national or resident of either country.

Additionally, in the application of the Multilateral Convention, tax administrations will be obliged to work within the framework of domestic regulations. The Convention particularly guarantees that the rights of the taxpayers under domestic laws are fully protected. Yet, domestic laws shouldn't be applied in a form that undermines the purpose of the Convention.

When it comes to the range of cases covered, the Multilateral Convention has a limitation that only civil cases are covered, and the information collected via the Convention is allowed to be used as evidence in criminal court proceedings if prior authorization has been given by the treaty partner that provided the data.

3.3. Multilateral Convention: Methods

The Multilateral Convention does not limit the possibility of sharing data, it conceives fixed principal ways of exchange of information;

1) Exchange of information on request through its Article 5;

2) Automatic exchange of information through Article 6;

3) Spontaneous tax exchange of information through Article 7;

4) Simultaneous tax examination through Article 8;

5) Tax examinations abroad through Article 9.

Regarding exchange of information by request, a party to the Multilateral Convention sends tax data to another party as a reply to a particular tax information request of this second party[196]. Requests are generally done in writing, and the Multilateral Convention obliges the applicant country to give the requested country all the information that can help to identify the person, and generally, a request must contain:

1) The agency or authority that started the request done by the competent authority;
2) The address, name or any personal data that can help to identify the person that is the object of the request;
3) If it is a request for information, the manner the applicant desires the information to be given;
4) If it is a request for help in recovery, or mechanisms of conservancy, the type of tax claim, the parts of the tax claim and the assets that the tax claim can be recovered;
5) If it is a request for service of documents, the type and issue of the matter to be provided;
6) If there is conformity with domestic regulations and administrative procedures of the applicant country and if it is justified according to the requirements of Article 21.2 g) (if the applicant country has used all reasonable mechanisms under domestic laws or administrative practices prior to the issuing the request, except when using such mechanism would arise an enormous difficulty, for example).

[196] View Article 5 of the Multilateral Convention

The Multilateral Convention was improved in 2010 to do a clarification of these requirements[197]. This new version of the Convention has adopted the globally accepted standard for the exchange of information that allows the possibility of requests regarding ascertainable groups or classes of persons.

When it comes to automatic exchange of information, under this Convention it is solely possible if another commitment between tax administration that specifies the data to be shared and solves practical issues such as the format and the timing and the format of the information is in force[198]. So the Multilateral Convention only allows for a number of agreements to make automatic exchange of information possible between treaty parties. Without the mentioned additional agreement there is no obligation for automatic exchange of tax information. This agreement can be filled by two or more parties, to allow for one agreement with a series of parties. A look at the OECD Model Memorandum of Understanding on Automatic Exchange of Information for Tax Purposes is recommended by the Convention for these kinds of agreements.[199]

The Multilateral Convention recognizes certain situations where these exchanges cannot be achievable, like the amount of information is very little or the limited economic relations between states.[200]

When it comes to spontaneous exchange of tax information, under this Convention, any signatory party can, without any previous request, send to another party, data that they consider important for that country's tax administration[201] and mentions situations as listed below:

a) The first party believes that there may be a loss of revenue to themselves;

b) An individual liable to tax gets a reduction or an exemption from tax in the first party that would lead to an increase in tax or in liability to tax in the other party;

c) Business dealings amongst an individual liable to tax in a party and an individual liable to tax in another party are done via one or more countries, in a way that it may result in a loss in tax in one or both parties;

d) Party has a basis to believe that a loss in tax is the result of artificial transfers of revenues within groups of enterprises;

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[197] View Paragraph 167, Explanatory Report to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters as amended by the Protocol (May 27, 2010). Available at http://conventions.coe.int/Treaty/EN/Reports/Html/127-Revised.htm

[198] Idem, View Paragraph 64

[199] Idem, View Paragraph 65

[200] Idem, View Paragraph 64

[201] View Article 7 of the Multilateral Convention

e) Information sent to the first party by the other party that has led to information that can be fiscally important for this last party.

Spontaneous exchange of information can be useful to provide data spontaneously as an addendum to data shared on a request related to a recovery case. This data should be sent with any other documents of evidence that are available to assist the other country.

With simultaneous tax examination, contracting parties can examine at the same time, each in its own territory, the tax issues of an individual or individuals where there is a related interest of both countries, with the purpose of sharing information[202]. This way of cooperation between tax authorities can help, especially, with transactions between associated enterprises.

Generally, the applicant's competent authority will report to the other competent authorities of its choice of potential situations for a simultaneous fiscal examination, and the other authorities will decide if they want to enter in to simultaneous tax examination of the mentioned cases and mention other cases for analysis. After agreeing on the simultaneous tax examination cases, staff from tax authorities in charge of the case or cases selected will analyse with the other party's staff, the time period to be covered, potential problems to be analysed and target dates. After agreeing on these basic lines, tax inspectors of each country will independently enforce their own examination within their country.

Administrations may desire to think about agreeing on bilateral or multilateral instruments to facilitate an effective functioning of simultaneous tax examinations and the grounds for this can be found in the OECD Model Agreement for the Undertaking of Simultaneous Tax Examinations.[203]

Finally, when it comes to tax examinations abroad, to be able to confirm an accurate picture of business and other relations between a resident of a country that is subject to a tax examination and his associates overseas, usually it can be of huge interest to be able to follow closely an examination started in a foreign country. The Convention allows for agents of a signatory party to conduct an examination in another signatory party's territory.[204] A signatory party that desires to conduct such an examination abroad must forward a request to a competent authority of another party, specifying as thoroughly as possible the reasoning for this request. The competent authority

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[202] View Article 8 of the Multilateral Convention

[203] Paragraph 72 of the Explanatory Report to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters as amended by the Protocol (May 27, 2010).
Available at http://conventions.coe.int/Treaty/EN/Reports/Html/127-Revised.htm

[204] View Article 9(1) of the Multilateral Convention.

of the country where the examinations are going to occur has the final call to allow this to happen[205]. Once the request is accepted the requested state informs the competent authority of the applicant state, of the location and period of the examination. The requested country also has the power to decide how the examination will be done.

3.4. Multilateral Convention: Principles

The Multilateral Convention follows 3 main principles: Confidentiality, Reciprocity, and Proportionality.

Confidentiality- Article 22 of the Multilateral Convention states that any data collected by a country via the Convention must be treated as secret in the same ways as data obtained via the domestic laws of that country, or in the regulations of secrecy of the country that supplied the information if they are more restrictive. This data can only be disclosed to authorities (courts and administrative/supervisory entities) and persons involved in the estimation/assessment, collection/recovery of the enforcement/prosecution in respect of, or the definition of appeals related to, taxes of that country. Solely the abovementioned persons can use the data and solely for the purpose mentioned above. This data can be made public in public court proceedings or in judicial decisions related to such taxes if the competent authority of the country that gave the information authorizes this.

Information received by a country can be used for other ends under the regulations of the state that supplied the data and its competent authority permits it, and the same situation applies to the transmission of data to a third party, it is permitted if the country that shared the data in the first place authorizes it.

Reciprocity- in the Multilateral Convention, this is a very important principle because cooperation is based on reciprocity, so a country can´t request for aid that it's not ready to provide aid to other countries[206]. The requested country is not required, even if it can do it via its own domestic law, to use powers that the asking country does not have in its own country. For example, not all member states can be in a position to provide all manners of aid to other countries. Constitutional and other explanations can prevent a country from giving some form assistance, such as collection of taxes on behalf of another country, for example, in which case the country enters a reservation on the relevant clause in Article 30 of the Convention.

[205] View Article 9(2) of the Multilateral Convention.
[206] View Article 21(2) (c) of the Multilateral Convention.

Proportionality- when a request for assistance is presented, the applicant country should point out if the request is in conformity with its own domestic regulations and administrative procedures, and if all mechanisms in its country were exhausted, unless their usage created an enormous challenge[207]. If these conditions are not fulfilled the requested country is not obliged to accept the request.

3.5. Multilateral Convention: Limitations

Limits to the obligation to provide assistance are provided by Article 21 of the OECD Model. It defines a basis on which a requested country can refuse to give information. These are the limitations:

The requested country is not obliged:

1) To give information that is not collected through its own laws or administrative procedures (Article 21 (2) (a);
2) To enforce mechanisms that are considered against public policy or to its vital interests (Article 21 (2) (b);
3) To provide data that is not collectable through its domestic regulations or administrative procedures or through the regulations of the applicant country or its administrative procedures (Article 21 (2) (c). Data is considered as collectable in the regular functioning of the administration, if it's in custody of the authorities or can be collected by them by the use of the normal practises that can include special inquiries, given the fact the tax authorities could make the same inquiries for their own ends, so the requested country has to obtain the data needed by the other country in the same manner as if its own taxes were involved;
4) To provide data that would make public any information that would be against public policy or any trade, business, industrial, commercial or professional secret or trade process (Article 21 (2) (d). A business or trade secret, is normally seen as, circumstances or facts that are seen of big economic importance and that can be explored practically, and which the unauthorized use can lead to serious damage,

[207] View Article 21(2) (g) of the Multilateral Convention.

yet, the estimation, assessment or collection of taxes cannot be considered to have a result of serious damage;

5) To give administrative aid whether and to such an extent that the requested country sees that taxation in the applicant country to be against the normally accepted principles/provisions of treaty for the avoidance of double taxation, or any other treaty which the requested has with the applicant country (Article 21 (2) (e), which can happen for example, in a case where the requested country beliefs that taxation in the applicant country is too harsh or when it finds that the taxpayers penalty for the tax offence is exaggerated;
6) To give administrative aid for the ends of carrying out a clause of the applicant country's tax laws, or any requirement linked with it, that discriminates a national of the requested country, if compared with a national of the applicant country, in similar circumstances (Article 21 (2) (f). This rule is not applicable in case the fiscal rules only differ on the grounds of residence.
7) To give administrative aid whether the applicant country has not fulfilled all reasonable mechanisms available under its own regulations or administrative procedures, apart from when the use of these mechanisms could lead to a huge difficulty (Article 21 (2) (g).

The Multilateral Convention also authorizes signatory states, via reservations, to limit the application of the Convention to certain kinds of taxes, and to define their limits in aid when it comes to collecting taxes or providing tax documents. Yet, Article 21 (4) clarifies that these reservations cannot constitute a reason for a requested country to refuse to give data just because the information is in the possession of a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests of a person. In 2010, the "domestic interest" clause was added to the Convention, to deal with the requirement to exchange information in certain situations where the requested information is not required by the requested state for its own ends. This provision states that when collecting data asked by another party, the requested party is obliged to use, in case it needs, special assessment or inquiry power given by its laws, for imposing its own domestic taxes although it doesn't need the information for its own ends.

3.6. Multilateral Convention: Costs and Timing

Considering costs, the OECD sees flexibility to be a necessity for the smooth and effective establishment of the Convention. The competent authorities of the signatory states can have consultations amongst themselves and commit on bilateral grounds on the general lines they desire to be applicable and the practices to be done for solving the most important and more expensive cases[208].

In the event of a lack of a bilateral commitment between the states, normally, ordinary costs are the onus of the requested state[209], because they are costs normally done by tax administrations for collecting data or taxes for domestic ends[210]. However, the Convention establishes that when the assistance has extraordinary costs involved, these are of the applicant state's responsibility[211]. These are normally costs done by third parties from which the requested state has obtained the data from experts or translators when needed for the elucidation of the case or translation of documents.[212]

Regarding timing, the Convention states that the requested country should report to the applicant country of the course of actions done and the results of the assistance as swiftly as it can.[213]

3.7. Multilateral Convention: Problems

Like any international legal framework, the Multilateral Convention also has its own issues.

It has some minor issues such as problems if states provided assistance prematurely before the tax has been assessed, the costs of recovery being superior to the amount of tax due, problems related to the provisional assessment, use of postal service for the sending of official documents that can be an infringement of state sovereignty, application and interpretation of the Convention problems and the non-solution of differences in the assistances provided by countries[214]

The biggest issue regarding the Multilateral Convention is probably the right of reservation since it provides extensive flexibility for signatory countries to exclude or to change key clauses of

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[208] View Paragraph 252 of the Commentary to Article 26 of the Multilateral Convention (2010 update).
[209] Article 26 of the Multilateral Convention.
[210] View Paragraph 253 of the Commentary to Article 26 of the Multilateral Convention (2010 update).
[211] Article 26 of the Multilateral Convention.
[212] View Paragraph 254 of the Commentary to Article 26 of the Multilateral Convention (2010 update).
[213] Article 20(1) of the Multilateral Convention.
[214] OECD, Text of the Revised Explanatory Report to the Convention on Mutual Administrative Assistance in Tax Matters as Amended by Protocol, 2010.

the Convention in their application for assistance. For example, Portugal can make a reservation declaring it would not provide any form of aid in relation to 1) taxes on income, profits, capital gains or net wealth which are levied on behalf of political subdivisions or local authorities of a party, 2) compulsory social security contributions payable to general government or to social security institutions established under public law, 3) real estate, inheritance or gift taxes, taxes on immovable property, general consumption taxes such as VAT or other value and sales taxes. Like this Portugal, would be a party to the Convention but wouldn´t commit to some of its major provisions.[215]

3.8. Confidentiality and the Multilateral Convention

The Multilateral Convention gives one of the most thorough and rigid confidentiality frameworks for international information exchanges provided by its Article 22.[216]

So, the Multilateral Convention has included all general confidentiality provisions of the OECD's Model Tax Convention and Model TIEA and added the following conditions and clauses.

The Multilateral stipulates that the data collected by a competent authority must be handled as a secret in the same way as taxpayer data collected in the receiving country's domestic regulations, and to the necessary range to assure the necessary standard of protection of personal information, and according to provisions that can be specified by the supplying country as stated in its domestic regulations. So, when trying to guarantee the confidentiality of shared data, the Multilateral Convention does not refer only to the receiving's states important domestic regulations, but to the laws of the supplying states as well, basically requiring that the confidentiality law applicable to the shared data is the one that is stricter.

By this, the Multilateral Convention tries to face circumstances where regulations of the country receiving the information doesn't give proper confidentiality security for the collected data, or where the standard of protection in the receiving states is lower than the standard of protection provided by the country that is giving the information. The Multilateral Convention clarifies that in such circumstances, to the range needed to guarantee the necessary standard of protection of

[215] Article 30 of the Multilateral Convention.

[216] The Multilateral Convention on Mutual Administrative Assistance in Tax Matters as amended by the 2010 Protocol, Article 22. Available at: http://www.keepeek.com/Digital-AssetManagement/oecd/taxation/the-multilateral-convention-on-mutual-administrative-assistance-in-taxmatters_9789264115606-en#page24

personal information, safeguards that can be provided to assure data protection through domestic regulations of the data supplying country can apply, if they are stricter.

The explanatory notes to the Multilateral Convention stipulate that such safeguards can be related to individual access, independent oversight or redress, for example. It also gives a clarification stating that specifications of the safeguards may not be needed if the supplying country considers that the receiving country has the necessary standard of data protection regarding the data being given. Anyhow, the safeguards should not go further than what is needed to assure data protection, and this additional layer of requirements is not foreseen in the OECD's Model TIEA and Model Tax Convention.[217]

An additional interesting feature of the confidentiality provisions under the Multilateral Convention is related to the fact that it expresses clauses on the possibility of sharing information by receiving country to a third country. As the naming means this Convention is multilateral and so, it tries to address the circumstances where data given by one-member states to another could be of interest to a third state. As a default principle, the Multilateral Convention does not permit the data collected by one state to be sent to a third country. Yet, the Convention sets up an exception, which is the transmissions can be possible if there is authorization from competent authority giving the information[218], so, in this way, a situation where the third country collects the information that it could not collect directly from the first country is prevented.

In the discussion of the confidentiality clauses of the OECD Model Tax Convention, the OECD Model TIEA, and the Multilateral Convention, it is worthwhile to stress that the OECD launched in 2012, a guide regarding the protection of confidentiality of information exchanged for fiscal purposes called "Keeping it Safe", that mentions the best procedures regarding confidentiality and gives procedural guidance on how to achieve a proper standard of protection for all channels of data exchanged through TT's, TIEA's and the Multilateral Convention.[219] It should also be noted that in the last few years the International Organization for Standardization (ISO) and the International Electro-technical Commission (IEC) created as well, particular technological models for the safe transmission and storage of large amounts of data across frontiers[220] with

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[217] Explanatory note (216) to Article 22(1) of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (updated in 2011).

[218] Article 22 (4) of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (updated in 2010).

[219] OECD/Global Forum, Keep It Safe: Joint OECD/Global Forum Guide on the Protection of Confidentiality of Information Exchanged for Tax Purposes (France: Paris: OECD/Global Forum on Transparency and Exchange of Information for Tax Purposes, 2012).

[220] Available online at http://www.iso.org/iso/home/standards/management-standards/iso27001.htm

international standards on information security management, risk control, data encryption and decryption being implemented.

4. The Savings Directive

The Directive 2003/48/EU or the so-called Savings Directive was part of a group of tax policies to combat harmful tax competition.

It already foresaw the automatic exchange of tax information between member states regarding savings revenues of individuals and had essentially two purposes: avoid distortions of capital flows and allow an effective taxation of payments of interest done by paying agents, present in one member state of the EU to individuals residing in another member state. The directive allowed in this way, that savings revenues were taxed in accordance with the tax law of the member of residence of the passive subject for fiscal matters, creating like this a true provision of tax harmonization. For this, a system of automatic exchange of information was created by the Directive regarding the payment of interest. The competent tax authority of the paying agent should send the necessary information to the competent tax authority of residence of the effective beneficiary of the interest[221], and this communication should be done in an automatic way, at least once a year, in the following six months after the end of the fiscal year of the paying agents state, regarding all interest payments done in that year.[222]

All member states created communication mechanisms of automatic exchange of information, except for Austria, Belgium and Luxembourg[223] were allowed to apply withholding taxes for a temporary period instead of providing the data that they were obliged to do in conformation with all member states of the EU.[224]

So, with the Savings Directive the chosen method to allow the effective taxation of interest/revenues of savings was the automatic exchange of information. In this way, the directive to combat tax evasion and fraud embraced a big amount of taxable revenues and subjectively embraced certain mechanism and entities which the effective beneficiary are individuals. As mentioned before the Directive came into force in 2005.

Yet, after a decade it was expectable that the scope of application of this directive would not be sufficient to face the evolution of the financial industry, investment behaviours and savings

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[221] View Article 8 of the Directive 2003/48 EU
[222] Article 9 of the Directive 2003/48/EU
[223] Article 10 of the Directive 2003/48/EU
[224] Article 11 of the Directive 2003/48/EU

products. So, in 2014, Directive 2014/48/EU was created with the intention of reforming the Savings Directive, including in its scope further mechanisms of savings such as life insurance contracts, a broader scope of investment funds and another type of products that offered interest payments or similar revenues (the concept of interest was also enlarged). It was expected for member states to adapt their legal systems for this revision until January of 2016, so that this revision of the directive could come into force by January 2017.

