

TECHNOLOGY, PRIVACY AND THE FUTURE OF TAXATION

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INTERNATIONAL INFORMATION SHARING

by

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1. Introduction

1. Four decades of increased trade and financial liberalization, coupled with rapid advances in communications technology, have dramatically increased cross-border trade and financial activity. These developments have had positive effects on the global economy but have also made the tax authorities' task more difficult. While taxpayers can operate relatively unconstrained by national borders, tax authorities must respect these borders in carrying out their functions. Although most taxpayers seek to comply with the tax laws, non-compliance in the international context presents significant and growing challenges for tax administrators around the globe. While it is difficult to quantify the overall revenue losses from this form of non-compliance, it is generally regarded in many countries as constituting a serious level of revenue leakage. Left unchecked or treated inadequately, it is inevitable that national tax bases will be further eroded, with negative future consequences for honest taxpayers and the overall integrity of national tax systems.

2. The experience of many tax administrations indicates that international non-compliance cuts across all taxpayer segments and takes many different forms:

- Individuals concealing taxable assets or income through the use of foreign bank accounts, offshore trusts or shell companies, often located in countries that do not exchange relevant information for tax purposes.
- Small or closely-held businesses using shell companies to shift profits abroad often using fictitious invoices or over (or under) charging for related party transactions.
- Large (often multinational) corporations engaging in any number of sophisticated transactions ranging from cross-border financial schemes which are profitable only due to the embedded tax benefits, to the misuse of tax treaties, to the manipulation of transfer pricing to artificially shift income into low tax jurisdictions and expenses into high tax jurisdictions.

3. Administrative co-operation between foreign tax authorities helps them to deter, detect, correct and, in appropriate cases, penalize, such non-compliance. A key element of such co-operation in tax matters is information sharing between tax authorities.

4. Exchange of information between tax authorities gives them access to relevant information that they otherwise would not be able to obtain. It also helps them to maintain sovereignty over their choice of

¹ The views expressed in this paper are those of the author and do not necessarily reflect those of the OECD or its member countries.

tax system. If taxpayers are able to cheat the domestic tax system by concealing income, assets and the true nature of their activities abroad, the design of that country's tax system may become increasingly influenced by the effects of secrecy laws (or de facto secrecy resulting from lack of effective exchange of information) of other countries rather than domestic tax policy objectives.

5. Legal instruments that provide for exchange of information in tax matters have been around for some time but have recently grown in importance due to the changing, more global economic environment. Tax authorities are also thinking more strategically about the types of information they exchange and how they exchange it. The use of technology to share information has the potential to improve the efficiency of exchange of information but must provide equivalent guarantees of confidentiality to those available under traditional, paper-based exchanges of information.

6. This paper describes the purposes of information exchange, the legal mechanisms available that permit information exchange between tax authorities, how information exchange works, the rules that protect the confidentiality of shared information, recent developments in the use of technology to facilitate information exchange and trends in information sharing.

2. Purposes of exchange of information between tax authorities

7. Exchange of information provisions of bilateral or multilateral agreements provide a legal framework for the tax authorities of one country to obtain such information from another country. Information is typically exchanged for one of two purposes. First, information is exchanged to ascertain the facts in relation to which the rules of an income tax convention are to be applied. Second, information is exchanged with a view to assisting one of the contracting parties² to an income tax convention or exchange of information agreement in administering or enforcing its domestic tax law. The former case only arises in connection with exchange of information pursuant to a bilateral income tax convention whereas the latter may occur in the context of either a bilateral income tax convention or a bilateral or multilateral mutual assistance or exchange of information agreement.

8. Separate and apart from ensuring the enforcement of domestic tax laws or the provisions of tax conventions, exchange of information provisions also act as a strong deterrent to taxpayers considering hiding income, assets or activities from their domestic tax authorities by shifting them abroad. In order to avoid having such behavior simply move to those jurisdictions that do not engage in effective exchange of information for tax purposes, it is important for countries to establish exchange of information relationships with as many other countries as possible.

3. Legal bases of exchange of information

9. There are a number of international legal instruments on the basis of which exchanges of information for tax purposes may take place:

- Bilateral tax conventions, which are generally based on the OECD Model Convention on Income and on Capital (“Model Convention”) or the United Nations Model Convention on Income and Capital.
- International instruments designed specifically for administrative assistance purposes in tax matters such as tax information exchange agreements generally based on the 2002 Model Agreement on Exchange of Information on Tax Matters (“Model Agreement”), the Council of

² For the sake of convenience, the term “contracting parties” is used throughout. The term is intended to include the references to “Contracting States” in the Model Convention.

Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters (“Council of Europe/OECD Convention”), the Nordic Convention on Mutual Administrative Assistance in Tax Matters, the Model Agreement on the Exchange of Tax Information developed by the Inter-American Centre of Tax Administrations (CIAT), the U.S. Discussion Draft of the Caribbean Basin Exchange of Information Agreement or the Model Agreement on Co-operation and Mutual Assistance on Issues of Compliance with Tax Legislation developed by the Russian Federation.

- Within the European Community, the EC Directive on Mutual Assistance (Directive 77/799/EEC as updated), for exchange of information for VAT purposes, Regulation No 1798/2003 and for excise duties, Regulation No 2073/2004.
- International judicial assistance agreements, such as the European Convention on Mutual Assistance in Criminal Matters (as extended to tax matters by the Additional Protocol of 17th March 1978) in cases of prosecution for a tax offence, or the Inter-American Convention on Mutual Assistance in Criminal Matters (as extended by the Optional Protocol of May 23, 1992) in cases of tax crimes.

10. Procedures for providing assistance to foreign jurisdictions may also be established in domestic law. For instance, Germany permits the provision of information to another jurisdiction, subject to certain conditions and safeguards (e.g. reciprocity and confidentiality of information), even in the absence of an international agreement and solely based on its domestic law provisions.³

11. When more than one legal instrument may serve as the basis for exchange of information, the problem of overlap is generally addressed within the instruments themselves.⁴ Where the applicable instruments contemplate the co-existence of more than one information exchange provision and if there are no domestic rules to the contrary, the competent authorities are generally free to choose the most appropriate instrument on a case-by-case basis.

12. The discussion that follows focuses primarily on Article 26 of the Model Convention and on the Model Agreement given that these are the main models currently being used to establish exchange of information for tax purposes.

4. Assistance in criminal tax cases

13. Article 26 of the Model Convention and Article 1 of the Model Agreement permit exchange of information in cases that involve criminal tax offences. There may also be – depending on the nature of the legal system of the contracting parties as well as the facts and circumstances of any particular case – alternative legal instruments⁵ through which exchange of information is possible when an inquiry or investigation has criminal aspects and in certain situations countries may have a preference for using such

³ See *Tax Co-operation: Towards a Level Playing Field: 2006 Assessment by the Global Forum on Taxation* (OECD, 2006) for a review of the legal and administrative frameworks of 82 countries and jurisdictions in the areas of transparency and exchange of information for tax purposes.

⁴ See Article 27 of the Council of Europe/OECD Convention, Article 12 of the Model Agreement, and Paragraph 5.2. of the Commentary on Article 26 of the Model Convention, for EU Member States. See also Article 11 of the 1977 EC Directive, “Applicability of wider-ranging provisions of assistance.”

⁵ For example, mutual legal assistance treaties or domestic law provisions that may permit exchange of information in criminal matters even in the absence of international agreements.

instruments.⁶ Unlike the Council of Europe/OECD Convention, neither Article 26 of the Model Convention nor the Model Agreement⁷ contains a rule that would limit its scope of application depending on the stage of a criminal investigation.⁸ Competent authorities may, therefore, request information under Article 26 or the Model Agreement even if criminal tax proceedings have been instituted against a taxpayer, provided, of course, that the information is requested for the purposes covered by Article 26 or the Model Agreement (see paragraph 7, above).