However, and even with the proposed revision the Savings Directive was eventually repealed in November 2015, with the reasoning that new EU laws in this field, especially the DAC 2 became more ambitious and had a larger scope than the Savings Directive, making a lot more financial instruments obliged to automatic exchange of information, in the form of mandatory automatic reporting.

DAC2 as the official tool of the EU to establish the CRS has done a good job in the issue of automatic exchange of financial information, like this portraying an image of a stronger directive, and making the report of information mandatory to a very large number of revenues like interest, dividends or capital gains for example. It also covers most financial products that exist today, held directly or indirectly by individuals or private sector entities. Besides this, this DAC2 already had a provision that granted the prevalence of its legal dispositions regarding automatic exchange of information over any other legal frameworks in EU Law, including like this, the Savings Directive.[225]So only in very seldom situations, the Savings Directive would be applied which led the European Commission to conclude that it was not necessary to have both legal frameworks working because it could compromise the principles of better legislating and the demands of legal clarity, certainty and security.[226]

It can be concluded that the repealing of the Savings Directive was one of the main features of the *Tax Transparency Package* because with its repeal the issue of mechanisms duplication, legal uncertainty and overwhelming expenses in administrative tools for the establishment of both frameworks, since the impact of costs would largely surpass the benefit of extra coverage of the Savings Directive.

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[225] View DAC2, Article 8 number 3-A

[226] View Proposal of the Council to repeal Directive 2003/48/EU
Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015PC0129&from=EN

It is important to mention that there are six versions of the DAC but in this article, there will only be references to the DAC1 and DAC2 because these frameworks are more related to the subject of study than the other versions of the DAC.[227]

5. FACTA and IGA's

5.1. Historical Background

In 2010, the US government approved the Foreign Account Tax Compliance Act (FACTA), as an answer to worries of the Congress that U.S. Taxpayers' were escaping taxes by misreporting their revenues on assets possessed overseas.

The importance of this regulation lies in the fact that although it is by nature a domestic regulation it's being carried out globally. This regulation tries to enforce major tax compliance requirements of nearly all financial entities globally that have a relation, direct or indirect, with U.S citizens/residents. FACTA demands foreign financial institutions (FFI's)[228] globally to log-on with the US Internal Revenue Service (IRS) and to do constant (1) due diligence, (2) reporting and (3) tax withholding requirement directly to the US administration, regarding their clients that are US citizens/residents.[229]

More in specific, it obliges FFI's to make due diligence reviews regarding all their existing and new customers, to check their accountholders that are US citizens/residents, and to inform them on the accountholders name, TIN's, addresses and the account information to IRS on a constant basis.[230]

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[227] For more information please view: https://ec.europa.eu/taxation_customs/business/tax-cooperation-control/administrative-cooperation/enhanced-administrative-cooperation-field-direct-taxation_en#Areas%20covered%20by%20the%20Directive

[228] The definition of foreign financial institution is intended to be very extensive in scope. It contains practically any foreign entity that is engaged primarily in the business of accepting deposits, holding financial assets for the account of others, investing, re-investing, or trading in assets, partnership interests, commodities and any interest in such assets. Generally, this includes foreign banks, credit unions, broker dealers, clearing organizations, trust companies, custodians of employee benefit plans, insurance companies, mutual funds, pension funds, exchange traded funds, hedge funds, fund of funds, private equity, venture capital funds, investment corporations, partnerships, and trusts including family investment trusts. View US IRC, §1471(d) (5).

[229] View US IRC, §1471(b).

[230] The report statement should include: a) the name, address, and TIN of each specified US accountholder. In the case of any account holder that is a United States owned foreign entity, the name, address, and TIN of each substantial United States owner (i.e. one that owns more than 10 per cent of the entity by vote or value) of such entity; b) the account number; c) the account balance or value as of December 31, 2013, or if account was closed after the effective date of the FFI agreement, the balance of such account immediately before closure; d) gross investment income paid to and credited from the account. View US IRC, §1471(c) (1).

If an accountholder stays unidentified or disobedient for FACTA ends, the FFI is forced to withhold 30% of the dividend, interest and/or investment payments due to the mentioned accountholder, and transfer the withheld funds to the US administration[231]. Registration with the IRS is done by an agreement amongst the FFI and the IRS.

This law can lead to serious penalizations for the FFI's that fail to fulfil with their obligations[232]; 1) non-compliance with this laws will make FFI's vulnerable to a 30% withholding tax on revenues that come from their business activities in the US, and given that all major FFI's have enormous investments in the US, financial or some kind of business activity related to the US banking, economic or financial systems, the consequences of non-compliance are quite harsh.

Therefore, FACTA has been the cause of major complaints amongst financial entities globally for several reasons. Firstly, these regulations have enforced excessive compliance cost on FFI's. Secondly, a great number of foreign states have taxpayer confidentiality regulations that prevent their financial entities from exchanging data with third parties, and therefore, this US regulation submits FFI's to a dilemma in where they have to choose between the FACTA penalty or the breach of their domestic state laws.[233]

The question of the carrying out of this law on financial entities where the US has no jurisdiction also came up, but the experience of the US with UBS and other banks has already demonstrated the necessity for an efficient control to guarantee the proper functioning of this type of system.[234]

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[231] Disobedient accountholders are: (a) individual accountholders who fail to provide sufficient information about their identity; (b) institutional accountholders that fail to provide sufficient information about the identity of their substantial owners; and (c) other FFIs, which have not concluded a FATCA agreement with the IRS. The FFI is forced to withhold and pay over to the IRS 30 per cent of any payments of US-source income that are to be made to those accountholders.

[232] The withholding tax of 30 per cent applies to (i) any payment of interest (including any original issue discount), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodical gains, profits, and income, if such payment is from sources within the United States, and (ii) any gross proceeds from the sale or other disposition of any property of a type which can produce interest or dividends from sources within the United States. View the US IRC, § 1473 (1) (A).

[233] Reuven Avi-Yonah & Gil Savir*, IGAs vs. MAATM: Has Tax Bilateralism Outlived Its Usefulness?* (2014) 1:1 Law and Economics Working Papers, pp. 1.

[234] The largest Swiss bank, UBS, participated of the the U.S. Qualified Intermediary (QI) program (2001). Under this program, UBS commited to identify and document any of its customer who holds US investments. It also agreed to report to the IRS any of its customers who are US persons and holds US assets. If a US customer refuses to be identified under the QI agreement, UBS is required to withhold US tax at a 28% rate on payments made from U.S. payers to the customer. In March 2006, a former employee of UBS sent a confidential letter to the US tax authorities with an inside account of the bank's conduct. This insider information revealed that UBS had been habitually violating its reporting obligations under the QI regime. The UBS bankers had been advising its U.S. customer to transfer the ownership of their UBS accounts and US securities to shell entities established in offshore locations. These foreign entities would then act as independent, non-transparent beneficial owners of the UBS accounts, thereby shielding the US persons from being disclosed to the IRS.

Expecting a fierce response from foreign administrations and from FFI's and foreseeing the potential challenges of administering such mechanism, the US entered consultations with some major states such as France, Germany, Italy, Spain and the UK to come up with a potential solution. In the beginning of 2012, the US Treasury released a statement declaring that is was working with five European states to take an intergovernmental approach to make better transnational fiscal compliance and establishing FACTA, and stated that France, Germany, Italy, Spain and the UK had agreed to support the intention of the US, by committing to a six-nation consolidated declaration[235].

This statement aimed for a commitment amongst the US and any of the "FACTA partners" states that could give a different framework for financial entities to obey to FACTA, and when the framework was concluded, financial entities of these states would not be obliged to enter into independent information agreements with the US IRS[236]. They would also not be obliged to collect taxes on the behalf of the IRS, they would just forward the data to their domestic tax authorities, that would then forward it on to the US administration.[237] In reciprocity, the US administration also agreed to obtain the same data from US financial entities on accounts of European residents, and automatically send it to the competent tax authority of the six-nations.[238]

In July of 2012, the six mentioned countries and the US released an additional joint declaration, revealing the publication of the *Model Intergovernmental Agreement to Improve Tax Compliance and to Implement FACTA*[239]. After this declaration, the US Treasury released the Model 1 IGA[240] and relying on this model, partner administrations exchange account data of the relevant taxpayer on reciprocal grounds. The first IGA based on this standard was signed between the US and the UK in September 2012.[241]

Additionally, to the implementation of the reciprocal standard of the IGA, the US published joint declarations with Switzerland and Japan, that indicated that these two countries showed their

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View for more details: J. Weiner, *Disqualifying UBS from the QI Regime* (December 8, 2008) 121:1097 Tax Notes.

[235] 7 US Treasury Department, 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 (February 8, 2012). Available at http://www.treasury.gov/press-center/pressreleases/Documents/020712%20Treasury%20IRS%20FATCA%20Joint%20Statement.pdf

[236] Idem. View Subparagraph (B) (2) (a).

[237] Idem. View Subparagraph (B) (2) (d).

[238] Idem. View Subparagraph (B) (2) (e).

[239] https://www.gov.uk/government/news/joint-communique-on-the-model-intergovernmental-agreement-toimprove-tax-compliance-and-implement-fatca

[240]The Model IGA is available online at https://www.treasury.gov/press-center/pressreleases/Documents/reciprocal.pdf

[241]https://www.gov.uk/government/news/joint-communique-on-the-model-intergovernmental-agreement-toimprove-tax-compliance-and-implement-fatca

intention to conclude IGA agreements, using a somewhat different approach. In November 2012, the US Treasury launched the second standard of IGA (Model 2 IGA)[242], and in this model, the financial entities of the partner state, report directly to the US IRS, and the partner state agrees to reduce any legal issues to this reporting. Therefore, this model has no reciprocity or local reporting clauses. Agreements having this model as a basis were concluded between the US and Austria, Bermuda, Chile, Japan, and Switzerland.

The US has also launched a third model IGA (Model 1B IGA), which is very identical to the Model 1 IGA and it regards an intergovernmental data reporting system. Therefore, it requires FFI's to hand over the relevant data to their local tax departments, but unlike Model 1 IGA, reciprocity is not considered in this model, so no requirement for the US to transmit the same data to its IGA partner jurisdiction is in place.

At the beginning of 2015, the IRS stated that the number of IGA's between the US and other states was already over 100[243], either signed or agreed in substance, which has altered FACTA from a domestic law into a bilateral legal framework.

5.2. IGA's: Substance

IGA's have a series of key elements for the efficient automatic exchange of information, and it is a huge task for financial entities to keep and transmit fiscal, relevant data of their non-resident clients to tax administrations for sharing this information.

For IGA purposes, financial entities normally refer to institutions that possess financial assets for the account of others as an important part of its business (Custodial Institution); or takes deposits in the regular functioning of a bank, or identical business (Depository Institution); or is involved mainly in the business of trading financial instruments, managing portfolios or otherwise managing monetary funds (Investment Institution); or does particular business as an insurance corporation (Specified Insurance Company)[244]. Thus, these definitions range from banks, insurance companies, broker-dealers, trust companies, hedge funds, private equity funds and pension funds as well.

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[242] For more information visit at http://www.treasury.gov/press-center/press-releases/Pages/tg1825.aspx

[243] Samuel Rubenfeld, *RS Launches Data Exchange Service for FATCA* The Wall Street Journal (12 January 2015). Available at http://blogs.wsj.com/riskandcompliance/2015/01/12/irs-launches-data-exchange-service-for-fatcacompliance/

[244] The Model 1 IGA, Art. 1(1)(g)

Additionally, IGA's introduce complex due diligence practices, to be accepted by financial entities, by obliging these entities to review existing and new client accounts, to confirm if they are reportable accounts for IGA ends. This review must be done to accounts in the possession of entities and individuals as well. It is also set out by IGA's, particularly due diligence regulations regarding existing and new accounts, with these diligence practises involving self-certification, electronic data search, paper data search, and application of enhanced KYC/AML rules. For personal accounts the account verification and informing is not needed if the amount of the accounts is less than 50,000 dollars.[245]

5.3. IGA's: Scope

IGA's recognize that the parties to the commitment must get particular information regarding all reportable accounts from their financial entities and must share this information with each other on annual basis. Through the Model 2 IGA, this requirement is planted on the own financial entities to directly forward the relevant data to the IRS. The reportable data includes normally:

a) The name, address, and taxpayer identification number (TIN) of each reportable person (or reportable U.S. person) who is an account holder. Regarding pre-existing accounts the financial entity may provide the date of birth of the reportable person instead of the TIN if the TIN is not in the records of the financial entity;
b) The account number or working equivalent;
c) The name and identifying number of the reporting financial entity;
d) The account amount at the end of the year (Cash Value Insurance Contract or Annuity Contract, the cash value or surrender value included) ;
e) In the case of a custodial account, the total gross amount of interest, dividends, other revenues, and total gross proceeds of the sale or redemption of property during the calendar year;
f) In the case of a depository account, the final amount of interest paid or credited to the account during the year;

[245] The Model 1 IGA, Annex I, III (A).

g) In the case of any account in which financial entity is the obligor or debtor, the total gross amount paid or credited during the calendar year, including the aggregate amount of any redemption payments made during the calendar year or any other relevant reporting period.[246]

Normally, IGA's permit a transition to the full reporting mechanisms through stages, with each stage generally lasting a year. In the first stage, data to be shared contains the types specified in a) to the types mentioned in d). In a second stage, parties are asked to share information in an all points of the list except for total gross proceeds of point e). In a third stage, parties are required to share information on all points of the list above.[247]

5.4. IGA's: Exemptions

IGA's normally exempt specific financial entities like central banks, retirement funds, investment entities fully owned by exempt financial entities and international organizations from reporting. Exemptions are given as well to specific entities that are considered to have a low risk of tax evasion like entities that are situated only in a single country that doesn't accept or keep accounts held by foreign clients.

Certain kinds of accounts like retirement savings accounts, general insurance products, and tax-exempt savings accounts, which are subject to the specific regulatory regime in the jurisdiction where they are opened, are exempt from being reported as well.

5.5. IGA's: Timing

IGA's have certain regulation when it comes to dates when the data must be shared or reported, and generally, information must be exchanged or reported in the period of nine months after the end of the year to which the information is related to.[248]

[246] The Model 1 IGA, Art. 2 (2).
[247] The Model 1 IGA, Art. 3 (3) (a).
[248] The Model 1 IGA, Art. 3 (5).

5.6. IGA's: Legal basis

IGA's, and particularly, IGA's done based on the Model 1 IGA, have their carrying out authority from bilateral tax conventions between the US and respective states.[249] This can be understood by the fact that the US only has Model 1 IGA agreements with states that it has a TT or a TIEA, so Model 2 IGA agreements are concluded, by norm, with countries the US doesn't have a TT or TIEA.

Within the US, IGA's do not need congressional ratification proceedings, so they can come into force rapidly[250], and in this IGA's are solely administrative and interpretative agreements, but, these features of the agreement have led to some scholar discussions.[251]

5.7. IGA's: Problems

IGA's are still quite a new and evolving reality in international taxation, so it can be quite early to point out its perks and problems, but, one of the problems of IGA's seem to be regarding reciprocity, and there is the impression that in IGA's there is an absence of de-jure and de-facto reciprocity.

As stressed above, IGA's are their essence a creation of the US that has developed reciprocal and non-reciprocal models: Model 1 IGA which includes reciprocity, Model 1B IGA, and Model 2 IGA which excludes reciprocity. These two last models are non-reciprocal in their wording and so via the IGA's data only comes into the US.

Although the Model 1 IGA seems to be reciprocal, in its substance it's not that much. The provision concerning reciprocity in Model 1 IGA obliges the contracting party to inform the US administration on US citizens/residents that have relevant accounts in their financial entities, requiring as well, for the US to give the other state data, or that states residents in the possession of US financial entities.

But, there are particular rules in the income tax law of the US that practically inhibit the US of collecting this information for these exchanges. These rules are usually called *Qualified Intermediary rules.* Within the regime of these rules, FFI's who administer non-resident taxpayers

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[249] View the preambles of the Model IGAs

[250] Paul M Schmidt & Michael W Nydegger, FATCA Intergovernmental Agreements–Could This Evolve Into the Primary Approach for Global Implementation of FATCA? (2013), Volume 30 Part 2 Journal of Taxation of Investments.

[251] Allison Christians, *The Dubious Legal Pedigree of IGAs (and Why it Matters*) (2013) Volume 69 Part 6 Tax Notes International;

Susan Morse, *Why FATCA Intergovernmental Agreements Bind the US Government* (2013) Volume 70 Part 3 Tax Notes International.

investments in the US are not oblige to disclose the details of their customers to the US tax authorities as long as the FFI's themselves obtain the necessary documents of residence and beneficial ownership situations of their client and commit to properly calculate and transfer US withholding taxes on payments done to these clients by US payers[252]. So, the *Qualified Intermediary* regime efficiently protects the identity of non-residents that have properties in the US from the US tax administration. Therefore, and as an effect of this, as long as the *Qualified Intermediary* regime stays like it is, the US can't do proper data reporting to its IGA counterparts, undermining the essence of IGA's for other states.

6. Global Standard on automatic exchange of financial account information

6.1. Introduction

In April of 2013, the G20 took an official attitude regarding automatic exchange of information when it supported the much anticipated new standard for international fiscal information exchanges[253]. Briefly after this, the OECD launched a report that delineated the actual steps to take to put in practice a global standard of automatic exchange of tax information[254], and in September of 2013, the G20 demonstrated their willingness in collaborating with the OECD, to create a new multilateral mechanism on exchange of data, and to come up with a new model at the beginning of 2014, appealing on all states to embark on this job as soon as possible.[255]

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[252] 74 J. Ames, New U.S. Qualified Intermediary Rules and Their Impact on Foreign Financial Institutions (2001) 15:2 Bank Accounting & Finance 51;
S. Nathaniel Zane, "Carrot or Stick?: The Balance of Values in Qualified Intermediary Reform" (2010) 33:2 Boston College International and Comparative Law Review, at 361 (Quoting from the GAO Report *Qualified Intermediary Program Provides Some Assurance That Taxes on Foreign Investors are Withheld and Reported, But Can be Improved*, December 2007)

[253] "We welcome progress made towards automatic exchange of information which is expected to be the standard and urge all jurisdictions to move towards exchanging information automatically with their treaty partners, as appropriate. We look forward to the OECD working with G20 countries to report back on the progress in developing of a new multilateral standard on automatic exchange of information, taking into account country-specific characteristics. The Global Forum will be in charge of monitoring" See the Communiqué of the G20 Finance Ministers and Central Bank Governors in Washington DC on April 19, 2013. Paragraph 14. Available at: http://www.g20.utoronto.ca/2013/2013-0419-finance.html

[254] A Step Change in Tax Transparency: Delivering a Standardised, Secure and Cost Effective Model of Bilateral Automatic Exchange for the Multilateral Context (France: Paris OECD, 2013).