5. Assistance in tax collection

14. Article 26 of the Model Convention and Article 1 of the Model Agreement do not provide for assistance in tax collection in the sense of empowering the competent authorities to use their powers of collection on behalf of the other contracting party. However, the scope of both the Model Convention and the Model Agreement include information exchange for “collection of taxes.” Thus, information that would assist in the collection of domestic taxes can be exchanged between contracting parties.

15. Article 27 of the Model Convention deals with assistance in the collection of taxes. Both the Nordic Convention on Mutual Administrative Assistance in Tax Matters and the Council of Europe/OECD Convention also include provisions on tax collection and the EU has the Directive on Mutual Assistance for the Recovery of Tax Claims (Directive 76/308/EEC as amended by Directive 2001/44/EEC).

6. Forms of exchange of information

16. Article 26 does not limit the forms or manner in which information exchange can take place. The main forms of information exchange are: on request, automatic and spontaneous. The Model Agreement only applies to the exchange of information on request, although the contracting parties may agree to expand their co-operation by including the possibility of automatic and spontaneous exchange.⁹

- *Exchange of information on request.* Exchange of information on request refers to a situation where the competent authority of one country asks for particular information from the competent authority of another contracting party. Typically, the information requested relates to an audit, examination, inquiry, or investigation of a taxpayer’s tax liability for one or more specified tax years. Before making such a request, a contracting party should use all means available in its own territory to obtain the information except where those would give rise to disproportionate difficulties.
- *Automatic exchange of information.* Automatic exchange of information (also called routine exchange by some countries) involves the systematic and periodic transmission of “bulk” taxpayer information by the source country to the residence country concerning various categories of income (e.g. dividends, interest, royalties, salaries, pensions, etc). This information

⁶ For example, where the seizure of original records for evidentiary purposes is requested and the requested country can only undertake such measures if the request is based on a mutual legal assistance treaty.

⁷ Article 26 of the Model Convention and Article 12 of the Model Agreement only recognise that different exchange of information instruments may coexist.

⁸ The Council of Europe/OECD Convention covers information exchange in preparation of criminal proceedings but does not apply once criminal proceedings have begun before a judicial body. See Explanatory Report, paragraphs 9 and 56.

⁹ The Council of Europe/OECD Convention contains specific articles dealing with information exchange upon request, spontaneous information exchange, automatic information exchange as well as simultaneous tax examinations and tax examinations abroad. See Articles 5 through 9.

is obtained on a routine basis in the source country (generally through reporting of the payments by the payer (financial institution, employer etc). Automatic exchange can also be used to transmit other useful types of information such as changes of residence, the purchase or disposition of immovable property, VAT refunds, etc.¹⁰ The country of residence tax authority can then check its tax records to verify that resident taxpayers have reported their foreign source income. In addition, information concerning the acquisition of significant assets may be used to evaluate the net worth of an individual, to see if the reported income reasonably supports the transaction. There are an increasing number of countries involved in automatic exchange using different types of media: diskettes, CD-ROMs and also paper. Normally, countries interested in automatic exchange will agree in advance as to what type of information they wish to exchange on this basis.

- *Spontaneous exchange of information.* Spontaneous exchange of information is the provision of information to another contracting party that is foreseeably relevant to that other party and that has not been previously requested. The effectiveness of this form of exchange of information largely depends on the ability of tax inspectors to identify, in the course of an investigation, information that may be relevant to a foreign tax administration. Information provided spontaneously is usually effective since it concerns particulars detected and selected by tax officials of the sending country during or after an audit or other type of examination. For example, a foreign tax administration informed on a spontaneous basis that commission fees were reported to have been paid to one of its residents, may find out that no commission fees were actually paid and it may report this fact to its counterpart who supplied the information. As a result, the deduction of the commission fees will be denied and the taxable income adjusted accordingly.¹¹

17. There are also other forms of exchange of information besides the traditional ones described above:

- *Simultaneous tax examinations.* A simultaneous tax examination is an arrangement by two or more countries to examine simultaneously and independently, each on its territory, the tax affairs of one or more taxpayers in which they have a common or related interest with a view to exchanging any relevant information which they so obtain. The existing differences in statutes of limitations of countries are a major practical consideration in the selection of cases. Such examinations are particularly useful in the area of transfer pricing and in identifying tax evasion schemes involving low tax jurisdictions. The OECD has designed a model agreement for the undertaking of simultaneous tax examinations to facilitate this process.
- *Visit of authorized representatives of the competent authorities.* Travel to a foreign jurisdiction for purposes of gathering information for a particular case may be useful in certain circumstances. However, such a visit has to be authorized by the foreign jurisdiction (and be permitted by the laws of the sending country); otherwise it would represent a breach of sovereignty. Thus, the decisions of whether or not to authorize such visits and whether the presence of foreign tax officials should require the consent of the taxpayer (as well as any other terms and conditions for such visits) fall

¹⁰ These other types are not at present supported by the standard transmission formats (SMF/STF) developed by the OECD.

¹¹ The Council of Europe/ OECD/Convention specifically sets forth the circumstances in which the contracting parties should provide information spontaneously. See Article 7(a) through (e).

within the sole discretion of individual countries. The tax officials must be authorized representatives of the competent authorities in order to engage in such visits. Such visits may be made at the request of the country seeking the information if it is felt that it will facilitate the understanding of the request and the gathering of information. They may also be initiated by the requested competent authority so as to reduce his country's cost and burden of gathering the requested information. In a number of countries, authorized representatives of the competent authorities of the other country may participate in a tax examination and this is often of great value to develop a clear picture of the business and financial relations a resident of one country may have with its foreign associates.

- *Industry-wide exchange of information*: An industry-wide exchange of information does not concern a specific taxpayer but an economic sector as a whole, for instance, the pharmaceutical industry or the oil industry. An industry-wide exchange involves representatives of contracting parties meeting to discuss the way in which a particular economic sector operates, the financing schemes, the way prices are determined, the tax evasion trends identified, etc.

7. The authority to exchange information

18. In most countries, contacts and relations with other countries fall within the competence of the Ministry of Foreign Affairs. In principle, therefore, official contacts with foreign countries have to be made through diplomatic channels. In the case of information exchange in tax matters, this may, however, not be very practical and would result in needless disclosure of taxpayer information to another governmental department. The Model Convention and the Model Agreement therefore allow the contracting parties to designate one or more “competent authorities” to deal directly with each other.¹² The competent authority is nominated by each contracting party and is typically a senior official in the Ministry of Finance (either in the treasury or the tax administration part) or an authorized delegate thereof.

19. The function performed by the competent authority is generally centralized within the Ministry of Finance. The existence of this central body ensures co-operation and the necessary consistency with respect to the exchange of information policy. There are, however, situations in which certain responsibilities of the competent authorities may be delegated to a local level, for instance, in matters dealing with the hiring out of labor across borders, where direct and speedy contacts between local tax authorities on each side of the border may be the only way in which exchange of information may be effective. This does not imply, however, that the competent authority is no longer involved. In cases of delegation of certain competent authority functions, clear arrangements between the competent authorities will be necessary (e.g. the types of information that may be exchanged, the relevant subject matter area to which this exchange may apply, the process for keeping the competent authorities involved).

20. As the term “competent authority,” usually means the Ministry of Finance or its authorized representative, a judicial authority of one country cannot directly transmit requests for information to another country on the basis of Article 26 or the Model Agreement.

8. Scope of exchange of information

21. Both Article 26 of the Model Convention and Article 1 of the Model Agreement envisage information exchange to “the widest possible extent.” Nevertheless, they do not allow “fishing expeditions,” i.e. speculative requests for information that have no apparent nexus to an open inquiry or

¹² Article 3(1)(f) Model Convention, 4(1)(b) Model Agreement. This approach is also found in the Council of Europe/OECD Convention, see Article 3(1)(d).

investigation. The balance between these two competing considerations is captured in the standard of “foreseeable relevance.”¹³ The Model Agreement specifically sets forth the type of information that a requesting party should provide to “demonstrate the foreseeable relevance of the [requested] information to the request.” See Article 5 (5). Although Article 26 of the Model Convention does not specify the types of information to be included in a request, the OECD Manual on the Implementation of Exchange of Information for Tax Purposes¹⁴ includes a checklist of information to be included in a request.