[255] "We commend the progress recently achieved in the area of tax transparency and we fully endorse the OECD proposal for a truly global model for multilateral and bilateral automatic exchange of information. Calling on all other jurisdictions to join us by the earliest possible date, we are committed to automatic exchange of information as the new global standard which must ensure confidentiality and the proper use of information exchanged, and we fully support the OECD work with G20 countries aimed at presenting such a new single global standard for automatic

In February of 2014, the Standard for automatic exchange of financial account of information was, at last, launched by the OECD and this Standard sought to provide additional help for the previous standard of information exchange on request, by trying to solve most if its problems.[256]

In May 2014, all member states of OECD and other states like Argentina, Brazil, China, India, Indonesia, Saudi Arabia and South Africa supported the proposed model. Over 65 countries publicly agreed to establish it, with over 40 having agreed to a particular schedule to establish it, setting the date for the first automatic exchanges of information as soon as 2017.[257]

In July of 2014, the OECD launched the complete version of the Standard for Automatic Exchange of Financial Account Information in Tax Matters that has included in it, commentaries, model administrative commitments, orientations, and also a standard format and requirements for the secure sharing of information.[258]

At this time as well, the Global Forum on Transparency and Exchange of Information for Tax Purpose was ordered to implement a system to observe and scrutinize the establishment of this new global standard on automatic exchange of information[259] and in September of 2014 the

exchange of information by February 2014 and to finalizing technical modalities of effective automatic exchange by mid-2014. In parallel, we expect to begin to exchange information automatically on tax matters among G20 members by the end of 2015. We call on all countries to join the Multilateral Convention on Mutual Administrative Assistance in Tax Matters without further delay. We look forward to the practical and full implementation of the new standard on a global scale. We encourage the Global Forum to complete the allocation of comprehensive country ratings regarding the effective implementation of information exchange upon request and ensure that the implementation of the standards are monitored on a continuous basis. We urge all jurisdictions to address the Global Forum recommendations in particular those 14 that have not yet moved to Phase 2. We invite the Global Forum to draw on the work of the FATF with respect to beneficial ownership. We also ask the Global Forum to establish a mechanism to monitor and review the implementation of the new global standard on automatic exchange of information." For more information, visit at http://www.g20.utoronto.ca/2013/2013-0906-declaration.html

[256] Available at http://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-financial-accountinformation-common-reporting-standard.pdf.

[257] The OECD's annual Ministerial Council Meeting in Paris in May. More information of the meeting is available at: http://www.oecd.org/tax/transparency/AEOIjointstatement.pdf.

[258] The document is available at http://www.oecd.org/ctp/exchange-of-tax-information/standard-for-automaticexchange-of-financial-information-in-tax-matters.html

[259] "We endorse the finalised global Common Reporting Standard for automatic exchange of tax information on a reciprocal basis which will provide a step-change in our ability to tackle and deter cross-border tax evasion. We will begin exchanging information automatically between each other and with other countries by 2017 or end-2018, subject to the completion of necessary legislative procedures. We call on all financial centres to make this commitment by the time of the Global Forum meeting in Berlin, to be reported at the Brisbane Summit, and support efforts to monitor global implementation of the new global standard". See the G20 Communiqué at the Meeting of G20 Finance Ministers and Central Bank Governors, Cairns, September 21, 2014, Paragraph 8. The document can be found at http://www.g20.utoronto.ca/2014/2014-0921-finance.html

Global Forum launched guidelines for the participation of developing states in the new OECD Standard.[260]

By October 2014, 51 states, 38 that were represented at government level joined together in Berlin, and altered their previous agreements into action, with the formal signature of the multilateral competent authority agreement, that would activate automatic exchange of data, grounded on Article 6 of the Multilateral Convention and stated their intention to deliver the first information exchanges around 2017 and 2018.[261]

The OECD global Standard for automatic exchange of tax information has two mechanisms:

1) Common Reporting Standard (CRS) that covers the reporting and due diligence regulations to be fulfilled by financial entities;
2) Competent Authority Agreement (CAA) that sets specific regulations on the exchange of the obtained information.

The CRS gives governments a framework on financial data to be obtained from financial entities, by defining some rules on the kind of accounts and taxpayers to be reported and also common due diligence practises being done by these financial entities in the identification of these accounts and persons.

The CAA has the purpose to address other issues like the procedures to share the obtained information between contracting states, covering specific rules on confidentiality, safeguards, time and format of the exchanges. Therefore the CAA essentiality connects the reporting requirements of financial entities with the exchange requirements of their countries.

The establishment of the Standards involves four fundamental actions:

I) Inserting the CRS into domestic regulations, given that countries will have the necessity for regulations that oblige financial entities to obtain, keep and report data that are in agreement with the Standard;
II) Selection of legal grounds for the exchange of information. Many states possess the legal frameworks that allow automatic exchange of information such as bilateral TT's and the Multilateral Convention, but, independent agreements are necessary for the

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[260] The document is available at http://www.oecd.org/ctp/exchange-of-tax-information/global-forum-AEOIroadmap-for-developing-countries.pdf

[261] The list of the signatory countries is available at http://www.oecd.org/ctp/exchange-of-taxinformation/mcaa-signatories.pdf

functioning of the automatic exchange, so the bilateral and multilateral Model CAA's can be utilized for these ends;

III) Setting administrative and IT foundations for the collection and exchange of data through the Standard. It is included in the Standard, a transmission format to be utilized for exchange of data. States must commit to efficient encryption standards and communication for the secure sharing of data;

IV) Adoption of necessary procedures that guarantee confidentiality protection and information safeguards for the exchanged data, and so the Standard has specific rules on data safeguards and confidentiality to be set up in functional and legal levels.

It must be noted that this Standard derives from the early efforts of OECD in the field of automatic exchange of information, the EU Savings Directive and FACTA IGA's.

6.2. Common Reporting Standard (CRS)

Automatic exchange of information oblige states to possess the necessary mechanism and regulations to obtain data for automatic exchange ends, requiring as well, for states to delimit the scope of data to be obtained and the scope of people that have their data reported. Ultimately, the automatic exchange of information makes states agree to on a series of due diligence practices to be done by the reporting organisms in the procedure of information obtaining and reporting. So, the OECD Common Standard on Reporting and Due Diligence for Financial Account Information (CRS) has the intention to give assistance on these issues.

6.3. CRS: Reporting of financial institutions

Below the Global Standard launched by the OECD in February of 2014, states collect the needed information for automatic exchange from their financial institutions. When it comes to CRS, a financial institution[262] can signify a custodial institution[263], a depository institution[264], an investment

[262] OECD Common Reporting Standard, Sec. VIII (a) (3).
[263] Custodian institution is any entity that holds, as a substantial portion of its business, financial assets for the account of others. See the OECD Common Reporting Standard, Sec. VIII (a) (4).
[264] Depository institution is any entity that accepts deposits in the ordinary course of a banking or a similar business. See the OECD Common Reporting Standard, Sec. VIII (a) (5).

entity[265], or a specified insurance company[266]. Reporting financial institution (RFI) can mean any financial entity in a given state that isn't a non-reporting financial institution. CRS normally sees governmental bodies, international organisms or central banks, as well as any entity that is seen to have a low-risk to being utilized for tax evasion, for example, as non-reporting financial institutions. Further exemptions are applied for regulated collective invest institutions, that don't have shareholders and the interest of these organisms are not possessed by reportable people and to trusts, whose trustees are RFI's. So these trustees are required to report similar data that the trust would have to report. Thus, for a financial entity to be a RFI, it is necessary in the first place, to be an engaging jurisdiction financial entity and secondly, it can be an exempt or non-reporting financial entity.

6.4. CRS: Reportable Persons

Normally, automatic exchange of information has the purpose of guaranteeing compliance of taxpayers with overseas assets and revenues. Thus, with the Standard, it is expected of financial entities to pursue efforts to identify residency of their customers. Generally, the reporting has to be concluded on accountholders that are entities/individuals residing in the reportable state. In the case of an institution, it is seen to reside in the state where its place of effective management is situated.

But, administrations are also aware that individual taxpayers can use schemes to go around the system and so the CRS requites RFI's to analyse foreign sell entities, trusts, foundations and similar arrangements to find their supervising persons. The supervising person in CRS is the similar to beneficial owner as determined in the Financial Action Task Force Anti-Money Laundering Recommendation and its interpretation texts[267]. If none of the abovementioned is identified, the supervising person is assumed to be the person who holds the position of senior administering official.

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[265] Investment entity is any entity that primarily conduct as a business investment activities or operations on behalf of other person, and entities that are managed by those entities or other financial institutions. See the OECD Common Reporting Standard, Sec. VIII (a) (6).

[266] Specified insurance company is any entity that is an insurance company that issues or is obliged to make payments with respect to a cash value insurance contract or annuity contract.

[267] International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation - the FATF Recommendations (France, Paris: Financial Action Task Force 2012). View the interpretative notes for the Recommendation 10, pp.60. The report is available at: http://www.fatfgafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf

Some exemptions for reporting are stipulated for particular institutions. No data needs to be reported regarding 1) a company listed in an established securities market, 2) a government institution, 3) an international organism, 4) a Central Bank or 5) a financial entity (those where investment organisms are resident in a non-participating jurisdiction and therefore are treated like a passive non-financial entity.

6.5. CRS: Reportable Items

CRS states that for a standard of automatic exchange of financial account information to be efficient, the reporting regulations must be particularly created with a bigger focus on residence jurisdictions tax compliance instead of being a consequence of domestic reporting. CRS requires that the information reported by RFI's to include:[268]

a) In case of any individual that is an accountholder and a reportable person: the name, address, TIN, jurisdiction of residence, and date and place of birth;

b) In case of any entity that is an accountholder and a reportable person: the name, address, jurisdiction of residence, and TIN;

c) In the case of any entity that is an accountholder that is identified as having one or more controlling persons that is a reportable person: a. the name, address, jurisdiction of residence, and TIN; b. the name, address, TIN, jurisdiction of residence, and date and place of birth of each controlling person that Is a reportable person;

d) The account number (or its functional equivalent in the absence of an account number);

e) The name and identifying number of the reporting financial institution;

f) The account balance or value as of the end of the relevant calendar year or other appropriate reporting period or, if the account was closed during such year or period, the closure of the account.

Additionally, the below data must be reported as well:

a) In the case of any custodial account:

a. The total gross amount of interest paid or credited to the account during the calendar year or other appropriate reporting period;

[268] The OECD Common Reporting Standard (OECD, 2014), Sec.1, Paragraph A.

b. The total gross amount of dividends paid or credited to the account during the calendar year or other appropriate reporting period;

c. The total gross amount of other income generated with respect to the assets held in the account paid or credited to the account during the calendar year or other appropriate reporting period;

d. The total gross proceeds from the sale of redemption of Financial Assets paid or credited to the account during the calendar year or other appropriate reporting period with respect to which the RFI acted as a custodian, broker, nominee or otherwise as an agent for the accountholder;

b) In the case of any depository account: the total gross amount of interest paid or credited to the account during the calendar year or other appropriate reporting period;

c) In case of any account other than a custodial account or a depository account: the total gross amount paid or credited to the accountholder with respect to the account during the calendar year or other appropriate reporting period with respect to which the RFI is the obligator or debtor, including the aggregate amount of any redemption payments made to the accountholder during the calendar year or other appropriate reporting period.

CRS grants an exemption to specific types of accounts from reporting, such as retirement and pension accounts, term life insurance contracts and estate accounts, for example.[269] The abovementioned categories of accounts are obliged to meet specific criteria to be left of reporting. Regarding non-debt, direct interest in real property or commodities, reporting requirements do not apply as well.

Additionally, in a lot of scenarios, RFI's don't have the TIN and date of birth of the accountholder. In such a scenario, CRS establishes the RFI to make a "reasonable efforts" to collect these from the accountholder.[270]

"Reasonable effort" signifies that at least once a year, in the period between identifying the pre-existing account as reportable and the end of the second year after the identification of the account as reportable, an effort must be done to obtain this info from the accountholder, through contacting the accountholder or an electronic review of searchable data kept by the financial

[269] The OECD Common Reporting Standard (OECD, 2014), Sec. VIII(C) (17).
[270] The OECD Common Reporting Standard (OECD, 2014), Sec. I(C).

institution or a related entity to the financial institution.[271] No requirement vising the limit of the use of the account by the accountholder during the attempt to collect his/her TIN and date of birth are foreseen.

6.6. CRS: Diligence requirements

The CRS sets particular due diligence regulations to be complied by RFI's by requiring RFI's to do particular duties such as obtaining data and/or verifying data in their custody for the end of the identification of Reportable Accounts and Reportable Persons. Due diligence practices are, most of the times, defined by reference if the specific account is:

i. An individual or an institution account;
ii. A new or pre-existing account;
iii. A high-value or low-value account.

Regarding new and pre-existing accounts, a pre-existing account is an account, contract or instrument executed or kept by the RFI before the date of effectiveness of the Standard in participating states and, on the other hand, a new account is an account, contract or instrument created after the effectiveness date of the Standard.

Considering, high value and low value accounts. RFI's are obliged to check individual accounts without regard to their account balance. Yet, for the pre-existing individual accounts, the degree and procedure of due diligence are dependent if the accounts are high or low value accounts. An account is considered high value if the balance is higher than one million dollars and a low value if the balance is less than that amount according to CRS considerations, and obviously more sophisticated practices are applied in the case of high value accounts.

All RFI's are obliged to maintain records that were collected or originated due to CRS requirement, like documentary and self-certification evidence. Records of policies and practices regarding the due diligence procedures and the governance of the entity are required as well to be kept by financial entities. In the following sections, we will analyse particular usual notions that endorse the identification and due diligence procedures regarding these accounts.

[271] The OECD Common Reporting Standard (OECD, 2014), Commentary for Sec. I (C).

6.1.1. Pre-existing accounts and due diligence

Considering low value individual pre-existing accounts, CRS obliges RFI's firstly to apply the *Residence address test* and in case of necessity *Electronic record test* for the aim of defining if the accounts are reportable accounts and are in the hands of reportable persons.

a) Residence address test

RFI's are required by CRS to have methods and practices set up to review the residence address of pre-existing individual accounts with grounds of evidence provided by documents. Thus, for low value/amount pre-existing accounts, if a RFI has records of a current residence address of an accountholder, it can treat the accountholder as being a resident for fiscal reasons of the country where the address is situated for the purpose of determining if this individual accountholder is a reportable person.

RFI's can treat this individual as a resident for fiscal purposes of the country that the address is situated if these conditions are fulfilled:

(a) The RFI possesses a residence address of the accountholder in its records. Its clarified by the CRS that post office box of "in care of" is not considered as a resident address;

(b) The given residence is the present one. A residence address is seen as a present residence if it is the latest address that was kept by the RFI regarding that individual account;

(c) There is a basis of evidence provided by documents for this residence address. This requirement is completed whether RFI methods and practices guarantee that this address in the records is identical to the address or in the same jurisdiction as the one provided by documentary proof such as identity card, driver's licence or certificate of residence for example. Recent documents issued by electricity or water companies can also be used as documentary proof.

b) Electronic record search

If a RFI does not have a present residence address for the account holder given by documentary proof, the CRS mandates RFI's to check their electronically searchable information for any of the below mentioned indications:

(a) Recognition of the accountholder as a resident of a reportable administration;

(b) Present mailing or residence address (post office box included) in a reportable administration;

(c) At least one telephone number in a reportable administration and no telephone number in the jurisdiction of the RFI;

(d) Permanent orientations to transfer funds to an account kept in a reportable administration

(e) Presently efficient power of attorney of signatory authority given to a person with an address in a reportable administration;

(f) "In-care-of" address or "hold mail" instruction in a reportable administration whether the RFI does not possess any other address of the accountholder on record.

Given that any of the abovementioned indications is encountered in the electronic search or whether there is an alteration of circumstances that provides one or more indications being connected to the account, the RFI should treat the account as a resident for fiscal purposes of each reportable administration for which the indication is recognised. Given that any indication is not encountered in the electronic search, no further action is then required unless there is an alteration in circumstances that results in one or more indications being connected to the account, or the account turns into a high value account.

c) Pre-existing high value individual accounts

The CRS employs improved control practices for high value accounts, requiring RFI's to employ "Electronic record test" and "Paper record test" regarding these accounts to discover reportable accounts and reportable persons.

d) Electronic record test

In this test, it is required of the RFI to check electronically searchable info kept the entity for similar identifications described regarding pre-existing accounts of low value.

e) Paper record test

When the electronic database does not collect such data, the RFI should review the current client master records, and the following statements linked with the account and collected by the RFI in the last five years for any of the following indications:

(a) The latest documentary evidence obtained regarding the account;

(b) The latest account opening contract or documentation;

(c) The latest documentation collected by the RFI compatible with AML/KYC practices or for other legal purposes;

(d) Any given power of attorney or signature authority manners in effect;

(e) Any given existing instructions to transfer funds presently in effect.

If any of these indications are seen in the comprehensive review, or if there is a posterior alteration in circumstances, resulting in one or more indications relating to the account, then the RFI is required to treat the account as a reportable account, relating to each administration for where the indication is identified. If any of the listed indications are found in the comprehensive review of high value accounts, and the account is not identified as that of a reportable person, then further action is not required, until an alteration in the situation, where one or more indications are associated with the account.

Any given pre-existing individual account that has been recognised as a reportable account, is required to be treated as so in all posterior years unless the accountholder stops to be a reportable person.

6.6.2 New individual accounts and due diligence

The CRS calls for that when an account is open, RFI's should get a self-declaration that can be part of the account opening papers that permits RFI's to define the accountholder's for fiscal reasons and assure this self-declaration through other forms of other documentation obtained compatible with AML/KYC practices[272]. Whether the self-declaration demonstrates that the accountholder resides in a reportable jurisdiction, such self-declaration should include as well, his/her date of birth and TIN.

Whether there is a posterior alteration in circumstances regarding a new individual account that leads to the RFI knowing or gives it reasons to know that the original self-declaration is incorrect or unreliable, the RFI must collect a valid self-declaration which, demonstrates the accountholder's residence for fiscal reasons.

[272] The OECD Common Reporting Standard (OECD, 2014), Commentary to Section IV (A).

6.6.3 Pre-existing entity accounts and due diligence

Due ddiligence for institutions accounts can involve several practices. Firstly, RFI's are compelled to define if the institution is a reportable person. Then, RFI's are compelled, as well, to define if the institution is a passive non-financial organism and if so, to determine the residency of its supervising persons. On the other hand, due diligence regulations that apply for individual, and for pre-existing institution accounts engage the *de minimis* rule.

Normally, a pre-existing institution account with a balance of under 250,000 $ by 31 December is seen as a low value institution and is not compelled to be identified, verified and reported as a reportable account till the balance of the account is over 250,000 $ by the last day of the calendar year[273]. The Tax Justice Network blames this *de minimis* rule by stating that this can originate a chance for abuse because an entity could split an account into several accounts in multiple banks or lessen the amount immediately prior to the reporting date and can restock the account later.[274]

In general, RFI's must apply the needed verification practices for accounts over the threshold, to find out if the account is the institution regarding which reporting is compelled. For this reason, RFI's then determine the accountholder's residency based on its address or the place of incorporation.

RFI's also define if the accountholder is a passive non-financial institution, with one or more supervising person that are reportable persons. All organisms are non-financial institutions except for financial entities. A passive non-financial entity is any given non-financial organism that is not an active non-financial institution. Defining if an entity is "active" or "passive" non-financial organism is dependent on the percentage of income (over 50%) that is for active or passive revenues. Normally, passive non-financial institutions are related to foundations and trusts. "Supervising persons" are usually related to the natural person who has control over an institution, and by this, supervising persons are normally beneficial owners of the institution.

In defining if the accountholder is a passive non-financial institution, RFI's must collect self-declaration from the accountholder to determine its situation. In establishing the supervising persons of the passive non-financial entities and their residence, RFI's can rely on data obtained, compatible with know-your-customer rules.[275]

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[273] The OECD Common Reporting Standard (OECD, 2014), Sec. V (A).

[274] Tax Justice Network, OECD's Automatic Information Exchange Standard: A Watershed Moment for Fighting Offshore Tax Evasion? (United Kingdom: Tax Justice Network 2014), pp.13.

[275]The OECD Common Reporting Standard (OECD, 2014), Sec. V (D).

6.6.4. New entity accounts and due diligence

Regarding new entity accounts, when the account is opened, RFI's should establish if the account is in the hands of one or more reportable persons or by a passive non-financial entity with one or more supervising people who are reportable persons. But, there is no *de minimis* rule applicable, so RFI's will be compelled to report a larger amount of data to competent authorities.

To establish if the organism is a reportable person, RFI's must collect a self-certification that permits the RFI to establish the accountholder's residence for fiscal reasons and verify the veracity of the self-certification grounded on the data collected by the RFI linked with the account opening , and with any documents obtained compatible with AML/KYC rules included[276]. Given that the organism ensures that it has no residence for fiscal purposes, the RFI can depend on the address of the main office of the institution to establish the residence of the accountholder.

Given the case of a passive non-financial organism, RFI's must identify the supervising persons of the organism and establish if these supervising persons are reportable[277]. If it is considered that any supervising persons of a passive non-financial entity is a reportable person, then the account is treated as a reportable account.

6.6.5 Exceptional due diligence regulations and legal basis of the CRS

CRS states that RFI's are not forced to trust documentary evidence or self-certification if it knows or has reasons to believe that the documentary evidence or self-certifications are unreliable or incorrect.[278] For the purpose of establishing the total value of financial information in the hands of an entity or individual, RFI's are compelled to collect all financial accounts kept by the RFI or a related organism, but only to the range the RFI's informatics systems connected to the financial accounts according to a data feature such as TIN or client number, and permit the account balances to be accumulated. Each owner of the jointly possessed financial account will be given the full balance or this account for the purpose of the application of the accumulation obligations.

CRS states that an administration must have administrative practices and rules set up to guarantee efficient establishment of, and compliance with, the due diligence and reporting rules established in the CRS. In particular, it must have regulations to avoid that any kind of financial institutions, persons or agents from performing procedures with the intention to go around the due

[276] The OECD Common Reporting Standard (OECD, 2014), Sec .VI (A) (1).
[277] The OECD Common Reporting Standard (OECD, 2014), Sec. VI (A) (2).
[278] The OECD Common Reporting Standard (OECD, 2014), Sec. V (A). Model CRS, Sec. VII (a).

diligence and reporting practices; the rules compelling RFI's to maintain files of the steps taken and any proof depended on for the concluding of the practises and proper measures to collect those files; administrative practises to validate RFI's compliance with due diligence and reporting practices; administrative practices to guarantee that the accounts and institutions mentioned in the domestic regulations as non-reporting financial entities and excluded accounts continue to a have a low risk for being utilized for tax evasion; and finally efficient enforcement laws to combat non-compliance and in these measures we find the legal basis of the CRS, because for the proper functioning of the CRS it is required for the abovementioned measures to be transposed to national laws.[279]

6.7. Competent Authority Agreement (CAA)

Article 26 of both the OECD and UN Model Tax Conventions and Article 6 of the Multilateral Convention have already stated the possibility of automatic exchanges of data amongst contracting states. Yet, these documents do not give the framework and instruments to activate automatic exchange of tax data relationships. Thus, the contracting states necessitate a further agreement to be done by their administrations especially on the logistics and the range of taxes covered, and so the OECD designed the CAA for this reason.

6.8. Exchange of information through the CAA

The Model CAA states that the competent authorities of contracting states, on an annual basis, exchange automatically data collected in accordance with the rules in the agreement and in the CRS.[280] The data to be shared is, normally, the data to be reported by RFI's through the due diligence and reporting rules of the CRS.

6.9. CAA: Enforcement, manner, and timing

The CAA delineates that a competent authority informs its counterpart competent authority when it first believes that a mistake could have led to incomplete and incorrect data reporting or the lack of compliance of its RFI's with the applicable reporting obligations and the due diligence

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[279] The CRS, Section IX (a).
View also The Recommendations of the OECD Council on the Standard for Automatic Exchange of Financial Account Information in Tax Matters on July 15, 2014, Paragraph 1.
[280] The OECD Model Competent Authority Agreement (OECD, 2014), Section 2 (1).

rules, thus making the informed competent authority to undertake all appropriate action available via its national regulations to correct the error or the non-compliance.[281]

Tax data through the new Standard is shared on annual grounds. Yet, this data can be exchanged more constantly than an annual basis[282]. The Model CAA states the data is shared within nine months posterior to the end of the calendar year to which the data regards to, but this schedule is as minimum rule and jurisdictions are at will to commit to shorter timelines.[283]

6.10. CAA: Confidentiality and data safeguards.

The Model CAA stipulates that the data shared is subject to confidentiality provisions and other safeguards given by a legal framework, such as bilateral TT's or the Multilateral Convention, with the rules restricting the utilization of data exchange to the range needed to guarantee the level of protection of private information, in agreement with the securities that can be specified by the given competent authority as required via its national regulations. The requirement of automatic notification to any organism or individual of any failure of safeguards or breach of confidentiality and the remedial measures and sanctions levied are a consequence of this.[284]

6.11. CAA: Consultation, suspension and termination

The Model CAA stipulates that parties to CAA can ask for consultations to solve any difficulty in the establishment of the agreement, and may improve the agreement via an additional written agreement.[285]

The hypothesis of suspending the CAA by the parties is also given, provided by a written notice that establishes that significant non-compliance by the other party to the agreement has occurred or is occurring and this suspension will have an immediate effect**.** A list of examples that indicate significant non-compliance is provided by the Model CAA and those examples are:

1) Non-compliance with a confidentiality or a data safeguard regulation;

ii) Failure to give proper and timely data;

iii) Inappropriate defining of excluded accounts and/or non-reporting financial entities;

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281 OECD Model Competent Authority Agreement (France: Paris OECD, 2014), Commentary to Section 5.
282 Idem. Section 2 (2).
283 Idem. Subsection 3 (3).
284 The OECD Model Competent Authority Agreement (OECD, 2014), Section 5.
285 The OECD Model Competent Authority Agreement (OECD, 2014), Section 6.

iv) Absence/lack of administrative practices and provisions to guarantee the efficient establishment of due diligence and reporting mechanisms.[286]

A CAA party can also terminate the agreement by providing a notice of termination to the other party in writing, and this termination will be effective 12 months after the date of notice of expiry[287]

6.12. Control of the Implementation of the Global Standard: the Global Forum on Transparency and Exchange of Information for Tax Purposes

The analysis done in the previous sections can ask if there is an international organism that guaranties the participating states obedience to the Standard on automatic exchange of tax information. A potential candidate for this is the Global Forum on Transparency and Exchange of Information for Tax Purposes Global Forum), which was created in 2000 by the OECD[288] as a follow up of another forum (Global Forum on Taxation) that was created in 1998 in the circumstances of the OECD's combat against harmful fiscal competition. The main objective of the Global Forum is to help countries to efficiently establish the international model of transparency and exchange of data for fiscal reasons.[289]

There was a reorganization of the Global Forum in late 2009 answering a G20 appeal to improve establishment of the standards of transparency and data exchange in fiscal matters[290]. Over 150 delegates from 70 states and transnational organisms held a meeting to proceed with this reshuffle and committed:[291]

1- To open membership of the Forum to all OECD or non-OECD states that agree to implement the standards on transparency and exchange of information on tax matters, and agree to be verified by the Global Forum and help with funding;

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[286] The OECD Model Competent Authority Agreement (OECD, 2014), Commentary to Section 7, Paragraph 2.

[287] The OECD Model Competent Authority Agreement (OECD, 2014), Section 7.

[288] The Global Forum's website is situated at: http://www.oecd.org/tax/transparency/abouttheglobalforum.htm

[289] View: http://www.oecd-ilibrary.org/taxation/global-forum-on-transparency-and-exchange-of-information-fortax-purposes-peer-reviews_2219469x

[290] Global Forum on Transparency and Exchange of Information for Tax Purposes, Tax Transparency 2012: Report on Progress (Paris OECD, 2012), pp. 14.

[291] 5 One of the key restructuring involves the implementation of the Steering Committee and Peer Review Group that conduct in-depth peer review of the implementation of the standards of transparency and exchange of information for tax purposes. View *Summary of Outcomes of the Meeting of the Global Forum on Transparency and Exchange of Information for Tax Purposes Held in Mexico on 1-2 September 2009.* The document can be downloaded at: http://www.oecd.org/ctp/exchange-of-tax-information/43610626.pdf

2- To develop a consensus-grounded organism where all countries act on an equal basis;

3- To begin an in-depth peer verification procedure to control its member states compliance with the standards on transparency and exchange of information in tax matters;

4- To agree on a three-year decree to boost the fast establishment of the standard via the peer review of all its members and other jurisdictions appropriate to its work.

Resulting from this reorganization, the participation in the Global is now open to all states:

1-That commit to establishing the international standard on transparency and exchange of information;

2-participate and contribute to the peer review process and

3-contribute to the budget.

Today, the Global Forum is the principal international organism for the guarantee of the establishment of the globally agreed standards of transparency and exchange of information in tax matters. It has 148 members on an equal basis and has 17 observers, which makes it the largest tax group worldwide.[292] The initial members were only OECD states and jurisdictions that had committed to establish transparency and exchange of information for tax purposes. Belonging to the Global Forum comes with the duty of paying an annual fee to the Global Forum and this is either flat 17,500 € or progressive for countries whose GNP is above 35 billion dollars.

6.12.2 The Global Forum and the Standard on Automatic Exchange of Information.

Recognizing the rise of the automatic exchange of information as a new global standard, the Global Forum was decreed to control and verify the establishment of the new standard on automatic exchange of information. The Global Forum has two main forms of work regarding the new Standard: controlling and verifying its establishment, and to help where developing countries indicate their technical assistance necessities and capability building in order to cooperate and take benefits form the Standard.[293]

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[292] View at: http://www.oecd.org/tax/transparency

[293] For more information visit at http://www.oecd.org/tax/transparency/abouttheglobalforum.htm

To better do this work, the Global Forum created a new willing working group called Automatic Exchange of Information Group (*AEOI Group)*. The *AEOI Group* consists of the Global Forum members and observers that desire to cooperate in an effort towards a common objective in doing automatic exchange of information. The *AEOI Group* presently consists of 60 Global Forum members and three Global Forum observers that are the Commonwealth Secretariat, the European Commission, and the World Bank Group.[294]

The *AEOI Group* first obligations coming from its decree were to implement reference and procedures for controlling the establishment of the Standard on progressive grounds.

To control the establishment of the Standard, the "AEOI Group" is developing a peer review procedure. Efforts have started for the development of new Terms of Reference and new Methodology that will permit the Global Forum members and important non-member states to be graded on the efficiency of the establishment, with the compliance of confidentiality and data safeguard obligations being included as well. These verifications will guarantee a globally consistent establishment of the Standard. The controlling and peer review procedures were expected to start an outputting review of the legal frameworks in 2016 and a review of procedural establishment in 2019. The outcome of these peer verifications should be available publicly and should be used to help states to make better their juridical and procedural frameworks according to the best practices.[295]

6.13 FACTA and CRS

FACTA was the pioneer for the CRS. Like FACTA, the CRS comes to use the automatic exchange of tax information as a way to combat tax fraud and tax evasion. One should not be surprised by the fact that the provisions established in the CRS have a large influence from FACTA and the IGA's. Financial Institutions of adherent countries to these frameworks begin to have a major role in providing tax authorities easy access to financial information of taxpayers, including in this, information of the revenues acquired through the accounts the taxpayers have in these Financial Institutions.

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[294] For more information, visit at http://www.oecd.org/tax/transparency/automaticexchangeofinformation.htm

[295] Global Forum on Transparency and Exchange of Information for Tax Purposes, *Automatic Exchange of Information: A Roadmap for Developing Country Participation* (France: Paris Global Forum on Transparency and Exchange of Information for Tax Purposes 2014), pp.19

So, the CRS, like FACTA (in its Model 1 IGA), obliges Financial Institutions to provide the necessary information to the tax authorities of the legal system they belong to, so that after that this information is forwarded automatically to the competent tax authority of each country that is relevant to receive this information.

Yet, although the CRS was created in a similar basis to the one achieved by FACTA, it wasn't created specifically to replace it, nor to be a more extensive framework in its scope than FACTA[296].

If we compare both frameworks, FACTA has the requirement of citizenship, which means only the accounts that US citizens are accountholders are subject to FACTA. CRS has a different requirement, the requirement of tax residence. So, it can be easily concluded that the amount of information that will be reported through the CRS will be a lot more than the amount of data collected through FACTA and the IGA's. As an example in the FACTA framework, the so called "smaller accounts" (accounts with figures lower than 50 thousand dollars), are not subject to automatic exchange of tax information, while in CRS all accounts, even the newly created accounts are subject to automatic exchange of information. In spite of this, in the CRS, Financial Institutions can decide if they want to exclude pre-existing accounts of 250 thousand dollars or less from the "due diligence" procedures.

The CRS has a broader scope and as a multilateral commitment, creates more obligations to Financial Institutions when it comes to automatic exchange of information.

The influence of FACTA on the CRS also created the situation that the increase of obligations to Financial Institutions what be seen as a shock because FACTA has already "paved the way" for these requirements although in a smaller scope. However, although the CRS implies the same process that was done to implement FACTA, allowing like this for a reduction of administrative costs, it should be noted that a global implementation of the CRS can suggest considerably high costs to Financial Institutions since the amount of data through the CRS will be much more.

Moreover, FACTA goes essentially around the US while the CRS has a multilateral format. Yet, and although these frameworks are different they can and should be used together when

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[296] For further information please view:
Nuno Sampaio Ribeiro, Workshop... FATCA, Common Reporting Standard e Nova Diretiva da Poupança, Instituto de Formação Bancária, 2014.
Patrícia Domingos, FATCA, IGA, MCMMA, CRS E MCAA – UE e Portugal em análise, (2016), available at:
Https://www.linkedin.com/pulse/fatca-mcmma-crs-e-mcaa-ue-portugal-em-an%C3%A1lise-patr%C3%ADcia-domingos

possible so that synergies can be created and the duplication of efforts and costs can be avoided because there are a lot of similarities between these frameworks. For example, both instruments have the goal of combating tax evasion and end the possible resource to Financial Institutions outside the country of citizenship (FACTA) or of residence (CRS) of the taxpayer to create accounts with the intention of these accounts being subject to automatic exchange of tax information. Additionally, both frameworks possess provisions to detect accounts of taxpayers in Financial Institutions outside of their countries of residence/citizenship. Finally, both frameworks establish that all "due diligence" and reporting obligations are the responsibility of Financial Institutions and tax authorities only work as receptors of this data. With this, tax authorities are no longer forced to do specific inspection procedures against certain taxpayers since then now receive automatically all the information required concerning each taxpayer.

6.14. DAC2- Directive 2014/107/EU

The new challenges set by the behavioural evolution of taxpayers, investors, society groups and due to the expanding in number and in shape of strategies of tax evasion and fraud did not escape the attention of the EU. After the US, through FACTA and the IGA's, giving a decisive impulse to automatic exchange of tax information and having in mind the efforts of the G8, G20 and the OECD in the creation of the Global Standard, the EU had to make an approach in this issue. Normally, due to the fact that the EU member states are all member states of the OECD, its work influences EU law.[297]

With this in mind, in 2013, the European Council asked for the spread of the automatic exchange of tax information, at an EU and global level, with the goal of fighting illegal behaviours of deviation from compliance with fiscal obligations.

ECOFIN, in 2014, in the revision of the DAC that created DAC2 intended to establish the Global Standard regime in all EU countries, and it was expected for the first exchanges of tax data between EU states to occur in September of 2017. Moreover, it is important to stress that the Global Standard was implemented in the EU through the DAC2 that gives it legal force in the EU.

The original DAC already established the automatic exchange of information but this was only allowed in revenues of non-financial nature.[298]

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[297] Maria Odete Batista Oliveira, *O Intercâmbio de Informação Tributária*, 2012, p. 257.
[298] Article 8 Directive 2011/16/EU

So, in December 2014 the European Council implemented the new Directive on Administrative Cooperation (DAC2) that changed the original DAC. These changes appeared like a firm step for the solving of the issues of tax evasion and fraud that worry countries worldwide and reflect what is established in the Global Standard. The DAC2 had as main novelty the expansion of revenues that are subject to automatic exchange of data. The revenues of financial nature are now subject to automatic report of information, and revenues such as dividends, interest and other savings revenues like bank accounts balances and products of the sale of financial assets, amongst others.[299] All this is in conformity with what is established in the Global Standard.

It is important to note as well, that according to the whereas (7) of the DAC2, that the fact that EU countries celebrated FACTA agreements with the US, leads to the issue that these countries are providing a greater cooperation to the US in comparison to the assistance provided to fellow EU member states disrespecting the most favoured nation principle established in article 19 of the DAC. This article establishes a rule that is known as the "big father" rule.[300] Having this in mind, if a member state has established through any instrument or agreement cooperation with any state out of the EU that is broader than the one provided by the directive, this country cannot deny the same degree of assistance to a member state if it desires this.

Since the IGA's for the establishment of FACTA were done with some member states of the EU, and since the FACTA foresees a broader scope of automatic exchange of information than the DAC, an opportunity for member states to have a greater exchange of information with the USA emerged.

Has it can be easily observed with is, the will to celebrate agreements with several countries with the goal of would not take long to arise. So, with the purpose of avoiding an uncontrollable celebration of "parallel and uncoordinated agreements"[301] that could originate problems to the functioning of the common market, the DAC was reviewed, to conclude this global trend of greater cooperation between countries establishing the automatic exchange of tax information and eliminating the necessity of celebrating of bilateral or multilateral agreements and like this respect the most favoured nation principle would be respected. With the DAC2 this principle is effected,

[299] View Article 1 number 1, 3-A of the Directive 2014/107/EU

[300] Maria Odete Batista Oliveira, *O Intercâmbio de Informação Tributária*, 2012, p. 329.
For more information please view:
Ana Paula Dourado, *Planeamento fiscal e concorrência fiscal internacional*, Fisco, Lisboa, 2003.
Ana Paula Dourado, *Direito Fiscal*, Edições Almedina, Coimbra, 2015.
Glória Teixeira, *Manual de Direito Fiscal*, 5ª edição, Edições Almedina, Coimbra, 2018.