22. Exchange of information covers all information that is foreseeably relevant to the administration or enforcement of the domestic laws of the contracting parties concerning taxes. In addition, the Model Convention also contemplates information exchange for carrying out the provisions of the convention. Some older income tax treaties limit information exchange to the latter category (i.e. information exchange for purposes of applying the convention). However, among OECD members only Switzerland still seeks the inclusion of such a “narrow” exchange of information clause in its bilateral income tax conventions and Switzerland is willing to provide information exchange for domestic law purposes “in cases involving acts of fraud subject to imprisonment according to the laws of both Contracting States.”¹⁵ As of 4 July 2007, Switzerland has protocols to its bilateral conventions which have entered into force with Austria, Finland and Spain, and has signed protocols to its bilateral conventions with South Africa on 8 May 2007 and the United Kingdom on 26 June 2007 that provide for the exchange of information upon request in cases of tax fraud or the like. In addition, Switzerland has initialed revised provisions on the exchange of information with almost all those OECD Member countries that had asked for an adaptation of the article. The revisions of the treaties with Austria, Finland, Norway, Spain and the United Kingdom also provide for another significant departure from Switzerland’s previous practice in that they allow for exchange of information in both civil and criminal tax matters related to holding companies. Switzerland is engaged in negotiations with other countries to include similar provisions in its treaties with those countries.

23. Examples of the scope of Article 26 of the Model Convention are shown in paragraphs 7 and 8 of the Commentary.¹⁶ For instance, for the application of Article 12 of the Model Convention (royalty payments), the country of residence may ask the source country the amount of royalties transmitted to one of its residents, the source country may ask the country of the recipient of the royalties whether the recipient is a resident and whether he is the beneficial owner of the royalties for purposes of the exemption from withholding. Furthermore, for the application of Article 7 (Business Profits), Article 9 (Associated Enterprises), Article 23 A (Exemption Method) and Article 23 B (Credit Method) of the Model Convention, information may also be needed for the proper allocation of profits between associated enterprises in different countries or between a head office in one country and a permanent establishment in another country. Information necessary for the application of Article 9 also includes information on ownership and control in a foreign person for purposes of establishing whether or not enterprises are associated within the meaning of Article 9.

24. A request for information for the administration or enforcement of the domestic laws either under

¹³ The previous version of Article 26 of the Model Convention used the standard of “necessary.” The Commentary explains that the change from “necessary” to “foreseeably relevant” was not intended to alter the effect of the provision but was made to better express this balance and to achieve consistency with the Model Agreement. See, paragraphs 4.1 and 5 of the Commentary on Article 26. The OECD/Council of Europe Convention also uses the standard of “foreseeably relevant.” See Article 4(1).

¹⁴ Module 1, On Exchange of Information on Request available at www.oecd.org/taxation.

¹⁵ See the Swiss reservation on Article 26 of the Model Convention.

¹⁶ For each Article of the Model Convention, there is a detailed Commentary that is intended to illustrate or interpret its provisions.

Article 26 of the Model Convention or Article 1 of the Model Agreement could include any or all of the following items:¹⁷

- The fiscal residence of an individual or a company.
- The tax status of a legal entity.
- The nature of income in the source country.
- The income and expenses shown on a tax return.
- Business records (for instance to determine the amount of commissions paid to a company of another country).
- Formation documents of an entity and documents about subsequent changes of shareholders/partners.
- Name and address of the entity at the time of formation and all subsequent name and address changes.
- Number of entities residing at the same address as the requested entity.
- Names and addresses of the directors, managers, and other employees of a company for the relevant years, evidence (contracts and bank statements) of their remuneration, social security-payments and information about their occupation with regard to any other entities.
- Banking records.
- Accounting records and financial statements.
- Copies of invoices, commercial contracts, etc.
- The price paid for goods in a transaction between independent companies in both countries.
- Information involving a so-called triangular situation where in transactions between two companies, each situated in a contracting party, a company of a third country C (with which neither country A nor B have an information exchange instrument), is interposed. In this example, countries A and B may exchange information regarding transactions with the company in country C for the correct taxation of their resident companies.
- Prices in general, necessary to check the prices charged by their taxpayers even if there are no business contacts between the taxpayers. For instance, country A may wish to check prices charged by its taxpayers by reference to transfer pricing information on similar transactions in country B, even if there are no business contacts between the respective taxpayers in countries A and B. (see paragraph 8, sub-paragraph c of the Commentary on Article 26 of the Model Convention).

25. The scope of information exchange under the Model Convention and the Model Agreement also

¹⁷ This list is intended to serve as an illustration and is not intended to be exhaustive. Moreover, it should be noted that a request for information is subject to the reciprocity requirements discussed in paragraphs 44 through 47, below.

permits the exchange of confidential non-taxpayer specific information such as statistics, information about a particular industry, tax evasion trends, and administrative interpretations and practices.

9. Persons covered

26. Exchange of information is not limited to information relating to the affairs of residents of the contracting parties.¹⁸ The tax administration of one of the contracting parties will have a legitimate interest in receiving information on activities carried on in the other contracting party by a particular person resident in a third country because the tax liability of the latter as a non-resident taxpayer is at issue. There may also be situations where a contracting party could have an interest in receiving information about a third country resident who is not subject to tax in either of the contracting parties, for instance when the information is relevant to the taxation of a third party who is a taxpayer or resident of the requesting party. Of course, contracting parties cannot provide information on third country residents that is neither held by their authorities nor is in the possession or control of persons within their territorial jurisdiction. While this concept of jurisdictional limitation is implicit in Article 26 it is explicitly stated in Article 2 of the Model Agreement.

Example 1: Bank A, resident in country A has branch operations in both country B and country C. Bank A is engaged in the trading of financial assets and its operations in countries A, B, and C are carried out on a highly integrated basis. In the process of determining the taxable income of Bank A's branch in country B, the competent authority of country B requests information from country C relating to the branch operations of Bank A in that country.

Example 2: Component manufacturer A, resident in country A, sells components to a related distributor resident in country B and to unrelated distributors resident in country C. Country C's customs authorities record information on prices charged by A to country C distributors. In connection with an income tax audit of the transfer prices used by the distributor resident in country B, the competent authority of country B requests information from country C relating to the import prices charged by A to country C distributors.

Example 3: A trust has three trustees. Trustees A and B live in Country Y. Trustee C lives in Country Z. Trustees A and B were involved in a transaction but declined to provide, to the tax authorities of Country Y, information concerning the transaction, on the basis that the necessary documents are held by Trustee C, who is refusing to provide them with copies. The competent authority of Country Y asked the competent authority of Country Z to obtain copies of the relevant documentation from Trustee C.

10. Taxes covered

27. The exchange of information under the Model Agreement applies to the administration and enforcement of the taxes covered by the Agreement.¹⁹ The Model Convention uses a different approach and Article 26 also applies to taxes not otherwise covered. Article 26 provides that information exchange applies to taxes "of every kind and description" and goes on to state that the exchange is not limited by Article 2 (Taxes Covered).²⁰ Thus, Article 26 determines the types of tax for which information can be exchanged rather than Article 2 (Taxes Covered).

¹⁸ See Article 26, paragraph 1 Model Convention, Article 2 Model Convention and Article 1, paragraph 3 of the Council of Europe/OECD Convention.

¹⁹ The Council of Europe/OECD Convention lists the taxes to which it applies in Article 2, paragraph 1.

²⁰ The vast majority of bilateral income tax conventions currently in force do not cover taxes of every kind and description but are limited to the taxes covered by the Convention.