[301] Whereas (8) of Directive 2014/107/EU

legal assurance and security is strengthen, something that would be compromised with the celebration of several agreements. Besides this, the operational and results efficiency would be seriously compromised without the existence of the same mechanisms of cooperation.

Consequently, the celebration of multiple agreements and parallel agreements would create great legal insecurity and uncertainty, and generate overwhelming administrative costs and duties to tax administrations and economic agents. Due to this reasoning, it was understood that the EU law regarding automatic exchange of information regarding financial revenues should be totally in harmony with the Global Standard and the CRS. Like this, the scope of information covered by automatic exchange of information set in the DAC, was changed and now has the same information set in the Model CAA and in the CRS confirming like this, as mentioned before that the DAC2 is the legal framework that gives legal force to the Global Standard in EU Law.

With the DAC2, all EU member states, except Austria that asked for a 1 year deadline to implement the directive, had to make the first report of financial information to the competent authorities in September 2017[302].

The deadline for EU member states to transpose the DAC2 to the internal law was the end of 2015 and so now the DAC2 come into force in 2016.[303]

7. Automatic exchange of information: taxpayer confidentiality

At the time the new OECD Standard on automatic exchange of financial data comes into force, the amount and range of information exchanges between countries will rise considerably if we compare to the up until now standard of information exchange "upon request"[304]. With the new

[302] View Article 2 number 2 of the Directive 2014/107/EU

[303] View Article 2 number 1 of the Directive 2014/107/EU

For more information on this subject

[304] An exchange of information "upon request" can be refereed as to a situation where the tax authority of one jurisdiction, under the provisions of a TT or TIEA, asks for particular information concerning its taxpayer from the tax authority of another jurisdiction where such information is situated. Yet, the information request must meet "Foreseeable relevance" requirement. That is, the information request must be made with the greatest degree of specificity regarding the taxpayer(s) about whom the information is sought. There is often an official checklist of items that a requesting state generally has to provide in order to meet this requirement: a) name of taxpayer (for individuals and legal entities); b) Registration number (in the case of a legal entity); c) tax identification number and address (to the extent known); d) statement of the information sought, including its nature; e) tax purpose for which the information is sought; f) reasons for believing that the information sought is held by the requested party or is in the possession or control of a persona within the jurisdiction of the requested party; g) name and address of any person believed to be in possession of the requested information (to the extent known); h) a statement that the requesting party has pursued all means available in its territory to obtain the information, except those giving rise to disproportionate difficulties. The primary shortcoming of the standard is that the requesting jurisdiction must possess specific and detailed information regarding the taxpayer in question to be able to make an information request; otherwise, the request could be refused for being a "fishing expedition". The term fishing expedition is metaphoric.

standard, it is anticipated of participating states to automatically and regularly transmit personal data like name, date and place of birth, address and TIN and financial data such as account numbers, account balances, kinds and amounts of revenues credited to the account during the referred period of non-residents that have accounts in their financial entities to their states of residence[305]. Therefore, there will be an enormous amount of potentially vulnerable personal and financial data of taxpayers regularly being transmitted amongst national tax administrations globally.

As long as the amounts and numbers of data sharing rise, the greater the possibility of abuse or misuse of this data is. Consequently, taxpayer confidentiality and privacy will naturally become a major issue, because, given this, taxpayers would be obliged to be very defensive with their data regarding this new system. This raises some issues, regarding for example, to what extent the confidentiality and safety of the shared data is secured via this new automatic exchange of information system, if there are tools that properly ensure the confidentiality and safety of exchanged data, and how these tools work, and ultimately, if and how these tools can be upgraded.

7.1. The Standard and DCA2: Taxpayer Confidentiality rules applicable

While analysing the confidentiality rules applicable in automatic exchanges of information, it is relevant to discuss the OECD Standard on Automatic Exchange of Financial Accounts Information in Tax Matters of 2014 (and by inherence the DCA2) and analyse its important clauses. Two documents come in the Standard: The Common Reporting Standards (CRS) and the Model Competent Authority Agreement (OECD Model CAA). The Model CAA, especially in its Sections 5 and 7, has some principles and provisions important for our analysis.

It should be noted that the CAA, in its nature, is an administrative commitment that has its authority coming from the exchange of information clauses of the Multilateral Convention and TT's. It is only devised to enable the functioning of the automatic exchange of information provisions of the international frameworks mentioned above. Thus, all confidentiality rules applicable to info exchanges through the Multilateral Convention and TT's apply as well for the automatic exchanges

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It normally refers to unspecified information requests. View OECD, *Overview of the OECD's Work on Countering International Tax Evasion* (France: Paris OECD, 2009). View also Paragraph 5 of *the Manual on the Implementation of Exchange of Information Provisions for Tax Purposes in the OECD Model Double Taxation Convention.*

305 The OECD's Common Reporting Standard (2014), Section 1 (A). The document is available online at: http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/standard-for-automatic-exchange-offinancial-account-information-for-tax-matters_9789264216525-en#page31

of info through the CAA. Yet, the CAA gives some additional requirements to confidentiality particularly applicable for automatic exchanges of data through these legal instruments.[306]

An elemental rule of the Standard is that a country is not required to automatically send tax data to its treaty counterpart unless the counterpart possesses a thorough system of administrative, physical and technical securities created to properly secure the confidentiality of the exchanged information[307].

The OECD Commentaries of the Model CAA determines the safeguards needed to fulfil security requirements for information exchange, stipulating 3 aspects, first a legal framework, second data security management practices and procedures and finally the verifying compliance and penalizations to solve a breach in confidentiality.[308]

Considering the legal framework, the commentaries state the treaty party must possess a legal framework to secure the confidentiality of taxpayer data and provide for reasons and particular and restricted situations when this data can be turned public. Domestic regulations should also define firm penalties for confidentiality breach.[309]

Considering data security management practices and procedures, the commentary of the OECD Model CAA mentions, that the treaty partner must possess practices and procedures set to guarantee that the exchanged data is not disclosed to people and governmental authorities that are not involved in the assessment, collection, administration, or enforcement of covered taxes, or related appeals, oversight, and prosecutions[310]. Additionally, domestic regulations must assure that individuals in authority positions and access to the important data are trustworthy and fulfil security standards, and their access benefits must be properly controlled and verified. These individuals should be subject to several evaluations of potential security risks, to help guarantee that they responsibly treat the data and do not present a risk to security. It requires also, that if an employee has continued access to data, annual or more constant skills upgrade must occur. Procedures should be in place for the swift termination of access to confidential information for employees who leave or no longer need access to the data to assure information confidentiality. The requirement

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[306] OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters (with commentaries) (France: Paris OECD, 2014). View the Commentary to Section 5 of the Model Competent Authority Agreement (MCAA).

[307] Section 7 (2) of the OECD Model Competent Authority Agreement (2014). Available at http://www.oecd.org/ctp/exchange-of-tax-information/standard-for-automatic-exchange-of-financialinformation-in-tax-matters.htm

[308] Idem. Commentary to Section 5(2), Paragraph 7, pp. 83.

[309] Idem. The Commentary on section 5 (2), Paragraphs 8-10, pp. 82.

[310] Idem. The Commentary on section 5(2), Paragraphs 11, pp. 83.

to keep tax secrecy should be maintained posterior to the employment bond and tax authorities are required, as well, to have security mechanisms set up, to limit entry in the facility where the important data is stored. These mechanisms can be the existence of security guards on the premises or coded entry systems for employees.[311]

When it comes to compliance and sanctions, the Commentary acknowledges the fact that having set up domestic regulations is not acceptable, unless the competent authorities enforce these regulations in fact, by imposing applicable civil penalties and criminal sanctions towards those who breach these laws.[312]

At last, through the OECD Model CAA, each competent authority has no requirement to inform the other competent authority right away when it regards a confidentiality breach or safeguards failures, any sanctions, and remedial actions levied consequently included. Non-compliance with confidentiality and data safeguard clauses can be considered relevant non-compliance and can result in the immediate suspension of the CAA.[313] The OECD Standard on automatic exchange of financial account information, expects the participating states to share a big range of potentially vulnerable information of many taxpayers. Yet, the tax authorities of the receiving states may not need or use all this given data, which can result to the commonly named *information inflation*[314] in the possession of the tax authorities of the receiving state, potentially leading to taxpayer confidentiality breach.

Thus, it's appropriate for treaty parties to not ask for more data than they can use or implement a type of central filter and data management centre in their tax authorities, in which all the collected data from their treaty counterpart is accumulated, stored, organized and then transmitted to the tax agents and tax departments of relevance. This internal filter tool can allow only the relevant categories of data to be transmitted and utilized and maintain the rest of the information to a point when they can use this remaining data after improving their capability to deal with tax information. This system can ultimately permit the tax authorities to adapt the data issuing as the information processing capabilities raise, and in general, this system can further ensure taxpayer confidentiality.

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[311] Idem. The Commentary on Section 5(2), Paragraphs 13-17, pps. 83-84.
[312] Idem. The Commentary on Section 5(2), Paragraph 34-35, pp. 87.
[313] Idem. The Commentary on Section 5(2), Paragraph 6, pp. 81.
[314] George L Paul & Jason R Baron, "Information Inflation: Can the Legal System Adapt?" (2007) 13 Rich. JL & Tech.

7.1 Protection against misuse of exchanged information

One major confidentiality issue in automatic information exchange, is the hypothesis that own administrations can use the given data for improper ends, like for example, a government can utilize the obtained information to persecute political opposition and in these situations, automatic exchange of information can lead to the breaching of human rights in the data-receiving state. Thus, countries may desire the guarantee that the data given won't be used for these ends.

In the Commentary to the Model CAA states that data should not be given to another state if the making public of this info is contrary to the public policy. This interpretation of the Model CAA comes from the wording in Article 26 (3) (c) of the OECD Model Tax Convention and Article 21 (2) (d) of the Multilateral Convention[315]. It is noted by the commentary that this application in the field of the exchange of information between the competent authorities is very rare, specific countries can demand their competent authorities to state that the information is given cannot be utilized or made public in practices that could lead to the application of the death penalty or other major violations of human rights, like when fiscal inquiries are motivated by political, religious or racial reasons, it is against the public policy of the supplying country[316]. Therefore, no assurance for the misuse of data by the receiving state, unless the wording of the agreement between the countries provides this limitation.

7.3. Taxpayer confidentiality: Taxpayer notification

Analysis of the transnational exchange of information indicates another important issue: Whether a taxpayer is entitled to be notified of the transmission of his/her fiscal-relevant information to a foreign administration. This issue is integrated, with some limitations, in the information exchanges upon request.

There are some particular challenges to integrating this right in the automatic exchange of information regime. In the automatic exchange of information regime, data sharing happens on a regular basis, and so, when the system is set up and disclosed, in general, taxpayers will have the knowledge, of the kind, frequency, and scope of data sharing amongst their state of residence and other countries. Furthermore, the automatic exchange of data system works similarly to a third-party reporting system in which employers, financial entities, and additional third parties have the obligation to constantly inform the government on their payments to taxpayers. These parties, by

[315] Idem. The Commentary on Section 5 (2), Paragraph 5, pp. 80.
[316] Idem.

norm, have no *ex-ante* requirement to inform the relevant taxpayer about their data informing tax authorities, they only give the relevant taxpayers an *ex-post* notification under end-of-year fiscal information sheets.

Thus, given the routine nature of the exchanges and the systematic nature of fiscal enforcement that this data is utilized for, the prior taxpayer notification mechanism seems difficult or/and even unnecessary in the automatic exchange of information system. Yet, it looks necessary to analyse the posterior notification mechanism as it only is seen in the domestic third-party reporting system. Within this system, a financial entity or a local tax authority, informs non-resident accountholders on which info regarding them has been transmitted to their states of residence and the relevant time period that info regards to. But, there are some potential administrative issues of this system due to the requirements of the Standard.

Firstly, generally in the OECD Standard on Automatic Exchange of Financial Account Information in Tax Matters, information sharing happens nine months after the end of the calendar year the data regards to[317]. So, at the time the data has been transmitted and the relevant notices are issued, the taxpayers could already have filled their residence state tax return for this given period. This leads to the question of the utility of this posterior notice system to the taxpayer, and thus, treaty parties must analyse the benefits and costs of this notice system.

Secondly, within the OECD Standard, automatic exchange of information happens between the competent entities of contracting parties with basis on the data that the supplying states normally collect from its financial entities. So, there is a question of which institution would be suitable to do these posterior notices, if the financial entity, if the fiscal entity of the supplying state, or the fiscal entity of the residence state.

At first glance, financial entities seem to be the most suitable institutions to do the taxpayer notice, but in general they don't possess the control and know-how of when and which of their reported data will be eventually transmitted to foreign states by their domestic fiscal entities, and they don't possess expertise on which foreign states their tax entity sends this specific data to. Thus, the tax authority of the supplying state seems to be the best body to enforce taxpayer notification if it is done.

[317] The OECD Model CAA (2014), Section 3 (3).

7.4. Taxpayer Confidentiality: Conceivable Issues

As analysed in the previous sections, in the automatic exchange of information regime, it is very important that the state that is giving the information, is ensured by the receiving state, that the confidentiality of the supplied information will be enforced. This section tries to address cases where the statutes of the state receiving the information don't give proper confidentiality protection to this information. Yet, even when protection is given, the standard of protection is less than this data has in the supplying state.

Thus, the OECD Model CAA gives higher authority to the treaty party supplying the information, by allowing it to levy to the receiving country the confidentiality obligations and securities provided by its own regulations if they are stricter. Basically, this rule distributes the right to define the scope and standard of confidentiality regulations applicable to the exchanged data to the authority of the state providing the information, presuming that this system will sort out the problem of confidentiality once and for all, but, this power reallocation system can put in jeopardy the appropriate functioning of the automatic exchange of information regime for the following reasons:

1) Through the standard, automatic exchange of information is expected to be ultimately applied all over the world, meaning by this that it is anticipated that states share financial account data with many states if not all states worldwide. If we analyse the present confidentiality regulations, having this system in mind, the indications given can look a little concerning, because the information receiving state can be asked to meet different confidentiality obligations of different states to obtain data from these states.
2) A continuous effort for the implementation of an efficient international fiscal exchange system has been going on for quite some time now. This occurs because countries are interested in receiving fiscal data from other countries but are not very amused to give identical data in a reciprocal way. Indeed, some states financial economy and industry are dependent on confidentiality and secrecy aspects, the protection they give to non-resident investors in their state. These states have built their reputation on bank secrecy and confidentiality for a long time and their system

would suffer enormous threats if they agreed to automatic exchange of data[318]. So, it can be fair to say, that it is the narcissism of these territories (i.e. tax havens) that has set back information exchange, because these states have taken every chance they had, to oppose the initiative of exchange of information.[319]

Yet, at this moment, the majority of these countries have committed, or have the intent of committing, to the automatic exchange systems thanks to the global community's firm and fundamental claim for worldwide transparency. In this scenario, the present confidentiality regulations under the Standard can give countries a new chance to evade data exchange or to exchange data solely with countries to which they desire to share data. This can happen because the Standard has basically left the design and standard of confidentiality provisions applicable to the shared data to the authority of data supplying country, by allowing that treaty party, to stipulate the anticipated level of confidentiality for the provided data, as required in its domestic statutes.

This situation provides the opportunity for the data giving state, to utilize confidentiality provisions solely as a pretext to decline and suspend information exchange with less powerful but greatly beneficial states, by arguing that the treaty counterpart's legal system, cannot ensure a similarity of confidentiality, like the one under its own domestic law. Several secrecy jurisdictions have already begun to stress this *myth of confidentiality*.[320] For an average state, it is usually hard or even worthless, to engage in a competition with a secrecy jurisdiction, on the juridical securities of confidentiality.

In general, the present OECD system tries to face some conceivable issues around taxpayer confidentiality, by basically redistributing the authority to define applicable provisions, from the data receiving state to the information giving state, with little regard whether the data receiving state can abuse this authority.

An attempt to guarantee consistency, not merely in the design and functioning of automatic exchange of information regime, but in the provision of confidentiality security for the exchanged data throughout all participating states, must be done by the Standard. Hence, the Standard must remove the current inequality of authority, by defining confidentiality provisions applicable to the

[318] Rose-Marie Belle Antoine, Confidentiality in Offshore Financial Law, 2 ed. (Oxford; New York: Oxford University Press, 2014), pps. 5-8.
[319] OECD, Harmful Tax Competition: An Emerging Global Issue (Paris: OECD, 1998), pp.77.
[320] Nadia Fountain, "Riding the Waves of Change: Balancing Compliance with Confidentiality " IFC Review (1 January 2015). Available at: http://www.ifcreview.com/restricted.aspx?articleId=8831&areaId=17

exchanged data, and give a comprehensive minimum standard for taxpayer confidentiality, that can be globally applicable. This minimum standard should be created to assure the needed level of confidentiality security for the exchanged data while removing potential chances for abuse by narcissist states.

8. Automatic Exchange of Information and Developing Countries.

8.1. Introduction

Promptly after the G20 sponsoring of the automatic exchange of information and the launch of the Standard on automatic exchange of information on financial account, the representatives of more than 50 states met in Berlin, in October of 2014, to sign the first-ever multilateral commitment, to establish the Standard (the Multilateral CAA). The signatory parties vowed to work towards the establishment of the Standard in 2017, with the initial international automatic exchanges to occur in 2018. [321]

This was an enormous leap towards the implementation of the long expected automatic exchange of fiscal data on a worldwide scale. The Multilateral CAA also marks one of the rare multilateral agreements in the field of taxation.[322] Although there has been a significant change in recent years, only a few developing countries signed the agreement in the beginning, like Argentina, Mexico, Romania and South Africa. Even major developing states like the BRIC countries, although they have recently committed to this agreement, when it was first presented they declined to sign it. There has been progressing, but there are still many states that haven't committed to the agreement and leaves the relevant question of whether the international automatic exchange of information system can provide any benefit to the developing world. So in this section, an analysis of the automatic exchange of information from the perspective of developing states will be done, by analysing the risks of not involving developing countries in the automatic exchange of information regime, the challenges and problems that developing countries can face when participating in this regime and ultimately, some ideas to solve some of these issues will be proposed.

[321] The details on the agenda and the participants of the meeting are available at: http://www.oecd.org/tax/exchange-of-tax-information/multilateral-competent-authority-agreement.htm

[322] The list of signatory countries is available online at http://www.oecd.org/tax/exchange-of-taxinformation/MCAA-Signatories.pdf

8.2. Implications of the non-inclusion of developing countries

A) Illicit financial outflows

A major issue exists in nearly every developing country in today's globalized world that must be addressed, which are illicit financial flows.[323]By norm, illicit financial flows (IFF's) are capital flows that are illegal in the form they are created, transferred or used[324]. IFF's are described as unrecorded money, such as capitals obtained from crime, like drug commerce, human trafficking or counterfeiting, manipulative commercial dealings like income emerging from import and export operations done to manipulate custom duties or income taxes, for example, and corruption.[325]

These funds evade from the state and hide overseas. IFF's are a stimulant for tax evasion and tax evasion is stimulated by IFF's.

A study done by the Global Financial Integrity (GFI), IFF's from developing countries reached a total amount of 6.6 trillion US dollars between the years of 2003 and 2012[326], this amount being ten times the amount that these states collected in official development assistance in this period[327]. In 2012, according to this study, these states lost 991.2 billion US dollars in IFF's, stating also, that this statistic is increasing steadily at an average rate of 9.4% annually, which is double the rate of growth of the GDP worldwide.

This study also discussed IFF's from developing states on a regional ground, and Asia was the region of the developing world with the highest efflux, being responsible for just over 40% of the world total, followed by Developing Europe with 21%, the Western Hemisphere at just short of 20%, North Africa and the Middle East with just under 11% and Sub-Saharan Africa with 8%[328]. Regarding state analysis, China, Russia, Mexico, India, and Malaysia were the biggest players in IFF's[329].

One of the most practised ways of IFF is trade mispricing or trade misinvoincing, which is the intentional misreporting of the actual value, amount or composition of products on custom

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[323] Dev Kar & Joseph Spanjers, *Illicit Financial Flows from Developing Countries: 2003-2012* (Washington DC, Global Financial Integrity, 2014)
[324] Martin Hearson, Tax-motivated Illicit Financial Flows: A Guide for Development Practitioners
(Norway, Bergen: U4, 2014).
[325]Illicit Financial Flows: Analytical Methodologies Utilized By Global Financial Integrity Global Financial Integrity 2014), at 1. Available at http://www.gfintegrity.org/wp-content/uploads/2014/09/GFI-Analytics.pdf
[326] Kar & Spanjers, Supra note 292 pp. vii
[327] Idem. Pp.12
[328] Idem. pp.8
[329] Idem. pp.9

declaration invoices and forms for money-laundering or tax evasion ends[330]. According to the study, 78% of IFF's in 2012[331] were caused by trade mispricing, costing developing countries an average of 470 billion US dollars annually because of trade mispricing. Trade mispricing normally happens in two manners: over-invoicing and under-invoicing.

Resident taxpayers usually utilize trade over-invoicing to funnel their revenues from developing states, this being done through the inflation and over-invoicing the current cost of imported equipment or inputs so that the taxpayer can report a lower amount of taxable revenues in the source state. The opposite scheme can also be used, under-invoicing. Here, the taxpayer exporting products from a developing country can intentionally undervalue the product being exported, so that revenues are once again shifted overseas. After this shifting, it becomes tax free money, because it deviates to an offshore bank account owned directly or indirectly by the taxpayer, and due to this cross-border nature of these operations and the absence of extraterritorial data, makes it difficult for tax administrations of developing states to determine, the right amount of revenues being levied in their own state.

Generally, this study does a thorough analysis of IFF's from developing countries but it doesn't mention where IFF's flow to in general or the reason they are flowing to those states.

Indeed, answering this is quite easy, because, in the world, only two types of countries exist; developed and developing, and in the developed countries, very few, can provide a free and safe tax-haven[332], where money doesn't have to be disclosed regarding its true owner, purpose, and source[333]. Once the capital gets into these countries, it seldom comes back to the state of origin, and in general, this illicit flow of capital and tax income loss from developing states is actively made easy by the secrecy clauses in many countries.

The main problem is that this efflux causes a deprivation of business, education, infrastructure and healthcare in developing countries that need funds urgently because they are usually in a very bad situation due to lack of financing. This efflux takes as well, very much needed tax income that can be utilized to alleviate poverty and improve lives.[334]

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[330] Further details on basic mechanism of trade mispricing are available at http://www.gfintegrity.org/issue/trade-misinvoicing/

[331] Kar & Spanjers. Supra note 292, pp. 22

[332] Prem Sikka, The Role of Offshore Financial Centres in Globalization (2003) 27:4 Accounting Forum.

[333] Jane G Gravelle, *Tax Havens: International Tax Avoidance and Evasion* (2009) National Tax Journal, pp. 20.

[334] Sri Mulyani Indrawati, "Dirty Money and Development" Project Syndicate. Available at: http://www.projectsyndicate.org/commentary/money-laundering-corruption-trafficking-and-development-by-sri-mulyani-indrawati2015-01

These concerning statistics can demonstrate that the developing countries have bigger reasons to get involved in automatic exchange of information, since major benefits would be provided by the capability to obtain data from developed states, especially from secrecy jurisdictions. General public and citizens have suffered because of IFF's for a long period of time and this problem will continue unless it's solved at the national and transnational grounds.

B) Developing Countries as conceivable tax havens

The transnational effort on automatic exchange of data, in its present form, has the intention to implement a system for constant flow of data, mainly between developed states and tax havens, largely ignoring the developing states necessities in this process. In late 2014, the OECD finally convinced, for the first time, a series of tax havens like Bermuda, the Cayman Islands, Cyprus, San Marino and Switzerland, to commit to the automatic exchange of data regime on multilateral grounds. By 2014, most tax havens signed the Multilateral CAA. Other tax havens, like Hong Kong, Singapore, and the United Arab Emirates soon followed, meaning that all these states that in the past were constantly against automatic sharing of information, are at last quitting to be a tax haven. This means that offshore fiscal evaders have two choices: or they stop evading taxes, or they shift their assets to other states that don't have the automatic exchange of information. Thus, developing countries have a curious scenario, because tax evaders normally look for jurisdictions that don't legislate much, don't levy a lot of taxes, and don't share fiscal information. Now they must search for new jurisdictions where the abovementioned aspects are present, and several developing countries fit these criteria. Overall, they are vulnerable to tax administration and legislation due to financial difficulties. Many of them are not currently in the automatic exchange of information regime, and won't be part of it any time soon. The Global Forum's analysis gives strong proof of this fact, because in the answers of 37 developing states, on their status of readiness for automatic exchange of information, evidenced that only 3 developing states were transmitting data automatically, with nearly half of the inquired states have responded that they are planning to begin automatic sharing of data but don't know when they can be capable of doing so, and nearly 15% of the countries, stated they had no intention to begin automatic exchange of tax information.

For potential tax evaders, opportunities exist in developing countries, although they don't assure similar standards of governance, infrastructure, financial and telecommunication services provided, and political stability as tax havens, they have reasonable legislative and financial infrastructure and can provide an extensive TT network, that didn't exist with tax havens, providing for some benefits that previously didn't exist in tax havens.

Ultimately, the present exclusion of developing states from the automatic exchange of information regime, can possibly make some of these states, become tax havens or secrecy regimes in the future.

8.3. Developing Countries: Challenges

Looking at the abovementioned reasoning it can be questioned why developing states are repressing the automatic exchange of information or more specifically, what is making them repress it? In this section, we will attempt to discuss these doubts.

A) Promised multilateralism with occult multi-bilateralism

The OECD expects for the standard on automatic exchange of information to be established through the current frameworks of TT's or Multilateral Convention.[335]

TT's, in their nature, are bilateral commitments, where two countries have the goal to eradicate double taxation of revenues emerging in one state and being paid to residents in a distinct country. Normally, the conflict of fiscal jurisdiction claims of the treaty parties over the same revenues is solved by a TT, but TT's, also intent to battle international fiscal evasion with Article 26 of most TT's, which permit treaty parties to exchange data automatically, given that there is a further commitment between the competent authorities of each treaty party, with regard to the procedure and the scope of such exchanges. An administrative commitment of this type generally determines the kind of data to be exchanged automatically, procedures for the transmission and collection of the information, and the proper format for the exchanges. Given that TT's are bilateral commitments, the OECD has found it more effective to establish the Standard under the Multilateral Convention and has incentivized all states to ratify the Convention.

The Multilateral Convention permits its member parties to share data automatically, but like TT's, automatic exchange of information is only possible if an additional agreement regarding the forms and procedures for automatic exchange of information is in place, otherwise member states are not required to get involved in automatic exchanges of data. The commentary on the Multilateral Convention states, that such commitment can be done between two or more

[335] The OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters (2014), Introduction, Paragraph 11, pp.13.

counterparts (exchanges always occurring on bilateral grounds)[336]. To fulfil this function, the OECD released bilateral and multilateral model CAA's and recommended that countries establish the multilateral model.

As mentioned before, in October 2014, 51 jurisdictions met in Berlin and signed the Multilateral CAA, marking the first-ever official step to collect and automatically share data amongst each other through the Multilateral Convention. Amongst the countries that signed the agreement were major EU countries, a few developing states and states like the Cayman Islands, Liechtenstein, Luxembourg and Switzerland that for so long were against this regime.[337] Yet, there are two main issues in this multilateral concept.

To start, and this can seem puzzling, hugely developed states like Canada, Japan, and the US didn't sign the agreement at the first opportunity and until now the US has not signed the agreement. But, this can be explained by the fact that there is quite an overlap between the multilateral CAA and the FACTA IGA's that were already being done between the US and other states, meaning by this, the US, for now, has no intention of joining the multilateral CAA.

After all, if a state has the intention to get involved in automatic exchange of data with a country like the US, or any other that is not a signatory member of the Multilateral CAA, such discussion must occur in a bilateral scenario. Several compelling issues emerge for developing countries in these bilateral resolutions.

It's extremely relevant to mention that bilateral agreements usually involve power relations and normally, major and politically powerful states do not agree easily in conceding to deals of this kind with smaller and less powerful states[338]. As an example, Mexico has appealed to the US for a commitment on automatic exchange of information regarding interest paid by US banks to Mexican residents and vice-versa since 2009, mentioning that this information exchange could assist Mexican authorities in identifying and preventing drug trafficking, money laundering, organized crime and tax evasion[339], and this, in essence, was the same data the US claimed and obtained from Swiss authorities after the UBS scandal. But the US continuously ignored Mexico's appeal

[336] The Multilateral Convention on the Mutual Administrative Assistance in Tax Matters (amended by the 2010 Protocol), commentaries (Paragraphs 64-65) on Article 6.

[337] See the signatories of the Multilateral Competent Authority Agreement. The list is available online at: http://www.oecd.org/tax/exchange-of-tax-information/MCAA-Signatories.pdf

[338] Allison Christians, Tax Treaties for Investment and Aid to Sub-Saharan Africa: A Case Study (2005) Northwestern Law Legal Working Paper Series.

[339] Kevin Preslan, Turnabout is Fair Play: The US Response to Mexico's Request for Bank Account Information (2010) 1 Global Bus. L. Rev., pp. 204.

based on the potential flight of funds from its banking sector[340]. Only very recently has the US agreed to automatic exchanges of information with Mexico, mainly due to their own interest through FACTA[341]. Curiously, with the other border state of the US, Canada, which is a developed country, there has been an agreement in place for automatic exchange of information since 1997.[342]

Additionally, even when the requests of developing countries are accepted, it doesn't mean there will be successful due to powerful states using these appeals as leverage to obtain something else on their agenda.[343] For example, in 2007, Argentina asked for a TIEA with the US, yet, the US administration left the negotiations dependent on Argentina's will to join a more extensive bilateral income TT with the US[344]. There would appear to be nothing wrong with this, except for the fact that Argentina would basically have to agree to all of the US proposals in this proposed bilateral income TT, abdicating of several of its taxing rights, if they desired to obtain fiscal data from the US.[345]

Ultimately, the conclusion of a bilateral agreement is a resource and time-consuming procedures, involving relevant cost, not only in monetary terms but in terms of efforts and time as well. There is an initiation, planning, negotiation, conclusion, and, approval from parliament costs. Although this is a major part of all international commitments, getting involved in negotiations on the same issue with several countries at the same time can bring massive costs for states with smaller budgets and resources. How long it will take for all developing countries to engage into bilateral agreements on automatic exchange of data with all secrecy jurisdictions and tax havens cannot be foreseen right now, but it looks quite certain that it will take long, due to the lack of manpower and resources of developing countries.

With these considerations, it's highly improbable that developing states will have enough strength to complete reasonable agreements on automatic exchange of information with bigger developed states if this is not done at a multilateral level.

It is concerning to think, that even through the Multilateral CAA, there can be an opportunity for discretion and unilateralism. In November 2014, in the press release on Switzerland joining

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[340] Idem.

[341] Agreement between the Department of the Treasury of the United States of America and the Ministry of Finance and Public Credit of the United Mexican States to Improve International Tax Compliance Including with Respect to FATCA (November 2012). Available at http://www.treasury.gov/resource-center/taxpolicy/treaties/Documents/FATCA-Agreement-Mexico-11-19-2012.pdf

[342] Preslan. Supra note 548

[343] Christian Aid, Automatic for the People: Automatic Information Exchange, Tax Justice and Developing Countries (UK: Christian Aid 2013)

[344] Martin Hearson, Why the US and Argentina Have no Tax Information Exchange Agreement (UK: 2013).

[345] Christians. Supra note 307. (A thorough analysis of US policy in entering TT's with less developed states is given by the author)

Multilateral CAA, Swiss authorities stated *that the question regarding the countries with which Switzerland should introduce this exchange of data is not affected by the signing of the multilateral agreement… the bilateral activation of the automatic exchange of information will be submitted to the Federal Assembly separately for approval*[346]*.* This gives the implication that the signing of the Multilateral CAA and its approval will not, on its own, require Switzerland to start automatic exchange of data with the signatory jurisdictions. Apparently, the country can still choose the countries it desires to share information automatically amongst the signatory states.

The moment they sign the Multilateral CAA, all signatory members agree to automatic exchange of data with all of the other signatory states, once the needed rules are in place to establish this commitment.[347] Most of the "precondition" rules are related to the availability of domestic laws on due diligence and data collection by financial entities, on taxpayer confidentiality, data safeguards, and the appropriate use obligations for transmitting and receiving data. The Multilateral CAA specifically states that a signatory must give, by the time of the signing of the commitment or as rapidly as possible after its jurisdiction possesses the needed regulations set up to establish the OECD's CRS, a notification to the Coordinating Body's Secretariat must be sent[348]. Yet, the Multilateral CAA permits the signatory countries, to list the member states they wish to have automatic exchange in effect.[349] Section 2.1 of the Multilateral CAA stipulates, that the agreement will come into force between two competent authorities on the later of these dates: (1) the date which the latter of the two competent authorities has notified the Coordinating Body Secretariat, including the list of the other competent authority's jurisdiction, and when applicable (2) the date that the Multilateral CAA has come into force and is effective for both parties.

From these provisions, some essential questions emerge: What value does the Multilateral CAA have if its signatory states can unilaterally choose the countries amongst the signatory counterparts they wish to share data with? What value does this commitment have for those signatory countries that are not on the list of other signatory parties? Must signatory parties still

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[346] The Swiss Federal Council and Federal Department of Finance, *Switzerland Takes Further Step Towards Introduction of Automatic Exchange of Information* (Switzerland: Bern Swiss State Secretariat for International Financial Matters 2014). The document is available at: https://www.news.admin.ch/message/index.html?lang=en&msg-id=55327

[347] Section 7(1) of the Multilateral CAA. The agreement is available online at: http://www.oecd.org/ctp/exchange-of-taxinformation/multilateral-competent-authority-agreement.pdf;

View also Commentary to Section 7(1) of the OECD Model CAA. The document is available online at: http://www.keepeek.com/Digital-AssetManagement/oecd/taxation/standard-for-automatic-exchange-of-financial-account-information-for-taxmatters_9789264216525-en#page92

[348] Section 7 of the Multilateral CAA

[349] Section 7 (1) (f) of the Multilateral CAA

face arbitrary choosing and are required to struggle for information after the signature of so many layers of multilateral agreements? To conclude, what could be the selection criteria for signatory countries to determine with whom they desire to exchange data?

Indeed, there are many examples of signatory countries that refrain from information sharing even through the Multilateral CAA.

An article from late 2014, showed the Bahamas status regarding the Multilateral CAA, when its minister of finance said that the state "got everything it wanted out of the Multilateral Competent Authority Agreement", for example.[350]

Ultimately, we can see that there is a hidden and malicious bilateralism within the promised multilateralism, in general, and not especially aimed at developing states, but the potential casualties of this bilateralism are most probably developing states, due to their weakness in bilateral agreements. Despite all these facts, the Multilateral Convention and the Multilateral CAA are still the best potential manner for developing states to progress to automatic sharing of data procedures, at least for now.

B) Standard on Automatic Exchange of Information: Problems

The Tax Justice Network (TJN) is an independent international organism that has done an analysis of the Standard from the perspective of developing countries in the initial stage of its development[351].

It emphasizes some particular issues with the Standard:

(I) Reciprocity. In its present format, the Standard obliges for reciprocity, meaning this that if a country receives data automatically, similar duty is expected in return to the country that supplies this data. Consequently, countries are not obliged to give data to a counterpart, if this counterpart is not capable of collecting and providing identical data in return, through its administration and domestic regulations. Apparently, this is considered a fair principle, yet, this principle can restrain most developing states from being part of the automatic exchange of

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[350] Neil Hartnell, *Bahamas 'Got Everything Needed' On Tax Exchange* Tribune 242 (31 October 2014). Available at http://www.tribune242.com/news/2014/oct/31/bahamas-got-everything-needed-on-tax-exchange/

[351] Tax Justice Network*, OECD's Automatic Information Exchange Standard: A Watershed Moment for Fighting Offshore Tax Evasion?* Tax Justice Network 2014). Available at: http://www.internationaltaxreview.com/pdfs/TJN2014_OECD-AIE-Report.pdf;
View also Andres Knobel & Markus Mainzer, *Automatic Exchange of Information: An Opportunity for Developing Countries to Tackle Tax Evasion and Corruption* (Tax Justice Network 2014). Available at: http://www.taxjustice.net/wp-content/uploads/2013/04/AIEAn-opportunity-for-developing-countries.pdf

information system. Singapore, for example, was one of the states that didn't sign the Multilateral CAA at the first opportunity, it committed to it in 2017, but only after declaring in 2014[352], that it would only commit to the Standard if the reciprocity amongst member states would be a reality. This declaration, requires for developing states, to withstand a rapid and daunting task, of the reprioritisation of efforts, to set up the needed mechanisms that make them able to provide information automatically to its treaty counterpart, in order to fulfil the Standard's reciprocity aspect. 4 years to set up such a system, for many developing countries, is a very short time frame, due to major restrictions regarding administrative, financial and technological instruments.[353]

A potential solution given by the TJN has *staged reciprocity*. It proposes the letting go of the reciprocity obligation for developing states at an initial period[354]. Thus, the Standard would initially focus on data transmission, not the data exchange with developing states, that would be given a period to develop their capacity so that they could fulfil the reciprocity requirement in due course.