Example 1: Country A and country B have entered into a tax convention that follows the OECD Model Convention, i.e. while the convention generally only covers taxes on income and capital the exchange of information article contains no such restriction. The competent authority of country A requests certain transactional information about a resident person in country B for the purpose of verifying the sales tax liability of a person resident in country A. The competent authority in country B cannot refuse to comply with the request on the grounds that sales taxes are not otherwise covered by the convention.

Example 2: Same as Example 1 except that country A and country B have entered into a tax information exchange agreement, based on the Model Agreement, that only covers taxes on income and capital. The competent authority in country B does not have to comply with the request because sales taxes are not covered by the agreement.

11. Years covered

28. Time periods during which tax situations may be examined vary from country to country and the beginning of the tax year does not always coincide with the calendar year. Where there is a significant time lag between the time the information is supplied and the year to which the information relates, a statute of limitations issue may arise. The question of whether use of the information is time barred has to be determined by reference to the statute of limitations rules of the country where the information is to be used. In certain countries (e.g. France) the sending of a request for information concerning a case subject to a tax examination will suspend the statute of limitations. For questions relating to exchange of information and the issue of entry into force and effective dates, see Article 15 of the Model Agreement and paragraph 10.3. of the Commentary on Article 26 of the Model Convention.

12. Obligation to exchange information

29. Under either the Model Convention or the Model Agreement, the exchange of information is mandatory. This is due to the use of the word “shall” in the first sentence of both Article 26 of the Model Convention and Article 1 of the Model Agreement.²¹ In connection with the Model Convention, the obligation to exchange information is provided by the Article insofar as the taxation under the domestic laws concerned is not contrary to the Convention.

30. The obligation to exchange information is not limited to information contained in the tax files held by a tax administration. Where requested information is not available in the tax files, the requested party must use its information gathering measures to seek to obtain the information from the taxpayer(s) or third parties.²² This may include special investigations or special examination of the business accounts kept by the taxpayer or other persons. Whether or not the requested party has an interest in the information for its own tax purposes is irrelevant. Information must be provided even where the requested party does not need the information for the administration or enforcement of its own tax laws.

31. In some cases, contracting parties may need information in a particular form to satisfy their evidentiary or other legal requirements. Where specifically requested, and to the extent allowable under its domestic law, the competent authority should try to obtain information in the particular form requested. Such forms typically include depositions of witnesses and authenticated copies of original records.²³

²¹ The same formulation is also used in the Council of Europe/OECD Convention. See Article 1, paragraph 1 and Article 4, paragraph 1 and Article 7, paragraph 1.

²² See paragraph 16 of the Commentary on Article 26 of the Model Convention, Article 5, paragraph 2 of the Model Agreement and Article 5 paragraph 2 of the Council of Europe/OECD Convention.

²³ See paragraph 10.2. Commentary on Article 26 Model Convention; Article 5(3) Model Agreement and

13. Limitations to exchange of information

32. The legal obligation to supply information is lifted in a limited number of situations. These exceptions are contained in paragraphs 3 through 5 of Article 26 of the Model Convention and in Article 7 of the Model Agreement.²⁴ In the rare cases where the exceptions apply, the contracting parties are not obligated to provide information. The decision to provide or not to provide the information is then left to the discretion of the requested contracting party. It follows that a competent authority may decide to provide the information even where there is no obligation to do so. If a competent authority does provide the information, it still acts within the framework of the agreement. For instance, where a request relates to information that may involve a trade secret, a competent authority may still provide such information if it considers that the laws and practices of the requesting State together with the confidentiality obligations imposed under Article 26, paragraph 2 of the Model Convention (or Article 8 of the Model Agreement) ensure that the information cannot be used for the unauthorized purposes against which the trade or secrecy rules are intended to protect. If the requested party decides to provide the information it should indicate that a trade or other secret is involved in order to allow the requesting party to take any additional or special measures as may be appropriate to ensure the strictest confidentiality.

33. The remainder of this section discusses the grounds that can be used for declining information. It also discusses some of the grounds that can not be used for that purpose.

13.1 Tax secrecy and confidentiality

34. Tax secrecy refers to the provisions under the domestic law of each country that ensure that information gathered or received by a tax authority relating to a taxpayer and his affairs remains confidential and is protected from unauthorized disclosure. Governments would not agree to share tax information without the assurance that such tax secrecy would be preserved and that the information they provided to a contracting party would only be used for the purposes permitted under the relevant treaty or agreement. For this reason, the Model Convention and the Model Agreement require that any information supplied by a contracting party must be treated as confidential.²⁵ Because confidentiality is preserved by the exchange of information instrument and the applicable domestic law in the receiving country, the supply of information cannot be declined on the basis that it would contravene domestic tax secrecy rules.

35. The Model Agreement provides that the information received may be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment, collection and enforcement of the taxes covered by the Agreement (including the prosecution or the determination of appeals) and the information may be used only for such purposes. Information may not be disclosed to any other person or third jurisdiction without the express written consent of the competent authority of the requested party.

36. With respect to the disclosure rules, the Model Convention differs from the Model Agreement in several respects. First, the Model Convention also permits disclosure to oversight authorities.²⁶ Oversight authorities are authorities that supervise the tax administration and enforcement authorities as part of the general administration of the government of the contracting parties.²⁷ Second, the Model Convention does

accompanying Commentary.

²⁴ In the Council of Europe/OECD Convention the exceptions are contained in Article 19 and Article 21, paragraph 2.

²⁵ Article 26, paragraph 2; Article 8 of the Model Agreement, Article 22 of the Council of Europe/OECD Convention.

²⁶ This is a change from the previous version of Article 26. Under the previous version of Article 26 information could not be disclosed to oversight authorities.

²⁷ See paragraphs 12 and 12.1. of the Commentary on Article 26 of the Model Convention.

not permit disclosure to any other person, entity, authority or jurisdiction whereas the Model Agreement permits such disclosure provided express written consent is given by the competent authority of the requested party. Finally, while both the Model Agreement and the Model Convention require that information be kept confidential and then identifies the persons to whom the information can be disclosed, the Model Convention contains the additional requirement that information should be treated “as secret in the same manner as information obtained under domestic law.”²⁸ However, because both the Agreement and the Convention specify to whom the information can be disclosed (thus ensuring a minimum standard of confidentiality), there should be little practical difference between the two formulations.

37. Under the rules of some countries, special procedural rules may apply to sensitive information. For instance, in connection with the provision of bank information Hungary requires that the requesting competent authority signs a statement confirming the confidential treatment of the information provided by Hungary.

38. The confidentiality rules apply to all types of information, including both information provided in a request and information transmitted in response to a request. If the secrecy provisions under the domestic laws of a Contracting State are narrower than under the Model Agreement or the Model Convention, then the provisions of the Model Agreement or the Model Convention will have no consequences. If the domestic rules are broader, however, then the confidentiality provisions will put a restriction on the use of information received from abroad. The local tax authorities are under the obligation to refer to their competent authorities any issue which may arise concerning the disclosure of the information received.

39. Information received may also be communicated to the taxpayer, his proxy or to a witness. However, while such disclosure is permitted, it is not required. In fact, the disclosure to the taxpayer or his proxy may raise an issue in certain cases, for instance where the information is given in confidence and the source of the information may have a legitimate interest in not disclosing it to the taxpayer. Similarly, the competent authorities may wish to keep confidential their correspondence with respect to any information exchanged. In such cases, they will normally indicate whether there are any objections to the disclosure of any part of the information provided (including any related correspondence) to the taxpayer, his proxy or to a witness.

40. Since information may be disclosed to the taxpayer or his proxy it may also be disclosed to any governmental or judicial authorities charged with deciding whether information should be released to the taxpayer.²⁹ This situation may arise in countries where a taxpayer who has been denied access to his files by the tax authorities has the right to apply for a review of that decision by a review or appeals body. Logically, this body would have to see the information in order to render its decision.