(II) Confidentiality. It is noted by the TJN, that developing states can face a major issue due to the rigid confidentiality obligations of the Standard. The OECD Model CAA, in its Section 5, permits the data supplying signatory state, to dictate its own national confidentiality law obligations on the receiving signatory state, if the supplying state has stricter confidentiality regulations than the receiving state. Section 7 of the Model CAA permits parties to suspend the agreement if the confidentiality obligations are not fulfilled. The issue is that developing states may not possess the administrative capabilities to give the identical mechanism of confidentiality, like the one given by tax, havens, for example. TJN states that although the confidentiality provisions could aid in dealing with constitutional issues for the exchange of information in some situations, it could lead to possible abuse by secrecy jurisdictions to use these requirements as an excuse to not exchange data with poor states in terms of income.[355]

[352] Singapore Ministry of Finance, Singapore's Implementation of Global Standard for Automatic Exchange of Financial Account Information (Singapore Ministry of Finance 2014). The press release is available online at: http://www.mof.gov.sg/news-reader/articleid/1405/parentId/59/year/2014?category=Parliamentary%20Replies

[353] Richard M Bird & Eric M Zolt, Technology and Taxation in Developing Countries: from Hand to Mouse (2008) National Tax Journal.

[354] Tax Justice Network. Supra note 320, pp.5

[355] Idem. Pps. 7-8

(III) Bilateralism. The Standard stresses out bilateral agreements, making it voluntary to sign a multilateral commitment. Bilateral commitments develop unneeded barriers, thus opening opportunities for secrecy jurisdictions to claim further compromise from developing states. The TJN advice that the Standard should make multilateral agreements mandatory instead of voluntary.[356]

(IV) Capability building. The TJN indicates that tax authorities in developing states need to improve their capability to deal with automatic exchange of data. Thus, it mentions that the G20, the Global Forum, and the OECD must offer material and technical aid to assist developing states in benefiting from the automatic exchange regime, with assistance being given in the manner of aid with juridical alterations, education for employees and IT infrastructure improvements.[357]

C) The lack of democracy in the creation of the rules

The previous sections point out, that the Standard on automatic exchange of financial account information, its actual format, may not exactly demonstrate the capabilities and limitations of developing states to engage in the automatic exchange of information regime. With these issues, one fundamental question emerges: why did this happen?

The Standard was started by the G20 and was developed by the OECD and largely influenced by the US FACTA. The OECD is in its essence, a group of 35 states that are very rich and influential in general. This organism gives a platform for a member to share policy experiences, look for answers for similar issues, identification of good procedures, and the coordination of national and international policies. This organism's mandate contains economic, environmental, financial and social issues.

In recent years, OECD has also assumed an important role in drafting transnational standard and tax rules, by giving guides to best practices, model conventions, recommendations, and standards.[358] Other countries than the OECD member states can have an observer status in these procedures, so they can observe the debating, deliberation and development procedures of the OECD standards and fiscal rules. Nonetheless, it has been demonstrated that non-OECD countries are expected to commit to these regulations and standards, eventually, usually through

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[356] Idem. Pp. 8
[357] Idem. Pp.8
[358] Arthur Cockfield, Rise of the OECD as Informal World Tax Organization through National Responses to E-Commerce Tax Challenges (2005) 8 Yale JL & Tech.

pressure through the means of black-listing, formal recommendations, public scrutiny or some other way of manipulation[359]. The Standard on the automatic exchange of financial account information is a result of such usual procedure, although curiously it was always expected for this Standard to apply at a global scale.

TJN states that ideally the creation and drafting of these transnational fiscal rules should have been given to a distinct international organism, such as the UN, specifically the Committee of Experts on International Cooperation in Tax Matters (the UN Committee on Taxation), that is a legitimate organism to perform this task. It stresses that the mentioned committee should be improved to be a more influential, intergovernmental task force[360]. But, there are some practical problems that make this idea difficult.

The UN Committee on Taxation is constituted of 25 members: 15 members of developing states, and 10 members of developed states. The Committee's work agenda is enforced by the working parties of the Committee that function throughout the year[361]. The Committee's authority is quite extensive, containing all ways of international fiscal policy making[362], but in spite of this, the Committee has little reputation for solving international fiscal situations, mostly because of the lack of staff, little funding and shortage of resources. A significant part of the Committee's work has been around the UN Model Tax Convention and it's from time-to-time revisions and updates, that in most cases are just a replica of the updates of the OECD Model Tax Convention.

On the contrary, the OECD Committee on Fiscal Affairs (the OECD Tax Committee) is a very active international organism, having a huge amount of resources and funds, organizing the

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359 Further info on the OECD's pressure policy is available at: http://www.oecd.org/site/peerreview/peerpressurearelatedconcept.htm

360 Tax Justice Network, supra note 320, pps 5-6

361 UN Financing for Development Office, Committee of Experts on International Cooperation in Tax Matters: Mandate (US: New York: UN Financing for Development Office, 2011).

362 Idem.

The mandate of the UN Committee on Taxation constitutes: 1) to keep under review and update as necessary the United Nations Model Double Taxation Convention between Developed and Developing Countries; 2) to provide a framework for dialogue with a view to enhancing and promoting international tax cooperation among national tax authorities; 3) to consider how new and emerging issues could affect international cooperation in tax matters and develop assessments, commentaries and appropriate recommendations; 4) to make recommendations on capacity - building and the provision of technical assistance to developing countries and countries with economies in transition; and 5) to give special attention to developing countries and countries with economies in transition in dealing with all the above issues.

OECD's work agenda in the fiscal area and gives a mechanism for member states to share perspective on international administrative and tax policy concerns.[363]

The OECD Tax Committee is constituted of a permanent secretariat, and a rotating list of mid-level national tax agents, in multiple sub-committees and task forces. The Committee also has, the Centre for Tax Policy and Administration (CTP), that provides to the Committee technical knowledge, concentrating on domestic and transnational fiscal policy and tax administration situations[364], and the CTP alone, has around 100 members of staff, organizing around 80 events during the calendar year, regarding the full extent of the OECD's fiscal work, joining nearly 100 non-OECD jurisdictions in these events[365]. In recent years, the Committee has started and guided multiple works on bank secrecy, harmful tax competition, and transparency, and consequently, it has drafted and released analogous transnational frameworks.

In 2011, the UN Secretary General appealed for UN member states to indicate their perspectives on the issue of improving the UN's Tax Committee in funding and strength.[366] All developing states (Group of 77 and China included) voted affirmatively for this upgrade of the UN Committee on Taxation[367]. Strikingly, all OECD member countries (with the exception of Chile and Mexico) cast votes against this upgrading, stating as reasons for this that the upgrade could take the focus of the Committee away from its work on the UN Model Tax Convention; Costs and benefits of this should be discussed, since there is no assurance that a representative organism would exist, and this upgrade could double the UN's work, as well as leading to the implementation of various and mutually-inconsistent transnational standards in international taxation, and of course, there

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[363] The mandate of the OECD Tax Committee constitutes: 1) to facilitate the negotiation of bilateral tax treaties and the design and administration of related domestic legislation; 2) to promote communication between countries and the adoption of appropriate policies to prevent international double taxation and to counteract tax avoidance and evasion; 3) to encourage the elimination of tax measures which distort international trade and investment flows; 4) to promote a climate that encourages mutual assistance between countries and establish procedures whereby potentially conflicting tax policies and administrative practices can be discussed and resolved; 5) to support domestic tax policy design through the development of high quality economic analysis of tax policy issues, comparative statistics and comparisons of country experiences in the design of tax systems; 6) to improve the efficiency and effectiveness of tax administrations, both in terms of taxpayer services and enforcement; 7) to support the integration of non-OECD economies into the international economy by strengthening policy dialogue with them to increase their awareness of and contribution to the committee's standards, guidelines and best practices. View OECD, OECD's Current Tax Agenda (France: Paris: Organization for Economic Cooperation and Development 2012), pps. 14-15

[364]OECD, Secretary-General's Report to Ministers 2014 (France: Paris: OECD, 2014).

[365] Idem. pps. 17-18

[366] Hamrawit Abebe et al., A Research and Policy Brief for the Use of the NGO Committee on Financing for Development: The United Nations' Role in International Tax Policy (Italy: Milano: Milano School of International Affairs, 2012), pp. 8.

[367] The Group of 77 at the United Nations is a loose coalition of developing nations, designed to promote its members' collective economic interests and create an enhanced joint negotiating capacity in the United Nations. Idem pp.9

could be the issue of repetition, given that the OECD has made good developments in the fields of tax cooperation and taxation.[368]

Ultimately, in spite of the numbers advantage, the balance of power was not in favour of developing states, and so, the discussion on the UN's Tax Committee's improvement still goes on in the UN work program. Relevant questions emerge such as- can the OECD give a space for representation of developing states, in its global fiscal policy debates?

There are concerns regarding that the bigger the group is, the more difficult it will become, to achieve a consensus on any situation. The absence of representation and democratic procedures, all fiscal policy debates or models are likely to be tendentious and aimed to benefit only those around the debate table.

Having these contending concerns, there seems to be no viable course of action, according to the TJN, with regard to the Standard on automatic exchange of information. If this is true, what are the potential options to have their opinions heard and have their concerns treated? Is there a practical response for this issue? Is it possible for developing states interests to be discussed even though they don't have a place at the "table"? And ultimately, is it possible for the Standard to work for all states or at least, for the majority of states? These are difficult questions to answer. In the following section, a discussion of the OECD's attitude to battle these issues is presented.

8.4. Developing Countries: OECD's approach

Understanding the relevance of all states participating in the automatic exchange of information regime, in their meeting of September of 2013, the G20 leaders, directed the Development Working Group to collaborate with the Global Forum and other transnational organisms to create a roadmap demonstrating how developing states can participate in the Standard. The Development Working Group invited the Global Forum Secretariat to lead the work, and in September of 2014, the Global Forum issued a report called *Automatic exchange of information: a roadmap for developing country participation* (The Roadmap)[369]. The Roadmap evaluates the status of readiness of developing states towards the Standard and indicates benefits, costs and the main building blocks for developing countries to achieve the requirements of the Standard.

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[368] Idem. pps. 10-11, 18.

[369] Global Forum on Transparency and Exchange of Information for Tax Purposes, *Automatic Exchange of Information: A Roadmap for Developing Country Participation* (France: Paris Global Forum on Transparency and Exchange of Information for Tax Purposes 2014).

8.5. Developing Countries: Costs and Benefits

A list of four major benefits of automatic exchange of information for developing states is provided by the Global Forum: (I) detection of fiscal evasion and overseas wealth; (II) prevention of future non-compliance; (III) endorsement of domestic cooperation; (IV) Improving reputation.[370]

The Global Forum acknowledges that the percentage of overseas income that belongs to developing states is superior to that of the global average, and states that the automatic exchange of data could assist tax authorities to achieve effectiveness in data collection and tax levying on these goods[371]. It argues as well, that the establishment of automatic exchange of data, can give a chance for fiscal administrations to improve and strengthen general fiscal administration in developing states, through a rendering "spill over" effect. Ultimately, the Global Forum denotes that developing countries adhesion to the Standard, shows their willingness to commit to transparency and enhancing in fiscal compliance, and consequently improving their reputation. [372]

It is additionally recognised by the Global Forum that automatic exchange of data has exponential costs, denoting that the majority of cost aspects of the system are anticipated to be related to human resource and IT investments.[373]

8.6. Developing Countries: Status of readiness

At the time of the launching of The Roadmap, a survey amongst developing states was taken regarding their status of readiness towards automatic exchange of information was conducted by the Global Forum, and this organism pointed out that it obtained answers from over 100 jurisdictions.[374] The results of the survey showed that several developing states were not in a situation at that time to benefit from automatic exchange of information, only 3 developing countries were capable of participating in the automatic exchange of information in comparison to 50 developed states.[375] A number of 17 developing states stated that they had obtained data automatically, but could not efficiently utilize it because of their limited capabilities to match the data, and as mentioned before, 48 % of the states that participated in the survey, mentioned they desired to get involved in automatic exchange of information but didn't know at what time they

[370] Idem. pps. 9-10
[371] Idem. pp. 10 (Quote from Boston Consulting Group's study: *Global Wealth in 2013*)
[372] Idem. pp.10
[373] Idem. pp.10
[374] Idem. pp.10
[375] Idem. pp. 12

would be capable of doing so, and 14% of developing states noted that they had no intention in engaging in automatic exchange of information, at least for that moment. The World Bank Group pointed out that the biggest challenges for developing states to establish the Standard were banking communications, legal alterations, staff training, IT infrastructure and organizational structure.[376]

8.7. Developing Countries: Proposed solutions of the Global Forum

A series of cornerstone principles have been proposed by the Global Forum to address these issues, this principles being: 1- these issues need a suitable approach for each state; 2- being part of the Standard must be seen as part of the procedure that is cross dependent to a developing state´s capacity building effort and long-run resource mobilization; 3- developing states must be permitted to have enough time and proper assistance; 4- capacity building in developing states are financial centres as well should be considered a priority.[377]

A step-by-step address to guarantee that developing states can defeat barriers in establishing the Standard is also provided by the Global Forum. It sets essential steps to be undertaken by three principal collaborators in this procedure: (I) developing states; (II) the Global Forum, with assistance from an international organism like the World Bank Group and (III) the G20 and the other developed states.[378]

(I) Steps to be followed by developing countries

The first recommended step for developing countries is to become part of the Global Forum[379]. In doing so it is expected of developing countries to assure efficient establishment of the standard of exchange of information upon request and to be part of the peer review process. Additionally, it's also anticipated for them to develop an exchange of information network (Multilateral Convention included). Being part of the Global Forum would allow developing countries to collect benefits from automatic exchange of data experimental projects.

Secondly, it would be expected of developing states, to develop a high standard of political endorsement to make the required alterations, being acknowledged by the Global Forum that

[376] Idem. pp. 12
[377] Idem. pp. 13.
[378] Idem. pp. 14
[379] Idem. pps. 14-15

without this political support it will be very hard for the needed changes to be done in an effective way.[380]

Thirdly, all Global Forum members that are developing states are invited to participate in a voluntary pet project[381]. This project has the intention to figure out how the establishment of the Standard could be achieved in a certain developing state in an effective way. These steps would take place: (a) choosing of participants; (b) initial utility analysis; (c) preparation of an action strategy; d) establishment of the action strategy; (e) evaluation of the action strategy. Every step would be developed on the experience collected and feedback gained from the previous steps. A pet project would be created in adjacent consultation with the developing state and the developing states participating to guarantee that each states particular needs are considered.

Fourthly, it would be anticipated from developing countries, to develop capacities for the Standard in forms that are compatible with their national income mobilization necessities and other fiscal administration upgrades. This is commonly called *developing building blocks*[382], which are a number of dynamic steps that a developing state chooses to begin the establishment process: (a) comprehension of the Standard; (b) dialogue with relevant private sector agents and the financial industry; c) possessing internal agreements and legislation; d) formation and technology.

Fifth and finally, after a successful accomplishment of testing procedures, it is expected from developing states to begin automatic exchange of information with their treaty counterparts[383]. A mandate has been given to the Global Forum to create a mechanism for controlling and verifying this establishment procedure.

(II) Steps to be taken by the Global Forum:

The Roadmap sets out as well, three main actions for the Global Forum, which is expected to perform these actions assisted by other international and regional organism like the World Bank Group[384].

The first action is the improvement of awareness. It has been pointed by the Global Forum that the survey and other consultations demonstrate an absence of knowledge of the Standard and its pros amongst developing states. Thus, the Global Forum mandated its AEOI Group to raise the

380 Idem. pp. 15
381 Idem. pps. 15 and 27-31 (Annex 1: Global Forum Pilot Project Outline).
382 Idem. pp.16.
383 Idem. pp.19
384 Idem. Paragraphs 60-70, pps. 19-20

awareness of the Standard and its pros for developing states[385], including the encouragement of more developing states to be part of the AEOI Group, and have annual Competent Authority assemblies, to provide a chance for the exchange of experiences and training amongst tax agents.

Secondly, it is also required for the Global Forum to provide the design of resource and training materials, and to host training events, and to provide advisory services to give counsel on draft legislation and best procedures.[386]

Third and finally, it is anticipated from the Global Forum, to administer and lead pilot projects in consultation with the World Bank Group, other interested parties and the G20 Development Working Group. The pilot project basically combines a developing state with a developed state, with the goal of testing the actual sharing system on a time limited and non-reciprocal grounds, and by this, the Forum expects to raise awareness between developed states, on how they can assist developing states in their dynamic establishment of the Standard.[387]

(III) Steps to be taken by the G20 and other developed states

The Global Forum, in the Roadmap, gives a series of instructions for G20 and other developed states, to assist developing states in establishing the Standard. These instructions include the encouragement of all states, to become part of the Global Forum and Multilateral Convention; the holding of regional forums to ensure awareness to AEOI, to look at spontaneous sharing of aggregate or detailed info with a particular developing state, to provide funding, resources and technology packages, and finally to send staff to a developing states tax administration that is establishing the Standard.[388]

The Roadmap of the Global Forum seems to be a good beginning, to see developing states integration into the system. Yet, in its present form, the Roadmap has challenging and resource-intensive instructions for developing states to establish the Standard[389], and, at the same time gives rather nominal and theoretical instructions for the G20 and other developed states to help developing countries in the procedure[390]. Curiously, none of these instructions are directed to the bilateralism, confidentiality and reciprocity issues, mentioned in the previous sections, and that have been mentioned by international NGO's and developing states on the Standard.

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385 Idem. pps. 19-20
386 Idem. pp. 20
387 Idem. pp. 20
388 Idem. pps. 21-23
389 Idem. Paragraphs 41-59, pps. 14-19
390 Idem. Paragraphs 71-79, pps. 21-23

8.8. Mandatory preliminary disclosure of aggregate data as a solution

As analysed in previous sections, an automatic exchange of data regime assists in keeping the virtue of a tax system. Yet, the major challenges of establishing automatic exchange of information regimen in developing states, are their constrained administrative, financial and technological capabilities to establish this system. Even if they can surpass these barriers, there is an additional major obstruction: a lack of enthusiasm,

Primarily at the political elite level to be part of the regimen and the reason is relatively clear to most people, so the issue is multi-layered and needs comprehensive attention.

Yet, there is a potential solution that can reduce and even solve some of the mentioned issues. It doesn't relate to giving direct financial aid, or instantaneous technical support, but offers an authentic confidence and motivation to developing states, to take part in the automatic exchange of data system.