41. Many countries have domestic information disclosure laws such as freedom of information or other laws that allow access to governmental documents and records. The confidentiality provisions in exchange of information instruments are intended to take precedence over any domestic rules that permit disclosure to persons not referred to in the confidentiality provision.³⁰ Any country that cannot adhere to

²⁸ It needs to be borne in mind that the Model Agreement was developed for use also in situations where one of the parties has no direct tax system. Where a country has no tax system it is unlikely to have domestic rules on tax secrecy and the reference would then be meaningless. Furthermore, note that the confidentiality rules of Article 22 of the Council of Europe/OECD Convention require that “information obtained by a Party shall be treated as secret in the same manner as information obtained under the domestic laws of that Party, or under the conditions of secrecy applying in the supplying Party if such conditions are more restrictive”.

²⁹ See paragraph 12 of the Commentary on Article 26 Model Convention. The previous version of the commentary on Article 26 did not include such a clarification. However, no change in substance was intended.

³⁰ Paragraph 12 of the Commentary on Article 26 of the Model Convention expressly clarifies this point.

that principle and which is engaged in treaty negotiations should bring this point to the attention of the other contracting party. Where this issue arises as a result of a court decision or a subsequent change in legislation, the competent authority of that contracting party should inform its counterparts at the earliest opportunity. It should be noted that confidentiality provisions of income tax conventions create obligations under international law. Any person faced with a request to release information supplied under an income tax convention or a tax information exchange agreement should consult with his or her competent authority, who may also inform the competent authority who supplied the information.

13.2. Use of information for other purposes

42. The information exchanged may not be used for purposes other than those for which it has been exchanged. Thus, the information shared pursuant to the Model Convention or the Model Agreement cannot be used for non-tax purposes. For instance, fiscal information obtained pursuant to the Model Convention or the Model Agreement must not be used for the prosecution of non-fiscal crimes. If the information appears to be of value to the receiving party for another purpose, it must resort to means specifically designed for that purpose, for example a judicial assistance treaty.

43. Some countries, however, require the sharing of tax information by tax authorities with other law enforcement authorities and judicial authorities on matters such as money laundering, corruption or terrorism financing. As a result these countries may wish to include specific wording in their bilateral treaties to permit the sharing of information received pursuant to a tax information exchange agreement with such other authorities. The Commentary to the Model Convention provides language that can be used for this purpose.³¹

13.3 Reciprocity

44. Reciprocity in relation to exchange of information means that a contracting party, when collecting information for the other contracting party, is obliged only to obtain and provide such information that the requesting party could itself obtain under its own laws in similar circumstances. The Model Convention further provides that a requested party is not obliged to supply information that the requesting party itself could not obtain in the normal course of administration.

45. The underlying idea of the concept of reciprocity is that a contracting party should not be able to take advantage of the information system of the other contracting party if it is wider than its own system.³² The requested party may refuse to provide information where the requesting party is precluded by law from obtaining or providing information or where the requesting party's administrative practices (e.g., failure to provide sufficient administrative resources) result in a lack of reciprocity. However, too rigorous an application of the principle of reciprocity could frustrate effective exchange of information and therefore reciprocity should be interpreted in a broad and pragmatic manner. The respective commentaries of the Model Convention and the Model Agreement elaborate further on the principle of reciprocity and its intended application.³³

³¹ See paragraph 12.3. of the Commentary on Article 26 of the Model Convention. Also note that similar language is contained in Article 22, paragraph 4 of the Council of Europe/OECD Convention.

³² See Article 26, paragraph 3, sub-paragraphs a) and b) Model Convention and Article 7, paragraph 1 (first sentence) of the Model Agreement, Article 21, paragraph 2, sub-paragraph a) and c) Council of Europe/OECD Convention.

³³ See paragraphs 15 through 15.2 of the Commentary on Article 26 of the Model Convention, paragraphs 72 through 74 of the Commentary on the Model Agreement, paragraphs 189, 195 196 of the commentary on the Council of Europe/OECD Convention The previous version of the commentary on Article 26 contained a less detailed discussion of the principle of reciprocity. However, newly added paragraphs 15.1, 15.2 and 18.1. as well as the language added to

46. In practice, it may be difficult for the competent authority to determine in each instance whether the requested party would be able to obtain and provide the requested information under similar circumstances. In order to address this issue, the Model Agreement requires the requesting party to provide a statement confirming that the reciprocity condition is met.³⁴ Where such a statement is furnished, the requested party may decline the request only “if it has grounds for believing that the statements are clearly inaccurate.”³⁵ This mechanism was introduced to facilitate the determination of whether reciprocity was satisfied. The Model Convention does not require the provision of such a statement. However, in cases where a country under its domestic law can only lend assistance if the reciprocity condition is fulfilled, it may wish to ask its treaty partner to include a similar statement regarding reciprocity in each request for information. The inclusion of such a statement would then avoid the additional administrative burden that would otherwise result from the competent authority of the requested party having to ask additional questions before the request could be processed.

13.4 Public policy/Ordre public

47. Another reason for declining to provide information relates to the concept of public policy/ordre public.³⁶ The Commentary on Article 26 of the Model Convention (paragraph 19.5)³⁷ and the Commentary on Article 7 of the Model Agreement (paragraph 91) elaborate on the meaning of the term. “Public policy” generally refers to the vital interests of a country, for instance where information requested relates to a state secret. A case of “public policy” may also arise, for example, where a tax investigation in another country is motivated by racial or political persecution. Thus, this limitation rarely arises in practice.

13.5 Trade, business and other secrets

48. Both Article 26 of the Model Convention and Article 7 of the Model Agreement make clear that there is no obligation to supply information that would disclose any trade, business, industrial, commercial or professional secret or trade process.³⁸ The respective commentaries explain that these secrets should not be interpreted in too wide a sense. In particular, financial information, including books and records, does not by its nature constitute a trade, business or other secret. In the rare cases where the issue of a trade, business or other secrets arises, the decision of whether or not to provide such information is left to the discretion of the requested contracting party. Where in a particular case a contracting party decides to decline to provide certain information on such grounds it should excise the details of the trade, business or other secret from the relevant documentation and provide the remaining information to the other contracting party.³⁹ The role of the competent authority is to determine whether or not to pass on sensitive

paragraph 15 were not intended to alter the effect of the provision but should be understood as clarifications.

³⁴ See Article 5, paragraph 5, sub-paragraph f).

³⁵ See paragraph 76 of the Commentary to the Model Agreement.

³⁶ See Article 26, paragraph 3, sub-paragraphs c) of the Model Convention, Article 7, paragraph 4 of the Model Agreement and Article 21, paragraph 2, sub-paragraph (d) of the Council of Europe/OECD Convention.

³⁷ The previous version of the Commentary on Article 26 discussed only briefly on the meaning of the term “public policy/ordre public.” However, the more extensive discussion in the current version is intended to clarify rather than alter the meaning of the term.

³⁸ In connection with the Council of Europe/OECD Convention, see Article 21, paragraph 2, sub-paragraph (d).

³⁹ For further details on trade, business or other secrets see paragraphs 78 through 83 of Commentary on the Model Agreement and paragraphs 19 through 19.2 of the Commentary on Article 26 Model Convention. The previous version of the Commentary on Article 26 did not elaborate on the meaning of the terms “trade, business, industrial, commercial or professional secret or trade process.” However, the new language in the current version is intended to illustrate and explain the terms, not to alter their meaning.

information and the local authorities that gather the information in the first instance should point out what might be sensitive. Ordinary tax secrecy protects trade and business secrecy in all countries but in general neither the taxpayer nor a third party has a right to refuse to give such information to its tax administration.

Example: In responding to a request from country B, the competent authority of country A engages in a comprehensive investigation of pharmaceutical company C, resident in country A. As a result, the competent authority of country A is exposed to highly valuable commercial information concerning the manufacture of the product itself. Such information would be subject to the limitations described above and the competent authority of Country A could refuse to supply the information to country B, or at least excise that part of the information from the response to country B.

13.6 Legal professional privilege

49. A contracting party may decline to provide information in cases where the information constitutes a confidential communication between a client and an attorney, solicitor or other admitted legal representative. However, the rules on what constitutes a confidential communication should not be interpreted or applied in such a broad way so as to hamper effective exchange of information. In particular, no privilege should attach to documents or records delivered to an attorney, solicitor or other admitted legal representative in an attempt to protect such documents or records from disclosure.⁴⁰ In addition, a requested party would be expected to verify, and challenge if necessary, on behalf of the requesting party, the validity of a claim for legal professional privilege if such validity was in dispute.

13.7 Bank secrecy

50. In most countries, banks and similar financial institutions are required to protect the confidentiality of the financial affairs of their clients. This obligation (“bank secrecy”) may not only protect bank information against disclosure to third parties but may also affect the access to such information by governmental authorities, including tax authorities. The practices of OECD member countries in this regard are summarized in the Report, “Improving Access to Bank Information for Tax Purposes”(OECD, 2000), and in the update report issued in 2003 (the “2003 Progress Report”).

51. Both the Model Convention and the Model Agreement stipulate that bank secrecy can not form the basis for declining to provide information.⁴¹ Thus, the competent authorities of the contracting parties need to have the authority to access, either directly or indirectly, through a judicial or administrative process, information held by banks or other financial institutions and to provide such information to the other contracting party. The respective commentaries elaborate further on this point.⁴²

⁴⁰ For further details on legal professional privilege see paragraphs 19.3 and 19.4 on Article 26 of the Model Convention and Article 7, paragraph 3 of the Model Agreement plus the accompanying commentary (paragraphs 84 through 90). The previous version of the Commentary on Article 26 did not discuss the attorney – client privilege or similar privileges. However, the new language included in the current version only illustrates and explains these concepts without affecting the substantive rules regarding the limitations on the obligation to exchange information.

⁴¹ See Article 5, paragraph 4 of the Model Agreement and Article 26, paragraph 5 of the Model Convention. Paragraph 5 was added in the current version of Article 26 and no equivalent provision existed in the previous version. However, the Commentary on Article 26 explains that the addition of paragraph 5 should not be interpreted as suggesting that the previous version of Article 26 did not authorise the exchange of bank information and goes on to say that the vast majority of OECD member countries already exchanged bank information under the previous version of Article 26. See paragraph 19.10 of the Commentary on Article 26. Note that Austria, Belgium, Luxembourg and Switzerland have entered a reservation regarding paragraph 5.

⁴² See paragraphs 19.10 through 19.15 of the Commentary on Article 26 of the Model Convention and paragraphs 46

13.8 Information held by nominees, agents, fiduciaries and ownership information

52. A request for information cannot be declined solely because the information is held by nominees or persons acting in an agency or fiduciary capacity or because the information relates to an ownership interest.⁴³ For instance, an information request could not be declined merely because domestic law or practices may treat ownership information as a trade or business secret. The commentaries elaborate further on this point.⁴⁴

Example 1: During a tax investigation, A, a resident of Country Y, claims that payments he made to B, a resident of Country Z, were in relation to services provided by another individual, C, whose identity and place of residence is unknown to A. The competent authority of Country Y believes C may be resident in Country Y and asked the competent authority of Country Z to obtain information concerning the identity of C from B, notwithstanding that B appears to have been acting in an agency/fiduciary capacity.

Example 2: An investigation by the tax authorities in Country Y, in relation to Company A, revealed payment of royalties to Company B which is resident in Country Z. Believing that the payments may be for the ultimate benefit of individual C, a resident of Country Y, the competent authority of Country Y approaches the competent authority of Country Z to obtain information about the company and the payment it received. Company B claims that the individual who controls the company was an ex-employee of Company A and if his identity is revealed this could lead to the commencement of a civil action against that individual. Notwithstanding the protestations of the company, the competent authority could not decline the request for details of the ownership of Company B.

13.9 Domestic tax interest

53. The concept of “domestic tax interest” describes a situation where a contracting party can only provide information to another contracting party if it has an interest in the requested information for its own tax purposes. A refusal to provide information can not be based on a domestic tax interest requirement and a contracting party must use its information gathering measures even though invoked solely to obtain and provide information to the other contracting party.⁴⁵ There is no longer any OECD country that requires a domestic tax interest. However, Cyprus; Hong Kong, China; Malaysia; the Philippines and

through 48 of the Commentary on Article 5 of the Model Agreement. For details on any country specific procedural and other rules relating to access to bank information in OECD countries please see the Module on country profiles. Several countries have specific rules in this regard.

⁴³ See Article 5, paragraph 4 of the Model Agreement and Article 26, paragraph 5 of the Model Convention. Paragraph 5 was added in the current version of Article 26 and no equivalent provision existed in the previous version.

⁴⁴ See paragraphs 46 et seq. of the commentary on the Model Agreement and see paragraphs 19.12 through 19.15 of the Commentary on Article 26 of the Model Convention.

⁴⁵ Article 26, paragraph 4 Model Convention; Article 5(2) Model Agreement. Paragraph 4 was added in the current version of Article 26 to deal explicitly with the obligation to exchange information in situations where the requested information is not needed by the requested State for domestic tax purposes. In the previous version this obligation was not expressly stated in the Article, but was reflected in the Commentary. Paragraph 16 of the Commentary on Article 26 provided that this obligation was clearly evidenced by the practices followed by Member countries which showed that, when collecting information requested by a treaty partner, contracting states often use the special examining or investigative powers provided by their laws for purposes of levying their domestic taxes even though they do not themselves need the information for these purposes. Thus, the addition of new paragraph 4 should be seen as a clarification.

Singapore still require a domestic tax interest.⁴⁶

13.10 Request in conformity with the terms of the instrument pursuant to which it is made

54. The Model Agreement provides explicitly that a contracting party may decline to provide information where the request is not made in conformity with the Agreement.⁴⁷ For instance, Article 5(5) of the Model Agreement requires that in connection with a request the requesting Party must provide certain information to the competent authority of the requested Party. A failure to supply such information allows the requested Party to decline the request because the request is not made “in conformity with the Agreement.” The Model Convention is less formalistic in this regard and leaves more leeway to the competent authorities but the basic principle applies equally. For instance, where a requesting party does not demonstrate the relevance of the requested information to an ongoing examination or enquiry, the requested party may decline the request because it does not meet the “foreseeably relevant” standard and is thus outside the scope of Article 26. Of course, before declining a request on this basis the requested party should seek clarification from the other competent authority on this point.

13.11 Non-discrimination

55. A competent authority may refuse to supply information in cases involving discrimination of a national of the requested Party. This rule is contained in Article 7, paragraph 6 of the Model Agreement. In the context of the Model Convention the rule flows from the first sentence of Article 26 paragraph 1 (“... insofar as the taxation thereunder is not contrary to the Convention.”) read in conjunction with Article 24, paragraph 1. This issue should only arise in exceptional circumstances and, thus, should be of little practical relevance.⁴⁸

13.12 No obligation to carry out measures at variance with domestic laws and practices

56. The Model Convention provides that a Contracting State is not obligated to carry out administrative measures at variance with its law and administrative practice.⁴⁹ The underlying rationale is that a contracting party should be required to do no more – but also no less – than it would if its own taxation were at stake. Thus, where the information in possession of the competent authority is not sufficient to reply to a request, a contracting party must take all relevant information gathering measures, including special investigations or special examinations of the business accounts, provided it would take similar measures for its own tax purposes.

57. The Model Agreement contains a similar rule⁵⁰ and provides that where the information in the possession of the competent authority is not sufficient to reply to a request, the requested party should take all relevant information gathering measures to provide the information requested. An information gathering measure is “relevant” if it is capable of obtaining the information requested. The decision to determine in a

⁴⁶ See *Tax Co-operation: Towards a Level Playing Field: 2006 Assessment by the Global Forum on Taxation* (OECD, 2006).

⁴⁷ See Article 7, paragraph 1

⁴⁸ In connection with the Council of Europe/OECD Convention see Article 21, paragraph 2, sub-paragraph (f).