While analysing possible actions for the developed states to assist developing states presence in the Standard, the Global Forum instructs developed countries, to think about the spontaneous exchange of aggregate information with a specific developing state[391]. Basically, this means that a developed state partners with a developing country and informs the developing state of the aggregate amount of accounts possessed in its financial entities by the residents of the developing state. The Global Forum mentions that this spontaneous transmission of aggregate information would be optional and would happen to the range the receiving state would comply with the Standard's obligations on confidentiality and data safeguard[392]. The intended end of these unilateral behaviours is (i) to show developing states the potential income benefits of automatic sharing of information; (ii) to raise the prioritization of automatic sharing of data and ultimately (iii) to obtain political agreement for collaboration from developing states.[393]

Although this collaboration would be favourable for any receiving states (not only developing states), it can be argued whether the states have enough motivation to start these behaviours willingly. It is naive to think that a state could commit to freely disclose or exchange with another state, an aggregate amount of accounts possessed in its financial entities by the second's residents. Practically, this freely and impulsive transmission of massive data happens

[391] Idem. Paragraph 74, pp.22
[392] Idem. Paragraph 75, pp. 22
[393] Idem. Paragraph 74, pp. 22

only when the mentioned data is relating to the accounts possessed in third states, so the starter or the information transmitting countries, are in a neutral situation, as far as the data exchanged is concerned, and the possible implications of the transmission.

In general, it is extremely improbable that a state will start this aggregate info sharing willingly, though the data regards non-residents accounts possessed in financial entities in its own territory. Yet, this self-disclosure is fundamental, because this is what the entire automatic exchange of data regime is all about. Thus, the automatic exchange of data regime needs the state to self-report tax-relevant data of non-residents states of domicile. Indeed, the automatic exchange of data regime goes one step further than the aggregate data exchange, by requiring states to self-report accurate asset and identification data on constant grounds.

Given that the majority of developing states may not be prepared for these automatic exchanges, the turning public of aggregate data seems like a good idea to start the transition, meaning, that states must start to do preparatory public disclosures, of aggregate amounts of accounts, possessed in their financial entities, by residents of other states, and this disclosure of aggregate data should be required from all states considered secrecy and tax havens and specially from developing states (given the fact that most developed states have already committed to TIEA's with the majority of tax havens, so the necessity for the disclosure regarding developing states is eliminated. This disclosure should be imperative whether a developing state asks for it or not.

This appears to be an astounding and illogical demand for secrecy jurisdictions and tax has ns. Yet, if we analyse this proposed solution, and compare it with the Standard and its obligations, this proposal looks quite logical.

Firstly, the Standard requires states to obtain accurate data about accounts held by non-residents in their financial entities and transmit it to the accountholders states of residence. Yet, the public disclosure of the aggregate information would not have detailed data or engage in its actual transmission. It is only the public disclosure of the general amount of possible reportable accounts to important jurisdictions, so it does not have confidentiality or privacy issues at this point.

Secondly, most tax havens possess or are close to possessing, access to this data, due to the OECD Common Standard Reporting and Due Diligence for Financial Account Information (CRS) that they have committed to or will commit to soon. It is required by the CRS that states have the needed administrative and legal mechanisms set up, to guarantee the opportunity of relevant data and government's access to this information through its financial entities. Whether this information is available to tax departments of source states due to the CRS, the only action that states do is to accumulate, package and disclose this data state-by-state.

In general, this policy of preliminary disclosure of aggregate data is compatible with the declaration of the G8 states done to the developing states in the 2013 Lough Erne Summit, where they declared “developing countries should have the information and capacity to collect the taxes owed them- and other countries have a duty to help them”.[394]

This public disclosure of aggregate info could be a major support for developing countries, given that it would provide them with an unparalleled motivation and needed confidence to accelerate the procedure of participating in the system, resolving the issue where a developing states’ administration is hesitant to get involved in automatic exchange of data, because this aggregate information disclosure, would put administrations to huge pressure from their general population and from the international community to act. So, this proposed system could serve as a driving force for developing states to battle corruption, illicit money flows, and offshore tax evasion.

Finally, a chance for the developed states to show, that they do care about developing states development and progress, solving a lot of doubt and taking transnational international collaboration to the next level.

9. Conclusions

In this part, we did a thorough observation to the whole issue of automatic exchange of tax information.

We did a comprehensive analysis on the Multilateral Convention, and realized that it was the most comprehensive multilateral framework available for all, for administrative assistance and tax cooperation amongst countries to battle tax avoidance and tax evasion, having the potential to totally alter the international exchange of information system, because it has a large membership base, larger scope than TT’s, TIEA’s and FACTA IGA’s when it comes to the taxes covered.

Then, we discussed FACTA and its IGA’s that represent a unique framework in automatic exchange procedures, given that these frameworks really raised questions regarding the efficiency of the international tax data exchange frameworks through TT’s and TIEA’s, getting global attention

[394] G8 Lough Erne Declaration (Northern Ireland, Lough Erne 2013). The text of the Declaration is available at http://www.g8.utoronto.ca/summit/2013lougherne/lough-erne-declaration.html

to this issue in a very efficient manner in a short time period, and, acting as a stimulant to an official attitude towards moving to automatic exchange of tax information on a worldwide scale.

Discussion on the OECD's Standard on automatic exchange of financial account information was the next issue covered. We realised that it improved transnational cooperation on fiscal issues to a whole new level, facing some of the most serious issues of the previous international exchange of information systems, given that these frameworks were unilateral, bilateral or regional in their nature that led to inefficiency and tensions, they had inconsistencies regarding their material, personal, and practical scopes, and finally the functioning of some of these frameworks was dependent on the existence of additional commitments that were done very seldom.

The Standard resolved most of the problems by at first, giving the conceptual and structural foundations for automatic exchange of information regimes to work on a multilateral ground. Secondly, it has created standard provisions that are compatible with the existing practices in the area, by essentially creating a single worldwide global standard on automatic exchange of tax information and ultimately, it has developed a very necessary framework in the CAA, that the TT's and Multilateral Convention aimed at, but were not capable to create.

We also noticed there are some issues and questions that remain without a reply, like if the CAA will take over the existing frameworks on automatic exchange of information because it looks very improbable this will occur regarding the IGA's specifically, because these agreements have good reasons to continue, due to their importance in assisting the US administration in collecting data on the global assets and income of its citizens, while the Standard has the purpose to assist states in the obtaining of their global assets and income of their tax residents. So, unless the US gives up on its citizenship based tax regime, or the new Standard integrates the US's fiscal regimes particular necessities, the Standard is not as utile, and ultimately some degree of inconsistency and multiplicity of reporting regimen can still remain.

We also observed the EU's approach to this issue, we observed that the EU as a large international organization has also done some work in this matter, especially in the form of Directives, initially with the Savings Directive and then with the DAC´s so that it can keep up with the continuous economic and financial developments in the globalized world we live today, and with the Global Standard.

In this section, we did a greater discussion in taxpayer confidentiality. Initially, in the first part, we concluded that an improvement in international exchange of information must be accompanied by an upgrade in confidentiality and protection of the exchanged data. The big question is if the international community can develop a proper mechanism that assures efficient exchanges of tax information amongst countries, thereby improving worldwide fiscal enforcement and at the same time giving the adequate standard of confidentiality and protection for the exchanged data. The Standard tries to put the first steps for this system, by setting up some very rigid confidentiality obligations and safeguards, like for example, that taxpayer data received by a competent authority must be treated as a secret in the same way as taxpayer data collected through the country's domestic laws, and to the range needed to assure the necessary level of protection of personal information, compatible with the safeguards that can be specified by the supplying country as required under its domestic regulations. In doing so, the Standard basically gives the right to define the level and scope of confidentiality provisions applicable to the exchanged data, mainly to the authority of the data supplying state.

However, it is yet to be analysed how these provisions function but, it is fair to expect that this system has some issues, the main problem being the fact that states in general, like to receive data but have no interest in transmitting it, so, transferring the authority to define the scope of confidentiality provisions applicable to the exchanged data from the state that has a firm interest in obtaining it to the state that generally has no interest in giving it, can possibly set back the appropriate working of the data exchange mechanism, allowing for confidentiality to become the most popular reason to refuse data exchange, and this trend already exists.

Thus, the OECD must rectify its unstable approach and set a minimum standard on taxpayer confidentiality, rather than leaving this subject to the responsibility of tendentious parties, so that this consistency in confidentiality protection, would be guaranteed for the data exchanged in all countries participating, and abuse would be eradicated.

Finally, in the last section, we analysed the situation of international automatic exchange of information and developing states. We started by realising that developing states are faced with a lot of illicit capital flows and offshore fiscal evasion and that the automatic exchange of information regimen, has an enormous potential to address these issues. Yet, there is a concern that most developing states cannot be part of the automatic exchange of information regimen due to the administrative, financial and technological restrictions. Some firm eligibility obligations of the Standard and remaining bilateralism in the Multilateral CAA have contributed to these barriers, leading to around 100 countries not being part of the international exchange of tax information system today, creating the risk that what was intended to be a global standard is in fact not. In general, the possibility that not only the original tax evasion issues continue unresolved, but states that started this system, can become victims of the systems because of the possible transfer of assets to non-participating states.

There is a manner to efficiently integrate developing states into the automatic exchange of information systems, which is that, the G20 and the OECD must persuade all secrecy jurisdictions, to make a public disclosure of the aggregate value of possibly reportable accounts possessed by residents of developing states in their financial entities. This initial disclosure is made, ideally, for each developing state, or for some of them, with grounds on legitimate criteria, like the Global Forum membership.

The consequences of this disclosure would be huge for developing states: it would give them unmatched motivation and the needed confidence to participate in the system and to start automatic exchange of information. It would resolve the absence of political will in some developing states to get involved in automatic exchange of information because this initial public disclosure of the aggregate information would expose administrations to an enormous pressure from the international community and from their general public to take action. In general, it would allow for a quicker and more inclusive route to achieve international automatic exchange of information and transparency on a worldwide range.

FINAL CONCLUSIONS

This century can be defined by an unseen economic and technological globalization. A rising free cross border flow of capital, goods, ideas, information, and services has made possible for a higher integration of economies worldwide. However, these developments have created some difficulties for domestic fiscal systems as well. The residence-based tax regime that is applied in most states for quite a long time, has to prove it's practicability to the new reality present nowadays. A question on how to administer a tax system in a world was countries fiscal and administrative capacities are highly limited to territorial borders, while their residents invest, provide services and trade to a greater extent overseas. It has been observed that the residence-based tax regime is susceptible to abuse if there is no cooperation between countries, and ultimately, of levying fiscal laws on foreign source income of resident taxpayers, which has become one of the main goals of domestic and international income tax regimen.

The results of this work indicate that if countries desire to keep the residence-based income tax system, more specifically, if they want to continue to collect the foreign-source of their tax residents in their future fiscal base, major reforms need to occur. Assuring transparency in overseas economic activities, implementing an efficient international exchange regime and ultimately, adopting a balanced and coordinated approach when it comes to taxing overseas income amongst residence and source states, seem to be necessary measures to start this major reform.

The discussion in this work indicates as well that one key feature of this reform started over 50 years ago, with the introduction of the notion of automatic exchange of information in international fiscal policy mechanisms. Automatic exchange of fiscal data involves periodic and systematic communication of large amounts of taxpayer data by the source state where the taxpayer earns revenues to her/his state of residence regarding multiple types of income. With grounds on the data received it could then be possible for the residence state to assess taxes on the foreign income of the taxpayer. In general, this regimen permits countries to have an improved enforcement of their fiscal regulations on foreign-source revenues of their residents.

The first mention of this notion was done in the Commentary to the OECD Model Tax Convention of 1963, but, at that period of time, countries were not very interested in this idea. The was no urgent necessity or a desire to establish this politically hard, costly and intrinsically domestic fiscal enforcement instrument, similar to third-party tax data reporting in an overseas situation, so the notion of automatic exchange of tax data continued as an idea only.

Rather than this, countries pursued efforts on the establishment of a different transnational mechanism, the exchange of information "upon request". In this mechanism, a country can request certain tax data, like foreign assets of its resident taxpayers, for example, from another country. But, to do so, a country has to have specific information regarding its resident's foreign assets and the location of these assets. Indeed, inter-state assistance is required for this reason, because normally states don't have this specific data, and given they had this info, there would not be a necessity for information requests and so this system is not very useful.

Some states noted this issue and tried to put the concept of automatic exchange of information in operation. It was initially established in 1972 by the so-called Nordic Convention between Denmark, Finland, Iceland, Norway and Sweden, and this framework made way for the Multilateral Convention of 1988, done by the Council of Europe and the OECD, which is a broader framework in terms of membership and a real attempt for a global mechanism to establish this notion. The Multilateral Convention integrated clauses that permitted automatic exchange of information amongst signatory parties. Yet, this framework needed the existence of a further agreement between the parties that desired the exchange, that implemented the procedures to be adopted and the kind of data to be shared automatically. Unfortunately, these additional agreements were rarely done.

The major push towards an attitude alteration on the automatic exchange of tax information notion was done in 2010 when the US passed the FACTA legislation. FACTA tried to apply this notion unilaterally in the US and in a worldwide context by demanding that financial entities from all over the world to report their data on US account-holders to the US IRS, having a severe penalty of 30% withholding tax on US source income all foreign financial entities that did not fulfil these requirements. This was a highly controversial and hard to apply domestic regulation that had a major extraterritorial range, and consequently, the US initiated, in 2012, new bilateral commitments, the FACTA IGA's, to make the establishment of the FACTA system easier by transforming it into intergovernmental and reciprocal. One of the major benefits of these commitments was that, by following the procedures done by their governments after the conclusion of an IGA with the US, non- US financial entities would be regarded as compliant to FACTA, which meant that the US would not levy the 30% withholding tax on US source income on those financial entities.

All these frameworks, like the Multilateral Convention and FACTA, have had one simple goal: maintain states informed of foreign revenues, assets, and holdings of their resident taxpayers and then to be able to levy taxes on these revenues.

A very important role to achieve this goal has to be played by financial entities.

Yet, the unilateral, bilateral or regional nature of these legal frameworks and the absence of uniformity within them has created enormous difficulties.

Firstly, these frameworks usually overlap, by touching on the same fiscal authorities and the same taxpayers but from different perspectives and with different standards of requirements. To explain this, a state can be part of the Nordic Convention, the Multilateral Convention and have a FACTA IGA, each of these frameworks, having a distinct material and geographical scale but the same purpose.

Secondly, there are many discrepancies and inconsistencies amongst these frameworks. For example, FACTA IGA's have *de minimis* thresholds for reportable accounts, the other frameworks do not have these thresholds. There are also disparities in the requirements in the definition of the beneficial owner of reportable accounts. These issues originate challenges for financial entities that are primary administrators and cost bearers of these legal frameworks.

Thirdly, although the notion of automatic exchange of tax information has only been applied for a few years, it has been observed that automatic exchange of information commitments through these frameworks, are less efficient in triangular situations, meaning, that if fiscal commitments are done only in a bilateral or a very limited context, taxpayer can simply channel their investments and revenues through a non-participating third country. In this situation, we can observe that these frameworks merely relocate or alter the issue of offshore tax evasion instead of solving it. Not only would the original offshore fiscal evasion issue continue unresolved, but also the states that started this regimen could become victims of their regimen.

In 2014, the OECD's Standard on Automatic Exchange of Financial Account Information in Tax Matters began an action to deal with these issues, by trying to implement some standardization and uniformity to these discrepant international frameworks, through the introduction of the CRS. The CRS has overall due diligence provision, for financial entities to follow, in the establishment of reportable accounts. The Standard tries to apply the notion of automatic exchange of information on a global scope, by the introduction of a Multilateral Model of the CAA.

In October of 2014, more than 50 states met in Berlin to put the signature to the first-ever Multilateral CAA, establishing the automatic exchange of tax information system on a worldwide scale. Today there nearly 100 states that have committed, to an ambitious and thorough schedule, to establish the CRS and the Multilateral CAA, leading to the first automatic exchanges in 2017 or latest 2018. This was a major step in the worldwide trend towards a new tax enforcement regimen.

These developments recognize a simple conclusion, which is that countries have at last agreed that the present income tax regimen, needs higher international cooperation. The developments point out, that states have recognized the possible role that automatic exchange of information has, as one of the most promising tools of this cooperation, and have started to engage in it. Yet, there are some difficulties expected in this transition to this new system.

This transition will not be easy, because some states, the so-called *secrecy jurisdictions* or *tax havens* that have collected benefits from the non-cooperative and non-transparent world for a long time, will try to prevent automatic exchange of tax information, from becoming a worldwide practice. The international community needs to persuade secrecy jurisdictions and tax has ns, that the automatic exchange of information regimen and more specifically, worldwide tax transparency, is a unique dominant action plan that has better results for all countries in the long term, than the current systems.

This transition needs to be gradual, preventing unneeded victimization from the taxpayers involved and societal divisions. A major concern is that this regimen will basically disclose the situations of foreign assets and revenues of residents that have concealed overseas for several years, and were never known to the states of residence previously because they were never declared. Consequently, the issue of regularization of previous fiscal liabilities become critical when states begin the data exchanges. Administrations need to look for ways to solve this issue in an effective, fair and smooth way.

When the Standard comes into force, an enormous volume of potentially sensitive taxpayer financial and personal data will continuously flow between national fiscal administrations worldwide. Thus, the upgrade in international exchange of information relations must be accompanied by an upgrade in the protection of the exchanged information, and this, the Standard is trying to achieve. It provides some rigid confidentiality provisions for transnational tax data exchanges. It puts the authority of the determination of the level and scale of confidentiality rules applicable to the exchanged data, to the responsibility of the data supplying state that normally has no interest in giving information, allowing for this issue to become the new popular statement against transnational information exchanges.

It is more suitable for an international organism to define a minimum level regarding confidentiality of the exchanged information than leaving this subject to the responsibility of any tendentious parties, assuring like this, consistency in confidentiality protection for the exchanged data through all participating jurisdictions and prevent imprudent function in this subject.

It must be acknowledged that the automatic exchange of information regime will be efficient when all, or the majority of countries participate in it. Until there are zero non-participating countries in this regime, it has gaps in it. The OECD's Standard on automatic exchange of information has the purpose of implementing a platform for a constant flow of data, primarily amongst tax havens and developed countries. It initially largely ignored developing states, and although there was a slight improvement from 2014 until now, there is still room for improvement. Indeed, some rigid obligations of the Standard, such as firm confidentiality regulations, immediate reciprocity, and multi-bilateralism, could prevent many developing states from participating in this regime in the near future. Incentivising developing countries to participate, bearing and accommodating their necessities in the process, has to be a fundamental part of this transition because, without the participation of developing countries, the Standard cannot become a global framework like is meant to be. If developing countries continue to be ignored we can assist in the emergence of new secrecy jurisdictions and tax has ns, the developing countries.

To finalize, it must be realized that this regimen is relatively new and that the first automatic exchanges of information only occurred very recently. Many features of this concept are still under serious debate and scholars will continue debating around this issue. Some issues that need urgent analysis are regarding the determination of reportable persons and more specifically, the beneficial owners of reportable accounts, the quality of data that is shared, and countries abilities to use the provided data. Additionally, taxpayers possess firm self-protection and adapt rapidly to new rules and systems, so many challenges will still emerge involving these issues in years to come.

That most important fact, in my opinion, is that a new age of transparency is emerging in the international fiscal system and states are focused on engaging in it. Rising economic globalization necessitates an extensive tax administrative cooperation between states, and the regimen of automatic exchange of information is leading the world towards this route.

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