⁴⁹ Article 26, paragraph 3, sub-paragraph a) Model Convention. Previously, Article 26, paragraph 2, sub-paragraph a). In connection with the Council of Europe/OECD Convention, see Article 21, paragraph 2, sub-paragraph (c).

⁵⁰ Article 5, paragraph 2.

particular case which information gathering measures are relevant lies with the requested party.⁵¹

13.13 No obligation to provide information not obtainable under domestic law in the normal course of administration

58. Article 26, paragraph 3, sub-paragraph b) of the Model Convention provides that a Contracting State is free to decline to provide information if the information can not be obtained under its domestic law or can not be obtained in the normal course of administration. The Model Agreement does not contain a provision similar to Article 26.⁵² However, both provide that irrespective of domestic law or domestic administrative practice a contracting Party cannot use bank secrecy or a domestic tax interest requirement as a basis for declining to provide information. Furthermore, a request can not be declined because the information is held by a nominee or a person acting in an agency or fiduciary capacity or because it relates to an ownership interest.⁵³ Thus, the outcomes under the Model Convention and the Model Agreement are therefore largely the same.

14. Information Gathering Measures

59. The information requested may already be at the disposal of the tax administration of the requested party or it may require special information gathering measures. Which particular information gathering measure(s) is(are) most appropriate in an individual case will depend on all relevant facts and circumstances. Information gathering measures could include the following types of measures, provided, of course, that those measures are in line with the laws and administrative practice of the requested party:

- Question a person that may have knowledge of information or may be in possession, custody or control of information.
- Where voluntary co-operation can not be obtained, require a person to appear at a specified time and place for the taking of testimony.
- Where the person does not appear at the specified time and place take appropriate measures to compel such person's appearance.
- Request the production of books, papers, records or other tangible property.

⁵¹ The Model Convention and the Model Agreement use different approaches to reach a similar result. The Model Convention is built on the assumption that both contracting parties have a tax system and that therefore they should use the same types of information gathering measures irrespective of whether a matter relates to their taxation or to the taxation of a treaty partner. The Model Agreement, however, was developed in a context where one contracting party may not have any system of direct taxation. Such a country may then not have any tax related domestic information gathering measures and the "reciprocity approach" used in the Model Convention could not be applied. The Model Agreement therefore simply refers to all relevant information gathering measures.

⁵² As already mentioned in the preceding footnote, the Model Convention uses a "reciprocity approach" which assumes that both countries have direct tax systems. This assumption is not valid in connection with the Model Agreement which was developed to permit use also for situations where one of its parties does not have a direct tax system. In this case the "reciprocity approach" can not be applied because a country without a direct tax system would have no "normal course of [tax] administration" and no information may be "obtainable" for domestic tax purposes where a country imposes no tax.

⁵³ See Article 26, paragraph 5 Model Convention and Article 5(4)(b) Model Agreement.

- Question the individual producing books, papers, records or other tangible property regarding the purposes for which and the manner in which the item is or was maintained.
- Place the individual giving testimony or producing books, papers or other tangible property under oath.
- Gain access to and search premises for the purpose of locating and securing books and records or other tangible property for examination.
- Produce true and correct copies of books, papers, records or other tangible property.
- Permit the competent authority of the requesting State to provide written questions to which the individual giving testimony or producing books, papers, records or other tangible property is requested to respond.

15. Procedural Rights and Safeguards

60. Domestic laws provide a variety of procedural rights and safeguards for persons affected by information gathering measures or more generally by information exchange. Such rights and safeguards include notification rules, a right to challenge the exchange of information following notification or rights to challenge information gathering measures taken by the requested party.

61. Several OECD member countries must notify the taxpayer subject to the enquiry and/or the person that provided the information in certain circumstances. This may result for the person notified in a mere right to be informed about the exchange, a right to be consulted or even a right to challenge the exchange. Some countries lift these notification requirements in cases of tax fraud or postpone notification until after the exchange. In some cases the obligation to notify is lifted if a federal court determines that notification would seriously jeopardize the investigation. In countries that require notification, taxpayers generally have the right to appeal the exchange of information. Notification rights no longer apply in VAT cases of exchange between member states of the European Union.⁵⁴

62. Given the possible implications of such rights and safeguards for information exchange, contracting parties should inform each other of their legislation or administrative practice concerning notification (and any other procedural rights and safeguards that may be of relevance) when a tax information exchange agreement or an income tax convention is concluded and thereafter whenever the relevant rules are modified.⁵⁵

16. Use of Technology to Exchange Information

63. Use of technology can greatly facilitate the effectiveness of exchange of information between tax authorities and the OECD has undertaken various initiatives to facilitate this process. Set out below is a description of these initiatives.

16.1 Use of Taxpayer Identification Numbers (TINs)

64. As the use of technology increases within national tax administrations, it becomes more and more important for tax administrations to have some form of unique identifier to process and match information related to its taxpayers. Most OECD member countries attribute Tax Identification Numbers (TINs) to

⁵⁴ For more details see the Module on Country Profiles.

⁵⁵ See also paragraph 14.1 of the Commentary on Article 26 of the Model Convention.

their resident taxpayers and some countries (e.g. the United States) also assign TINs to non-residents under certain circumstances or require them to provide their residence country TIN (e.g. Sweden). In 1997, the OECD Council adopted a Recommendation on the use of TINs in the international context (C(1997)39/FINAL). TINs are used to identify taxpayers and are a key to automated matching programs within national tax administrations and also for matching information received through information exchange programs such as information received automatically. The provision of TINs (both source and residence country, if known) is also important when either making or answering a request or providing information spontaneously because it will facilitate the quick identification of the taxpayer.

16.2 Standardization of transmission formats and use of new media

65. Automatic exchange of information requires the standardization of formats in order to be efficient. In 1981 the OECD designed a paper-based form for automatic exchange which introduced the standardization of certain pieces of information C(81)39/FINAL. In 1992, taking advantage of technological developments, the OECD then designed the Standard Magnetic Format (SMF) for the transmission of taxpayer information on magnetic tape. Based on country experiences, the SMF was revised in 1997 to further improve countries' capacity to match information received automatically with information reported by its taxpayers. Use of the revised format was recommended by the OECD Council in 1997 (see C(97)30/FINAL). The SMF includes fields allocated to the:

- recipient beneficial owner, his agent or intermediary, to the actual payer of the income, the payer's agent or intermediary. For each series of fields the same pattern is followed to provide information on the TIN (both residence country TIN and source country TIN), name, alias or other name, date of birth (where applicable) and address; and
- income (tax year, date, type of payment, currency, gross and net amount, tax withheld, refund etc).

66. Fields are allocated to residence country TINs and source country TINs. The SMF is used by OECD member countries involved in automatic exchange and increasingly by non member countries. In 2002 the European Union Council agreed on a standard format (FISC 39) for the implementation of the Savings Directive which is to be based on the OECD SMF. In 2008, EU countries will start using an STF-like format (FISC 73).

67. The OECD has also designed a new format to eventually replace the SMF that is based on extensible mark-up language (XML),⁵⁶ a document mark-up language widely used in today's information technology for its many advantages (e.g. separation of the content of a message from any display structure, readability both by humans and machines, modularity and flexibility, ability to check the conformance of documents with the "contract" about its structure, etc). The new format is called the Standard Transmission Format (STF). As the SMF and STF will coexist for the foreseeable future, bridging programs have been developed to achieve conversion between the two formats, thus enabling contracting parties to engage in bilateral automatic exchange notwithstanding that they might each use a different standard format.

16.3 Security: Encryption and alternative methods

68. It is desirable that information contained in magnetic media exchanged automatically be transmitted in a secure manner and be encrypted whenever feasible. Such information is now transmitted

⁵⁶ XML: a technical language for describing documents containing structured information. The term "extensible" refers to a system that can be enlarged by addition rather than by complete replacement.

on diskettes or CD-ROMs, both of which can be easily encrypted by the sending country using encryption software and decrypted by the receiving country. Encryption software such as GNU PG⁵⁷ or equivalent commercial software has been found adequate to ensure the security of automatic exchange. If not encrypted, diskettes or CD-ROMs are generally exchanged via a secure mail system, such as a diplomatic pouch.

69. The foreign source information received on magnetic media or in digital form can be input into the recipient country's tax data base (often using bridging programs to capture the relevant information) and automatically matched against the income reported by the taxpayer. This is the most cost effective way to process the information. For example, the Australian Tax Office's 2004-05 Compliance Program states that 1171 foreign source income data matching audits were completed during the 2003-04 tax year, raising over AUD\$3 million in liabilities. The foreign source information received on magnetic media or in digital form can also be matched manually, as a general procedure or when it cannot be matched automatically.

70. Countries are now starting to use foreign source information received automatically not only for matching purposes but also in a more strategic manner for risk assessment purposes, and in particular to select cases for more in depth tax examinations. Thus, while technology can play an important role in the effective use of information that is exchanged on an automatic basis, such information can also be used effectively even in the absence of adequate technology or information (e.g. absence of TINs) to mechanically match the information. The information can still be analyzed "the old fashioned way" to identify risks and non-compliance.

71. Unlike automatic exchange, where the majority of exchanges rely on electronic media such as diskettes or CD-ROMs, on-request and spontaneous exchanges largely remain paper-based. For all three types of exchanges, competent authorities generally still rely on the postal or fax system (or commercial courier services) to physically send and receive information. In 2002, the OECD initiated work on the feasibility of transmitting specific requests and spontaneous information using encrypted files attached to e-mail messages. A pilot project was established with the following business requirements:

- **Confidentiality:** Information must remain confidential during transmission from the sender's environment to the recipient's environment. Confidentiality before transmission and after receipt is the responsibility of the sending and receiving authorities respectively.
- **Authentication:** The transfer process should provide assurance that the information came from a competent authority or an authorized delegate thereof.
- **Acknowledgement:** There should be an acknowledgement of the receipt of information from the receiving competent authority.
- **Warning regarding legal use and disclosure of information:** The electronic exchange must include a warning that the information is being exchanged under a specific legal instrument and that it can only be used for the purposes authorized by that instrument. The warning should be included in the signed competent authority covering letter that is the main document of the exchange.⁵⁸ For countries that currently use a "treaty stamp" to endorse each page of a document this warning is effectively already "embedded" in the document itself and

⁵⁷ GNU Privacy Guard is a suite of programmes developed by the Free Software Foundation that provides security solutions for protecting and encrypting data (see www.gnupgp.org). It uses the Pretty Good Privacy (PGP) standard and is compatible with commercial PGP products. PGP is a widely used encryption programme designed to provide high-security encoding algorithms.

⁵⁸ Some countries may prefer to also include an additional warning in the text of the email message.

the use of scanning technology does not alter this.

- **Platform independent (open standards):** In order to maximize its usefulness, the information should be set out in a “platform independent” format, i.e. in a format capable of being read by any operating system. Furthermore, the information must be capable of being read by a personal computer (as opposed to a mainframe computer). Paper documents should be scanned to one of the following formats: Portable Document Format (PDF), Joint Photographic Group (JPG) or Tagged Image File Format (TIFF). Electronic documents should be transmitted as Rich Text Format (RTF), Hypertext Markup Language (HTML) or American Standard Code for Information Interchange (ASCII). Readers for these formats are available free of charge.
- **Integrity:** The electronic information exchange process should ensure that all of the information is received and that no parts are lost during transmission. The encryption methods reviewed provide adequate assurance of integrity, i.e. if the check fails, a warning message is generated and decryption of the file is prevented.
- **Low cost:** The process should be a low cost one that uses encryption software packages that are available free of charge (freeware) and require no licensing or registration. There may be small expenses for some countries to purchase a scanner (to image paper documents) and perhaps other software (to create PDF documents from scanned images).

72. The pilot project was very successful and procedures have been established and are being used for secure electronic exchanges that satisfy the above business requirements. Some OECD countries may be presently unable to implement the agreed procedures due to pre-existing governmental or organizational requirements relating to the use of encryption technology which may prevent a competent authority from adopting the encryption software recommended as a result of the pilot project.

17. Trends in information exchange

73. There is an increasing tendency for tax administrations to work together at the international level, not only in sharing taxpayer-specific information through the forms of exchange of information described above, but also by sharing information on trends and patterns in international non-compliance that they have already identified and experienced. The timely sharing of such non-taxpayer specific information enables countries to understand new forms of non-compliant behavior, facilitate their detection, adapt risk management strategies and identify successful legislative and administrative measures targeted at those who design and market the schemes and at taxpayers using them. Following on from such discussions, countries can bilaterally exchange detailed and taxpayer specific information using the information exchange provisions of the relevant bilateral or multilateral treaty or agreement.

74. The OECD, through its Committee on Fiscal Affairs, its Forum on Tax Administration and its Working Party on Tax Avoidance and Evasion, provides regular opportunities for sharing non-taxpayer specific information⁵⁹ but countries have also formed smaller groups to focus on specific areas of non-compliance with the tax laws.

- In 1998, the Seven Country Tax Haven Forum (Australia, Canada, France, Germany, Japan, United States, United Kingdom) was formed to improve each country’s capacity to deal with offshore compliance risks arising from the use of tax havens and other jurisdictions of concern (primarily countries with strict bank secrecy). This is achieved through ongoing bilateral

⁵⁹ Discussions at the OECD and documents disseminated through the OECD benefit from the confidentiality rules flowing from the OECD Convention (i.e. the international treaty that created the OECD) and the applicable OECD Council Resolution.

exchanges of information at a case and promoter level, the sharing of research, schemes encountered and response strategies adopted and through joint training sessions.⁶⁰

- In 2004, the Joint International Tax Shelter Information Centre (JITSIC) was established by Australia, Canada, the United Kingdom and the United States to supplement the ongoing work of tax administrations in identifying and curbing abusive tax avoidance transactions, arrangements and schemes. Japan joined the JITSIC in 2007. The purpose of JITSIC is to (i) provide support to the parties through the identification and understanding of abusive tax schemes and those who promote them; (ii) share expertise, best practices and experience in tax administration to combat abusive tax schemes; (iii) exchange information on abusive tax schemes, their promoters and investors consistent with the provisions of bilateral tax conventions; and (iv) enable the parties to better address abusive tax schemes promoted by firms and individuals who operate without regard to national borders.
- In 2006, the revenue administrations of Brazil, India and South Africa last year launched an initiative to exchange information in tax and customs matters to help identify high risk transactions. They also agreed to share information on tax – especially abusive tax avoidance arrangements and schemes – using the exchange of information provisions of the existing tax treaties between them. Where appropriate, they agreed to perform simultaneous tax audits on common business entities and to further strengthen the links between their organizations.

75. The recent establishment of these strategic groups reflects a greater recognition of the need to work multilaterally to tackle non-compliance in the tax area rather than simply bilaterally. This recognition is also reflected in the renewed interest in the Council of Europe/OECD Convention. The Convention has been open for signature since 1988 but almost half of the countries that have signed the Convention have done so within the last 5 years. The Convention provides a single legal umbrella for multilateral exchange of information for a broad range of taxes.

76. Overall, the trend to strengthen information sharing capabilities between tax administrations is likely to continue not only in terms of the legal instruments and the technology used, but also, and perhaps more importantly, in the development of more strategic approaches to information sharing. As technology, the global economy and information exchange practices continue to evolve, there will be an ongoing need to ensure that an appropriate balance is maintained between taxpayers' legitimate expectation of privacy and tax administrations' legitimate need for information to enforce their respective tax laws.

⁶⁰ Non-taxpayer specific information may be shared within these groups but any taxpayer-specific information would need to be exchanged in accordance with a legal instrument (e.g. tax treaty) that authorises the exchange of such confidential information.